California
Fair Political
Practices Commission

SUPERSEDED
(see attached memo)

August 23, 1988

D. Barton Doyle
General Counsel
California Building Industry Assoc. of So. Calif., Inc.
1571 Beverly Boulevard
Los Angeles, California 90026

Re: Your Request for Advice
Our File No. I-88-202

Dear Mr. Doyle:

You have written on behalf of your client, the Building Industry Association of Southern California, Inc. You have requested our advice regarding whether expenses incurred in connection with a pre-election challenge to a ballot measure must be reported as campaign expenditures under the Political Reform Act (the "Act").[1] Your letter seeks general guidance as to future actions; consequently, we treat your request as one for informal assistance.[2]

QUESTION

Are expenses incurred in connection with a pre-election court challenge to the substantive validity (i.e., constitutionality) of a ballot measure, as opposed to its procedural validity, reportable under the campaign disclosure provisions of the Act?

1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

2/ Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

CONCLUSION

A pre-election court challenge to the substantive validity of a ballot measure is aimed at having the measure judicially removed from the ballot. Costs incurred in connection with such litigation are reported as "expenditures" under the Act's campaign disclosure requirements.

FACTS

You have provided the following facts in your letter requesting advice, your follow-up letter of June 15, and in our telephone conversation of August 11. The Building Industry Association of Southern California, Inc. (the "Association") is an ongoing trade association. It has in the past established a non-profit, tax-exempt litigation foundation. The foundation receives donations from various members of the building industry and other interested persons to support litigation efforts of interest to the industry.

On March 1, the Orange County Registrar of Voters certified an initiative measure to the board of supervisors. The board directed that the measure be placed on the June 7 ballot. The general purpose of the measure was to regulate and control future real property development and growth within unincorporated areas of the county.

On March 3, the Association filed an action in the superior court challenging the validity of the measure. A number of legal issues were raised in the litigation, including allegations of unconstitutionality under the United States Constitution. The litigation brought by the Association was financed through its litigation foundation. The suit made no challenge to the validity of the initiative petitions, their circulation, the signatures obtained, or any other aspect of the ballot qualification process.

However, the suit also argued that the initiative should be invalidated prior to the election on the ground that it did not actually enact legislation, but merely directed the board of supervisors to do so. You feel that this was a basis for pre-election invalidation of a statewide balanced budget initiative in 1984. (American Federation of Labor v. Eu (1984) 36 Cal. 3d 687.)[3]

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[3] The ability of the courts to strike down initiatives through pre-election review on the basis of the measure being unconstitutional was established in Legislature v. Deukmejian (1983) 34 Cal. 3d 658.

You have also cited several other recent cases which you believe are indicative of a trend by the courts to engage in judicial review of ballot measures before they are voted upon. You seek guidance as to how expenditures by your organization on such litigation will be treated with respect to the Political Reform Act's campaign disclosure requirements.

ANALYSIS

The Act requires 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.
>
> Section 81002(a).

In order to effectuate this policy, campaign contributions and expenditures are required to be disclosed. (Section 84100, et seq.) The terms "contribution" and "expenditure" are broadly defined in the Act to assure that moneys expended for the purpose of affecting elections will be disclosed. (Sections 82015 and 82025, respectively.) These definitions are further refined in Regulations 18215 and 18225 (copies enclosed), respectively.

On several occasions the Commission has applied the foregoing definitions to instances where litigation has been undertaken to place a candidate or measure on the ballot or to remove a candidate or measure from the ballot. Legal actions to overturn election results have also been considered.

