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By Electronic Mail (HWagner@fppc.ca.gov; JKim@fppc.ca.gov)

California Fair Political Practices Commission
Chair Jodi Remke
Commissioner Maria Audero
Commissioner Eric Casher
Commissioner Gavin Hachiya Wasserman
Commissioner Tricia Wynne
428 J Street, Suite 620
Sacramento, CA 95814

**RE: Oct. 15, 2015 Meeting Agenda Item 64: Amend Independent Expenditures Regulation 18225.7 (Made at the behest of); Repeal Regulation 18550.1 (Independent and Coordinated Expenditures).**

Dear Chair Remke, Commissioners Audero, Casher, Hachiya Wasserman and Wynne:

These comments are submitted by the Campaign Legal Center with regard to proposed amendments to the California Code of Regulations pertaining to independent and coordinated expenditures, which will be considered by the Fair Political Practices Commission (FPPC) at its October 15 meeting as Agenda Item 64.

Specifically, proposed amendments to Regulation 18225.7 would strengthen California's rules governing independent expenditures by adding several situations in which an expenditure is presumed to be coordinated with a candidate or committee, including situations where (1) the candidate and the spender used the same consultants, (2) the candidate has engaged in fundraising for the spender, (3) the spender is staffed in a leadership position by a person who worked in a senior position for the candidate, and (4) the spender is established, run, staffed or funded by an immediate family member of the candidate.

As explained in greater detail below, the Campaign Legal Center supports the proposed amendments to Regulation 18225.7 and recommends that the Regulation be strengthened even further by expanding the scope of Regulation 18225.7(c) and (d) beyond communications containing express advocacy or "urg[ing] a particular result in an election." Additionally, the Campaign Legal Center recommends that the scope of the regulation be expanded to include

certain "pre-candidacy" activities that have been used at the federal level to circumvent coordination rules and contribution limits. The proposed amendments to Regulation 18225.7, as well as the Campaign Legal Center's proposed additions to these amendments, reflect good policy and are constitutionally sound.

## I. Proposed amendments to Regulation 18225.7, together with the Campaign Legal Center's suggested modifications, reflect good and critically important public policy.

The Campaign Legal Center supports the FPPC's efforts to strengthen California's coordination regulation. The U.S Supreme Court's decision in *Citizens United v. FEC*, 558 U.S. 310 (2010), and subsequent court decisions have dramatically increased the amount of ostensibly independent spending in elections at every level of government. As the amount of unlimited outside group expenditures has dramatically increased, the legal lines separating "independent" and "coordinated" spending have become critically important. Candidates, their supporters and their lawyers have pushed the boundary of what constitutes an "independent" expenditure to absurdity. Without effective regulation of coordinated spending between candidates and their supporters, candidate contribution limits are rendered meaningless. If a California Senate or Assembly candidate can solicit a $50,000 contribution from a supporter to a so-called "independent" expenditure committee supporting that candidate, then the State's $4,200 limit on contributions directly to Senate and Assembly candidates is completely undermined. Such candidate involvement in political fundraising and spending is precisely the type of corrupting scenario that contribution limits are intended to prevent.

The proposed amendments to Regulation 18225.7 add several situations in which an expenditure would be presumed coordinated with a candidate or committee. First, the proposal amends Regulation 18225.7(d)(3), extending the "common consultant" presumption to apply to the primary and general election of an election cycle. The regulation currently applies to the primary and general elections separately, which allows a candidate to work with a media strategist, for example, in the primary and for that same strategist to then work for an independent expenditure committee in the general election. A strategist who has consulted with a candidate within the election cycle will undoubtedly have valuable inside information that will accordingly make the independent expenditure committee's activities more valuable to the candidate. This is precisely the type of transfer of knowledge situation that a common consultant regulatory provision should cover.

