



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
1102 Q Street • Suite 3000 • Sacramento, CA 95811  
(916) 322-5660 • Fax (916) 322-0886

August 12, 2020

Nick Warshaw  
546 Liberty Street  
San Francisco, CA 94114.

Re: Your Request for Advice  
**Our File No. I-20-079**

Dear Mr. Warshaw:

This letter responds to your request for advice regarding campaign provisions of the Political Reform Act (the “Act”).<sup>1</sup> Please note our analysis is based solely on the facts you presented in your request. We are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice. Because your request is general and not on behalf of a specific entity with duties under the Act, we are treating this request as one for informal assistance.<sup>2</sup>

### QUESTION

You request general advice on whether payments from a company to a candidate under an agreement to pay monies when an independent expenditure or Section 85310 communication is made in opposition to the candidate in a particular election will meet the definition of a “contribution” under Section 82015. You also request advice on whether the company’s payment under its agreement with the candidate would meet the definition of “expenditure” in Section 82025.

### CONCLUSION

We find that the agreement the company wishes to enter into with candidates would constitute an enforceable promise to make a payment, and it is clear from the surrounding circumstances that the agreement, and any resulting payments, are for a political purpose, thus meeting the definition of a “contribution” and “expenditure” under the Act.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329.)

## FACTS AS PRESENTED BY REQUESTER

An unidentified group of investors, including yourself, wish to fund a company in the “Super PAC/independent expenditure market vertical.” You state that the company would seek to make a profit by allowing a candidate to contract with the company to guarantee payment to the candidate if certain “triggering events” occur related to their campaign for public office. You describe the transaction as based on an insurance business model, but acknowledge that it may not meet the definition of “insurance” as the payment is not made for a “loss” event.<sup>3</sup>

You describe the transaction(s) as follows: first, a candidate purchases a policy from the company. Next, when an independent expenditure, as defined under Section 82031<sup>4</sup> and/or a communication as defined under Section 85310<sup>5</sup> is made opposing the candidate or is made in support of the candidate’s opponent(s), the company will treat this event as an event triggering payment in the agreed upon amounts. Then the company will pay the candidate a multiple of (e.g., two times) the amount of the triggering event. You envision that opposing candidates may each enter into agreements with the company. A payable event would be determined by the company, based on an examination of committee filings such as Forms 460 and 496. You note that the cost of the agreement to the candidate would be based on market factors, the expense of the media market involved, and the likelihood that the payable events would occur. Candidates with the same factors would pay the same cost, regardless of party or political considerations.

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<sup>3</sup> Specifically, you state: “For ease of conceptual understanding, throughout this request for advice, the product is referred to as “insurance.” However, because a Super PAC expenditure is not a “fortuitous” event, it is likely that the California Department of Insurance will not consider the product to fall under the legal definition of “insurance.” Should they make that determination, the company would not refer to the product as an “insurance” product. If that were to occur, the company would still utilize insurance best practices and actuarial sciences to inform its business model.”

<sup>4</sup> Section 82031 states:

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

<sup>5</sup> A Section 85310 communication is one that identifies a candidate for elective state office. This section states, as relevant:

(a) Any person who makes a payment or a promise of payment totaling fifty thousand dollars (\$50,000) or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election . . . .

To make a profit, the company aims to collect more in payments from the candidates than it pays out due to triggering events. In our telephone conversation on July 15, 2020, you explained further that the company's business model is based on your understanding that publishing a list of candidates that enter these payment agreements with the company will reduce, or eliminate, independent expenditures and Section 85310 communications in the particular election. You note that campaign contribution limitations often result in an increase in independent expenditures and Section 85310 communications in an election, as persons seek to influence the campaign outside the constraints of contribution limits.

You request advice on whether the payment from the company to the candidate will meet the definition of a "contribution" under Section 82015. You also request advice on whether the company's payment under its agreement with the candidate would meet the definition of "expenditure" under Section 82025.

## ANALYSIS

### *Contributions*

Pertinent to these facts, Section 82015 defines a contribution to include "a payment ... or an enforceable promise to make a payment, except to the extent that full and adequate consideration is received, or if it is clear from the surrounding circumstances that the payment is not made for political purposes." Under Section 82044, "payment" may involve money or a thing of value, whether tangible or intangible.