The leading opinion on the subject is In re Buchanan (1979) 5 FPPC Ops. 14, No. 78-013 (copy enclosed). You are familiar with the opinion and have cited to a footnote in the opinion which you believe applies to your client's situation. The pertinent portion of the opinion reads as follows:

> Although payments for the costs of litigation are not generally thought of as having any connection with political campaigns, in the circumstances presented here and in similar circumstances, the litigation costs are just as key to the success of the campaign as traditional campaign costs such as mailings and media advertisements. When expenditures are made to support litigation aimed at gaining a place on the ballot for a candidate or measure, aimed at keeping a

> candidate or measure off the ballot, or challenging the results of an election, 3/ the expenditures are made for the purpose of influencing the outcome of the election in favor of or against a particular candidate or measure and should be reported. . . .
>
> ---
>
> 3/ Litigation challenging the results of an election must be distinguished from litigation challenging the constitutionality or legality of a statute enacted by an initiative. The only connection litigation in the latter category has to the election process is the coincidental one that the statute in question was enacted by the voters rather than a legislative body. Therefore, such litigation would not give rise to any campaign disclosure obligations.
>
> In re Buchanan, 5 FPPC Ops. at 15-16. (Emphasis added.)

You have noted the reference in footnote three to constitutional challenges to already enacted statutes. The litigation which is the subject of your request involves constitutional challenges to the validity of a measure. Therefore, you have asked whether the litigation comes within this exception to Buchanan's general rule that litigation costs are reportable.

Unlike the situation posited in footnote three of Buchanan, the Association's litigation was brought prior to the election for the express purpose of keeping the measure off the ballot. The exception in footnote three does not apply here. Regardless of the basis for the challenge, the pre-election litigation is aimed at affecting the outcome of the electoral process. Consequently, moneys spent to undertake that challenge must be reported as campaign expenditures. (See Herzig Advice Letter, No. A-87-272 and Swift Advice Letter, No. A-83-096, copies enclosed.)

The reporting requirements which apply in each case depend on the specific facts. The material facts are not presented in your communications. You should recontact Bruce Robeck of the Commission's Technical Assistance and Analysis Division for

assistance in determining the Association's reporting obligations. Mr. Robeck may be reached at (916) 322-5662.

Sincerely,

Diane M. Griffiths
General Counsel

By: Robert E. Leidigh
Counsel, Legal Division

cc: Bruce Robeck

Enclosures

BIA
building industry association
of southern california, inc.

MAY 31 2 08 PM 88

May 26, 1988

Fair Political Practices Commission
428 "J" Street
Sacramento, California 95814

RE: REQUEST FOR ADVICE LETTER

Gentlemen:

Pursuant to Section 83114 of the Government Code, I am writing to request an advice letter on the question of whether the Building Industry Association of Southern California is required to report as political expenditures a pre-election law suit challenge to the substantive legality of a ballot measure.

Our organization received an opinion on this matter on May 2, 1988, prepared by Chuck Bell from the firm of Nielsen, Merksamer, Hodgson, Parrinello and Mueller, which concluded that pre-qualification or pre-election legal activities are generally reportable campaign contributions and expenditures. Specific authority cited included 5 FPPC Opinions 14, Douglas Buchanan FPPC No. 78-013 and Letter to Nestor Synadinos FPPC No. A-87-036.

In a good faith effort to comply with the reporting requirements of the Political Reform Act, we placed a call to Bruce Roebach, Political Reform Consultant at the Commission, on May 23, 1988, to determine the procedures and forms required. Based upon that conversation, we began assembling materials and discussing the need to disclose with our members and their own counsel, several of whom felt there was no duty to disclose in this particular case.

Question Raised

Must the cost of a pre-election lawsuit be disclosed if the basis for the suit is a legal or constitutional challenge to the substance of the ballot measure, rather than a challenge to some aspect of the electoral process such as ballot qualification or the conduct or outcome of the election?

1571 Beverly Boulevard
Los Angeles, CA 90026 (213) 250 8965

An Affiliate of NAHB and the CBIA

Basis for Distinguishing Buchanan

There are two issues raised by the Buchanan opinion, one based on dicta in the language on the opinion and one based on different factual circumstances.

Footnote 3 of the Buchanan opinion (5 FPPC Opinion 16) draws a distinction between reportable and non-reportable post-election expenditures for lawsuit.

> Litigation challenging the results of an election must be distinguished from litigation challenging the constitutionality or legality of a statute enacted by an initiative. The only connection litigation in the latter category has to the election process is the coincidental one that the statute was enacted by the voters rather than a legislative body. Therefore, such litigation would not give rise to any campaign disclosure obligations.

