FPPC Update

Thursday, September 13, 2018 General Session; 8:00 – 9:30 a.m.

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Notes:

FAIR POLITICAL PRACTICES COMMISSION ("FPPC") UPDATE

League of California Cities 2018 Annual Conference

September 13, 2018

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A. ENFORCEMENT

Enforcement Action against Los Angeles County (Use of Public Funds in an Election)

The Fair Political Practices Commission ("Commission") is considering whether Los Angeles County failed to properly disclose payments made for communications that were allegedly covered by Regulation 18420.1, which addresses payments by state or local agencies for a campaign related communication. The communications at issue included television spots the County made to inform its residents about a March 2017 ballot measure (Measure H), a sales tax measure to fund homeless services and prevention. The Howard Jarvis Taxpayers Association complained that the communications expressly advocated for passage of the measure.

Measure H passed with approximately 69% of the voters approving. This matter is also now the subject of litigation (*Howard Jarvis Taxpayers Association v. County of Los Angeles* (Los Angeles County Superior Court Case No. BC714579) filed on July 17, 2018).

1. Background

This enforcement action raises important questions related to the distinction between the legal standards that apply to campaign finance reporting under the Political Reform Act[1] (the "Act") and the constitutional limitations that apply to the expenditure of public funds to support or defeat a ballot measure.

a. Constitutional Limitations

In *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, the California Supreme Court reaffirmed its holding in *Stanson v. Mott* (1976) 17 Cal.3d 206, which established that, absent clear and unambiguous statutory authority, cities may not spend public funds to assist in the passage or defeat of an initiative or other ballot measure. Nevertheless, cities may spend public money for informational purposes, to provide the public with a "fair presentation" of relevant information relating to an initiative or other ballot measure.

These cases point out that some activities "unquestionably constitute improper campaign activity" such as ". . . the use of public funds to purchase such items as bumper stickers, posters, advertising "floats," or television and radio 'spots.'" (*Stanson v. Mott, supra,* 17 Cal.3d at p. 221; *Vargas v. City of Salinas, supra*, 46 Cal.4th at p. 32.) In other cases, ". . . 'the style, tenor and timing' of a communication must be considered in determining whether the communication is properly treated as campaign activity." (*Vargas*, at p 33 (citing to *Stanson*, at p. 222.).)

[1] The 1974 voter-adopted 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.

b. Campaign Finance Reporting

The Act requires political candidates and campaign committees to file written reports of election expenditures made and contributions received once certain thresholds are reached. (§§ 84204.5, 82013.)

In *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, the court made clear that the definition of an "expenditure" under the Act must be ". . . limited in accordance with the First Amendment mandate 'that a state may regulate a political advertisement only if the advertisement advocates *in express terms the election or defeat of a candidate.*' [Citation omitted.]" (*Id.*at p. 470.)

Taking into account this limitation, the definition of "independent expenditure" contained in section 82031 was amended in 2009 to now provide that:

> "Independent expenditure" means an expenditure made by any person, including a payment of public moneys by a state or local governmental agency, in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee.

In 2009, the Commission amended Regulation 18420.1 to clarify when a payment of public moneys by a state or local governmental agency constitutes an "independent expenditure" for the purposes of section 82031. In doing so, the Commission incorporated both the "express advocacy" standard set forth in 82031 and the standards set forth in the *Vargas* and *Stanson* cases. Regulation 18420.1 now reads in relevant part that:

> (a) A payment of public moneys by a state or local governmental agency, or by an agent of the agency, made in connection with a communication to the public that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, as defined in Section 82025(c)(1), or that taken as a whole and in context, unambiguously urges a particular result in an election is one of the following:
>
> > (1) A contribution under Section 82015 if made at the behest of the affected candidate or committee.
> >
> > (2) An independent expenditure under Section 82031.
>
> (b) For the purposes of subdivision (a), a communication paid for with public moneys by a state or local governmental agency unambiguously urges a particular result in an election if the communication meets either one of the following criteria:

> (1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots.
>
> (2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.

In adopting these amendments to Regulation 18420.1, the Commission did add this cautionary note:

> COMMENT: Nothing in this regulation should be read as condoning or authorizing use of public moneys for campaign related activities by a state or local governmental agency. Under many circumstances these activities may be illegal. (See Penal Code Section 424; Government Code Sections 8314, 54964, and 89001; Education Code Section 7054; and *Vargas v. City of Salinas* (2009) 46 Cal.4th 1.).

