

Initiative Disclosure Reform: Overview and Recommendations

By Kim Alexander,
President & Founder,
California Voter Foundation
For the Greenlining Institute

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Executive Summary

This analysis focuses on the role of money in California initiative campaigns. It describes current laws and regulations requiring timely and accessible disclosure of campaign finance data. It identifies ways to enhance disclosure and voters' awareness of who is funding initiative campaigns, partly by strengthening disclosure laws and partly by publicizing disclosure data through governmental and campaign entities. It also describes ways to ensure voters hear from both sides on initiatives, regardless of who raises and spends the most money.

Part I: Understanding the Context for Initiative Disclosure Reform

1. Money and initiatives in California

At just about every election, the California ballot includes at least one and often several high-stakes propositions. Millions of dollars in contributions pay for campaigns and fund advertisements to sway voters' opinions on these measures.

The conventional wisdom is that it costs at least \$1 million to qualify an initiative for the ballot in California. Proponents therefore need a wealthy individual, business or interest group to finance a signature-gathering campaign to get on the ballot. Genuinely grassroots measures are rare. The high price of a statewide media campaign in California also means that underfunded groups and individuals wanting to oppose a well-funded measure are playing on an unlevelled field.

This is very likely not the situation Hiram Johnson had in mind when he championed the initiative, referendum and recall for California in 1911. In fact, Johnson was seeking a way around special interest control of the Legislature, and promoted his reforms as tools favoring citizens. The initiative process in particular, as Johnson and the Progressive Party designed it, held genuine promise of favoring the public interest over special interests. Initiative proponents had to gather eight percent of the votes cast for Governor to qualify an initiative statute or initiative constitutional amendment within 131 days.¹

In November 1910 there were only about 725,000 eligible voters in the state. In 1911, an initiative constitutional amendment proponent would have had to collect 85,574 signatures to qualify the measure for the ballot.² One hundred years later, California is home to nearly 24 million eligible voters, with 10.1 million casting votes for Governor in November 2010.³ So, now the number of valid signatures required to qualify an initiative constitutional amendment is 807,615,⁴ an 844 percent increase in the number required in Hiram Johnson's day.

¹ Proposition 1A of 1966 a major revision of the California Constitution that voters approved, included a reduction in the percentage of signatures needed to qualify an initiative statute from eight to five percent. See <http://holmes.uchastings.edu/library/california-research/california-ballot-test.html> to access the measure's full text.

² See the Secretary of State's historical study of initiatives, page 14, http://www.sos.ca.gov/elections/init_history.pdf

³ Secretary of State Official Statement of the Vote, January 6, 2011, page 19, <http://www.sos.ca.gov/elections/sov/2010-general/19-initiative-ref-qual.pdf>.

⁴ *ibid.*

2. The people's lawmaking arena

There is widespread agreement that the initiative process is now a tool readily accessible primarily to well-funded interests and wealthy individuals and out of reach for the ordinary citizens Progressive reformers had in mind. Despite the use, and some would argue, abuse of the initiative process by well-funded interests, it *does* provide a successful path for lawmaking in California outside of the legislative process. Laws that can never make it through the Legislature, because of special interest pressure and lawmakers' self-interest, can be passed through the initiative process when they have broad popular support. Important examples in recent decades include term limits, campaign finance restrictions, redistricting reform, recycling, increases in cigarette taxes, and the legalizing of medical marijuana.

It is also important to note that special interests are not nearly as successful at manipulating the initiative process as they are the legislative process. Try as they might, they cannot "buy" an initiative. While it is certainly true that anyone with enough money can buy their way on to the ballot, the fact is that getting broad public support and eventually a majority of voters for an initiative is not just a matter of spending money. The record shows, in fact, that voters are far more likely to reject initiatives than they are to pass them. In the past 100 years, voters have considered a total of 344 initiatives; 116 or approximately one-third were approved, while 228, or two-thirds were rejected.^{5 6}

In important respects, then, the initiative process is the people's lawmaking arena and ought to be protected as such. If it is not working in ways that satisfy voters, it can be changed, so that those who want to take part in the process play by a set of rules that puts the public interest first.

3. The impact of money on California initiatives

Complaints about the corrupting influence of money in the initiative process are frequent but often lack focus. They run the gamut from bemoaning the misleading and confusing advertisements that run nonstop on TV at election time to wondering how anyone can possibly "follow the money" and really know who is paying for campaigns and for the commercials they spawn.

The three essential issues to consider are these:

1) Limitless spending. Nothing prevents a well-funded interest or individual from spending unlimited amounts of money on a proposition. Such spending can, of course, distort public awareness of the pros and cons of a measure, if one side is much better funded than the other. In theory, this problem could be addressed by contribution or spending limits on initiative campaigns. However, although campaign contributions to politicians can lawfully be limited in size, on the basis that contributions can have a corrupting influence on politicians, U.S. courts have ruled that limits cannot be imposed on contributions to initiative

⁵ This figure was obtained in part by using the data included in the Secretary of State's "History of Initiatives", which summarizes passage and failure rates from 1911-2002, page 10, http://www.sos.ca.gov/elections/init_history.pdf.

⁶ By comparison, voters are far more likely to approve measures placed on the ballot by the Legislature. Between 2005-2010, voters considered 17 legislative ballot measures and approved ten, or 59 percent of them.

campaigns, because they are not susceptible to the same corrupting influence. So, while many voters might find it attractive to limit spending on initiatives, including restrictions on giving by out-of-state funders, such reforms are not constitutional under current law and court rulings.

2) An imbalance of resources. If one side simply does not have the resources to get its message out effectively, voters are deprived of equal access to all the arguments for and against a measure. The remedy is to “level the playing field,” by giving those without money an opportunity to be heard and to wage an effective campaign. Reforms might ensure that both the “pro” and “con” sides on initiative campaigns have a sufficient opportunity to reach voters by providing free media access and/or public financing. Federal moves in this direction include the now-defunct Fairness Doctrine. There are still other ways, however, to address the imbalance of resources, such as requiring fewer signatures to qualify an initiative and/or giving proponents more time to qualify a measure, thus offsetting the influence of money.