The basic issue presented is why this distinction doesn't also apply to pre-election lawsuits. There are insufficient facts set forth in the Synadinos letter to determine the basis of the legal challenge to that particular initiative. We are not aware of any other advice letters which draw this type of distinction.

The other issue is factual. The facts surrounding the lawsuit which is the subject of this letter are as follows. On March 1, 1988, the Orange County Registrar of Voters certified an initiative measure entitled "Citizens Sensible Growth and Traffic Control Initiative" to the Orange County Board of Supervisors. The Board directed that the measure be placed on the June 7, 1988, ballot. The general purpose of the initiative is to regulate and control future real property development and growth within unincorporated areas of the county.

On March 3, the Building Industry Association of Southern California filed an action in the Orange County Superior Court challenging the validity of the measure. A number of legal issues were raised, based upon the 5th and 14th amendments to the U.S. Constitution as well as state grounds, including the ground that the initiative does not actually enact legislation, but directs the Board of Supervisors to do so. This latter ground was a basis for pre-election invalidation of a state-wide balanced budget initiative in 1984 (American Federation of Labor v. Eu, 36 Cal. 3d 687).

The ability of the courts to strike down initiatives through pre-election review on the basis of being unconstitutional was established in Legislature v. Deukmejian 34 Cal. 3d 658.

No challenge was made to the validity of the petitions, their circulation, the attached signatures or any other aspect of the ballot qualification.

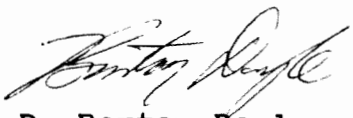
By contrast, in Buchanan, the suit involved an attempt to alter the outcome of a first round county election. The second and third place candidates had tied, and both were entitled under the Election Code to appear on the general election ballot. The plaintiff Jacobsen was seeking to show that defendant Glidden has actually received less votes, the effect of which would be to change the result of the first round election and exclude Glidden from the second round ballot.

This action constituted an interference with the operation of the electoral process, and fits squarely within the scope of Buchanan, which dealt with litigation "aimed at gaining a place on the ballot for a candidate or measure, aimed at keeping a candidate or measure off the ballot, or challenging the results of an election", 5 FPPC Opinions 16. We feel that our situation is different because there was no challenge to the integrity of the ballot process.

The question of whether such activities are considered reportable political expenditures is important to our organization, both because we expect to engage in an increasing number of such suits in the future and because a decision that such activities are reportable will require corporate restructuring, bylaws changes and a substantial redirection of fundraising activities in order to comply with the reporting framework of the Political Reform Act.

Please contact me if I can provide any additional information.

Sincerely,



D. Barton Doyle
General Counsel

DBD:pjp

California
Fair Political
Practices Commission

June 2, 1988

D. Barton Doyle
BIA of Southern California, Inc.
1571 Beverly Boulevard
Los Angeles, CA 90026

Re: File No 88-202

Dear Mr. Doyle:

Your letter received by the Fair Political Practices Commission on May 31, 1988, has been reassigned to Robert Leidigh an attorney in the Legal Division. If you have any questions regarding your letter, you may reach him at (916) 322-5901.

Sincerely,

Diane M. Griffiths
General Counsel

DMG:plh

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

California Fair Political Practices Commission

June 1, 1988

D. Barton Doyle
BIA of Southern California, Inc.
1571 Beverly Blvd.
Los Angeles, CA 90026

Re: 88-202

Dear Mr. Doyle:

Your letter requesting advice under the Political Reform Act was received on May 31, 1988 by the Fair Political Practices Commission. If you have any questions about your advice request, you may contact Kathryn Donovan, an attorney in the Legal Division, directly at (916) 322-5901.

We try to answer all advice requests promptly. Therefore, unless your request poses particularly complex legal questions, or more information is needed, you should expect a response within 21 working days if your request seeks formal written advice. If more information is needed, the person assigned to prepare a response to your request will contact you shortly to advise you as to information needed. If your request is for informal assistance, we will answer it as quickly as we can. (See Commission Regulation 18329 (2 Cal. Code of Regs. Sec. 18329).)