Second, the proposed amendments add a fundraising coordination presumption. This is a critically important addition. A candidate appearing at a fundraiser or soliciting funds for a committee making expenditures to benefit the candidate is clear indicia of coordination. At the federal level, the FEC has perpetuated the legal fiction that a candidate can raise money for an "independent expenditure-only political committee"—a.k.a. Super PAC—while that Super PAC's expenditures supporting that candidate are deemed *legally* independent of the candidate. In reality the message that is sent to contributors when a candidate raises money for an independent expenditure group is: "This is my Super PAC. Please give generously so that it can support my candidacy." This practice allows for blatant violation of the contribution limits. We

support the FPPC's efforts to protect its contribution limits against this clearly evasive fundraising practice.

Third, the proposed amendments add a presumption of coordination when the spender is staffed in a leadership position by a person who worked in a senior position for the candidate. Similar to the fundraising presumption, when an independent expenditure committee is run by a candidate's former high-level staff, the message sent to contributors is: "This is the candidate's Super PAC and we know what expenditures are going to be the most helpful to the candidate." The proposed regulation also makes clear that there is a finite window of time in which the activities of former staff may be presumed coordinated. The proposed language for 18225.7(d)(6) includes a reasonable 12-month period before the election within which the activity of former staff will be considered coordinated. The former staffer's knowledge of the candidate's campaign and strategy will be less useful as more time passes. Although we think the regulation may be stronger if the 12 month period were increased to 24 months, it is important that the regulation clearly define a "cooling off period" after which the former staff's activities will not be considered coordinated. The regulation is not an indefinite ban on the ability of former staff to engage in activity independent of the candidate.

Finally, the proposed amendments add a presumption of coordination when the spender is established, run, staffed or funded by an immediate family member of the candidate. Like the other proposed amendments, this focuses on the relationship between the spender and the candidate. A family member's involvement with an outside spender sends the message to contributors that this is the candidate's preferred "independent" group and that it's expenditures will be the most beneficial to the candidate.

In sum, the proposed amendments to Regulation 18225.7 are good public policy. These presumptions address practices that are being used to circumvent contribution limits. We urge the FPPC to adopt these presumptions. These situations are based on practices that have developed post-*Citizens United* to circumvent contribution limits. Although the proposed changes to Regulation 18225.7 are a step in the right direction, we think a few additional changes would further strengthen the regulation.

First and foremost, we believe that the "express advocacy" standard adopted by the regulation will allow much coordinated activity to fly under the radar. Proposed Regulation 18225.7(c) and (d) require that, in order for an expenditure on a communication to be within the scope of the coordination regulation, the expenditure must fund a communication that "expressly advocates the nomination, election or defeat of a clearly identified candidate" or that "taken as a whole unambiguously urges a particular result in an election." A communication expressly advocates the nomination, election or defeat of a candidate if it "contains express words of advocacy such as 'vote for,' 'elect,' 'support,' 'cast your ballot,' 'vote against,' 'defeat.'" Cal. Code Regs. Tit. 2 § 18225(b)(2). The other standard set forth in proposed Regulation 18225.7, "taken as a whole unambiguously urges a particular result in an election," applies to communications appearing within 60 days prior to an election. *Id*. Proposed Regulation 18225.7 does not address whether the different standards apply to coordinated expenditures at different times in the election cycle; therefore it appears that the coordinated communications would be subject to the same timeline

specified in Regulation 18225(b)(2)—express advocacy outside of the 60-day period before an election, and unambiguously urges a particular result within the 60 days prior to an election.

We agree that communications appearing within the 60-day period preceding an election should be subject to a stricter standard than ads aired outside of that period. The Political Reform Act recognizes the increased impact of communications appearing in the pre-election period and accordingly requires greater disclosure for an ad that "clearly identifies" a candidate within the 45 days before an election. Cal. Gov't Code § 85310. Section 85310 specifically states that ads appearing in this pre-election window do not have to contain the magic words of express advocacy before being subject to the reporting requirements. We think this is the appropriate standard by which to evaluate coordinated communications as well. When funds are spent to air an ad clearly identifying a candidate within 60 days prior to an election, and the other "coordination" criteria of proposed Regulation 18225.7 are met, the expenditure should be deemed coordinated. An ad should not need to go even further and "unambiguously urge[] a particular result in an election" in order to be covered by the coordination regulation.