Regulation 18215(a) provides that a payment is made for "political purposes" if it is for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure. The very nature of the proposed agreement and related payments to candidates is to influence the action of the voters in the election of a candidate for elective office. In order to make a profit, it is key that the agreement will discourage the launching of an independent expenditure or Section 85310 communication to voters in opposition to the participating candidate. The agreement and payment are each aimed at discouraging political speech to voters that oppose a participating candidate's election to office. These are payments for a political purpose. We advise that the agreement the company wishes to enter into with candidates would constitute an enforceable promise to make a payment, and it is clear from the surrounding circumstances that the agreement and any resulting payments are for a political purpose, thus meeting the definition of a "contribution" under the Act.

Additionally, we note under Regulation 18215 (b)(4) that a "contribution" includes "Any goods or services received by or behested by a candidate or committee at no charge or at a discount from the fair market value unless the discount is given in the regular course of business to members of the public." Past advice letters have found that payments received through a business program provided to the public and without special terms for a candidate or committee are not

“contributions.”<sup>6</sup> *In re California Republican Party* (1999), 13 FPPC Ops. 1), regarding a credit card affinity reward program,<sup>7</sup> the Commission stated:

No contribution to the [California Republican Party] results under the affinity fundraising program described below because the CRP provides “full and adequate consideration” to the credit card issuer for the payments received from the issuer. Our conclusion assumes two conditions are met: First, the credit card issuer contracts with the CRP on standard terms, comparable to those offered to other affinity sponsors; second, the issuer’s correspondence to cardholders or prospective cardholders does not include political literature prepared by or on behalf of the CRP.

*(Id., p.1)*

The Commission specifically rejected the request that it create a “presumption” of full and adequate consideration in business transactions such as the affinity credit card program. The Commission stated, “[w]hether a contribution results from a particular fundraising program depends on the facts of the particular case.” *(Id., p. 2)*

Here, the facts indicate that the agreement is exclusively available to candidates for elective office. The agreement does not fall in the category of the standard business transactions you noted, such as a workman’s compensation policy, which may be purchased by the public at large. The agreement and payment do not meet the two conditions outlined above, to avoid being characterized as contributions under Section 82015.

### *Expenditures*

You request advice on whether the company’s payment under its agreement with the candidate would meet the definition of “expenditure” under Section 82025. An “expenditure” is similarly defined to include “a payment ... or an enforceable promise to make a payment, unless it is clear from the surrounding circumstances that it is not made for political purposes.” An expenditure, which may be monetary or nonmonetary, is “made for a political purpose” if it is for “purposes of influencing or attempting to influence the action of the voters for or against the

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<sup>6</sup> Your request noted, for example, the *Nguyen-Tan* Advice Letter, No. A-00-168 (finding no contribution where the candidate received a referral fee from PayPal for using its service as an online donation processor, so long as it is a standard fee given by PayPal); and the *Zerbe* Advice Letter, No. I-95-146 (finding no contribution for the use of a telephone company’s “affinity program” for political fundraising “so long as the same services are provided to any organization that is involved with the affinity program. Section 82015 defines “contribution” to include the granting of discounts or rebates not extended to the public generally. (Section 82015.)” *(Id., p. 6.)*

<sup>7</sup> The Commission determined that payments to the California Republican Party (“CRP”) by a credit card company were not contributions. Under its “affinity” program, the credit card company agreed to pay CRP a “licensing fee” of \$1-\$2 for every new account and 0.3 percent of each new customer’s monthly credit card bill and in return, the CRP agreed to license its name, logo, mailing lists, provide the credit card company with free space at CRP’s conventions, and advertising space in CRP’s marketing materials to the credit card company. (Note: this Opinion is also cited as 0-99-047.)

election of a candidate.” (Section 82025, subdivision (b).) Accordingly, the payments would be “expenditures” under Section 82025.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Dave Bainbridge  
General Counsel

*L. Karen Harrison*

By: L. Karen Harrison  
Senior Counsel, Legal Division

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