October 14, 2015

BY E-MAIL (jwoodside@fppc.ca.gov) AND FACSIMILE (916- 322-6440)

California Fair Political Practices Commission
c/o: Jack Woodside, Senior Commission Counsel
428 J Street, Suite 620
Sacramento, CA 95814

Re: October 15, 2015 Meeting Agenda General Item #64; Comments on Proposed Changes to 2 Cal. Code Regs. § 18225.7 ("Made at the Behest; Independent Versus Coordinated Expenditures")

Dear Chair Remke and Commissioners:

The Center for Competitive Politics ("CCP")[1] submits these comments in response to the Commission's proposed changes to 2 Cal. Code Regs. § 18225.7, which the Commission is scheduled to consider as Agenda General Item #64 for its October 15, 2015 meeting.

Although the Commission's proposal has many pitfalls and paradoxes, CCP notes some of the ones that stand out the most:

- The proposed changes would make such a broad universe of publicly available information about candidates' campaign plans the basis of coordination that it would force independent speakers to choose between shutting their eyes and ears, on the one hand, or shutting their mouths on the other;

- The proposal unjustifiably and irrationally prohibits family members from independently supporting their relatives' campaigns;

- The proposal disfavors certain forms of communications and unfairly inhibits independent speakers' ability to illustrate their points.

[1] The Center for Competitive Politics is a nonpartisan, nonprofit 501(c)(3) organization that promotes and protects the First Amendment political rights of speech, assembly, and petition. It was founded in 2005 by Bradley A. Smith, a former Chairman of the Federal Election Commission. In addition to scholarly and educational work, the Center is actively involved in targeted litigation against unconstitutional laws at both the state and federal levels. For instance, it presently represents nonprofit, incorporated educational associations in challenges to state campaign finance laws in Colorado and Delaware and recently won a case in the Nevada Supreme Court. It is also involved in litigation against the state of California.

A) The Proposal Virtually Prohibits Independent Expenditures.

Under the Commission's proposal, the sponsor of an independent expenditure is presumed to be coordinating with a candidate if the sponsor receives information about the candidate's campaign needs or plans "directly or indirectly" from the candidate or candidate's committee. The type of information covered under this presumption of coordination includes "campaign messaging, planned expenditures or polling data."[2]

The proposal's use of the adverb "indirectly," without any accompanying qualifier, means that virtually any publicly available information that a candidate conveys "indirectly" to the sponsor of an independent expenditure would create a presumption that the expenditure is coordinated. Given the sheer breadth of the proposed rule, independent speakers would have to hermetically isolate themselves from the rest of the world lest their speech be considered "coordinated" with a candidate. They could not use the Internet, watch television, read a newspaper, listen to the radio, or talk to anyone.

That is because candidates' "planned expenditures" are typically a matter of public knowledge, and the media routinely reports on this subject. For example, in August, *Politico* reported that Hillary Clinton was planning to spend $2 million on television advertising in Iowa and New Hampshire in the coming weeks.[3] In September, *CNN* reported that Clinton was set to up the ante to $4 million.[4] Even long-shot candidate Larry Lessig's planned media expenditures have been the subject of press reports.[5]

Of course, none of these news sources is clairvoyant. Presumably, they were apprised of the candidates' planned expenditures by the candidates or their campaigns. Thus, any independent speaker who is informed by these publicly available reports would – in the language of the proposal – have received "information about the candidate's or committee's campaign needs or plans that the candidate or committee provided to the expending person directly or *indirectly*."[6] The fact that reporters may obtain this information from broadcast stations' "political file"[7] also does not change the analysis, since the information for the ad buys would

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[2] Proposed 2 Cal. Code Regs. § 18225.7(d)(1).

[3] Annie Karni, "Clinton set to launch $2 million ad campaign," POLITICO, Aug. 2, 2015, *available at* http://www.politico.com/story/2015/08/hillary-clinton-set-to-launch-2-million-ad-campaign-120921.