And outside of the 60-day pre-election period, sole reliance on an express advocacy standard would allow candidates and supposedly independent spenders to coordinate on the details of expenditures and execute a written agreement, so long as the resulting ad does not use the magic words of express advocacy.[1] Instead of the very narrow express advocacy standard for coordinated communications appearing outside of the 60-day pre-election window, we recommend that the Commission consider either of two possible approaches. The Commission could extend the more holistic standard "unambiguously urges a particular result" already defined in the Commission's regulations to the period preceding the 60-day pre-election window. *See* § 18225(b)(2). Unlike the express advocacy "magic words" standard, "the unambiguously urges" standard considers the communication as a whole and evaluates the intended message to viewers and would likely prove a more reliable standard for coordination.

An even more effective coordination rule would extend coverage outside the 60-day pre-election period to communications that promote, support, attack or oppose a clearly identified

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[1] In its regulations implementing the coordination provisions of the Bipartisan Campaign Reform Act of 2002 (BCRA), the Federal Election Commission twice adopted the express advocacy standard for coordinated communications appearing outside of the defined pre-election window. In both instances the United States District Court for the District of Columbia found that, in part, the regulations were unduly narrow. *See Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008) ("*Shays III*"); *Shays v. FEC*, 414 F.3d 76 (D.C. Cir. 2005) (''*Shays I*"), *petition for reh'g en banc denied*, No. 04-5352 (D.C. Cir. Oct. 21, 2005). As the court explained in *Shays I*:

> Under the new rules, more than 120 days before an election or primary, a candidate may sit down with a well-heeled supporter and say, "Why don't you run some ads about my record on tax cuts?" The two may even sign a formal written agreement providing for such ads. Yet so long as the supporter neither recycles campaign materials nor employs the "magic words" of express advocacy—"vote for," "vote against," "elect," and so forth—the ads won't qualify as contributions subject to FECA. Ads stating "Congressman X voted 85 times to lower your taxes" or "tell candidate Y your family can't pay the government more" are just fine.

414 F.3d at 98. The *Shays III* Court further highlighted that absent express advocacy, "the FEC would do nothing about such coordination, even if a contract formalizing the coordination and specifying that it was 'for the purpose of influencing a federal election' appeared on the front page of the New York Times." 528 F.3d at 925.

candidate—a legal standard employed in federal campaign finance law to regulate certain state political party public communications, which was upheld by the U.S. Supreme Court as constitutionally permissible in *McConnell v. FEC*, 540 U.S. 93, 169-70 (2003). The *McConnell* Court explained that public communications that promote or attack a candidate "undoubtedly have a dramatic effect" on elections and rejected the argument that the words "promote," "oppose," "attack," and "support" are unconstitutionally vague; these words, the Court reasoned, "provide explicit standards for those who apply them" and "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited." *Id*.

Finally, we recommend that the fundraising presumption in proposed 18225.7(d)(5) be extended slightly to cover such activities if engaged in during the election cycle by an individual who has not yet formally declared her candidacy, but who then becomes a candidate. Without such a regulation, practices seen this year in the federal presidential race might become the new normal in California politics, Jeb Bush and his political team set up Right to Rise Super PAC early in 2015 and spent the first half of the year raising more than $100 million in unlimited funds before Bush finally declared the obvious—that he is running for president. Every penny of the $100+ million that Bush has raised for Right to Rise Super PAC will be spent in support of his presidential campaign, severely undermining the $2,700 federal candidate contribution limit. Proposed Regulation 18225.7(d)(5) covers much of the type of single-candidate Super PAC coordination we have seen. However, we think it should be made clear that this presumption applies to the "pre-candidacy" establishment of and fundraising for such committees. As written, it is clear that the presumption would apply if the candidate—once officially a candidate—solicits funds and/or appears at a fundraiser for the committee. But it should also apply if an individual solicits funds and/or appears at a fundraiser for the committee at any time during the election cycle, even before announcing their candidacy.