2. Comment Letter

The California State Association of Counties ("CSAC") and the League submitted written comments in support of Los Angeles County in the pending administrative enforcement action (a copy of which is attached). These comments include arguments that Regulation 18420.1 is beyond the scope of the Commission's jurisdiction and is inconsistent with the definition of "independent expenditure" contained in section 82031.

As mentioned above, in adopting Regulation 18420.1, the Commission relied in part on the California Supreme Court decision in *Vargas v. City of Salinas*, *supra*, 46 Cal.4th 1, to define a contribution or independent expenditure. However, the *Vargas* case addressed the constitutionally permissible use of public funds to communicate with a public agency's constituents and specifically rejected the use of the Act's standards in that context.[2] Therefore, the comment letter argues that Regulation 18420.1 goes beyond the Act and into the realm of constitutional speech, and therefore, exceeds the jurisdiction of the Commission.

The comment letter questions whether Regulation 18420.1 would apply to such things as: community television channels that broadcast city council meetings, where ballot measures may be discussed and city councils may take positions by adopting resolutions; and placing informative documents concerning the impact of a ballot measure on a city website. The comment letter states that creating this type of ambiguity ". . . illustrates why the FPPC should not be in the business of enforcing constitutional speech standards."

[2] See *Vargas v. City of Salinas*, *supra*, 46 Cal.4th at 31-32 ["Whatever virtue the 'express advocacy' standard might have in the context of the regulation of campaign contributions to and expenditures by candidates for public office, this standard does not meaningfully address the potential constitutional problems arising from the use of public funds for campaign activities that we identified in *Stanson*." (footnote omitted.)].

B. ADVICE LETTERS

The following are select advice letters issued by the Commission between May 4, 2018 and August 16, 2018:

1. Interests in Real Property

a. 500-foot Property Rule

Under the Act's 500-foot rule, set forth in Regulation 18702.2(a)(11), a decision's effect on an official's real property interest, other than an interest in commercial property containing a business, is material if the decision affects real property within 500 feet of the official's real property, unless there are sufficient facts to indicate that the decision will not have a reasonably foreseeable measurable impact on the official's real property. During this reporting period, the Commission issued seven advice letters involving the 500-foot rule. Five of the seven advice letters concluded, on the specific facts, that there would be a reasonably foreseeable and material impact on the official's financial interest. In the following two advice letters, the Commission determined that the official could participate in the decision:

- **Mooney Advice Letter No. A-18-067**

City councilmember who owns residential rental property within 500 feet of an area zoned as Intensive Use can participate in amendments to the city's zoning ordinance which would allow recreational marijuana cultivation, manufacturing and distribution, in Intensive Use zoned areas. This is based on the fact that Intensive Use areas are already zoned to allow medical marijuana and the extension of permissible use to include recreational marijuana does not present a reasonably foreseeable measurable impact on the councilmember's property.

- **Eckmeyer Advice Letter No. A-18-087**

Heritage commissioners may take part in decisions relating to an application for a property tax reduction under the Mills Act even though the residential property that is the subject of the application is located within 500 feet of each of the commissioners' respective residences. Because the Mills Act contract would not include exterior work to the property - only window repairs, foundational improvements, and landscaping - it would have very little effect on neighboring properties or the overall character of the neighborhood.

b. Other Real Property Interests

- **Hill Advice Letter No. A-18-092**

Regulation 18702.2(a)(6) provides that the reasonably foreseeable financial effect of a governmental decision on a parcel of real property in which an official has a financial interest, other than a leasehold interest, is material whenever the governmental decision:

> Involves construction of, or improvements to, streets, water, sewer, storm drainage or similar facilities, and the parcel in which the official has an interest will receive new or improved services that are distinguishable from improvements and services that are provided to or received by other similarly situated properties in the official's jurisdiction or where the official will otherwise receive a disproportionate benefit or detriment by the decision.

In this advice letter, the Commission determined that, because highway on and off-ramps are similar to "facilities" and "streets", a mayor could not participate in decisions relating to the selection of U.S. Highway 101 on and off-ramps given that sites under consideration were within approximately 2,600 feet of his residence.

- **Mooney Advice Letter No. A-18-076**

This advice letter relates to zoning ordinance amendments that established standards for accessory dwelling units ("ADUs") in residentially zoned areas in the city. A city councilmember owned five properties in the city - four residential and one commercial - that may have been eligible for the construction of an ADU under the proposed zoning ordinance amendments.