3) Lack of donor transparency. Voters cannot fully assess the merits of initiatives and campaigns if the identities of the people who fund them are hidden or hard to understand. The remedy, here, is greater transparency. While California’s existing disclosure laws are strong, there is room for improvement. The focus should be on ensuring that state campaign finance disclosure laws are robust, that loopholes in these laws are closed or minimized, and that information about funders features prominently in official election materials and in campaign advertisements put before voters.

The remainder of this report deals chiefly with the third of these issue areas, because reforms under this heading are the least likely to be eroded in the courts through subsequent litigation. The second issue area is also addressed.

Throughout, the overarching assumption is that proposals to reform initiative campaign finance need to be made with a very clear goal in mind, and that goal is to increase accountability and transparency to the public for the money that flows into and through the initiative process in California. This is the surest route to maximizing voters’ ability to know who is funding ballot measure campaigns and to making these disclosures a “shortcut” to more informed choices.

4. A brief history of California initiative disclosure

A list of previous milestones on the road to better initiative disclosure in California looks like this:

Pre-1974	Basic disclosure – state law requires donors to be reported, but not occupation or employer data; fines are rarely imposed for failing to comply with disclosure laws.
1975	Disclosure with teeth – the Political Reform Act of 1974 is enacted by voters and implemented; state law requires timely itemized disclosure of all contributions and expenditures; anonymous contributions are prohibited; a regulatory framework is created and penalties for failing to comply are imposed; the contents of the state ballot pamphlet are expanded to include an impartial analysis by the state’s Legislative Analyst, and pro/con arguments by proposition proponents and opponents.

- 1996 Enhanced disclosure - Voters enact Proposition 208 which imposes several new rules requiring committees to identify their top donors within the committee's name and to list top donors in campaign advertisements.
- 1997 Online disclosure – Senate Bill 49/Karnette is enacted and implemented in 2000; committees raising or spending \$50,000 or more must file electronically; reports are available online in a PDF format with limited search capabilities.
- 2000 Accelerated disclosure – the legislature places Proposition 34 on the ballot which is approved by voters and, among other provisions, requires committees that receive \$5,000 or more within 90 days of an election to report contributions online within ten business days.
- 2001 Even more accelerated disclosure – the legislature enacts Senate Bill 34 which requires \$5,000 or more contributions to be reported within ten business days year-round.
- 2003 Searchable disclosure – Secretary of State Kevin Shelley and his staff enhance the Cal-Access web site by adding a searchable database of campaign contributions and expenditures, enabling the public to comprehensively search and sort campaign finance data online.

The discussion now turns to how further initiative disclosure reforms can be accomplished.

Part II. Initiative Disclosure Reform: Making Money Transparent to California Voters

The idea that one of the best ways to prevent moneyed interests from monopolizing and manipulating the initiative process is to disclose their financial interests in the process is broadly supported by the Political Reform Act of 1974. The Act clearly states in its "Purposes of Title" that:

*"Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."*⁷

The importance and value of voters being fully informed about money in campaigns has also frequently been confirmed by state and federal courts, most recently and notably in U.S. District Judge Morrison C. England's January 30, 2009 decision in *ProtectMarriage.com v. Bowen*, which quotes widely from earlier opinions favoring more disclosure, not less.⁸

The challenge, then, is to translate this broad legal and policy support for disclosure into a specific agenda of reform measures.

There are three key areas that need attention and each is addressed in turn:

⁷ Government Code Section 81002(a).

⁸ Judge England's decision, available at <http://docs.justia.com/cases/federal/district-courts/california/caedce/2:2009cv00058/186477/88/>, features numerous comments and observations expressing the value of disclosure information to voters. For example, "The influx of money referenced above "produces a cacophony of political communications through which California voters must pick out meaningful and accurate messages. Given the complexity of the issues and the unwillingness of much of the electorate to independently study the propriety of individual ballot measures...being able to evaluate who is doing the talking is of great importance." Getman I, 328 F.3d at 1105." Page 19.

1. Strengthen disclosure laws and regulations;
2. Publicize disclosure data through government agencies; and
3. Publicize disclosure data through campaigns.

1. Strengthen disclosure laws and regulations

California already has the best disclosure laws in the nation. A 2008 study conducted by the California Voter Foundation (CVF), the Center for Governmental Studies and the UCLA School of Law for the Pew Charitable Trusts found that California's campaign finance disclosure laws ranked number one in the nation, receiving an "A" score. And those engaged in initiative campaigns across the nation agree that California's laws are the most robust, enforced and complied with among all the states.

But there is still room for improvement and some specific loopholes that need to be addressed.

1.a. Revise the "first bite of the apple" exception

The primary obstacle to full disclosure of all funders in initiative campaigns is the "first bite of the apple" exception. Under the Political Reform Act, any entity that collects money and donates it in elections must form a committee and fully report who contributes to it.⁹ But there is an exception to this rule: if an entity is donating in a California election for the first time, it is exempt from having to form a committee and is not required to disclose its donors. It files instead a "major donor" report and is not required to list its contributors.

This exception in state law exists out of concern for the longstanding right nonprofit organizations and other groups, associations and foundations have under federal law to engage in initiative campaigns and also to keep the names of their donors private. The "first bite of the apple" exception creates, then, a grace period so that donors who give money believing they can do so under federal rules and remain anonymous are not later surprised to find their names publicly disclosed at the state level as donors to a proposition campaign. California law does provide that, if a nonprofit gives more than once it must begin filing as a committee and report its contributors, even if under federal law its donors have the right to remain private. After the "first bite of the apple" exception, then, many nonprofits do form committees and file committee statements.

CVF has specifically examined the extent to which this exception obscured public awareness of the funding sources supporting and opposing Proposition 23, the initiative on the November 2010 ballot that would have repealed Assembly Bill 32, a California law to reduce greenhouse gas emissions. The analysis identifies all the entities that were not individuals, PACs or businesses and donated \$100,000 or more either for or against Prop. 23. It then tries to determine where their money came from.

⁹ Under California law, the following information must be disclosed about donors who contribute \$100 or more: full name and address, city, state and zip code and in the case of individuals, occupation and employer. Street name and number are redacted from online display to protect donor privacy.

