

January 5, 2012

Ms. Heidi K. Abegg
Webster, Chamberlain & Bean, LLP
1747 Pennsylvania Ave., NW Suite 1000
Washington, D.C. 20006

Re: Your Request for Advice
Our file No. A-11-218

Dear Ms. Abegg:

This letter responds to your request for advice on behalf of the Institute for Justice regarding the campaign provisions of the Political Reform Act (the “Act”).¹

FACTS

The Institute for Justice (“IJ”) is a section 501(c)(3) nonprofit corporation organized in the District of Columbia and located in the Commonwealth of Virginia. IJ is a civil liberties public interest law firm that engages in litigation and advocacy in the courts of law and in the court of public opinion. Thus, IJ exists primarily for purposes other than making contributions or expenditures for political purposes and is a multi-purpose organization. IJ itself is funded primarily through donations by like-minded individuals and foundations. The *Abegg* Advice Letter No. A-11-143, addressed the reporting of certain contributions and expenditures being made by IJ on a California ballot measure effort. Following up on that letter, you have several additional questions concerning the reporting of contributions and expenditures of IJ staff time on the ballot measure.

APPLICABLE LAW

As fully discussed in the *Abegg* Advice Letter, No. A-11-143, the Act requires a nonprofit organization that is actively contributing to or spending on California candidates or ballot measures, which qualifies as a committee under Section 82013 and Regulation 18215(b)(1), to file disclosure reports in California.

¹ 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.

Two of your questions concern reporting a salaried IJ employee's personal services as contributions to and expenditures for a California ballot measure effort. Regulation 18423 addresses when an employer's payments for an employee's personal services count as contributions and expenditures under the Act. Regulation 18423 provides:

“(a) The payment of salary, reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10% of his compensated time in any one month rendering services for political purposes is a contribution, as defined in Section 82015 and Regulation 18215, or an expenditure, as defined in Section 82025 and Regulation 18225, by the employer if:

(1) The employee renders services at the request or direction of the employer;

(2) The employee, with consent of the employer, is relieved of any normal working responsibilities related to his employment in order to render the personal services, unless the employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity.

(b) Personal services are rendered for political purposes if they are carried on for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of one or more candidates, or the qualification or passage of any measure, and include but are not limited to:

(1) Personal services received by or made at the behest of a candidate or committee by an employee; and

(2) Hours spent developing or distributing communications that expressly advocate the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure.

(c) The amount of the contribution or expenditure reportable pursuant to this regulation is the pro-rata portion of the gross salary, reimbursement for personal expenses or compensation attributable to the time spent on political activity.”

Regulation 18423 was recently amended to provide that an in-kind contribution of the services of salaried personnel to a committee and the expenditure by the employer are considered to be made on the payroll date of the salaried personnel. A copy of Regulation 18423, as amended, is enclosed.

Therefore, if any employee of IJ spends more than ten percent of his or her compensated time engaged in the activities described in Regulation 18423, his or her salary and expenses attributable to the campaign must be disclosed as a non-monetary contribution from IJ to the ballot measure committee.

QUESTIONS AND ANSWERS

1. *Is IJ required to set up a separate bank account in which to deposit funds and track expenses specifically raised and used for its potential California ballot measure effort?*

As discussed in our previous letter to you, if IJ specifically raises funds for use on a California ballot measure effort, IJ must disclose the full amount and donor of each earmarked contribution in required campaign reports.

Under the Act and regulations, however, IJ is *not required* to set up a separate bank account in which to deposit funds specifically raised for its potential California ballot measure effort and from which to make or track expenditures made for the ballot measure effort.² An organization may wish to set up a separate bank account in which to deposit such funds for administrative convenience; however, an organization may also keep track of such funds within its general account.