Under the Act, a decision's financial effect on an official's interest is presumed reasonably foreseeable if the interest is a named party in, or the subject of, the decision (Regulation 18701(a)). An interest is the "subject' of a proceeding, and deemed materially affected, when the decision determines the parcel's zoning or rezoning (other than a zoning decision applicable to all properties designated in that category). (Regulation 18702.2(a)(2).)

In this case, the Commission determined that the councilmember could not participate in the decision because his real property ". . . is the subject of this decision regarding staff's proposed zoning amendments. His five parcels are currently in the areas zoned for ADU's and the decision on the amendments will determine if he may have ADUs on these parcels."

2. Interests in Business Entities

- **Borger Advice Letter No. A-18-059**

Mayor who owns and operates a gas station located approximately 2,165 feet from a Costco facility may not participate in a decision to include a gas station at the Costco facility. Regulation 18702.1 provides that a decision's effect on an official's business interest is material if a prudent person with sufficient information would find it reasonably foreseeable that the decision's financial effect would contribute to a change in the value of the privately-held business entity. In this case, the Commission determined that "[i]f the Costco Project is approved, it will increase the competition borne by gas stations within the City, including the Mayor's gas station." The Commission based this on the fact that there were only four gas stations in the City and the Costco gas station would much larger than the average gas station. Therefore, the Commission found that it was reasonably foreseeable that the decisions relating to the Costco gas station would contribute to a change in value of the mayor's gas station.

3. Government Code Section 1090

a. Consultants

The California Supreme Court recently affirmed that "[i]ndependent contractors come within the scope of section 1090 when they have duties to engage in or advise on public contracting that they are expected to carry out on the government's behalf." (*People v. Superior Court* (*Sahlolbei*) (2017) 3 Cal.5th 230, 245.)

- **Sanchez Advice Letter No. A-18-157**

Consulting engineering firm was hired by city to prepare final project drawings, plans and written specifications (Contract Documents) that would serve as a basis for the award of a contract to a construction contractor who would actually build a regional recycled water project ("project"). The Commission determined that the consulting engineering firm could also enter into a contract with the city to perform both engineering design services during construction and construction management services related to the project. In doing so, the Commission found that the firm had no financial interest in the contract because it did not seek to build the project. The Commission also pointed out that:

> It is plain that [the engineering firm's] pre-construction design services did not determine the scope of the engineering design services during construction, which is dependent upon inquires and request form the contractor who builds the project. If fact, these engineering services during construction would simply be a continuation of the same pre-construction design services [the engineering firm] has already provided.

b. Nonprofit Corporations and Entities

i. Officer or Employee of a Nonprofit Corporation or Entity

Under section 1091(b)(1), an officer or employee of a nonprofit corporation, or an Internal Revenue Code Section 501(c)(3) or 501(c)(5) entity, has a remote interest in contracts of that nonprofit corporation or entity. Therefore, such interest must be disclosed to the body or board of which the official is a member and noted in its official records, and the official must recuse him or herself from any participation in the contract.

- **Goldstein Advice Letter No. A-18-056**

County supervisor's husband was offered a paid position with a nonprofit corporation. Therefore, the board of supervisors may make grants to the nonprofit corporation as long as the interested supervisor discloses her interest and recuses herself from any participation in the contract.

ii. Nonsalaried Member of a Nonprofit Corporation

Under section 1091.5(a)(7), an officer or employee is deemed not to be interested in a contract if his or her interest is that of a ". . . nonsalaried member of a nonprofit corporation, provided that the interest is disclosed to the body or board at the time of the first consideration of the contract and provided further that this interest is noted in its official records."

- **Torres Advice Letter No. A-17-270**

Member of city's finance committee, who is an equity member of private member-owned country club incorporated as a nonprofit mutual benefit corporation, is considered to be a "non-salaried member of a non-profit corporation" for the purposes of section 1091.5(a)(7).[3] Therefore, under section 1090, he has no financial interest in in the country club's renegotiation of an agreement or license with the city.[4]

iii. Noncompensated Officer of a Nonprofit Corporation

Under section 1091.5(a)(8) an officer or employee is deemed not to be interested in a contract if his or her financial interest is that of a ". . . noncompensated officer of a nonprofit, tax-exempt corporation, which, as one of its primary purposes, supports the functions of the body or board or to which the body or board has a legal obligation to give particular consideration, and provided further that this interest is noted in its official records."

- **Khalsa Advice Letter No. A-17-248**

City librarian would not be prohibited from participating in the making or administration of any future agreements with a nonprofit organization in her role as librarian if she also served as an uncompensated volunteer member of the organization's board of directors. Because the nonprofit organization ". . . was created to showcase historical research and support the creation of 3D models of local building, landmarks, and street scenes," the Commission determined that its primary purposes supported the functions of the city and, therefore, the noninterest exemption contained in section 1091.5(a)(8) applied.