[4] Dan Merica, "Hillary Clinton campaign to spend $4 million on ads in Iowa, New Hampshire," CNN, Sep. 4, 2015, *at* http://www.cnn.com/2015/09/04/politics/hillary-clinton-4-million-ads-iowa-new-hampshire-2016/.

[5] Brianne Pfannenstiel, "Democrat Lessig makes $60,000 TV ad buy in Iowa," DES MOINES REGISTER, Oct. 12, 2015, *available at* http://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/10/12/democrat-lessig-makes-60000-tv-ad-buy-iowa/73839878/.

[6] *See supra* note 2 (emphasis added).

[7] *See* 47 C.F.R. §§ 73.3526 and 73.3527.

still have had to originate from the candidates' campaign committees or their media buyers, and could thus fairly be said to be an "indirect" conveyance about a "campaign[']s] needs or plans."

Similarly, every time a candidate or campaign aide speaks, every time a campaign distributes a public communication, and every time a campaign creates a website, it is "directly" sharing "information concerning [its] campaign messaging." Surely, an independent expenditure cannot fairly be said to be coordinated simply because it is informed by, or even parrots, some of a candidate's publicly available talking points or rhetoric. Indeed, the proposal itself acknowledges this reality; elsewhere, it specifies that simply receiving a "press release" from a campaign will not create a presumption that an independent expenditure is coordinated.[8] In short, the proposal is not only wildly unrealistic, it is also in conflict with itself.

Presumably, the FPPC does not propose to force independent speakers to live under a rock. If we accept that uncontroversial premise, then the practical effect of the proposed rule text is to prohibit independent expenditures altogether. The U.S. Supreme Court has held clearly that independent political speech must be protected,[9] and states are not free to disregard the Court's holding,[10] no matter how sincerely they may disagree with it.[11]

B) The Proposal Unjustifiably and Irrationally Discriminates Against Family Members.

Under the Commission's proposal, if the sponsor of an independent expenditure is "established, run, staffed in a leadership role, or principally funded by an individual who is an immediate family member of the candidate," the expenditure is presumed to be coordinated.[12]

The U.S. Supreme Court has held repeatedly that campaign contributions may be regulated only to the extent they "protect against corruption or the appearance of corruption."[13] Similarly, restrictions on direct speech may be regulated only to the extent they are rooted in a "substantial governmental interest in stemming the reality or appearance of corruption in the electoral process."[14]

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[8] *Compare* proposed 2 Cal. Code Regs. § 18225.7(d)(1) *with id.* § 18225.7(e)(2).

[9] *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

[10] *See Amer. Tradition Partnership v. Bullock*, 132 S. Ct. 2490 (2012).

[11] *See, e.g., N.Y. Progress and Protection PAC v. Walsh*, 17 F. Supp. 3d 319, 323 (S.D. N.Y. 2014) ("The Court has noted its concern; and many others have expressed similar concerns about the impact of the rulings in *Citizens United* and *McCutcheon*. The Court is bound, however, to follow the Supreme Court and Second Circuit's clear guidance.").

[12] Proposed 2 Cal. Code Regs. § 18225.7(d)(7).

[13] *See, e.g., McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434, 1441 (2014).

[14] *Citizens United*, 558 U.S. at 313 (quoting *Buckley v. Valeo*, 424 U.S. 1, 47-48 (1976)).

Regardless of whether the Commission's proposal with respect to family members funding or controlling independent expenditures is characterized as a contribution ban or a ban on direct speech, it begs the question: Where is the corruption here? Are we really concerned about mothers and fathers corrupting their sons and daughters by supporting their children's bid for elective office?[15] This provision essentially bars family members from independently speaking in support of their loved ones, a policy subject to strict scrutiny and a poor statement of California's view of the family. Absent some record that family members are more – not less – likely to enter into corrupt quid-pro-quo agreements with each other, this cynical provision cannot possibly survive constitutional scrutiny.