“First Bite” Entities

Many of the entities that contributed more than \$100,000 to committees involved with Prop. 23 filed as first-time major donors, and no detailed information is provided on where the money originated. These entities include:

- Adam Smith Foundation (#5 donor on “yes” side);
- National Wildlife Federation (#2 donor on “no” side);
- ClimateWorks Foundation; and
- Union of Concerned Scientists.

Two organizations initially filed as first-time major donors without reporting a contribution history but later formed and filed as recipient committees with contribution histories:

- Green Tech Action Fund; and
- Blue Green Alliance.

“Second Bite” Exceptions?

There were another three entities which provided monetary contributions more than once during the 2009-2010 election cycle, filed as major donors, but did not form committees or report in detail where their money came from:

- Natural Resources Defense Council;
- The Nature Conservancy; and
- The National Audubon Society.

More than \$36 million was spent for and against Prop. 23, and the true sources of many of those millions of dollars were originally and still remain obscured from public view. Moreover, interviews with people involved in political campaigns suggest that it may become increasingly common for entities wanting to hide the identity of their contributors from the public to create a new nonprofit, raise a lot of money and make one very large political play under the “first bite of the apple” exception, without anyone ever knowing in detail the sources of their funds. There is evidence already that this is happening with entities involved in a growing fight over public pensions that may lead to a future California ballot initiative.¹⁰

Revisiting the “First Bite” exception

The “first bite of the apple” exception needs to be revisited. It could be modified in several ways. For example:

- it might be available only to those entities that donate less than \$100,000 in an initiative campaign;
- it might be available only to entities that do not rate among the top five donors to a measure;

¹⁰ See “Secret out of state donor powering pension reform group,” by Chase Davis, California Watch, April 7, 2011, <http://californiawatch.org/dailyreport/secret-out-state-donor-powering-pension-reform-group-9534>.

- there could be a voluntary disclosure process, where those entities that have the right to invoke the “first bite” rule are still formally invited to submit the names of their donors. This would give voters a way of knowing whether that entity is willing to disclose its donors voluntarily or prefers to remain in the dark, which itself can be helpful information to voters when deciding how to vote; or
- only entities that have been in existence for at least two years could qualify for the exception, thus precluding the strategy that creates a new entity simply to exploit the exception.

The risk associated with changing this rule is that might open up new legal challenges to California’s disclosure laws on the basis that they undermine an individual’s right to contribute anonymously to a nonprofit. This risk needs to be taken into account when considering whether to push for a change to the current exception, as well as the fact that some nonprofits involved in initiative reform may object to making changes to the existing rules.

1.b. Implement specific accounting rules for multipurpose organizations

Currently, when nonprofits and other multipurpose organizations such as federal or out-of-state political action committees, associations or foundations, do form committees and disclose their donors in detail, there are no specific accounting rules they must follow. They also need not maintain one bank account solely for campaign expenses, in the same way that a California ballot measure committee would have to.

So, if a nonprofit raises \$2 million in one year and gives \$50,000 to a California proposition campaign and forms a committee, how does it determine which of the \$2 million raised will be attributed toward the \$50,000 given to a proposition and which of its donors will be listed in their campaign disclosure reports? The current rules let multipurpose organizations themselves decide how to handle these accounting questions.

The FPPC is working to establish new regulations to specify that multipurpose organizations must follow a “last in, first out” accounting approach so that their disclosure reports will list the donations most recently received by the organization. This requirement would reduce the possibility of a wealthy group or individual making a donation to an initiative via a nonprofit group and also keeping their names off disclosure reports, as multipurpose organizations are currently able to do under the existing accounting rules.¹¹

1.c. Ensure that top two donor names “pierce” through to actual contributors

One way donors hide their identities from the public is by making donations to one entity which then makes donations to a separate campaign committee. FPPC Commissioner Elizabeth Garrett co-wrote a paper about this practice in 2005:

“These veiled political actors (VPAs) take advantage of regulatory loopholes to spend substantial amounts of money to influence the outcomes of initiative and referendum elections while avoiding disclosure of their efforts. Complicated arrangements consisting of

¹¹ See the FPPC’s April 13, 2011 “Interested Persons Meeting” memo for more details, online at http://www.fppc.ca.gov/IPmeetings/2011/IP_Agenda_20110413.pdf.

nonprofit corporations, unregulated entities, and unincorporated groups can lead to structures resembling Russian matryoshka dolls, where each layer is removed only to find another layer obscuring the real source of money. Reformers must understand the structure and tactics of VPAs so that they can design disclosure laws to remove the veils and thereby improve voter competence in issue elections.”¹²

While the FPPC is clearly aware of this problem and is working on regulations to address it,¹³ it is important to make sure that such changes dovetail with other disclosure measures designed to inform the public about actual funders, such as requiring the top two donors to be identified in committee names and disclosed in campaign advertisements. This also impacts other possible new reforms. For example, if new rules are made to include lists of the top donors for and against propositions in the ballot pamphlet (see below), such lists will have much more value to voters if they include the names of the actual corporations or individuals making contributions rather than the names of the obscure-sounding committees to which corporations and individuals have made contributions.

Another way committees have attempted to obscure their donors despite laws requiring top donors to be disclosed and publicized is by creating very long committee names and listing the donors at the very end. With such long names, it is difficult, if not impossible for a voter watching a television advertisement to easily pick out the names of the top donors or industry groups funding the committee without enhanced technology that allows the screen to be frozen. The FPPC recently enacted a regulation requiring donors' names to be listed *before* the names of citizens groups included in the committee name.¹⁴ But long committee names can still obscure the public's ability to identify easily the top donors in campaign advertisements.

1.d. Require late contribution and independent expenditure reports to include cumulative amount contributed or spent

Adding a cumulative field to late contribution and independent expenditure reports would make it easier for the public, media, government agencies and campaigns to quickly and easily determine the total amount of money being raised or spent on a campaign by a particular entity. It would save researchers an enormous amount of time attempting to track through numerous, and occasionally redundant filings to determine the exact total amount an entity has donated.

1.e. Implement routine enforcement of disclosure laws and regulations

Enforcement of California disclosure laws and regulations is generally limited to situations where someone has made a complaint. It would be good to consider ways for disclosure laws to

¹² Elizabeth Garrett and Daniel L. Smith, Election Law Journal, "Veiled Political Actors and Campaign Disclosure Laws in Direct Democracy," Volume 4, Number 4, 2005, page 2, <http://lawweb.usc.edu/centers/cslp/assets/docs/cslp-wp-013.pdf>.