- **Barneich Advice Letter No. A-18-073**

City councilmember, who is also a member of the board of directors of a non-profit organization, may take part in the city council's decisions to donate to or enter into contracts with the organization. Because the organization's primary purposes includes aiding the city's homeless population by providing food, shelter, and medical and mental health services, it supported the

[3] The Advice Letter points out that "[t]he reference to "member" refers to persons who constitute the membership of an organization, rather than to those individuals that serve on its board of directors. [citing to 65 Ops.Cal.Atty.Gen. 41 (1982]."

[4] However, the Commission did find that the effect of the potential renegotiation decision on the official's personal finances was reasonably foreseeable and material due to a potential increase in dues. Therefore, the Commission ultimately determined that he did have a conflict of interest under the Act.

function of providing community services to the city's homeless population. Therefore, the Commission determined that the noninterest exemption contained in section 1091.5(a)(8) applied.

4. Behested Payments

- **Peters Advice Letter No. I-18-065**

This advice letter provides good general guidance on the Act's behested payment reporting requirements.

Under the Act, an elected official who fundraises or otherwise solicits payments from one individual or organization to be given to another individual or organization ('behested payments") is required to report within a 30-day period the payment where the aggregate payment(s) equal or exceed $5,000 from the same source in a calendar year. (Regulation 18215.3.)

Under Regulation 18215.3, payments "made at the behest of" means "made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of the elected officer . . . ." However, a payment is not "made at the behest of" an elected officer, and is not subject to the reporting requirements, if the payment is made in response to a fundraising solicitation from a charitable organization requesting a payment where the solicitation does not "feature" the officer. "Features an elected officer" means that the item mailed: (a) includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color; or (b) if the roster or letterhead listing the governing body contains a majority of elected officers.

C. REGULATIONS

1. New Regulations 18308, 18308.1, 18308.2, and 18308.3 (Governance Regulations)

These new regulations, discussed below, outline in great detail the specific authority of the Commission, the Chair, and the Executive Director, respectively.

2. Amendment to Regulation 18700.2 (Parent, Subsidiary, Otherwise Related Business Entities)

The Commission adopted an amendment to Regulation 18700.2 to clarify when an official with an interest in a business entity also has an interest in a parent, subsidiary, or related business entity. The amendment creates two exceptions to when an official has an interest in a parent or subsidiary of a business entity: (1) when the subsidiary has not been listed on reports filed by the parent corporation with the SEC; and (2) when an official's ownership interest in the business entity is below a certain threshold. The amendment is as follows:

§ 18700.2. Parent, Subsidiary, Otherwise Related Business Entity: Defined.

(a) For purposes of Section 82034 and Section 87209, in determining if a business entity has an interest in real property or does business or plans to do business in the jurisdiction, or has done business in the jurisdiction at any time during the two years prior to the time any statement or any other action is required under the Act, the business entity includes a "parent," "subsidiary," or "otherwise related to" another business entity as those terms are defined in subdivision (b) below.

(b) Parent, Subsidiary, Otherwise Related Business Entity, defined.

(1) Parent - A business entity is a "parent" if it is a corporation that controls more than 50 percent of the voting stock of another corporation. The parent corporation is also a parent to any subsidiaries of the corporation that it controls.

(2) Subsidiary - A business entity is a "subsidiary" if it is a corporation whose voting stock is more than 50 percent controlled by another corporation. The subsidiary corporation is also a subsidiary to any corporation that controls its parent corporation.

(3) Otherwise related business entity. Business entities, other than a parent corporation as defined in subdivision (b)(1), are otherwise related if:

(A) The same person or ~~a majority of the same~~ persons together direct or control each business entity; or

(B) The same person or ~~a majority of the same~~ persons together have a 50 percent or greater ownership interest in each business entity.

(c) An official with a financial interest in a business entity also has an interest in a parent or subsidiary of the business entity or an otherwise related business entity except when the business entity meets the criteria provided in subdivision (d).

(d) An official with a financial interest in a business entity does not have an interest in a parent or subsidiary of the business or an otherwise related business entity if:

(1) The official's only interest is that of a shareholder and the official is a passive shareholder with less than 5 percent of the shares of the corporation.

(2) The parent corporation is required to file annual Form 10-K or 20-F Reports with the Security and Exchange Commission and has not identified the subsidiary or related business entity on those forms or its annual report.