You also should be aware that your letter and our response are public records which may be disclosed to the public upon receipt of a proper request for disclosure.

Very truly yours,

Diane M. Griffiths
General Counsel

DMG:plh

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916) 322-5660

00 aus
new due date
7/20/88

building industry association of southern california, inc.

JUN 21 9 17 AM '88

June 15, 1988

Robert Leidigh, Esq.
Legal Division
California Fair Political Practices Commission
P.O. Box 807
Sacramento, California 95804

RE: FILE NO. 88-202

Dear Mr. Leidigh:

In my request for an advice letter on the question on what types of pre-election legal challenges to initiatives must be reported as political expenditures, I referenced two cases where such challenges have been successful on substantive legal grounds.

Since I prepared the letter, additional research has produced two other reported cases, de Bottari v. City Council 171 CA 3d 1204, 217 Cal Rptr 790 (1985), and Committee of Seven Thousand v. City of Irvine, which was handed down by the California Supreme Court on May 31. Both these cases involve decisions by city councils to place measures on the ballot in the absence of an organized political committee supporting or opposing the measure.

As noted in an article entitled "Ballot Box Zoning" in the May, 1988, issue of California Lawyer, between 1948 and 1983 no measure was omitted from the ballot before it was voted on. The recent C.O.S.T. v. Irvine decision does not discuss whether such challenges are appropriate, but deals solely with the substantive legal issues raised, signaling an increased willingness by the courts to provide a forum for the disclosure and resolution of these types of disputes. Clearly, these types of challenges were not a common practice at the time of the Commission's Buchanan opinion.

Please call if I can provide any additional information.

Respectfully,

D. Barton Doyle
General Counsel

DBD:pp

1571 Beverly Boulevard
[illegible] CA 90026 (213) 250 8965

88-202

building industry association
of southern california, inc.

JUN 20 9 17 AM '88

June 15, 1988

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P.O. Box 807
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General Counsel

DBD:pp

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of southern california, inc.

MAY 31 2 08 PM 88

May 26, 1988

Fair Political Practices Commission
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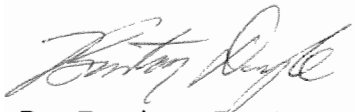

D. Barton Doyle
General Counsel

DBD:pjp

Fair Political Practices Commission

MEMORANDUM

To: West Group

From: Joan Giannetta
Legal Secretary

Subject: Superseded Advice Letters

Date: January 5, 2001

Please add the following to the summary for the *House* Advice Letter, No. A-92-111:

"This letter has been superseded by the *Miller* Advice Letter, No. A-00-242."

Please add the following to the summary for the *Herzig* Advice Letter, No. A-87-272:

"This letter has been superseded in part by the *Sutton* Advice Letter, No. A-00-226, to the extent that it indicates that payments for litigation to keep a measure off of a ballot are made, per se, 'for political purposes'."

Please add the following to the summary for the *Doyle* Advice Letter, No. I-88-202:

"This letter has been superseded in part by the *Sutton* Advice Letter, No. A-00-226, to the extent that it indicates that payments for litigation to keep a measure off of a ballot are made, per se, 'for political purposes'."

Please add the following to the summary for the *Lowe* Advice Letter, No. A-92-407:

"This letter has been superseded in part by the *Sutton* Advice Letter, No. A-00-226, to the extent that it indicates that payments for litigation to keep a measure off of a ballot are made, per se, 'for political purposes'."

Please add the following to the summary for the *Schmidt* Advice Letter, No. A-92-408:

"This letter has been superseded in part by the *Sutton* Advice Letter, No. A-00-226, to the extent that it indicates that payments for litigation to keep a measure off of a ballot are made, per se, 'for political purposes'."

Please add the following to the summary for the *Leidigh* Advice Letter, No. A-99-272:

"This letter has been superseded in part by the *Sutton* Advice Letter, No. A-00-226, with respect to the first and second conditions identified herein as conditions necessary in finding that a payment in support of litigation over an initiative is not a reportable contribution or expenditure."

Thank you for your assistance. Please call me at (916) 322-7770 if you have any questions.