¹³ This recommendation is among the tentative proposals made by the FPPC Chairman's Schnur's Advisory Task Force on the Political Reform Act, published January 19, 2011, # III 8 E on page 7, <http://www.fppc.ca.gov/taskforce/pdf/TaskForceFinalProposals.pdf>.

¹⁴ FPPC Regulation 18450.3(a)(4), adopted in 2009: "When the committee name is required to list the major donors of \$50,000 or more, either by name or by a name or phrase that identifies the economic or other special interest of the major donors, the list of the major donors shall be in descending order based on the amount of contributions made by the listed donor to the committee. The list of major donors shall precede, and not be interspersed with, other constituencies supporting or opposing the measure, such as "concerned citizens," "consumers," "taxpayers," etc."

be more routinely enforced, particularly for nonprofit and multipurpose committee disclosures, so that there is a proactive effort on the part of the state to see that entities required to identify their donors do, in fact, disclose that information on a timely basis.

There needs to be a disclosure advocate within state government whose job it is to ensure that campaign data is being fully disclosed to the public on a timely basis. In addition, penalties for failing to disclose donors on a timely basis need to be swift and severe enough to serve as a deterrent to those who might attempt to keep the public in the dark.

2. Publicize disclosure data through government agencies

Currently, only those with an insider's understanding of California's complex disclosure process and people who have the time and technical know-how to navigate the Secretary of State's Cal-Access web site can readily access California disclosure data. While nonprofits, news organizations and campaigns do conduct and disseminate campaign finance research, this is not a substitute for direct, easy access by voters themselves. It is time to move beyond this essentially exclusionary state of affairs to a new phase of disclosure in California, one where voters have easy access to understandable data.

Voters want such access. This is clear from numerous public opinion polls. The Public Policy Institute of California conducted six statewide surveys between 2005-2009 asking, among other things, whether likely voters would favor "increasing public disclosure of funding sources for signature gathering and initiative campaigns?" Support for this idea was very strong in the six surveys, ranging from 82 to 85 percent in favor, and consistently high across partisan affiliations and other demographics. Californians overwhelmingly favor increasing disclosure.

The agency ideally suited to take the lead in expanding public access to proposition donor information is the office of the Secretary of State, whose Political Reform Division is already the repository of campaign finance reports and the host of Cal-Access, the official state campaign finance disclosure web site.

2.a. Require the Secretary of State to conduct campaign finance research

Research the Secretary of State could conduct to provide voters with essential disclosure information includes the following for each side of each proposition:

- 1) identify the top five donors;
- 2) determine total amount being raised;
- 3) determine what percentage of the money raised is coming from in-state and from out-of-state;
- 4) identify the average donation size; and
- 5) identify the total number of donors.

The user-friendly disclosure by the Secretary of State of these data would enhance voters' ability to know who is funding proposition campaigns, whether campaigns are attracting grassroots or in-state support, and to use that information to make more informed voting choices. It would also benefit news organizations reporting on proposition campaigns, giving them a "news hook" on which to hang expanded coverage of the role of money in proposition campaigns. The data in question should be updated throughout the election season to show current and cumulative fundraising figures and contribution patterns.

2.b. Disseminate top donor data to voters

If data about the top five donors existed, it could be disseminated to voters in several useful ways, including:

- 1) in the official state ballot pamphlet, already the most trusted source of information for voters on propositions by far;¹⁵
- 2) on the Secretary of State's web site, cal-access.sos.ca.gov;
- 3) in election materials sent out to vote-by-mail voters; and
- 4) at polling places, where updated lists of top donors can be made available on election day.

Before the Cal-Access web site was in operation, the Secretary of State did routinely summarize and publish reports that listed the top donors on ballot propositions. These reports were phased out after the introduction of online disclosure, because it was assumed that the new system would be sufficient to help the public easily find this information for themselves.

But that is not the case. Voters need help synthesizing campaign finance data and, ideally, a government agency should perform this task, specifically the Secretary of State, because voters have learned to look to that government agency in particular for help at election time. Moreover, they are more likely to trust information they obtain from a government web site than they are information from a nonprofit or campaign web site.

Relying on a government agency is also the least constitutionally problematic way to go about disseminating this information to voters. While there are laws that require campaigns themselves to include top donor information in committee names and advertisements, this approach to disseminating disclosure data to voters runs into First Amendment problems, with campaigns objecting to and at times challenging rules on the grounds that they infringe upon political speech rights. Taking a governmental route to dissemination does not pose similar constitutional challenges.

- ***Senate Bill 334 and Assembly Bill 65***

Legislation was introduced this session (SB 334 authored by Senator Mark DeSaulnier and AB 65 by Assembly Member Mike Gatto) to require the Secretary of State to include a list of the five highest contributors, of fifty thousand dollars (\$50,000) or more, to each committee primarily formed to support and oppose each state measure, as well as the total amount of each of their contributions. These bills are substantially similar and both are moving through the Legislative process this year. SB 334 has the support of the Secretary of State.

Earlier attempts to enact similar legislation were unsuccessful. In 2010, SB 1202, a bill identical to SB 334 and also authored by Sen. DeSaulnier, made it to the Governor's desk but was vetoed by Governor Arnold Schwarzenegger. In his veto message the Governor said, in part:

¹⁵ According to a November 2006 PPIC statewide survey, 42 percent of voters said the official voter information guide and sample ballot were the most helpful sources of information in deciding how to vote on the 13 propositions on the ballot, a greater percentage than the four other information sources (advertisements, news coverage, newspaper editorials and the Internet) combined, http://www.ppic.org/content/pubs/survey/S_1106MBS.pdf, page 21.

"I have consistently advocated for transparency in campaign contributions and signed legislation that furthers that goal. This bill would instead create confusion for voters and encourage late contributions. Large donors could avoid being included on the list by limiting contributions until the deadline had passed. This would undermine the intent of this bill and could instead mislead voters as to the identity of the major contributors."

Two important factors have changed, however, since 2010. First, the Secretary of State is supporting SB 334, whereas the agency had no position on SB 1202. Secondly, a new governor is in office who may take a different view on this issue than that of his predecessor.