3. Proposed Regulations

a. Enforcement Streamline Settlement Program

The Commission plans on discussing the potential adoption of regulations codifying the Enforcement Division's Streamline Settlement Program, which was established for prosecution of those violations with a lesser degree of public harm.

b. Bitcoin

The Commission plans on considering the question whether Bitcoin or other cryptocurrencies are permitted currencies for campaign contributions.

c. 500-foot Property Rule

The Commission plans on discussing the materiality thresholds under the Act's conflict of interest provisions including bright-line materiality standards and clarification of the 500-foot property rule.

D. ACTIVITIES OF THE COMMISSION

1. Review of Enforcement Division's Practices and Procedures

Earlier this year, the Commission agreed to conduct a holistic review of the Enforcement Division's practices and procedures. The stated purpose of the review is to inform and achieve the following three goals:

1. The establishment by the Commission of step-by-step procedures that Enforcement will follow going forward, which shall include task lists, timelines, exceptions to timelines, procedures for obtaining extensions on those timelines from the Commission, investigations, and contact with the press regarding existing matters;

2. The reduction of those procedures to a writing subject to Commission approval in the form of a procedures manual that can be reviewed/revised with public comment from time to time as the Commission deems fit; and

3. The making public of said procedures manual, as it is created and/or revised, by placing and maintaining it on the Commission's website.

At its May 2018 meeting, the Commission voted to create a task force group to assist in this review. The League will be represented on the task force.

2. New Governance Structure

A power struggle between several of the Commission's part-time Commissioners and the full-time Chair largely consumed the attention of the Commission over the last couple of months. This resulted in the adoption of four new regulations which significantly change the governance structure of the Commission and diminish the power of the Chair. Just days before the Commission voted to adopt the new regulations, Chair Jodi Remke resigned.

a. Background

The Commission consists of five members, no more than three of the same political party. (§ 83100.) The Governor appoints the Chair and one additional member who may not be from the same political party. (§ 83101.) The Attorney General, the Secretary of State and the Controller each appoints one member. (§ 83202.)

The Chair is a full-time position and is compensated at the same rate as the president of the Public Utilities Commission. (§ 83106.) The other members of the Commission are part-time and are compensated at the rate of $100 for each day they engage in official duties. (§ 83106.)

According to one commentator, since the adoption of the Political Reform Act, "the part-time commissioners have chafed at the power of the chair." [5] This led to proposed legislation in 1981 to make the chair part-time rather than full- time. However, this proposal was eventually withdrawn.

In October of 2017, the Commission established an ad hoc committee to review the Commission's Statement of Governance Principles, which were originally adopted in 2001. The recommendations of the ad hoc committee ultimately were incorporated into proposed regulations promulgating governance rules for the Commission, discussed below. The proposed regulations were supported by three of the five Commissioners.[6] This was despite strong opposition from the Governor's Office, which believed that the proposed regulations risked "undermining and impeding the important work of the Commission."[7]

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[5] Stern, Robert, "The FPPC Chair Should be Part-Time, Not Full-Time," (http://www.foxandhoundsdaily.com/2018/05/fppc-chair-part-time-not-full-time/) Mr. Stern was the FFPC's first General Counsel from 1975-1983.

[6] The Commissioners supporting the proposed regulations included: Maria Audero (appointed by Governor Brown in 2015); Brian Hatch (appointed by Secretary of State Alex Padilla in 2017); and Allison Hayward (appointed by Controller Betty Yee in 2017).

[7] In an April 18, 2018 letter to the Commission from the Governor's Legal Affairs Secretary, Peter Krause, Mr. Krause also pointed out what he considered to be a number of "significant flaws" with the proposed regulations, and that ". . . the proposed regulations appear to have been drafted with little or no staff involvement."

b. Governance Regulations

The governance provisions are contained in new Regulations 18308, 18308.1, 18308.2, and 18308.3 ("Governance Regulations"). Regulation 18303 outlines the purpose of the Governance Regulations – "[t]o ensure that the accountability and authority for governance and management of the [FPPC] is clearly stated . . . ." Regulations 18308.1, 18308.2, and 18308.4 outline in great detail the specific authority of the Commission, the Chair, and the Executive Director, respectively.

Under the Governance Regulations, most work of the Commission will now take place through two two-member advisory standing committees: the Budget & Personnel Committee; and the Law & Policy Committee. The Chair nominates the committee members from among the other Commissioners (notably, the Chair may not serve on a committee). Almost every aspect of the Commission's work will now be subject to a committee recommendation before formal Commission action is taken.

