

REMCHO, JOHANSEN & PURCELL, LLP
ATTORNEYS AT LAW

201 DOLORES AVENUE
SAN LEANDRO, CA 94577
PHONE: (510) 346-6200
FAX: (510) 346-6201
WEBSITE: www.rjp.com

Joseph Remcho (1944-2003)
Robin B. Johansen
Kathleen J. Purcell (Ret.)
James C. Harrison
Thomas A. Willis
Karen Getman
Margaret R. Prinzing
Kari Krogseng

SACRAMENTO PHONE: (916) 264-1818

MEMORANDUM

To: Clients
From: Remcho, Johansen & Purcell, LLP
Date: March 2, 2012
Re: Recent Changes in California Election and Political Laws

There have been some significant changes in the past year regarding California election laws, the Political Reform Act and other campaign finance laws, Government Code section 1090, the Brown Act and Bagley-Keene Act. Below is a summary of the changes made in 2011 that may affect or be of interest to our clients.

I. CALIFORNIA ELECTION LAWS

A. New Legislation

The Legislature passed new laws that do the following:

1. Elections

- Changes the presidential primary election from the first Tuesday in February to the first Tuesday after the first Monday in June of presidential election years and consolidates the presidential primary election with the statewide direct primary election. (AB 80, Stats. 2011, ch. 138.)
- Prohibits local election officials from designating a polling place at a single-family residence where a registered sex offender resides, and require elections officials to consult the Megan's Law sex offenders' database maintained by the Department of Justice not more than 60 days prior to designating a single-family residence as a polling place. (AB 193, Stats. 2011, ch. 137.)

2. Voters and Voter Registration

- Authorizes a new citizen to register and vote at another location designated by the county elections official outside of the office of the county elections official, and extends the period in which the new citizen may register in the weeks before an election to until the close of polls on election day. The law also revises the definition of a new citizen to include any person who meets all the requirements of an elector of, and who has established residency in, California, except that he or she will become a United States citizen after the 15th day prior to an election. (AB 84, Stats. 2011, ch. 186.)
- Requires that a permanent vote by mail voter be removed from the list of qualified permanent vote by mail voters if the voter fails to return an executed vote by mail ballot in 4 consecutive statewide general elections. (AB 1343, Stats. 2011, ch. 191.)
- Permits county elections officials to provide affidavit of registration forms and voter registration cards online, provided the form is posted on or before January 1, 2012, and the affidavit meets specified requirements; and requires the Secretary of State, in consultation with county elections officials, to make available online an affidavit of registration. (AB 1357, Stats. 2011, ch. 192.)
- Requires the Department of Motor Vehicles and the Secretary of State to develop a process and the infrastructure to allow electronic copies of driver's license applicants' signatures and other required information in the possession of the DMV to be transferred to the Secretary of State and to the county election management systems in order to allow a person who is qualified to register to vote in California to register electronically or on the Secretary of State's website. (SB 397, Stats. 2011, ch. 561.)
- Prohibits a voter from placing personal information upon a ballot that identifies the voter, but deletes the requirement that a ballot that identifies the voter is void and instead requires the ballot be segregated and a duplicate ballot be prepared. (SB 183, Stats. 2011, ch. 739.)
- Provides that a person is guilty of a misdemeanor if he or she, while providing care or direct supervision to an elder in a state-licensed or state-subsidized facility or program, coerces or deceives the elder into voting for or against a candidate or measure contrary to the elder's intent or in the

absence of any intent of the elder to cast a vote for or against that candidate or measure. (AB 547, Stats. 2011, ch. 260.)

3. Candidates

- Changes the deadline to file nomination documents for candidates in elections consolidated with regularly scheduled elections from not later than 5 p.m. on the 83rd or 88th day prior to a regularly scheduled election (depending on whether an incumbent has filed) to the close of business on either the 83rd or 88th day before the election. (SB 327, Stats. 2011, ch. 248.)
- Requires that a statement of write-in candidacy for any of several specified local offices also include a statement that the candidate meets certain statutory and constitutional requirements for that office. (AB 362, Stats. 2011, ch. 214.)
- Requires the verified statement of the candidate for an elective office of a city to include a statement indicating his or her residence address, but permit elections officials to deplete the supply of existing nomination paper forms prior to providing new or revised forms. (SB 327, Stats. 2011, ch. 248.)
- Permits a person who is deployed on active military service outside of the state to have a declaration of candidacy, nomination paper, or any other paper necessary to run for office filed by an attorney-in-fact through a power of attorney. (AB 754, Stats. 2011, ch. 57.)
- Changes the signature requirement for petitions for write-in campaigns for superior court judge from 100 registered voters to 0.1% of the registered voters qualified to vote for the office, provided that the petition contains at least 100 signatures but need not contain more than 600 signatures. (AB 362, Stats. 2011, ch. 214.)

4. Ballot Measures and Charter Amendments

- Allows a statewide ballot measure or referendum to be submitted to the voters only at the next established statewide general election, not a primary election. The law does not apply to ballot measures and referendums that were certified for the June 2012 primary before July 1, 2011. (SB 202, Stats. 2011, ch. 558.)

