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September 4, 2009

Commissioner Ross Johnson, Chair, and
Members of the Commission
California Fair Political Practices Commission
428 J Street, Suite 800
Sacramento, CA 95814-2329

Re: Proposed Regulations: Title 2 Cal. Code Regs., § 18420.1
Agenda Item 25 (September 10, 2009)

Dear Chairman Johnson and Members of the Commission

We write on behalf of the California State Association of Counties (CSAC), League of California Cities (League) and the California School Boards Association (CSBA) to oppose adoption of regulation 18420.1 as presently drafted. CSAC, the League and CSBA believe the current draft regulation is inconsistent with clear statutory language of the Political Reform Act (PRA) and thus exceeds the Commission's authority to adopt. Moreover, even if the Commission had the authority to adopt a regulation changing statutory definitions as proposed here, the draft regulation does not conform to the California Supreme Court's decision in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1.[1]

Draft Regulation Inconsistent with Statutory Language

As a regulatory agency the Commission is authorized to adopt regulations "to carry out the purposes and provisions" of the PRA. (Cal. Gov. Code, § 83112.)[2] However, no regulatory agency, including the Commission, may not adopt rules that are contrary to the express requirements of the statute it is charged with interpreting. To do so exceeds the authority vested in that agency. (". . . no 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 California v. FPPC* (2006) 145 Cal.App4th 736.)

Here the Commission is poised to adopt a regulation that purports to define when a public agency becomes a committee that is required to file campaign disclosure reports for its

[1] CSBA separately raised at the Commission's June 2009 meeting the authority of the Commission to adopt the proposed regulation in light of *Davis v. American Taxpayers Alliance*, a court ruling requiring express advocacy before a "person" could qualify as a "committee" under the PRA. No effort has been made by the Commission staff to address this issue other than a suggestion at the June meeting that government entities have no First Amendment rights. While our research suggests that is clearly not the case, we do not repeat the *Davis* arguments here.

[2] All further references are to the Government Code.

expenditures made in connection with an election. While the Commission may believe that some public agencies are unlawfully supporting or opposing candidates or ballot measures, its authority does not extend to prohibiting such activity. The Commission's authority is limited to determining whether a "person," including a public agency, has become a political committee under the PRA.

To make that determination the Commission is bound by the statutory provisions that specifically define when "persons" become committees under the PRA. There are three types of committees—recipient committees which receive contributions of $1,000 in a calendar year, major donors which make contributions of $10,000 in a calendar year and independent expenditure committees which make independent expenditures of $1,000 or more. (§ 82013.) A public agency does not receive contributions, but could qualify as a major donor if it makes contributions of $10,000 or more to candidates or ballot measure committees, or as an independent expenditure committee if it makes independent expenditures of $1,000 or more supporting or opposing candidates or measures.

The keys to determining if a person is a committee are the definitions of the terms "contribution" and "independent expenditure." The PRA contains statutory definitions of both terms. In addition, the Commission has adopted regulations interpreting both terms. The PRA defines "independent expenditure" as payments for communications which "*expressly advocate the election or defeat of a clearly identified candidate or . . . measure, or taken as a whole and in context, unambiguously urge a particular result in an election*" and which are done independently of a candidate or committee." (§ 82031.) Thus, a person, including a public agency, expending $1,000 or more in a calendar year for communications that either 1) expressly advocate or 2) "*unambiguously urge a particular result*" qualifies as an independent expenditure committee (§ 82013) and must file campaign disclosure reports (§ 84200 et. seq.).

Instead of simply applying the statutory and existing regulatory definitions of "contribution" and "independent expenditure" to public entities, the draft regulation creates new definitions just for public agencies. First, it borrows the statutory definition for "independent expenditure" and applies it to the term "contribution." Second, and more importantly, it expands the definition of "independent expenditure" by providing a new definition of the term "unambiguously urges a particular result in an election."