The Governance Regulations also give very limited authority to the Chair and specify in detail how Commission agendas are established with "review and approval" of the Commission as a whole. Now, the primary role of the Chair is to conduct Commission meetings pursuant to Robert's Rules of Order and other rules adopted by the Commission.

Finally, the Governance Regulations provide that almost every management decision made by the Executive Director (including personnel decisions) must be made "in consultation" with either the Budget & Personnel Committee or the Law & Policy Committee.

3. Resignations

On June 1, 2018, a few of days before the Commission voted to adopt the Governance Regulations, Chair Jodi Remke resigned her position. She was appointed Chair in 2014 by Governor Brown. Remke accepted a new position as the presiding administrative law judge for appellate operations for the Unemployment Insurance Appeals Board.

One week after Chair Remke resigned, Commissioner Maria Audero resigned from the Commission. Commissioner Audero was appointed in 2015 by Governor Brown. She will assume a new role as a U.S. magistrate judge for the Central District of California.

4. New Chair

After Jodi Remke resigned as Chair of the Commission, Governor Brown appointed Alice Germond to fill the remainder of her term which expires on January 31, 2019. Chair Germond has held senior roles in the campaigns of Jerry Brown, Bill Clinton, Gary Hart and Michael Dukakis. She also previously served as Secretary of the Democratic National Committee.

According to Chair Germond, she would like to focus on the following in her time as Chair:

- Having the Commission meet in locations throughout the state in order for the public to become more familiar with the work of the Commission and be invited to participate if they choose;

- Partnering with educational systems and other communities both to share goals and wisdom and to increase civility and participation in the election process; and

- Making the Commission's internal process, from start to finish, "reflect California common sense."

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May 3, 2018

VIA FACSIMILE AND MAIL

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Commissioners Cardenas, Audero, Hatch and Hayward
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Sacramento, CA 95811

Re: FPPC Enforcement Action Against Los Angeles County (Regulation 18420.1)

Dear Chairman Remke and Members of the Commission:

The California State Association of Counties ("CSAC") and the League of California Cities ("League") submit these comments in support of Los Angeles County in the pending administrative enforcement action against the County concerning communications the County made to inform its residents about a March 2017 ballot measure (Measure H).

The Commission is considering whether the County failed to properly disclose payments made for communication that allegedly covered by Section 18420.1 of the FPPC's regulations.

Because Regulation 18420.1 goes beyond the scope of the FPPC's jurisdiction, and is in conflict with the definition of "independent expenditure" in the Government Code, CSAC and the League respectfully request that the Commission dismiss this enforcement proceeding and repeal Regulation 18420.1.

Regulation 18420.1 is Beyond the Scope of the FPPC's Jurisdiction, and Should Therefore not be Applied to LA County's Communications in an Enforcement Action

In adopting Regulation 18420.1, the FPPC purported to rely on the California Supreme Court decision in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, to define a contribution or independent expenditure in cases where a government agency uses public money to make certain campaign-related communications. However, the *Vargas* case addressed the constitutionally permissible use of public funds to communicate with a public agency's constituents, and specifically rejected the use of the Political Reform Act standards in that context. Regulation 18420.1 is therefore beyond the scope of the FPPC's jurisdiction.

A. *Vargas v. City of Salinas* (2009) 46 Cal.4th 1

In *Vargas*, the California Supreme Court expressly reaffirmed the law set forth in *Stanson v. Mott* (1976) 17 Cal.3d 206, holding that while a governmental agency cannot use public funds "for materials or activities that reasonably are characterized as campaign materials or activities," it "may generally publish a 'fair presentation of facts' relevant to an election matter." (*Vargas, supra,* 46 Cal.4th at 8, 25 quoting *Stanson v. Mott*, 17 Cal.3d at 222.) For activities that fall in the middle of this spectrum, "the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor and timing of the publication." (*Id.* at p. 25, quoting *Stanson v. Mott*, 17 Cal.3d at p. 222.)

Grounded in its interpretation of *Stanson v. Mott*, the Court provided guidance on which election activities conducted by governmental agencies are permissible, such as informational materials that provide a fair presentation of facts, and impermissible, such as bumper stickers, television and radio spots, billboards and door-to-door canvassing. (*Id.* at pp. 32-33.) Importantly, the Court recognized that while a public agency may not mount an election campaign to support or oppose a measure, it can "take sides" on a ballot measure and make that view known. "[T]he mere circumstance that a public entity may be understood to have an opinion or position regarding the merits of a ballot measure is not improper." (*Id.* at pp. 3-36.)