- Requires a city charter or charter amendment, whether submitted to the voters by a charter commission or the governing body of the city or city and county, to be submitted at the next established statewide general or primary election, or regularly scheduled municipal election (but not at a special election), provided there are at least 95 days before the election, instead of the current 88-day requirement. The new law also requires the ballot description of a proposed charter adoption to enumerate new city powers resulting from the adoption of the charter, including, but not limited to, whether the city council will have the power to raise its own compensation and the compensation of other city officials without voter approval. (AB 1344, Stats. 2011, ch. 692.)
- No longer requires that the text of a proposed measure be published or posted by an incorporated city. (SB 327, Stats. 2011, ch. 248.)

5. Canvass and Recount

- Requires a liberal construction of write-in vote processing provisions in the event of a manual recount to ensure that a ballot is counted if the voter's intent can be determined, regardless of whether the voter has complied with the voting instructions. (AB 461, Stats. 2011, ch. 189.)
- Authorizes an elections official, after tallying all eligible votes but prior to completing the official canvass and issuing the certified statement of the results, and upon the request of a qualified write-in candidate for an examination of undervotes within 5 days of completion of the semi-official canvass, to hand tally the remaining undervotes under specified conditions. If an elections official conducts a hand tally, the elections official must include the results in the official canvass of the election. (AB 503, Stats. 2011, ch. 190.)
- Authorizes an elections official to conduct a public manual tally during the official canvass of an election by alternative means, by permitting the elections official to conduct a manual tally of the ballots cast in 1% of the precincts chosen at random by the elections official and a separate manual tally of not less than 1% of the vote by mail ballots cast in the election, as opposed to including the vote by mail ballots in the precinct manual tally. (AB 985, Stats. 2011, ch. 52.)

6. Redistricting

- Requires the Department of Corrections and Rehabilitation to furnish to the Citizens Redistricting Commission, between April 1, 2020 and July 1,

2020, and in each year of the decennial census thereafter, specified information regarding the last known place of residence of each inmate incarcerated in a state adult correctional facility, except an inmate whose last known place of residence is outside of California. The law also requests that the Citizens Redistricting Commission deem each incarcerated person as residing at his or her last known place of residence, rather than at the institution of his or her incarceration, and to utilize the above information in carrying out its redistricting responsibilities. (AB 420, Stats. 2011, ch. 548.)

7. **Presidential Electors**

- Ratifies an interstate compact that requires the chief election official of each signatory state to appoint the slate of presidential electors that was nominated in association with the presidential ticket that received the largest national popular vote total. The compact would only become effective if it is ratified by states cumulatively possessing a majority of the total electoral votes. (AB 459, Stats. 2011, ch. 188.)

B. **Redistricting Cases**

The California Citizens Redistricting Commission drew new lines for state legislative, Board of Equalization, and Congressional districts. The California Supreme Court declined to hear challenges to those new districts on October 26, 2011. (*Vandermost v. Bowen*, No. S196493; *Radanovich v. Bowen*, No. S196852.) The opponents to the new State Senate and Congressional districts filed another suit in federal court, which was dismissed with prejudice. In addition, a referendum on the State Senate districts has qualified for the November 2012 ballot. On January 27, 2012, the California Supreme Court held that Citizens Redistricting Commission's State Senate maps will be used in the upcoming 2012 elections – not the old maps, despite the looming referendum. (*Vandermost v. Bowen* (Jan. 27, 2012) ___ Cal.4th ___.)

On December 9, 2011, the U.S. Supreme Court agreed to review a series of cases arising from interim redistricting plans imposed by a federal district court in Texas because the state's redistricting plans had not yet received federal preclearance under the Voting Rights Act of 1965. The Court expedited the hearing on the matter and issued an opinion on January 20, 2012, vacating the district court's interim redistricting plan and holding that courts issuing interim redistricting plans should be guided by plans enacted by the state legislature even when such plans have not received preclearance. (*Perry v. Perez* (2012) 132 S.Ct. 934, per curiam.) The three-judge panel in the District Court of the District of Columbia that must decide whether the plans are valid heard arguments on January 31, 2012, and its decision is pending.

C. Election Cases

There were a number of appellate court decisions on California election law in 2011. Those decisions held that:

- A statute providing that candidates may only declare their preference for qualified political parties on the ballot is constitutional, and write-in votes may be banned in the general election for a voter-nominated office. (*Field v. Bowen* (2011) 199 Cal.App.4th 346.)
- Proponents of initiative measures may defend the initiative's validity when state officials decline to do so. (*Perry v. Brown* (2011) 52 Cal.4th 1116.)
- Initiative petitions may not be signed electronically. (*Ni v. Slocum* (2011) 196 Cal.App.4th 1636.)
- The Legislature cannot write the ballot label and title and summary for a statewide measure through legislation. (*Howard Jarvis Taxpayers Assn. v. Bowen* (2011) 192 Cal.App.4th 110.)
- A political party may include its electioneering materials along with the sample ballot sent to its members. (*Kunde v. Seiler* (2011) 197 Cal.App.4th 518.)
- A state legislator must maintain a residence in his or her district to enjoy the presumption of domicile for purposes of eligibility for office; the statutory presumption that a legislator's domicile is at the address on his affidavit of voter registration applies only if the address is actually his legal residence. (*People v. Superior Court* (2011) 197 Cal.App.4th 511.)
- San Francisco's instant runoff voting (IRV) system is constitutional. (*Dudum v. Arntz* (9th Cir. 2011) 640 F.3d 1098.)