Critics of these proposed reforms argue, correctly, that the ballot pamphlet will not be a complete or timely representation of the money in proposition campaigns. This is because the timeline for when proponents and opponents raise and spend money in proposition campaigns differ. Proponents must raise and spend money up front in order to qualify a measure for the ballot. Opponents often do not organize and raise their money until the campaign season is well underway, and after the 110 day cutoff imposed in both bills to facilitate inclusion of this data in the state ballot pamphlet within current printing and distribution schedules. Consequently, voters will get a fairly good idea of who paid to put a measure before them, but not necessarily who is spending money to oppose that measure.

However, this imbalance is not necessarily problematic. Propositions are not public opinion polls. They are proposed laws which voters can either enact or reject. One could argue that it is far more important for voters, as lawmakers, to know who paid to put a proposed law before them than it is to know who is paying to convince them to vote "no". In addition, both bills would require the Secretary of State to include statements in the ballot pamphlet explaining that the lists reflect only the highest contributors of fifty thousand dollars (\$50,000) or more as of 110 days before the election. SB 334 also would require inclusion of a statement along the lines of: "To learn who contributed to committees supporting or opposing each state measure, access the Secretary of State's Internet Web site at cal-access.sos.ca.gov."

To ensure disclosure is really balanced, updated lists of top donors can be distributed to polling places and made available to voters to review there before they cast their ballots. Lists updated as of two weeks prior to the election would include useful, recent data. The state ballot pamphlet could alert voters to the availability of this additional resource. Similar alerts could be given to voters who vote by mail in the election materials they receive.

- ***Identifying top donors four months before Election Day vs. two weeks***

To help flesh this idea out, CVF conducted a research experiment to determine how significantly the top donor data differed between the 110 day cutoff and a cutoff date two weeks before the election. In 2010, CVF compiled and published lists the top five donors for and against each proposition on the November ballot and updated these lists on its web site up until October 17, approximately two weeks before the election. The comparison is a little apples-to-oranges because SB 334 and AB 65 require identification of the top donors of \$50,000 or more to *each ballot measure committee*, and CVF's lists identified the top five donors among all ballot measure committees on the same side of a proposition *combined*, with no threshold on the amount reported.

With that caveat, here are comparisons of the "Yes on 23" and "No on 23" reports:

"Yes on 23"

**Ballot Pamphlet Disclosure as required by SB 334 and AB 65:
Top Five Donors of \$50,000 or more to California Jobs Initiative, ID
#1323890**

as of 7/15/10:

1. Valero Services, Inc.	1,050,000
2. Tesoro Companies	525,000
3. Adam Smith Foundation	498,000
4. Occidental Petroleum Corp.	300,000
5. No New Taxes, a Project of the Howard Jarvis Taxpayers Assn.	100,001

**Top Five Donors overall to all "Yes on 23" committees combined, via
www.calvoter.org**

as of 10/17/10:

1. Valero Services, Inc., San Antonio, TX	4,075,315
2. Tesoro Companies, Long Beach, CA	1,540,637
3. Flint Hills Resources, Wichita, KS	1,000,000
4. Marathon Petroleum Company, LLC, Findlay, OH	500,000
5. Adam Smith Foundation, Smithville, MO	498,000

"No on 23"

**Ballot Pamphlet Disclosure as required by SB 334 and AB 65:
Top Five Donors of \$50,000 or more to Californian for Clean Energy and Jobs, ID
#1324059**

as of 7/15/10:

1. Natural Resources Defense Council	950,000
2. Green Tech Action Fund	500,000
3. Anne G. Earhart	250,000
4. Majestic Realty Company and Edward P. Roski, Jr.	100,000
5. DMB Associates, Inc. and Affiliates	100,000

**Top Five Donors of \$50,000 or more to NRDC Action Fund committee, ID #1306041
as of 7/15/10:**

1. Robert J. Fisher	500,000
2. Wendy Schmidt	500,000

**Top Five Overall Donors to all "No on 23" committees combined, via
www.calvoter.org**

as of 10/17/10:

1. Thomas Steyer, San Francisco, CA	5,000,000
2. National Wildlife Federation, Reston, VA	3,000,000
3. No on 23 Committee of the NRDC Action Fund to Stop the Dirty Energy Proposition	1,590,250
4. Vinod Khosla, Menlo Park, CA	1,037,267
5. L. John Doerr, Palo Alto, CA	1,000,000

5. Ann Doerr, Palo Alto, CA	1,000,000
5. Environmental Defense Action Fund Say No to Prop 23 Committee, NY, NY	1,000,000
5. James F. Cameron	1,000,000
5. Gordon E. Moore, Woodside, CA	1,000,000

This experiment provided several valuable insights. First, the pending legislation does not require disclosure of a donor’s city, state or zip code, or, in the case of an individual, occupation and employer data. CVF’s online display of top donor data in 2010 did include donors’ cities and states (and though not displayed on the chart above for the sake of brevity, it did also include individuals’ occupations and employers). The data show that many of the largest donations for the “Yes” side on Prop. 23 came from out of state and that is helpful information for voters. So, the pending legislation would be greatly improved if it required the cities and states of donors to be reported in the ballot pamphlet, as well as occupation and employer data for individual donors.

CVF also found that the approach taken by SB 334 and AB 65, which is to itemize contributions of \$50,000 to each committee, will probably work well at the July 15 cutoff, but that if this approach were maintained throughout the election cycle it would lead to very long lists. This might not be a problem in an online display, but it would be a problem if such lists were printed and distributed to polling places. The data would be hard to read and understand. It would be preferable to distribute top donor data to polling places by creating a list of the top five donors among all of the committees on the same side of a proposition.¹⁶ The \$50,000 threshold in both bills for listing donors should also be reconsidered if top donor lists were to be published at polling places to ensure that disclosure data will be available for all opposing campaigns, even those with limited funding.

We also learned that the research that went into our experiment was not very time-consuming. Using data on the Secretary of State’s web site, CVF’s research consultant spent about 40 minutes per proposition researching committees and identifying donors of \$50,000 or more as of July 15, 2010. With a total of nine propositions on the ballot, it would take about six hours to complete the research needed to provide the top donors in the state ballot pamphlet in the manner required by SB 334 and AB 65.