2. *If IJ is not required to set up a separate bank account, can IJ restrict or identify funds specifically raised for its potential California effort in accordance with generally accepted accounting principles and release or apply these funds as they are spent on the ballot measure? For example, if 15% of an employee's monthly time is devoted to California political purposes, can IJ "track" the prorated amount of the employee's monthly compensation within its general operating fund?*

Yes, to keep track of funds raised for a California ballot measure effort within its general account, IJ may identify funds specifically raised for the effort in accordance with generally accepted accounting principles and release or apply these funds as they are spent on the California effort, by way of IJ employees working on the ballot measure effort or by other expenditures on the measure.

3. *If an employee spends more than ten percent of his or her time in one month rendering services for political purposes, could IJ "over report" and include within the reported employee's compensated time to any relevant political committee both compensation and any other indirectly allocated costs related to the employee's time spent on the matter (such as rent, insurance, and other overhead costs)?*

IJ's accounting system allocates employee time and other overhead costs to specific matters. Regulation 18423(c) provides that "[t]he amount of the contribution or expenditure

² Because committees that make contributions to California state candidates are subject to contribution limits (Section 85303(a)), a committee that is making contributions to state candidates must make these contributions from a separate "all purpose" bank account under Regulation 18534. Under your facts, however, IJ is not contemplating making contributions to California state candidates, it is making contributions of employee staff time in connection with a ballot measure effort in California. As no contribution limits are applicable in the ballot measure context, no separate bank account is required for funds used to make contributions to California ballot measures.

reportable pursuant to this regulation is the pro-rata portion of the gross salary, reimbursement for personal expenses or compensation attributable to the time spent on political activity.”

Accordingly, if an employee spends more than ten percent of his or her compensated time in one month working on the California effort, IJ should report as an in-kind contribution to the ballot measure committee the employee’s compensated time and the costs of the employee’s travel and expenses to work on the California effort. However, under Regulation 18423, IJ should not allocate and “over-report” as part of the costs of the employee’s time IJ’s general overhead costs such as rent for its office space, insurance, and other overhead costs.³

4. *How is “compensated time in a calendar month” defined? Consider the following: IJ employees are generally salaried and work at least 2,080 hours/year (or 86.67 hours/pay period). There are 24 pay periods per year, or two per calendar month. An IJ employee logs 200 hours for a calendar month, of which 19 were spent working on a California ballot measure campaign. Would that time be considered a nonmonetary contribution to the ballot measure committee?*

Regulation 18423 does not specify how “compensated time in a calendar month” is defined, whether as ten percent of a salaried employee’s required hours or logged hours. However, to calculate compensated time in a calendar month for a salaried employee, we recommend you use the monthly-required work hours for the employee, rather than the actual hours logged. The calculation will be simpler using the salaried employee’s required hours per month because that figure is more constant and you will know what figure you are tracking ten percent of. Also, if several salaried employees are working on the campaign, the required work hours figure will be the same for all of them, rather than having different figures for each employee each month, depending on how many hours they log.

In your example, there are two pay periods per calendar month at IJ, and salaried employees work 86.67 hours per pay period, for a total of 173 required hours per month. But the employee works more than his or her required hours and actually logs 200 hours that month, still receiving his or her regular monthly salary. During that month the employee spends 19 hours working on a California ballot measure campaign. Ten percent of the salaried employee’s 173 required monthly work hours is 17.3, whereas ten percent of the employee’s 200 logged hours is 20. Using the ten percent of the salaried employee’s

³ See *In re Cannon* (1976) 2 FPPC Ops 133 (employee compensation counts but payments for regular business overhead are not reportable expenditures by a member association for the purposes of determining whether the association is a committee, and such payments are also not reportable as an in-kind contribution by the recipient).

With respect to reporting expenditures for a communication, Regulation 18225(c)(3)(A) provides that expenditures include any “additional administrative or overhead costs attributable to the communication,” but “any of the regular on-going business overhead which will be incurred in similar amounts regardless of the communication” is expressly excluded.

required monthly work hours, IJ would be required to report time spent by an employee who spent 19 (17.3 or more) hours working on a California ballot measure campaign.

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

Sincerely,

Zackery P. Morazzini
General Counsel

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HPW:jgl