The effect of using the definition of independent expenditure for the term contribution as applied to public agencies is to limit its application only to circumstances where an agency makes payments for "communications." Coordinated payments by a public agency that do not involve communications (e.g., use of public resources) would not constitute a contribution. Thus, as drafted the regulation would exclude a public agency from qualifying as a major donor committee by coordinating its activities with a candidate or ballot measure committee if the payments by the agency did not constitute "communications." If any other person were to coordinate its non-communication expenditures with a candidate or ballot measure committee, it would become a major donor committee once it hit the $10,000 threshold. Creating two different standards, one for public agencies and one for all other persons, is contrary to the

requirements of the PRA. As the Court of Appeal found in *Citizens to Save California* when it invalidated the Commission's regulation imposing contribution limits upon candidate controlled ballot measure committees, "*In effect, the FPPC has attempted to amend the PRA to create such a hybrid, but it lacks the authority to do so.*" (*Citizens to Save v. FPPC, supra*, 145 Cal.App4th at 751.)

The more significant problem with the draft regulation is its expansion of the definition of independent expenditure by defining the term "unambiguously urges a particular result in an election." The statute makes clear that a communication is only an independent expenditure when the communication either 1) expressly advocates or 2) unambiguously urges a particular result in an election. But the draft regulation substitutes for "unambiguously" terms that are, in a word, "ambiguous."

The proposed definition of "unambiguously urges a particular result" encompasses two criteria—both of which are ambiguous in their own right. The first criterion covers "campaign material or activity"—a term that is not defined in the draft regulation or anywhere else in the PRA or Commission regulations. Examples are given, although it is clearly not an exhaustive list, of such things as bumper stickers, television and radio "spots." There is no requirement that the campaign material or activity even reference a candidate or ballot measure, let alone "clearly identify" them. There is no requirement that the message on the bumper sticker or radio advertisement urge any particular result, unambiguously or ambiguously. By way of example, a bumper sticker that said "Support Our Schools" would meet the definition of "unambiguously urges" as that term is now defined in the draft regulation, and payments by a school district could, if sufficient in amount, make the district a political committee required to file campaign disclosure reports.

In the same way, if a City decided to make expenditures for nonpartisan voter registration communications to voters through radio advertisements urging voters to register to vote and participate in an upcoming election, without referencing a candidate, political party or ballot measure, the city would become a committee. This result would occur because the City was paying for "radio spots" which constitute "campaign material or activity" as now defined in the proposed regulation. Such an activity by a City is not merely hypothetical. The City of Irvine did precisely this when it paid for a "Vote 2000 program" to encourage citizens to register and participate in the March and November 2000 elections. A legal challenge brought against the City alleging the City had violated *Stanson v. Mott* (1976) 17 Cal.3d 206, the case upon which the *Vargas* opinion relied, was turned away by the Court of Appeal. (*Schroeder v. Irvine City Council* (2002) 97 Cal.App.4th 174.) Thus, if the Commission adopted this regulation and a City engaged in a nonpartisan voter registration/participation program such as the City of Irvine, it would become a political committee required to file campaign reports, but would not be deemed to have violated the principles laid out in *Stanson* and *Vargas*—an odd and ironic result given the Commission's stated purpose of conforming its rules to the *Vargas* standards.

The draft regulation does not stop with the "campaign material or activity" criterion. It adds a second and equally ambiguous criterion for communications that "can be reasonably

characterized as campaign material" which do not contain a "fair presentation of facts serving only an informational purpose." The draft regulation does not explain who will determine what is "reasonably characterized as campaign material" or whether a communication is a "fair presentation of the facts serving only an informational purpose." Virtually every informational mailer or newsletter could be challenged under this definition, as it is completely subjective. What could be more ambiguous?

This the Commission may not do. It may not do so because the statute states that communications must either contain express advocacy or unambiguously urge a particular result in order that the payments for those communications to be considered "independent expenditures." The courts have been clear that a narrow and objective standard must be used in order to avoid constitutional challenges. (*Davis v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 464.) Unless a communication meets this standard it cannot be an "independent expenditure" subject to regulations by the PRA.

It should also be noted that the PRA was adopted well after *Stanson v. Mott*. If the voters had intended to treat public entities and private entities differently it could have done so. The statute's provisions apply to "persons" a term that has been judicially interpreted to include both private and public entities (*FPPC v. Suitt* (1979) 90 Cal.App.3d 125.) Nor has the staff articulated any reason for subjecting public agencies to an extremely subjective, ambiguous standard for campaign reporting.