- ***CVF analysis comparing July 15 donors with October 17, 2010 donors***

CVF conducted comparative research on all nine November 2010 propositions to determine how closely, or not, the top donors as of July 15, 2010 matched the top donors listed at www.calvoter.org as of October 17, 2010.¹⁷ Overall, the relevance of the state ballot pamphlet data would have been pretty well maintained when compared to the data available two weeks prior to the election. In most cases contribution amounts increased, but the entities and their relative contribution ranks remained fairly constant. Most of the exceptions were on the

¹⁶ Distributing top donor data to polling places would likely require the Secretary of State to compile the donor lists and disseminate them to county registrars of voters, who in turn would be responsible for including the lists in the materials provided to pollworkers to have on-hand at polling places on Election Day.

¹⁷ CVF’s top five donor charts can be found in the November 2010 edition of the California Online Voter Guide, in the “Propositions” section, <http://www.calvoter.org/voter/elections/2010/general/props/index.html>.

opposition sides of the ballot measures since they generally begin raising money later. Here are some other highlights from this research:

- Prop. 19 sought to legalize marijuana. The measure had very little contribution data available on both the support and opposition side by the July 15th date. Only one individual would have met the SB 334 criteria on the support side, but much more money was contributed shortly after that. The opposition side, funded by law enforcement groups and others, spent very little money overall, so no entities met the SB 334/AB 65 criteria at any point up to two weeks before the election.
- Prop. 21 aimed to enact a vehicle fee to help fund state parks. The measure's support side almost exactly maintained its top five donors during the two dates, while the overall amounts increased. There was very little spent on the opposition side, and no entities met the SB 334/AB 65 criteria for disclosure.
- Prop. 22 restricted state access to local government proceeds and was primarily funded by the League of California Cities, which maintained its place throughout the election as the major contributor. The opposition side, funded primarily by public employee unions, had just one qualifying contribution of \$50,000 that would have been printed in the ballot pamphlet, but by two weeks prior to the election they had three contributions from different entities, each over \$100,000.
- Prop. 23 was funded largely by oil companies which continued to dominate top donors' lists throughout the election. On the opposition side, top donors were primarily environmental organizations and wealthy individuals throughout the election, though different environmental groups and wealthy individuals appeared on the earlier list than did on the later list. Overall, there were more than 15 committees on the opposition side, many of them having their largest contributions coming in much later than the proposed deadline in SB 334/AB 65 for inclusion in the ballot pamphlet.
- Prop. 26 changed the legislative vote requirements for enacting new fees. It was funded by large contributions from several corporations; opposing donors, which included the state Democratic party and several public employee unions, had no contributions that would have met the SB 334/AB 65 criteria in time for the ballot pamphlet but by the two week deadline the top five contributors totaled over \$3 million.

CVF recommends reform groups pursue the placement of top five donor data in the voter pamphlet, online, and at polling places. Although the information in the ballot pamphlet may be somewhat out of date by the time of the election, it will still be valuable to voters. It will, for example, tell voters who paid to qualify the measure for the ballot. Since there is now absolutely no disclosure in the ballot pamphlet or on initiative petitions about who the sponsors of a measure actually are, these changes will make a major improvement.

If the top donor data goes into the ballot pamphlet, it will not exist in a vacuum. It will appear alongside other information about the propositions, including the identity of supporters and opponents, campaign contact information, pro/con arguments, and the groups and individuals who endorse these arguments. Adding more information to the ballot pamphlet about who is

funding initiative campaigns, even as of four months out, is feasible and a sensible response to voters who have repeatedly told pollsters by large margins that they want this information.

2.c. Improve the Cal-Access disclosure web site to make it more efficient and user-friendly

The Cal-Access web site was originally launched in 2000 and its design and architecture have not been changed since then. The site is designed to generate a PDF image that replicates the appearance of the data on a printed reporting form. The system can also generate tables of contributions received. It offers users the ability to download data and to search the site. But the site does not feature a robust, user-friendly database that can be easily queried to facilitate the analysis of data online.

Everyone involved in the disclosure process in California agrees that the site needs to be redesigned. The search tools are slow and limited. Using the site is complicated and presupposes an intimate understanding of California's arcane disclosure process and reporting forms. Discussions of a redesign often entail rethinking the disclosure timeline and the possibility of California moving, like Oregon did, from a forms-based disclosure process to a transaction-based process, where contributions and expenditures are reported on an ongoing basis.¹⁸ Such changes, were they to be implemented would certainly improve how campaign data are displayed online.

But even without a wholesale redesign of the web interface or radical changes to the disclosure process, a number of simple changes would make the existing site easier to use:

- Compile and analyze data and provide lists of top donors (as described above);
- Link committee names to their filings so users can easily dig deeper. Currently when a user is reviewing a list of donors on the site, the list will often include committees and individuals that have themselves filed disclosure reports; if their names were linked to their reports it would be easier for the public to drill down to the true sources of a committee's funding;
- Add either the Attorney General or Secretary of State's initiative tracking number to reports filed by the committees associated with that initiative. Currently, it is very difficult to use Cal-Access to research who is funding an initiative while it is in circulation; including tracking numbers will allow Cal-Access users to locate the disclosure reports associated with a measure in circulation;
- Use faded links. Currently when a link is first followed on Cal-Access it does not later show as a "faded" color. This is particularly frustrating when a user is looking at a list of fifteen or more committees involved in a single proposition, such as the "No on 23" table,¹⁹ and the user cannot easily tell whether a committee listed has already been reviewed. Using faded links will help users keep better track of their research.

¹⁸ This kind of alternative approach was included among the recommendations made by the recent FPPC Chairman's task force, under the "Simplify Campaign Reports" section. California already requires year-round disclosure of contributions of \$5,000 or more within ten days.

¹⁹ See <http://cal-access.sos.ca.gov/Campaign/Measures/Detail.aspx?id=1324800&session=2009>.

- Rename the link currently labeled “Advanced Search” to “Search Contributions”. The current label is not descriptive and does not tell the user this is the link to follow to search contributions and expenditures. As a result, many Cal-Access users may never use what is actually the most helpful tool available on the site.