The Political Reform Act was only brought into the case tangentially by the Court of Appeal in *Vargas*, when it relied on the definition of express advocacy in the Act to draw the line between permissible and impermissible use of public funds. (*Vargas v. City of Salinas* (2005) 37 Cal.Rptr.3d 507, 525.) On review, the Supreme Court rejected the lower court's reliance on the Act as setting the proper standard for use of public funds. The Court instead held that the standard is set by *Stanson v. Mott*. (*Vargas v. City of Salinas*, 46 Cal.4th at 31-32.) Thus, the *Vargas* case does not provide a basis upon which to create a regulation implementing the Political Reform Act.

B. Regulation 18420.1

In December 2008, the Commission adopted the original version of Regulation 18420.1, which stated that a payment of public funds for a communication concerning a ballot measure could be a reportable expenditure if the communication were express advocacy, or it was not a "fair and impartial presentation of the facts." In other words, the regulation assumed that committee status had already been triggered under Government Code section 82031. Thus, even though the regulation as originally adopted went beyond mere express advocacy, it did not change the way in which committee status was defined.

As noted above, the *Vargas* opinion was issued the next year in 2009. In the opinion, the Court drew a line between the "regulation of campaign contributions and expenditures" and "the potential constitutional problems arising from the use of public funds for campaign activities" as defined in *Stanson*. (*Vargas, supra,* 46 Cal.4th at pp. 31-32.)

Notwithstanding the Court's separation of campaign regulations and constitutional speech, the FPPC amended Regulation 18420.1 following the *Vargas* opinion in 2009 to "appl[y] the Supreme Court's *Vargas* standard . . . to determine whether a government agency is making a contribution or independent expenditure under the Act." (FPPC May 29, 2009 Staff Memorandum, p. 2.) In subdivision (a) of the 2009 amendments, the Commission simply restates that any public agency communication that expressly advocates or unambiguously urges a particular result is either a "contribution" or "independent expenditure." However, subdivision (b) goes beyond that – and beyond the Political Reform Act itself – to incorporate the *Vargas* and *Stanson* standards concerning constitutional speech, including the Court's statement that use of television or other mass media advertising is per se communication that unambiguously urges a particular result.

The FPPC's adoption of Regulation 18420.1 exceeded its authority under the well-established limitations of regulatory power. "'[N]o regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the

purpose of the statute.'" (*Citizens to Save Cal. v. Fair Political Practices Com.* (2006) 145 Cal.App.4th 736, 746, quoting Gov. Code, § 11342.2 [invalidating FPPC regulation because it was at odds with the PRA and inconsistent with legislative intent underlying the PRA].)

> [I]t is well established that the rulemaking power of an administrative agency does not permit the agency to exceed the scope of authority conferred on the agency by the Legislature. [Citation.] "A ministerial officer may not . . . under the guise of a rule or regulation vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute." [Citation.] And, a regulation which impairs the scope of a statute must be declared void. [Citations.]

(*Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 321, citations omitted.)

The authority for Regulation 18420.1 cited by the FPPC is Government Code sections 82013, 82015 and 82031. But there is nothing in those sections that delineates certain types of communication as unambiguously urging a particular result. Further, as noted above, the Supreme Court rejected the Court of Appeal's attempt to incorporate Political Reform Act definitions into the constitutional speech questions raised by *Vargas*. Indeed, *Stanson* and *Vargas* concern an area of law, the use of public funds, that is separate from and unrelated to the Political Reform Act. Thus, purporting to rely on the Political Reform Act as authority to incorporate the constitutional standard for use of public funds in election speech is a notion that has no support in the statute or in the case law.

By going beyond the Political Reform Act into the realm of constitutional speech, the FPPC has aggregated to itself the right to judge what government communications are permissible under *Vargas* and, as a practical matter, has usurped the proper role of the judiciary to decide such matters. Regulation 18420.1 contains ambiguity in how it may be applied to various local government activities. Subsection (b)(1), for example, relates to campaign material or campaign activity ". . . including, but not limited to, television, electronic media or radio spots." Would that apply to community television channels that broadcast City Council or Board of Supervisor meetings? It is not uncommon for local governing bodies to publicly discuss ballot measures and take positions by adopting resolutions, which the courts have found permissible. Would these televised discussions now be considered "campaign activity?" What about placing informative documents concerning the impact of a ballot measure on the agency's website? Is that considered unambiguously urging a particular result in an election because it is placed on "electronic media?" The enforcement activity undertaken in this proceeding raises these types of concerns for cities and counties across this State, and illustrates why the FPPC should not be in the business of enforcing constitutional speech standards.