## II. Proposed amendments to Regulation 18225.7, together with the Campaign Legal Center's suggested modifications, are constitutional.

### a. The Supreme Court has made explicit that only expenditures that are "totally," "wholly," or "truly" independent from candidates are non-corruptive.

There are no constitutional barriers to adopting proposed Regulation 18225.7. Notwithstanding the Supreme Court's pronouncement in *Citizens United v. FEC* that independent expenditures cannot be constitutionally limited because they "do not give rise to corruption or the appearance of corruption," 558 U.S. 310, 357 (2010), *non*-independent—i.e., coordinated—expenditures are not so immunized. The Supreme Court has maintained a broad view of coordination in general, and has spoken expansively about the degree of independence that is necessary to prevent outside spending from "undermin[ing] contribution limits." *FEC v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 464 (2001) ("*Colorado II*"). Only "totally independent," "wholly independent," and "truly independent" expenditures qualify.

Since the Supreme Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court has distinguished for constitutional purposes between limitations on "contributions" to a candidate's campaign, and limitations on "expenditures" to influence an election made independently of

candidates. The *Buckley* Court upheld as constitutionally permissible candidate contribution limits, *id.* at 29, but struck down limits on individual independent expenditures, *id.* at 51. The Court recognized, however, that to be effective any limitations on campaign contributions must apply to expenditures made in coordination with a candidate, so as to "prevent attempts to circumvent the [campaign finance laws] through prearranged or coordinated expenditures amounting to disguised contributions." *Id.* at 47. The *Buckley* Court further explained that there was a difference between expenditures "made *totally* independently of the candidate and his campaign," *id*. at 47 (emphasis added), and "coordinated expenditures," and construed the contribution limits to include not only contributions made directly to a candidate, but also "all expenditures placed in cooperation with or with the consent of a candidate" or his campaign committee. *Id*. at 46–47 n.53; *see also id.* at 78.

Unlike contributions, the *Buckley* Court explained, *totally* independent expenditures "may well provide little assistance to the candidate's campaign and indeed may prove counterproductive." *Id*. at 47. The Court explained further that the absence of coordination "undermines the value of the expenditure to the candidate" and "alleviates the danger that expenditures will be given as a quid pro quo for improper commitments from the candidate." *Id*.

The Court echoed *Buckley*'s broad language regarding coordination in later decisions on the same topic. In *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) ("*Colorado I*"), the Court held that a radio advertisement aired by the Republican Party attacking the Democratic Party's presumptive nominee to the U.S. Senate would not be treated as coordinated because the ad was developed "*independently* and not pursuant to any general or particular understanding with a candidate . . . ." *Id*. at 614. Then, in *Colorado II*, the Court—again in the context of party spending—noted that independent expenditures are only those "without any candidate's approval (or *wink or nod*) . . . ." 533 U.S. at 442, 447 (emphasis added). Shortly thereafter, the Court again noted that the relevant "dividing line" was "between expenditures that are coordinated—and therefore may be regulated as indirect contributions—and expenditures that *truly* are independent." *McConnell*, 540 U.S. at 221 (emphasis added).

The approach of creating presumptions of coordination based on certain activity as detailed in proposed Regulation 18225.7(d) would ensure that a donor cannot gain undue influence over a candidate by routing funds through another person or committee for the candidate's direct benefit. The Proposed Regulation thus effectuates the Commission's interest in preventing corruption and its appearance.