2.d. Encourage the FPPC to produce disclosure reports

The Secretary of State is not the only state agency with a role in campaign disclosure. The Fair Political Practices Commission (FPPC) is also involved in the disclosure process and plays a critical role in promulgating regulations that govern the details of California disclosure. The FPPC in recent years has also compiled and published reports that shine a light on campaign finances, particularly independent expenditures and most recently on ballot propositions. Last Fall, the FPPC published a report listing all donations of \$100,000 or more to all proposition committees in the November 2010 election.²⁰ The agency has also spearheaded numerous task forces to find ways to improve disclosure in California.

3. Publicize disclosure through campaigns

California law currently places several requirements on proposition committees in an effort to help the public identify the financial backers of a measure:

- Government Code Section 84504(a) requires “(a)ny committee that supports or opposes one or more ballot measures shall name and identify itself using a name or phrase that clearly identifies the economic or other special interest of its major donors of fifty thousand dollars (\$50,000) or more in any reference to the committee required by law...”;
- Government Code Section 84504(c) requires “(a)ny committee which supports or opposes a ballot measure, shall print or broadcast its name as provided in this section as part of any advertisement or other paid public statement”; and
- Government Code Sections 84503 (a) and (b) require “(a)ny advertisement for or against any ballot measure shall include a disclosure statement identifying any person whose cumulative contributions are fifty thousand dollars (\$50,000) or more,” and “(i)f there are more than two donors of fifty thousand dollars (\$50,000) or more, the committee is only required to disclose the highest and second highest in that order.”

The relevant section of the Political Reform Act, enacted via Proposition 208 of 1996, also includes a provision designed to thwart committees from following the temptation to evade disclosure requirements.²¹ Government code section 84505, titled “Avoidance of Disclosure” says:

- “In addition to the requirements of Sections 84503, 84504, 84506, and 84506.5, the committee placing the advertisement or persons acting in concert with that committee

²⁰ <http://www.fppc.ca.gov/index.php?id=250>.

²¹ Though many Prop. 208 provisions were challenged successfully in court, these surviving provisions remain in effect and have fundamentally changed and improved ballot measure campaign naming and advertising rules.

shall be prohibited from creating or using a noncandidate-controlled committee or a nonsponsored committee to avoid, or that results in the avoidance of, the disclosure of any individual, industry, business entity, controlled committee, or sponsored committee as a major funding source.”

These requirements, taken together, have greatly improved the public’s ability to know which interests or industries are backing an initiative campaign and who is actually paying for the campaign advertisements they see on TV or hear on the radio.

Other California laws also try to ensure that there is accountability in campaign communication. Government Code Section 84305 prohibits campaigns from sending out mass mailings (defined as 200 or more pieces of mail) “unless the name, street address, and city of the candidate or committee are shown on the outside of each piece of mail in the mass mailing and on at least one of the inserts included within each piece of mail of the mailing in no less than 6-point type which shall be in a color or print which contrasts with the background so as to be easily legible.”

The FPPC recently further amended state mass mailing regulations so that campaign mail must now say “Paid for by” next to the sender’s name and address (Regulation #18435), thus conforming with the language required of federal campaigns.

3.a. Require top donor disclosure on initiative petitions

One way to expand public awareness of the funders behind a proposed initiative is to require disclosure of top donors on the petitions proponents use to gather signatures and qualify their measure for the ballot. This idea has been floated for a number of years and, as previously stated, has found favor with the public several times in the results of PPIC statewide surveys, where it garners very high rates of support among voters.

Initiative petitions, while generated by campaigns, are regulated by state law, which imposes a number of requirements on the layout and information featured on petitions. Given that initiative petitions are in a legal gray area – responsibility for their content lies both with campaigns and with the state – requiring proponents to place the name of the funder who paid for the petition drive on the petition itself would not be likely to present the kind of First Amendment problems that often frustrate attempts to require campaigns to publicize their own donors.

But there are other challenges to making this approach work well. What happens, for example, if a new donor comes in after petitions are printed? Because initiative campaigns are dynamic it is possible, and some would argue even likely, that the top donors will change during a five-month petition drive, and this could result either in outdated disclosure information on the petitions or a burdensome requirement that they be reprinted to reflect up to date information about donors.

Despite these challenges, this reform deserves serious consideration. In legislative bill analyses the very first piece of information typically provided is the name of the person or group sponsoring the bill. To deny voters access to comparable sponsor information in their

lawmaking process limits their ability to make informed decisions about whether to sign and help qualify a measure.²²

3.b. Require committees to identify their own top donors

The job of identifying top donors to an initiative could be made easier by requiring campaigns themselves to identify their top donors. Under current law, donations are cumulated by calendar year. But initiative campaigns often spread over a two-year cycle. Determining the top donors for a full cycle can, thus, be a confusing and time consuming process. If an additional schedule were to be added to require committees to identify their top five, ten or 25 donors and the amounts contributed for the entire election cycle it would make the disclosure reports much more useful to the public.

Some have suggested that committees be required to list their top 25 donors on their campaign web sites. While such a requirement would expand public awareness of campaign donors, it could also be met with resistance from political committees and their attorneys, who would likely object on First Amendment grounds to having their political speech regulated.

An alternative would be to have the Secretary of State maintain lists of top donors and require campaign committees to link to such official lists from their own web sites and online advertisements, an approach that may be less constitutionally problematic. The FPPC could further public access to disclosure data by enacting this kind of requirement if such data were being maintained and prominently displayed on government web site.

3.c. Expand disclosure in broadcast advertisements

The campaign experts interviewed for this report spoke of the difficulty voters have reading the disclosure information featured at the end of television advertisements, partly because of the sheer length of the disclosure but also because of the short amount of time it appears on screen. In addition to having this information appear in writing in a broadcast ad, it might be better to also have it be spoken, as it is in radio advertisements. Such a change could be challenged, however, as an unwarranted infringement on political speech rights.

Recent changes to online advertising have been implemented by the FPPC, following recommendations made by two task forces that studied the need for more accountability in online campaign advertising. These changes make campaign messages generated by newer technology – such as web sites, email, mobile devices, social networking sites and the like – subject to the same requirements imposed on traditional broadcast and print ads.²³

²² An alternative approach would be to require ballot petitions to list the Secretary of State's web site and indicate that the names and affiliations of major campaign contributors to the circulation drive may be found on the Secretary of State's web site, as was recommended by the Center for Governmental Studies in its publication *Democracy by Initiative: Shaping America's Fourth Branch of Government, 2nd Edition* (2008), online at http://www.cgs.org/index.php?option=com_content&view=article&id=164:PUBLICATIONS&catid=39:all_pubs&Itemid=72.