For all of these reasons, the FPPC acted beyond its jurisdiction in enacting the regulation, and it should therefore not be enforced against Los Angeles County in this proceeding.

Regulation 18420.1 is Inconsistent with Government Code section 82031

In addition to being beyond the scope of the FPPC's jurisdiction, Regulation 18420.1 is also inconsistent with Government Code section 82031, a section that purportedly authorizes the regulation.

As noted above, for purposes of this pending enforcement action, Regulation 18420.1 states that a payment made in connection with a communication that unambiguously urges a particular result in an election is an independent expenditure under Government Code section 82031. Regulation 18420.1 goes on to state that a communication is considered to unambiguously urge a particular result if the communication is made via mass media advertising, including, but not limited to, television, electronic media or radio spots.

However, shortly after the Commission adopted Regulation 18420.1, the Governor signed Assembly Bill No. 9.[1] AB 9 amended Government Code section 82031 to include payments by a state or local government agency in the same definition of "independent expenditure." As a result, the same definition is now used for all persons, including local government agencies. And that definition does not identify television advertising as a communication that unambiguously urges a particular result.

To the contrary, the courts have specifically found that a television communication on a political subject does not automatically amount to an independent expenditure under Government Code section 82031. (*Governor Gray Davis Committee v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449.) In the case, defendant produced and placed on the air television ads that were critical of Governor Davis. The ads did not use express words of advocacy, but plaintiff asserted that in context, they were either express advocacy or communications that unambiguously urged a particular result, and therefore amounted to expenditures that should have been reported under Government Code section 82031.

The court, however, rejected that argument and found that the communications were protected political speech, rather than campaign ads regulated by the Political Reform Act, notwithstanding the fact that the communications were made via television. Instead, the court took a narrow view of the Political Reform Act in this context:

> We must therefore read and construe the scope of the provisions that define reportable expenditures in Government Code sections 82031 and 82025, and California Code of Regulations, title 2, section 18225, narrowly in accordance with First Amendment standards to apply only to those communications that "contain express language of advocacy with an exhortation to elect or defeat a candidate." Appellant's television spot does not contain the express or explicit words of advocacy that are subject to regulation. No campaign or election is mentioned. Nor does the advertisement overtly encourage the viewer to vote against Governor Davis. To be sure, the advertisement criticizes Governor Davis on the issue of the energy crisis, but it fails to associate the condemnation with any express endorsement of defeat of his candidacy for Governor. . . . Nothing in the explicit language of the advertisement "unambiguously urged Gray Davis'[s] defeat in the gubernatorial election," as

[1] Chapter 363, Statutes of 2009, signed by the Governor on October 11, 2009, with an effective date of January 1, 2010.

> respondent claims. . . . We conclude based upon the advertisement at issue here that appellant cannot be compelled to comply with the disclosure and reporting obligations of the Political Reform Act.

(*Governor Gray Davis Committee*, supra, 102 Cal. App. 4th at pp. 471-472 (citations omitted).)

It is important to note that the amendment to Government Code section 82031 that added public agencies to the existing definition of independent expenditure was made after the court's decision in *Governor Gray Davis Committee*. As such, the Legislature is presumed to know the narrow construction of this provision when it decided to use the same standard for both public and private entities to determine when a communication constitutes an independent expenditure.

What Government Code section 82031 does not do is list materials that are, by definition, campaign materials regardless of whether their content actually expressly advocates or unambiguously urges a particular result. Regulation 18420.1 does just that, but only for public agency activity, which is directly contrary to the Legislature's decision to treat both public and private agencies the same under Government Code section 82031. In so doing, the Commission not only reached into constitutional speech issues that are beyond the scope of the Political Reform Act, but also created a conflict between the Act and this regulation.

III. CONCLUSION

Regulation 18420.1 is not authorized by Government Code section 82031 or *Vargas v. City of Salinas*. The misuse of public funds is governed by the Constitution, case law and other statutory provisions, not the Political Reform Act. Further, the Political Reform Act treats both public and private entities the same under Government Code section 82031. As such, the regulation's attempt to impose additional reporting requirements for independent expenditures by public agencies that do not exist for private entities conflicts with the Political Reform Act.

Regulation 18420.1 is not valid because it exceeds the scope of the FPPC's authority, and is inconsistent with Government Code section 82031. CSAC and the League therefore respectfully request that it not be used in an enforcement action against Los Angeles County, and that the Commission consider repealing Regulation 18420.1.

Sincerely,

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California State Association of Counties