**b. The Supreme Court has confirmed that solicitation by candidates poses a serious threat of corruption and circumvention—even when the funds are solicited for and spent by another entity.**

The importance of the Proposed Regulation's presumption of coordination in the context of fundraising cannot be overstated. The Supreme Court has specifically recognized a serious threat of corruption or its appearance inherent in the act of candidate solicitation itself, in the context of upholding federal law restrictions on candidate solicitation of "soft money" (i.e., money raised outside of contribution amount limits and corporate/union source prohibitions) in connection

with any election.[2] The federal solicitation restrictions, which were enacted as part of the Bipartisan Campaign Reform Act of 2002 (BCRA), were challenged and upheld in *McConnell*, 540 U.S. at 142-54, 181-84, including with the vote of Justice Kennedy, who otherwise dissented in the case. *See id.* at 308 (Kennedy, J. dissenting in part and concurring in part). In so holding, the Court emphasized "the substantial threat of corruption or its appearance posed by donations to or at the behest of federal candidates and officeholders," noting that "the value of the donation to the candidate or officeholder is evident from the fact of the solicitation itself." *Id.* at 182-84. Even Justice Kennedy concluded that "[t]he making of a solicited gift is a *quid* both to the recipient of the money and to the one who solicits the payment (by granting his request)." *Id.* at 308 (Kennedy, J.). Consistent with this reasoning, the Court upheld the solicitation restriction as "clearly constitutional." *Id.* at 184.[3]

The Supreme Court has repeatedly emphasized that measures preventing the circumvention of valid contribution limits serve the same compelling anti-corruption interests as do the contribution limits themselves. *See, e.g.*, *McConnell*, 540 U.S. at 144 (upholding restrictions on "soft money" and stating that anti-corruption interests "have been sufficient to justify not only contribution limits themselves, but laws preventing the circumvention of such limits"); *Colorado II*, 533 U.S. at 455 (upholding coordinated party spending limits in order to prevent the "exploitation [of parties] as channels for circumventing contribution and coordinated spending limits binding on other political players"); *Cal. Med. Ass'n v. FEC*, 453 U.S. 182, 197-98 (1981) (upholding limits on contributions to political committees in order "to prevent circumvention of the very limitations on contributions that this Court upheld in *Buckley*"); *FEC v. Beaumont*, 539 U.S. 146, 155 (2003) (upholding restriction on corporate contributions on grounds that it "hedges against" the use of corporations "as conduits for circumvention of valid contribution limits") (internal quotation marks omitted).

When a candidate is specifically sought out by a spender for fundraising assistance, in fact assists with fundraising, and does so by soliciting unlimited contributions and/or appearing as a speaker at a fundraiser, the spender's later expenditure for the candidate's benefit is not "independent" in any meaningful sense. Under such circumstances, it can be reasonably inferred that the solicitation is undertaken with an expectation or understanding that the spender receiving those funds will use them to pay for communications benefiting the soliciting candidate—and indeed, the risk of a more explicit arrangement, going beyond a "wink or nod" or "general agreement," cannot be realistically denied.

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[2] The federal law prohibition on "soft money" fundraising provides: "A candidate … shall not … solicit, receive, direct, transfer, or spend funds in connection" with any election unless the funds are subject to the contribution limitations and prohibitions of the Federal Election Campaign Act. *See* 52 U.S.C. § 30125(e)(1)(A) (prohibiting such activity in connection with federal elections) and (B) (prohibiting such activity in connection with nonfederal elections).

[3] The Federal Election Commission has made clear that the federal law prohibition on candidates soliciting unlimited funds remains in effect with respect to independent expenditure-only political committees. The Commission has explained: "It is clear that under *Citizens United*, the [independent expenditure-only committees] may accept unlimited contributions from individuals, corporations, and labor organizations; however, the Act's solicitation restrictions remain applicable to contributions solicited by Federal candidates, officeholders, and national party committees and their agents." FEC, Ad. Op. 2011-12 at 4. The Commission explained further that the federal law restriction on candidate fundraising "was upheld by the Supreme Court in *McConnell v. FEC* … and remains valid since it was not disturbed by either *Citizens United* or *SpeechNow*. *Id*. (citation omitted).

## III. Conclusion

For all of the above-stated reasons, the Campaign Legal Center concludes that the proposed amendments to Regulation 18225.7 reflect good policy and are constitutionally sound. We respectfully urge the FPPC to make additional changes to the proposed amendments as outlined in these comments. We appreciate the opportunity to submit these comments.

Sincerely,

*/s/ Paul S. Ryan*

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