II. POLITICAL REFORM ACT

A. New Legislation

The Legislature amended the Political Reform Act ("PRA") to direct persons appointed to a state board, commission, or similar multimember body of the state to file their statements of economic interests with the respective board, commission, or body; require the original statements of economic interests to be handled as set forth in the Conflict of Interest Code of the respective board, commission, or body; and, if the board, commission, or body is not

required to send the original to the Fair Political Practices Commission (“FPPC”) pursuant to its Conflict of Interest Code, require the board, commission, or body to forward a copy to the FPPC. (SB 801, Stats. 2011, ch. 252.)

The Legislature also eliminated the PRA’s requirement that copies of the Statements of Economic Interests of statewide elected officers, candidates for statewide elective office, Members of the Legislature, the State Board of Equalization, and candidates for the Legislature or the State Board of Equalization be sent, among other places, to the Secretary of State and certain local elections officials. (SB 801, Stats. 2011, ch. 252.)

The PRA imposes restrictions on the post-government employment activities of elected state officers and designated state employees for a period of one year after the officers and employees leave state service. It has been amended to expand these restrictions with respect to the Public Employees’ Retirement Fund and the State Teachers’ Retirement System by prohibiting members of CalPERS or CalSTRS and specified officers and employees from (1) aiding, advising, consulting with, or assisting a business entity in obtaining or negotiating a contract or contract amendment with CalPERS or CalSTRS within *two* years after leaving service; (2) representing another person before CalPERS or CalSTRS for the purpose of influencing specified actions within *four* years after leaving service; and (3) accepting compensation for providing services as a placement agent within *ten* years of leaving service. (AB 873, Stats. 2011, ch. 551.) Finally, the Legislature amended the definitions of “placement agents” and “external managers” with respect to lobbying and the management of investment funds. (SB 398, Stats. 2011, ch. 704.)

B. New FPPC Regulations and Activities

The FPPC has begun a period of active regulatory review under recently appointed Chair Ann Ravel. The Commission has adopted or revised myriad regulations, including a comprehensive overhaul of the gift rules.

1. Gifts

The Commission adopted the following regulations or amendments to existing regulations in its “Gift Overhaul Package” in late 2011.¹ It will likely consider additional gift regulations in 2012.

¹ The Commission stated that while the new or amended gift regulations will be effective January 1, 2012, any provisions that are less restrictive than those existing in 2011 may be used for reporting activity that occurred in calendar year 2011. In other words, if there is an exception in the newly-adopted regulations, it can be applied retroactively to activity that occurred before the effective date.

a. **Guide to the Gift Rules**

Regulation 18940 was revamped to provide a roadmap to all of the regulations related to gifts and contains a helpful summary of the basic principles underlying the gift rules, including a discussion of what constitutes a “gift,” how gifts are valued and regulated, and the many exceptions created by statute or regulation.

b. **Definitions**

Regulation 18940.1 sets out important definitions concerning gifts to officials, gift reporting and the gift limit.

c. **Acceptance and Return of a Gift**

Regulation 18941 provides that a gift is received when the official knowingly takes actual possession of the gift or is provided the benefit of the gift, or takes any action exercising direction or control over the gift. This regulation also provides that a gift is not deemed to be received by the official if, within 30 days of receipt, the official returns the gift to the donor, donates the item to a 501(c)(3) charitable organization, or reimburses the donor for the value of the gift.

d. **Exceptions**

Regulation 18942 now lists in one place all the statutory and regulatory exceptions to what constitutes a gift. The substantive changes made to existing regulations regarding the definitions of “gift” and the exceptions to what is a gift are discussed below; a provision or exception that is not listed below was not substantively changed by these amendments.

Gifts From Family Members. The definition of a “family member” whose gifts are not reportable was expanded to include the official’s former spouse; former in-laws; step-child; grand nephew, niece, aunt and uncle; first cousin once removed; and spouses and former spouses of those individuals.

Reciprocal Exchanges. The Commission clarified the circumstances under which reciprocal exchanges made in a social relationship between an official and another individual (who is not a lobbyist registered to lobby the official’s agency) will not be considered “gifts.” The regulation now explicitly covers exchanges with an individual with whom the official participates in repeated social events or activities such as lunches, dinners, rounds of golf or attendance at entertainment or sporting events, where the parties typically rotate payments on a continuing basis so that, over time, each party pays for approximately her share of the costs of the continuing activities, so long as the total value of payments received by the official within the calendar year is not substantially disproportionate to the amount paid by the official. If the official receives a disproportionate amount relative to what the official paid, the official has

received a gift for the excess amount. This reciprocal exchange provision does not apply to any single payment that is equal to or greater than the amount of the PRA's gift limit.

Note: The gift limit for 2011 and 2012 is \$420 per year.