If corruption is not the concern, then the only public policy rationale for this proposal seems to be to "level the playing field" so that certain candidates who may have greater family wealth do not have an "unfair" advantage over other candidates. Whatever one personally thinks of this public policy concern, the Supreme Court has made it emphatically and repeatedly clear that campaign finance laws aimed at "leveling the playing field" are unconstitutional.[16]

Paradoxically, a candidate's third cousin, who is a lobbyist for the Acme Widget Corporation, or the Acme Widget Corporation itself – both of whom would like to see a candidate elected who favors the widget industry – could give unlimited amounts to a super PAC supporting the candidate.

C) The Proposal Unjustifiably Disfavors Certain Forms of Communications.

Under the Commission's proposal, if an independent expenditure "uses video footage . . . posted online by the candidate," the expenditure is considered to be coordinated.[17] At the same time, the proposal permits photographs to be used in independent expenditures.[18] Once again, the proposal is in conflict with itself and draws irrational distinctions.

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[15] Although the Supreme Court upheld the contribution limits under the Federal Election Campaign Act as applied to candidates' family members, the Court acknowledged that the potential for corruption is not as great in such contexts. *See Buckley v. Valeo*, 424 U.S. 1, 53 n.59 (1976). The provision at issue here, however, does not even pertain to direct contributions to candidates, but rather to independent expenditures, which the Supreme Court has held "do not lead to, or create the appearance of, *quid pro quo* corruption. In fact, there is only scant evidence that independent expenditures even ingratiate." *Citizens United v. FEC*, 558 U.S. 310, 360 (2010).

[16] *See Buckley*, 424 U.S. at 48-49 (invalidating the Federal Election Campaign Act's limitations on the amount of political expenditures that individuals may make); *Davis v. FEC*, 554 U.S. 724 (2008) (invalidating the "Millionaire's Amendment" under the Bipartisan Campaign Reform Act providing for increased contribution limits for candidates running against self-funding opponents); *Citizens United*, 558 U.S. at 350 ("The rule that political speech cannot be limited based on a speaker's wealth is a necessary consequence of the premise that the First Amendment generally prohibits the suppression of political speech based on the speaker's identity."); *Ariz. Free Enterprise Club's Freedom PAC v. Bennett*, 131 S. Ct. 2806, 2825 (2011) ("We have repeatedly rejected the argument that the government has a compelling state interest in 'leveling the playing field' that can justify undue burdens on political speech.").

[17] Proposed 2 Cal. Code Regs. § 18225.7(d)(4).

[18] *Id.* § 18225.7(e)(2).

It is baffling that a state that is almost universally associated with the "motion picture" industry and Silicon Valley would propose to regulate video footage obtained from the Internet differently from still pictures. After all, what is a video but a collection of pictures? Presumably, the Commission does not take the position that videos are any less protected under the First Amendment than are photographs.[19]

If "a picture is worth a thousand words," then a video is worth at least as many. Why is the sponsor of an independent expenditure mailer permitted to use a candidate's publicly available photograph, but the sponsor of an independent expenditure YouTube ad may not use a candidate's publicly available video footage? The proposal not only unconstitutionally discriminates against certain forms of communications, but it runs contrary to California's reputation for embracing technological progress. The Commission should eliminate the proposal's irrationally disparate treatment of still photographs and videos, not by also prohibiting the use of campaign photos, but by similarly permitting the use of publicly available campaign videos.

D) Conclusion

CCP thanks the Commission for its consideration, and reiterates that simply because these comments did not address the other specific changes the Commission is proposing to 2 Cal. Code Regs. § 18225.7, any omissions do not necessarily reflect CCP's support for those changes. Please do not hesitate to contact us should you have any questions about these comments.

Respectfully yours,

David Keating
President

Eric Wang,
Senior Fellow[20]

[19] *See, e.g., U.S. v. Stevens*, 559 U.S. 460, 468 (2010) (holding that a statute prohibiting depictions of animal cruelty in the form of "photographs, videos, or sound recordings" was unconstitutionally overbroad).

[20] Eric Wang is also Special Counsel in the Election Law practice group at the Washington, D.C. law firm of Wiley Rein, LLP. Any opinions expressed herein are those of the Center for Competitive Politics, and not necessarily those of his firm or its clients.