The Commission may assume that because the terms used in the draft regulation are found in the Supreme Court's decision in *Vargas* it is permitted to use them to re-define key statutory terms. However, the Supreme Court was not attempting to determine whether a public agency was a political committee regulated under the PRA, but instead was trying to develop legal standards that might guide public agencies in the first instance regarding use of public monies in connection with elections. While the Court may be free to adopt terms and standards that are ambiguous and that might require further clarifying court decisions in the future, the Commission cannot use those terms to change the definitions already provided in the PRA.

In summary, the Commission is bound by the statutory definitions found in the PRA which determine when a person, even a public agency, becomes a committee. It cannot create "*hybrid*" definitions to fit a perceived need to apply the Supreme Court's "*Vargas* standards." By changing the definition of contribution to limit its application only to coordinated communications and the definition of independent expenditure to change the standard from "unambiguous" to "ambiguous" the proposed regulation goes too far.

Draft Regulation is Inconsistent with *Vargas*

Although we are of the view that the Commission cannot substitute the *Vargas* standards in a way that contravenes statutory definitions in the PRA, if the Commission is going to substitute standards, it should at least incorporate what the Supreme Court actually said. As drafted the regulation does not do that.

Summary of *Vargas* Decision

In *Vargas*, the Court gave some detailed guidance on which activities by public agencies in connection with elections are permissible and which are not. As explained by the Court, there are some activities that without specific statutory authorization are unquestionably *campaign* activities and are not permissible. The Court listed as examples of impermissible campaign activities bumper stickers, mass media advertisement spots, billboards and door-to-door canvassing. The Court also noted that some activities are clearly informational (and therefore not campaign related), and cited as an example providing a fair presentation of facts in response to a citizen's request for information. However, for those activities that fall in the middle – that are neither unquestionably campaign activities nor clearly informational— the Court tells us in *Vargas* that it is "necessary to consider the style, tenor, and timing of a communication or activity to determine whether, from an objective standpoint, the communication or activity realistically constitutes *campaign activity* rather than informational material. . . ." (Emphasis added.)

When it becomes necessary to apply the style, tenor and timing test, the Court provides some guidance on the factors that should be considered. For example, was the expenditure made from a general appropriation in the annual budget or was it a special appropriation related to the measure? Was the communication part of the normal communication pattern for the agency? Was it part of a newsletter that is regularly sent out on a set schedule? Was it posted on a website in a manner consistent with how the agency has used its website in the past? Is the communication consistent with the style of other communications issued by the agency? Does the communication use inflammatory or argumentative language? These are the types of questions that must be asked when the style, tenor and timing test is applied. In upholding the actions of the City of Salinas and specifically including as appendices the permissible communications, the Court provided some concrete examples of how to apply the style, tenor and timing test to public agency communications.

Section 18420.1

With that background of the basic holding in *Vargas*, CSAC, the League and the CSBA have carefully reviewed the proposed revision to section 18420.1 and have some concerns with its consistency with the Supreme Court decision.

Reporting Expenditures for Communication that Unambiguously Urges a Particular Result

Section 18420.1 is a campaign expenditure reporting requirement. As relevant to this discussion, it requires state or local governmental agencies to report independent expenditures or coordinated contributions.

Under the proposed amendments, an independent expenditure is a payment made in connection with a communication that "expressly advocates" the passage or defeat of a measure, or one that "unambiguously urges" a particular result. In turn, an agency unambiguously urges a particular result if it is clearly campaign material or "[w]hen 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."

CSAC, CSBA and the League submit that this standard for determining whether an agency unambiguously urges a particular result is inconsistent with *Vargas*. The *Vargas* Court made clear that the style, tenor and timing test does not apply in all situations. Instead, the Court stated style, tenor and timing is relevant only "in some instances," i.e., when the communication is neither clearly campaign related nor clearly informational. Section 18420.1(b)(2) appears to merge the style, tenor, and timing test with the Court's dictate that clearly informational communication is permitted.