Gifts from Personal Friends. A payment provided to an official by an individual with whom the official has a long term, close personal friendship unrelated to the official's position with the agency is not a gift, unless the individual providing the benefit to the official is one described in (1) through (3) below, in which case the gift is subject to the ordinary gift rules.

(1) A lobbyist, lobbying firm, lobbyist employer, or other person required to file lobbying activity reports who is registered to lobby the official's agency.

(2) A person who has, or reasonably foreseeably may have, a contract, license, permit, or other entitlement for use pending before the official's agency; this prohibition continues for 12 months following the date a contract is signed or a final decision is rendered in the proceeding if the official participated in making the contract or decision.

(3) A person, or an agent of a person, involved in a licensing or enforcement proceeding before a regulatory agency that employs the official and in which the official reasonably foreseeably may participate, or has participated, within 12 months of the time the gift is made.

Bona Fide Dating Relationship. "Gift" does not include personal benefits commonly exchanged between people on a date or in a dating relationship. However, if the gift comes from an individual described in (1) through (3) above, the gifts provided during a calendar year may not exceed the gift limit set out in Regulation 18940.2 (\$420 per year for 2012) and the aggregate value of gifts received over that limit is subject to the conflict of interest disqualification provisions.

Home Hospitality. In Regulation 18942.2, the Commission expanded and clarified the circumstances under which food and lodging constitutes "home hospitality" exempt from the gift rules. Home hospitality provided by an individual with whom the official has a relationship, connection, or association unrelated to the official's position now explicitly includes not just visits in a home where the homeowner is present, but also visits in a vacation home owned, rented, or leased, including a timeshare; a motor home or boat owned, rented, or leased; and any facility whose access is a right-to-use benefit of home residency, such as a community clubhouse. Any benefit other than the use of the premises received by any guests of the official other than her spouse and children is a gift to the official.

Weddings and Civil Unions. Under Regulation 18942, benefits received as a guest attending a wedding or civil union are not gifts, provided the official received benefits that are substantially the same as those received by the other guests attending the event.

Bereavement Offerings. Bereavement offerings typically provided in memory of and concurrent with the passing of a spouse, parent, child, sibling, or other relative of the official are not gifts.

Acts of Human Compassion. The Commission exempted from the gift rules payments provided to an official or her family member to offset family medical or living expenses that the official can no longer meet without private assistance because of an accident, illness, employment loss, death in the family, or other unexpected calamity, or to defray expenses associated with humanitarian efforts such as the adoption of an orphaned child. To qualify for this exemption, the donor must have a prior social relationship with the official of the type where it would be common to provide such assistance (such as a relative, long-term friend, neighbor, co-worker or former co-worker, or member of the same local religious or other similar organization) or the payment must be made without regard to official status under circumstances in which it would be common to receive community outreach.

Acts of Neighborliness. The Commission codified previous advice exempting from the definition of “gift” the performance of services that are consistent with polite behavior in a civilized society and that normally would not be part of an economic transaction between like participants under similar circumstances. Specific examples include the loan of an item, an occasional ride, personal assistance in making a repair, and bringing in the mail or feeding the cat while the official is away.

Leave Credits. Leave credits, including vacation, sick leave, or compensatory time off, donated to an official in accordance with a bona fide catastrophic or similar emergency leave program established by the official’s employer and available to all employees in the same job classification or position, *except for donations of cash.*

Group Gifts. A gift from multiple donors is reportable only if a single source paid \$50 or more toward the gift, in which case the donor must be disclosed.

Wedding Gifts. The value of a wedding gift received by an official and his or her spouse is one-half the value of the gift. It is no longer necessary to determine if a gift was more appropriate for one spouse or the other. Wedding gifts remain exempt from the gift limits.

Bona Fide Competitions. Regulation 18942 confirms previous advice that a prize or award received in a bona fide contest, competition, or game of chance not related to the official’s status is not a gift, but clarifies that the prize or award must be reported as income. However, winnings from the California State Lottery are not reportable as gifts or income.

Catchall: Regulation 18942 also excepts from the gift regulations any other payment that would otherwise meet the definition of gift, where it is clear that the gift was made because of an existing personal or business relationship unrelated to the official's position and there is no evidence whatsoever at the time the gift is made that the official makes or participates in the type of governmental decisions that may have a reasonably foreseeable material financial effect on the source of the gift. This provision does not apply to payments made by an individual who is a lobbyist registered to lobby the official's agency.

Informational Material. The definition of "informational material" exempt from the gift regulations was expanded in Regulation 18942.1 to include photographs, audio and video recordings, flash drives, CDs, DVDs or other similar recordings. In addition, the definition of "on-site demonstrations, tours, or inspections" for the purpose of the travel exception was revised to include transportation provided to or in connection with the on-site demonstration, tour, or inspection, when any of the following apply:

- (1) The transportation serves as the means by which the information is conveyed and is integral to the conveyance of the information, such as an aerial tour over an area.
- (2) The transportation is provided solely at the site of a demonstration, tour, or inspection, including to and from an area of that site that is legally inaccessible to the public.
- (3) The transportation is to or from a site when there is no reasonable, publicly-available commercial transportation to that site and the transportation provided is limited to the segment for which public transportation is not available.