²³ See <http://www.fppc.ca.gov/faq/ElectronicMediaAds2010.pdf>.

Under the new rules, which took effect in January 2011, online advertisements and messages must contain the name and address of the committee responsible for sending them, and the top two contributors of \$50,000 or more, just as would be required if it were a broadcast advertisement. These improvements will help voters who see or receive online campaign advertisements know who is responsible for sending those ads.

4. Other ways to address the role of money in the initiative process

The Political Reform Act of 1974's ballot pamphlet provisions help reduce the need for money in order to get one's message out. Under its provisions, both sides in a proposition battle have equal access to the voters via the state ballot pamphlet, an official publication paid for by the state. It is a form of publicly financed political speech that is highly valued by California voters, is the kind of resource not available to voters in many other states that have an initiative process, and is one area where California excels compared to other state laws and practices.

There remains, however, the profound problem described at the very beginning of this report, namely that the initiative process itself is not accessible to underfunded, grassroots interests for which it was originally intended. This opens up new reform possibilities.

4.a. Make the initiative process more accessible to grassroots interests

Those who think that the corrupting influence of money in the initiative process keeps many good ideas off the ballot could think, then, about reducing this barrier. The number of signatures needed to qualify a measure for the ballot could be reduced, for example, or the amount of time allowed to collect signatures could be expanded. A public financing option could also be considered, to give proponents of initiatives who already have some money and strong grassroots support the additional funding they need to collect signatures on a timely basis and qualify their measure.

4.b. Provide more opportunities for both sides on a proposition to be heard

Another way to limit the money barrier in initiative campaigns is to create additional, free opportunities for proponents and opponents to be heard. The Fairness Doctrine, which was abolished by the Federal Communications Commission in 1987, required broadcasters to air balanced opinions on controversial issues. While California does not have the legal authority to impose such requirements on broadcasters, it is possible that similar requirements could be imposed on cable providers, whose basic services are regulated by local franchise authorities.

Another approach would be public, televised debates. While there is no guarantee that debates will be aired by television stations, in today's media environment there are so many alternative platforms for delivering programming that it would be possible to widely disseminate such programming even without broadcast networks' cooperation.

PPIC surveyed Californians in 2005 and again in 2008 on the question of whether the yes and no sides of initiative campaigns should be required to participate in a series of televised debates. Both surveys found strong support for this reform idea, with 75 percent favoring it in 2005,²⁴

²⁴ See http://www.ppic.org/content/pubs/survey/S_1105MBS.pdf, page 18.

and 72 percent in 2008.²⁵ Pursuit of this idea requires careful consultations with attorneys who are familiar with First Amendment and political speech laws, before crafting a proposal with a good chance of surviving legal challenges.

Another way to level the playing field and let voters know who is supporting and opposing each proposition is to expand the ballot pamphlet to include lists of endorsers. While proponents and opponents can already list some endorsers in their official pro/con arguments for the ballot pamphlet, this approach would give voters a much broader picture of how support and opposition lines up among major interests in the state.²⁶

5. Getting Reforms Implemented

There are three paths to implementation:

- 1) enact new laws through the Legislature;
- 2) enact new regulations through the FPPC; and
- 3) enact new policies through the initiative process.

As previously mentioned, there are two bills pending in the Legislature to implement top five donor disclosure in the state ballot pamphlet. The future of the disclosure legislation pending in the Capitol is uncertain, but recent history shows that it is possible to get significant election reforms through the legislative process. This includes legislation to allow for online voter registration, a “top two” primary election process, permanent absentee voting, giving 17-year olds the right to register to vote before they turn 18, and mandating electronic filing and online disclosure of campaign finance reports. Year-round disclosure of contributions of \$5,000 or more and a public financing proposition are also recent election reforms passed by the Legislature. It is important to remember, however, that any bills seeking to change the 1974 Political Reform Act require a two-thirds vote, and this represents an extra challenge for legislative reform.

The FPPC has enacted many important regulations in recent years that have improved disclosure and funder accountability. Many new regulations are in development, and would benefit from input by those seeking to strengthen initiative disclosure reform. Within the FPPC’s regulation process, political attorneys working on behalf of campaign interests are typically very involved and well-represented, particularly in comparison to groups representing the public’s interest. Given the agency’s strong track record in implementing regulations that strengthen disclosure, especially within the last few years, reform advocates would likely find time spent working within this agency’s processes to be a worthwhile investment.

Should initiative disclosure reform proponents seek to put an initiative before voters, it will be beneficial to conduct public opinion polls to first determine which particular reforms are likely to be the most popular and therefore likely to pass. CVF previously submitted a memo to the Greenlining Institute providing suggestions for poll questions that would help determine which reforms are likely attract broad public support.²⁷

²⁵ See http://www.ppic.org/content/pubs/survey/S_1208MBS.pdf, page 23.

²⁶ This reform idea was included in *Democracy by Initiative: Shaping America’s Fourth Branch of Government*, 2nd Edition published by Center for Governmental Studies (2008).

²⁷ See CVF’s memo to the Greenlining Institute, dated May 13, 2011, “Poll questions relating to initiative disclosure”.

6. Conclusion: Advancing “Publicized Disclosure”

Voters want and need to know more things than they know now before they cast ballots on initiatives. Who is funding the campaigns for and against each measure and whose interest is it really serving? Who is the sponsor? Why are they sponsoring it?

Legislators have these sorts of data before them when they vote measures up or down in the Assembly or the Senate. Voters should be given access to comparable information.

The next phase of initiative disclosure reform in California, then, should be “publicized disclosure.” New statutes need to be enacted and new regulations based on them need to be made so that there is more disclosure and, therefore, more transparency than we have now. And ways then need to be found to put this information “under voters’ noses,” so that it is easily accessible at key points all along the line of the initiative decision making process – when initiative petitions are signed, when the ballot pamphlet is consulted, and when ballots are cast - - so that the people of California, when acting as their own lawmakers, can make more informed and more confident choices.

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