As noted above, the style, tenor and timing test is only applied to communications that are neither unquestionably campaign activities nor clearly informational. If something is a fair presentation of facts serving only an informational purpose, there is no need to apply the style, tenor and timing test because it is clearly permissible under *Vargas*. The result of the proposed regulation is to exclude a category of communication that is permitted under *Vargas*—communication that may do something more than serve *only* an informational purpose, but when considering the style, tenor and timing, is not reasonably campaign material.

This is an important distinction. The *Vargas* Court made clear that it is not unlawful for a public agency to "take sides" and make its point of view about a particular measure known to the public. The Court emphasized that a proper role for a public agency could be to present an agency's view of a ballot proposal and make those views known to the public:

> Indeed, upon reflection, it is apparent that in many circumstances a public entity inevitably will "take sides" on a ballot measure and not be "neutral" with respect to its adoption. . . .Thus, the 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. The potential danger to the democratic electoral process to which our court adverted in *Stanson*, is not presented when a public entity simply informs the public of its opinion of the merits of a pending ballot measure or of the impact on the entity that passage or defeat of the measure is likely to have. Rather, the threat to the fairness of the electoral process to which *Stanson* referred arises when a public entity or public official is able to devote funds from the public treasury, or the publicly financed services of public employees, to *campaign activities* favoring or opposing such a measure.

Vargas v. City of Salinas (2009) 46 Cal.4th 1, 36-37 (citations omitted).

The *Vargas* Court included as appendices to its decision the City of Salinas' challenged communications. The Court used the style, tenor and timing test to uphold the communications. Presumably, however, if the communications presented a fair presentation of facts serving *only* an informational purpose, there would have been no need to apply the style, tenor and timing test. (*See Vargas, supra*, 46 Cal.4th at 33-34 [noting that the style, tenor and timing test only applies "in some instances," and not to activities explicitly identified as campaign activities or to activities that are clearly informational – "for example, providing a fair presentation of facts in response to a citizen's request for information."].)

Page B-4 of Appendix B to the *Vargas* decision is an example of a communication that was permitted by the Court, but that would arguably be prohibited by the proposed regulation. That document includes, among other pertinent information, a photograph of a methamphetamine lab with the accompanying text: "The proposed elimination of the Narcotics and Vice Unit will hamper Police Department's ability to promote the City Council's #1 goal of maintaining a safe and peaceful community." Such a document is not in the category specifically identified as campaign materials (bumper sticker, etc.), but arguably goes beyond mere facts serving only an informational purpose. Under the second part of Section 18420.1(b)(2) of the proposed regulation, this communication would become a reportable independent expenditure and subject the local agency to significant liability.

Yet the Supreme Court upheld this communication under the style, tenor and timing test. The Court found, when viewed from an objective standpoint, the information "*generally* involved past and present facts," avoided argumentative or inflammatory rhetoric, and was disseminated consistent with established practice.

To avoid this apparent contradiction, we urge the Commission to revisit this language and ensure the Regulation is consistent with the Supreme Court's ruling in *Vargas*.

Direct vs. Indirect Costs

The proposal would add a new 18420.1(c) stating that the public moneys subject to reporting include both direct and indirect costs. CSAC, CSBA and the League believe this paragraph is unnecessary. The regulation already covers expenditures "made in connection with" the covered communications, which would appear to cover the expenditures delineated in this new subparagraph (c).

Safe Harbors

The safe harbors in the existing regulation are helpful to local agencies, but we believe there should be a specific provision to allow staff members reporting to an agency concerning their view of a ballot measure and their analysis of its effects. Neither the current regulation nor the proposal appear to cover this situation, as the staff report is neither presented to an "organization" at its request nor an announcement of the agency's position.

Conclusion

By grafting standards and terms found in *Vargas* into a new regulation that conflict with the existing statutory definitions and requirements of the PRA, the Commission exceeds its regulatory authority. Moreover the Commission's proposal does not correctly apply the *Vargas* standards as the Supreme Court articulated them. We believe that the regulation as drafted should not be adopted, and, if adopted will be confusing and legally ineffective in fulfilling the stated goals of the effort.

Sincerely,

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On behalf of California Association of Counties

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