Free Admission to an Event at Which the Official Performs a Ceremonial Role.

"Gift" does not include free admission for an official and one guest to a facility, event, show, or performance for an entertainment, amusement, recreational, or similar purpose when, at the request of the holder of the event, the official performs a "ceremonial role" on behalf of her agency *if* the official's agency records it on the appropriate form and forwards the information to the FPPC for posting on its website. In addition, any other official who attends the event as part of her job duties to assist the official who is performing the ceremonial role is providing consideration for the admission and has not received a gift or income.

New Regulation 18942.3 defines "ceremonial role" as an act performed at an event by an official in her representative capacity at the request of the event holder where, for a period of time, the focus of the event is on the act performed by the official. The regulation lists as examples of a ceremonial role throwing out the first pitch at a baseball game, cutting a ribbon at an opening, and making a presentation of a certificate, proclamation, award or other item, such as the key to the city. A local filing officer or legislative body may adopt specific policies that either limit or expand the permissible ceremonial roles for an official in the local jurisdiction. If

a local agency policy is adopted, it must be forwarded to the Commission for posting on the FPPC website.

Free Admission to Events Provided by an Official's Agency. Regulation 18944.1 provides a procedure for an agency to publicly report tickets and free admission to events that are provided to the agency's officials, or provided to third parties at the behest of an agency official, so the tickets are not considered gifts reportable by the officials.

The regulation was amended to clarify that the reporting provisions *do not apply to*: (1) tickets, passes or free admission provided by the agency to any employee who is not designated in the agency's conflict of interest code; (2) free admission provided to a school, college or university district official, coach, athletic director, or employee to attend an amateur event performed by students of that school, college or university district (and, under these circumstances, the officials have not received a reportable gift); and (3) free admission for an official and one guest to an event at which the official performs a "ceremonial role" as described in Regulation 18942.3, above.

In addition, the following changes were made to the regulation: (1) the provisions apply to tickets or free admission provided to the official, his or her immediate family and one guest; (2) the provisions apply to free tickets received by the agency from an outside source as long as certain conditions are met; (3) the agency must have a written ticket distribution policy adopted by the agency's governing body that contains specific provisions set out in the regulation; (4) the agency must complete Form 802 and maintain it as a public record; and (5) the agency must send its completed Form 802s to the FPPC for posting on its website.

e. Valuation of Gifts

(i) Valuation of Invitation-Only Events

Under amended Regulation 18946.2, the valuation of admission for an official and one guest to attend an invitation-only event is their pro rata share of the cost of the food, catering services, entertainment and other items provided to all guests attending the event. Any other specific benefit provided to the official and guest at the event, such as golf green fees, is valued at fair market value. If the official attends the invitation-only event but does not consume a meal or stay for entertainment, and consumes only minimal appetizers and drinks, the value to the official is the value of anything provided to the official and her guest other than the appetizers and beverages.

If the event is sponsored by a lobbyist, lobbying firm or lobbyist employer, then it is valued as a gift pursuant to the provisions of Regulation 18640, which govern lobbyist activity expenses.

(ii) Valuation of Free Admission to Fundraisers for Non-Profit Organizations and Political Fundraisers

A fundraising event for a 501(c)(3) organization. According to amended Regulation 18946.4, an official need not report as a gift up to two tickets received from a 501(c)(3) organization holding a fundraising event. Additional tickets received by or under the control of an official, and tickets provided by someone other than the 501(c)(3) organization, are valued at the non-deductible portion of the cost of the ticket or, if no such value is reported, at the official's pro-rata share of the cost of any food, catering services, entertainment and any other item provided to all guests attending the event. Any other specific benefit provided to the official, such as golf green fees, is valued at fair market value.

A fundraising event for other non-profit tax-exempt organizations. When the ticket clearly states that a portion of the ticket price is a donation to the organization, or the organization provides information indicating the portion of the admission price that constitutes the donation, the official reports the non-deductible portion as a gift. If the non-deductible amount is not provided by the organization, the value is the official's pro-rata share of the cost of any food, catering services, entertainment and any other item provided to all guests attending the event. Any other specific benefit provided to the official, such as golf green fees, is valued at fair market value.

A fundraising event for a political committee. An official need not report as a gift up to two tickets to a political fundraiser held by a California political committee, a federal committee, or a political committee in another state. If an official receives more than two tickets, and the tickets clearly state that a portion of the ticket price is a campaign contribution, the amount that is not a campaign contribution is reported by the official as a gift. If there is no ticket indicating the amount of the donation, the value is the official's pro-rata share of the cost of any food, catering services, entertainment and any other item provided to all guests attending the event. Any other specific benefit provided to the official, such as golf green fees, is valued at fair market value.

(iii) Valuation of Free Air Transportation

Regulation 18946.5 was amended to provide that an official who receives free transportation on a commercial flight must report as a gift the price the carrier charges the public for the same class seat provided to the official.² The value of all other air transportation is the normal and usual charter fare or rental charge for a comparable airplane of comparable size divided by the number of passengers on the flight.

² Note that article XII, section 7 of the California Constitution prohibits anyone holding an office in this state from accepting a free pass or discount from a transportation company.

2. **Disclosure Requirements for Campaign Communications**

The Commission also made a number of changes affecting political campaigns, including changes to certain disclosure requirements.

a. **“Paid for by”**

The Political Reform Act requires the disclosure of the identity of the sender and top donors in various campaign communications, but an FPPC Task Force believed that prior regulations allowed the use of disclosures that failed to fully inform voters about the source of campaign funds. For example, it was possible for mailers to prominently highlight an organization’s support for a measure, while disclosing the name of the funding organization in such tiny print that voters could easily be left with the mistaken impression that the highlighted organization had paid for the mailer.

To address these concerns, Regulations 18435 and 18450.4 were amended to require the use of the words “paid for by” in the disclaimers for mass mailing, media advertising, telephone banking and other media advertisements. This is the phrase that the Federal Election Commission and many other states require in their disclosure rules.

b. **Disclosure Requirements Apply to Internet Websites**

The Commission issued a formal advice letter applying the disclosure requirements for advertising to internet websites that constitute independent expenditures paid for by a primarily formed or general purpose committee supporting or opposing a candidate for office. (*Rios* Advice Letter, No. A-11-181.) The letter clarifies that the FPPC’s 2010 regulatory changes regarding internet advertising were not intended to exempt websites from the disclosure rules.

3. **Reporting**

a. **Definitions of Primarily Formed and General Purpose Committees; and When and Where to File Campaign Reports**

Newly adopted Regulation 18247.5 provides a method for determining whether a general purpose or primarily formed committee is a “state,” “county,” or “city” committee for purposes of where the committee must file its campaign statements.

Regulation 18247.5 also provides formulas for determining whether a committee is “primarily formed” for candidates or measures, or instead is a “general purpose committee.” In addition, the regulation provides clear guidance on when the committee must conduct a review of its expenditures to determine if it is a primarily formed committee or a general purpose committee.

b. Payments for Personal Services

The amendment to Regulation 18423 clarifies that an in-kind contribution of the services of salaried personnel to a committee is considered to be made on the payroll date.

c. Online Disclosure of Contributions and Independent Expenditures

Amendments to Regulations 18539 and 18550 clarify that the “election cycle” in Section 85204 that applies to the 90-day reports filed under Sections 85309 and 85500 means 90 days before a *state election* in which the candidate or measure supported or opposed by the contribution or independent expenditure is on the ballot.

d. 24-Hour Contribution Reporting

Former Regulation 18116 provided that if a reporting deadline falls on a weekend or state holiday, the deadline generally is extended to the next business day, except for late contribution reports, late independent expenditure reports, and notices by the contributor of a late in-kind contribution. The exception forced some campaigns to staff their offices on weekends and holidays.

New amendments provide that the extension to the next business day applies to late contribution reports and notices by the contributor of a late in-kind contribution except when the reporting deadline falls on a weekend or holiday immediately prior to an election. The new extension does not apply to late independent expenditure reports, which will still have to be filed as necessary on weekends and holidays throughout the cycle.

e. CalSTRS and CalPERS Candidates

The FPPC repealed Regulations 18451, 18452 and 18453 and adopted new Regulation 18451, concerning campaign disclosure obligations of CalSTRS and CalPERS candidates. These actions implement legislation that subjects CalSTRS and CalPERS board candidates to the same campaign disclosure requirements as candidates for all other state elective offices.

4. Termination

a. Administrative Termination of Recipient Committees

New Regulation 18404.2 provides criteria under which a recipient committee that is inactive will be terminated by the FPPC Executive Director.

b. Termination and Reopening of Committees

Regulation 18404.1 was amended to set the deadlines for terminating state candidate controlled committees after the candidate is defeated, withdraws his or her candidacy or leaves office, or the term of office for which the committee was formed ends. The prior regulation required committees that had net debts to terminate within 24 months, unless they received an extension from the Executive Director, and required committees that have no outstanding net debts to terminate within 9 months. The revised regulation allows committees with net debts to remain open until the committee pays all of its debt, and extends the termination deadline for committees without net debt to 24 months. Regulation 18404.1 was later amended again to provide a process allowing terminated committees to accept refunds from governmental entities and accept unexpected refunds from any other entities totaling \$10,000 or less after termination and transfer them to other committees.

5. Enforcement

a. Procedures

The Commission made significant regulatory changes in its enforcement procedures, including: (1) codifying the current practice of allowing potential respondents the ability to communicate with the FPPC before a determination to investigate an enforcement matter is made; (2) codifying the current practice of assigning the General Counsel or an attorney in the Legal Division to hear probable cause proceedings; (3) allowing discovery of evidence in probable cause proceedings for respondents; (4) implementing procedures for default decisions; and (5) allowing the Enforcement Division the discretion to hold the party who violated the Act solely accountable in circumstances mostly applicable to major donor committees. (Amendment of Regulations 18360, 18361 and 18361.4; Adoption of Regulations 18361.11 and 18316.6.)

The Commission also amended Regulation 18360 to prohibit, except in specified circumstances, FPPC staff from communicating a decision to investigate or to take other action on an alleged violation of the Political Reform Act until at least five days have passed from the date the subject of the investigation or alleged violator has been sent notice of the Commission's action. That notice must be contemporaneously sent to the complainant and the subject of the investigation or other action.

b. Online Posting

In 2010, the FPPC began posting on its website all letters confirming that an enforcement investigation had been initiated, as well as all initial complaint forms for open investigations. The FPPC has now removed such postings from its website and confirmed it will no longer post enforcement letters and complaints online.

6. Other Regulations and Activities

a. Text Message Contributions

New Regulation 18421.31 allows a political committee to raise funds through text message contributions. The contribution will appear on the donor's monthly phone bill, and will be considered contributed for reporting purposes on the date the mobile fundraising vendor obtains possession of the contribution. The regulation does not impose any duties on wireless carriers to facilitate the reporting of such contributions, leaving it up to the wireless carrier and campaigns to implement systems that permit proper reporting of such contributions.

b. Slate Mailers

Regulations 18401.1 and 18435.5 were adopted to revise slate mailer disclaimer requirements and establish several new recordkeeping rules for slate mailer organizations. Regulation 18435.5 clarifies that a third party who pays for a candidate or measure to appear in a slate mailer must be identified with an asterisk, and the explanation for the asterisk must appear on the page which most prominently displays the list of candidates and measures with asterisks. Regulation 18435.5 also imposes various placement and color contrast requirements on the Notice to Voters, and requires the disclaimer to be in the same language as the slate mailer. Finally, Regulation 18435.5 clarifies that the slate mail requirements apply to slate mailers that are distributed electronically.

New Regulation 18401.1 requires slate mailer organizations to maintain records in a manner comparable to campaign committees.

c. Lobbying

In 2010, the Legislature amended Government Code section 82039 to add "placement agents" to the Political Reform Act's definition of "lobbyist." Section 82047.3 of the Act defines placement agents as those individuals who are compensated as intermediaries in connection with the offer or sale of securities, assets, or specified services to a state public retirement system. Regulation 18239, which determines when an individual becomes a lobbyist for purposes of the Act, similarly was amended to include placement agents in that definition.

d. Forms 804 and 805

The FPPC approved two new forms for an agency to disclose newly created positions (Form 804) and new consultants (Form 805) who are not designated on the agency's current Conflict of Interest Code.

III. CAMPAIGN FINANCE CASES

A. Independent Expenditures

Following the U.S. Supreme Court's landmark decision in *Citizens United v. Federal Election Com.* (2010) 130 S.Ct. 876, the U.S. Court of Appeals for the Ninth Circuit affirmed a preliminary injunction against a San Diego ordinance that had prohibited corporations and unions from making unlimited contributions to political action committees that make independent expenditures to support or oppose candidates for elective City office. (*Thalheimer v. City of San Diego* (9th Cir. 2011) 645 F.3d 1109.) The Court of Appeals held that the city's anti-corruption interest was not sufficient to support the ordinance's limitation on spending and fundraising by independent committees.

However, the Court of Appeals refused to declare unconstitutional San Diego's ban on direct contributions from corporations and unions to candidates for municipal office, holding that the ban was closely drawn to further the government's important anti-corruption interest. This distinction between limits on corporate contributions to candidates and corporate independent expenditures likely will be brought to the U.S. Supreme Court for review in the near future. (See Order dated February 17, 2012 in *American Tradition Partnership v. Attorney General of Montana* (S.Ct. No. 11A762), granting stay of Montana Supreme Court's decision upholding ban on corporate expenditures on candidate campaigns, pending filing and disposition of petition for writ of certiorari.)

B. Public Campaign Financing

In June 2011, the U.S. Supreme Court found unconstitutional that part of Arizona's public campaign finance law that provided matching funds to candidates who accept public funding and whose opponents make expenditures that exceed the initial grant of public funds. In *Arizona Free Enterprise Club's Freedom Club PAC v. Bennett* (2011) 131 S.Ct. 2806, the Court found that the matching funds provision imposed a substantial burden on the First Amendment speech rights of the privately financed candidate and her supporters. The Court also held that Arizona did not have a compelling state interest in equalizing electoral funding and, while it did have a compelling anti-corruption interest, that interest could not justify the substantial burden on political speech.

C. Reporting

The U.S. District Court for the Eastern District of California recently rejected a constitutional challenge to the Political Reform Act's requirement that the names and personal information of individual contributors to a ballot measure campaign be disclosed. The challenge had been brought by supporters of Proposition 8, who alleged that contributors to ballot measure committees supporting Proposition 8 have been subjected to threats of violence, harassment and reprisals. (*ProtectMarriage.com v. Bowen* (E.D. Cal. (Nov. 4, 2011) No. 2:09-CV-00058-MCE-DAD), 2011 WL 5507204.) The Court found that the plaintiffs' minimal burden of fear of

reprisal did not overcome the state's important interest in providing vital information to the electorate during the initiative process.

The Ninth Circuit also upheld the constitutionality of Washington State's requirements that ballot measure committees disclose the name and address of contributors giving more than \$25, and the employer and occupation of contributors giving more than \$100, because the requirements are substantially related to the important governmental interest in informing the electorate. (*Family PAC v. McKenna* (9th Cir. Dec. 29, 2011) 664 F.3d 296, amended Jan. 31, 2012, Nos. 10-35832, 10-35893, ___ F.3d ___.) The Ninth Circuit did find unconstitutional a statute prohibiting a political committee from accepting contributions exceeding \$5,000 from any one person within 21 days of a general election, as this prohibition is not closely drawn to achieve the state's interest in informing the electorate.

IV. GOVERNMENT CODE SECTION 1090

A California court of appeal recently upheld a trial court's determination that three individuals who were part of an irrigation district's "negotiation team" – county counsel, outside special counsel, and an economist advisor – did not have a conflict of interest under Government Code section 1090 in the negotiated agreements because plaintiffs failed to provide any evidence that the negotiators had a financial interest in the agreements. (*In re Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758., pet. for rev. pending.) The Court found insufficient plaintiffs' vague allegations that the negotiators had professional relationships with others interested in the agreements or worked for an adverse party to the agreements on other matters.

The California Attorney General issued an opinion concluding that even where spouses enter into a premarital agreement specifying that each spouse has no present or future financial interest in the income or assets of the other, spousal income and assets are still attributable to the other spouse for the purposes of determining conflicts of interest under section 1090. (94 Ops.Cal.Atty.Gen. 22 (2011).) This creates a significant difference between section 1090 and the Political Reform Act in each law's treatment of spousal separate property agreements.

V. THE RALPH M. BROWN ACT AND THE BAGLEY-KEENE ACT

The Legislature amended the Brown Act to require the legislative body of a local agency, or the presiding officer of the legislative body, to provide notice of each meeting, including special meetings, on the local agency's website, if the local agency has one. (AB 1344, Stats. 2011, ch. 692.) The statute also prohibits any local legislative body from holding a special meeting regarding the salary, salary schedule, or other form of compensation for any local agency executive.

The Legislature also amended the Brown Act to require that in order for a convened legislative body whose membership constitutes a quorum of any other legislative body

to convene a meeting of the subsequent legislative body, simultaneously or in serial order, a clerk or member of the convened legislative body must verbally announces the amount of compensation or stipend, if any, that each member will be entitled to receive as a result of convening the meeting of the subsequent legislative body, and that the compensation or stipend shall be provided as a result of convening the meeting. (AB 23, Stats. 2011, ch. 91.)

Two significant Brown Act cases were decided in 2011. The first held that members of the public are the intended beneficiaries of a contractual provision between a government agency and a government contractor that stipulated that the contractor shall comply with the Brown Act in meetings of its board of directors to the extent that the meetings involved publicly funded programs. (*Service Employees Internat. Union, Local 99 v. Options – A Child Care & Human Services Agency* (2011) 200 Cal.App.4th 869.) The Court of Appeal held that while the contractor cannot be sued directly under the Brown Act because it is not a “legislative body,” the public can enforce the provision as third party beneficiaries of the contract.

The second case held that a community college district’s joint labor/management benefits committee was not a “legislative body” subject to the Brown Act, because the committee was created as part of, and for the purpose of furthering, the collective bargaining process under the Educational Employment Relations Act (EERA). (*Californians Aware v. Joint Labor/Management Benefits Com.* (2011) 200 Cal.App.4th 972.) Meetings between unions representing community college district employees and the district’s joint labor/management benefits committee therefore are exempt from Brown Act open meeting requirements under the EERA exception.

The Attorney General’s Office also considered two Brown Act issues in the past year. It determined that a majority of the members of a city council may not meet to attend a private tour of the facilities of a water district that provides services to the city for the purpose of acquiring information regarding those services. They may attend a tour, however, if the tour is held as a noticed and public meeting of the council for the purpose of inspecting the facilities, and the topics raised and discussed at the meeting are limited to items directly related to the facilities being inspected. (94 Ops.Cal.Atty.Gen. 33 (2011).) The Attorney General’s Office also opined that a water district may hold its board meetings at the district’s principal office if the principal office is located outside the jurisdiction of the water district. (94 Ops.Cal.Atty.Gen. 15 (2011).)

There were no widely applicable statutory or judicial changes or clarifications to the Bagley-Keene Act in 2011.

VI. OTHER LAWS AFFECTING OFFICERS OF LOCAL AGENCIES

The Legislature amended the laws penalizing the misuse of public resources or falsifying expense reporting to require a contract executed or renewed between a local agency and an officer or employee of the local agency after January 1, 2012, to include a provision that requires an officer or employee of a local agency who is convicted of a crime involving an abuse

of his or her office or position to fully reimburse the local agency for specified payments made by that local agency to the officer or employee. (AB 1344, Stats. 2011, ch. 692.) The statute also requires an officer or employee of the local agency who is convicted of a crime involving an abuse of his or her office to fully reimburse any such payments that are made by the local agency in the absence of a contractual obligation between the agency and the officer or employee.

The Legislature also amended laws governing the removal of public officials from office by providing that an appointed or ex officio office becomes vacant (which effectuates the removal of the individual holding that office) when the individual holding the office has been debarred, suspended, disqualified, or otherwise excluded from participating in federal “covered transactions,” as prescribed under federal law. (AB 309, Stats. 2011, ch. 543.)