

March 6, 2014

Kimberly D. Willy, Tax Counsel III  
Administrative Oversight Section (MIC: 82)  
Settlement & Taxpayer Services Division  
Board of Equalization Legal Department  
450 N Street  
Sacramento CA 95814

Re: Your Request for Advice  
**Our File No. A-14-008**

Dear Ms. Willy:

This letter responds to your request for advice behalf of the Board of Equalization (“BOE”) Chairman Jerome E. Horton regarding the mass mailing provisions of the Political Reform Act (the “Act”).<sup>1</sup>

### **QUESTIONS**

(1) Would the mass mailing restrictions in Section 89001 and Regulation 18901 apply to the posters that reference both Mr. Horton and another BOE member?

(2) Would Chairman Horton need to count the 25-30 posters that will be mailed featuring the other BOE member towards the 200 mass mailing limitation?

### **CONCLUSION**

(1) Yes. All the criteria in Regulation 18901 would be met if a total of more than 200 of either poster are delivered by any means to recipients at their residence, place of employment, business or post office box and/or non-governmental business locations.

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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.

(2) No. The reference to Chairman Horton in the other BOE member's poster would fall under the "letterhead" exemption. Therefore, the other BOE member's poster would not count towards Mr. Horton's 200 mass mailing limitation.

## FACTS

The California State Board of Equalization ("BOE") is composed of five elected board members. Four members are elected by district. The current Board Members are Betty T. Yee (First District), George Runner (Second District) Michelle Steel (Third District), and Jerome E. Horton (Fourth District). John Chiang is the California State Controller and is the only member elected at large. He serves on the BOE in an ex officio capacity. The BOE administers more than 30 tax and fee programs that generate revenue to the state. Additionally, the Board hears appeals from various business tax assessments, Franchise Tax Board actions, and public utility assessments.

Voluntary Income Tax Assistance ("VITA") events are being sponsored by the BOE during the 2014 tax season in each of the districts, including in the Fourth District. The VITA events are free to the public to attend, and are designed to provide free income tax assistance to households with income of \$51,567 or less. In promotion of the events, BOE staff prepared a poster, which will include a "tear off" that can be removed by the public. The "tear off" includes the dates, times, and locations where VITA services may be obtained, scheduling information, and a list of the documentation that should be brought to receive free assistance. You have enclosed a copy of Chairman Horton's poster and "tear off" in this request for assistance.

BOE staff intends to *hand-deliver* more than 200 copies of Chairman Horton's poster to local BOE District Offices, city and county government offices, city/county-run libraries and recreation centers, partner public universities/colleges, and local public schools. An additional 199 or fewer copies of the poster will also be mailed to non-governmental business locations in the Fourth BOE District. Once distributed, the intent is for the recipients to hang the poster in a public area within their office/building for members of the public or their membership to see and take the "tear off."

Other BOE Members are also planning and sponsoring VITA events in their own BOE districts. Another unnamed BOE board member<sup>2</sup> also provided staff permission to *mail or hand-deliver* approximately 25- 30 posters to business locations in that member's district. The other BOE member's poster also includes a "tear off," which lists the dates, times and locations where VITA services may be obtained and scheduling information.

In addition to being named in the posters distributed to his constituents in the fourth district, you wish to also include Chairman Horton's name and title in this other BOE member's poster to be distributed outside the Chairman's district. You wish to include the Chairman's

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<sup>2</sup> Please note that because the other BOE member is not named in this request for formal written advice, the advice contained in this letter specifically pertains only to Mr. Horton. (See Regulation 18329(b)(2)(A).)

name and title at the top of the other member's posters. However, you have not indicated that the Chairman will be attending these events outside his district or that the Chairman will be a contact for the constituents in this other district. You have not provided any purpose for inclusion of the Chairman's name.

You included a redacted copy of the other BOE member's poster with your request. The other BOE member's name and photo appeared, before redaction, at the top of the poster near Chairman Horton's name. The other BOE member's name, title and photo are in smaller font and appear underneath Mr. Horton's name and title. Additionally, the events that will be held in the other BOE member's district will involve different volunteer tax preparers, partners and participants than will be used for Chairman Horton's Fourth District VITA events.

### ANALYSIS

#### *Mass Mailing Prohibition:*

Section 89001 of the Act states: "No newsletter or other mass mailing shall be sent at public expense." In *Watson v. California Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, the court described the purpose of Section 89001.

"[T]he initiative as a whole sought to reform the electoral process, at least in part, by prohibiting the public subsidy of political campaigns by incumbent officeholders and their challengers alike. As a means of implementing that goal, the measure imposed restrictions on campaign contributions (see §§ 85200-85202 and 85301-85305), limited honoraria (see § 85310), prohibited candidates for public office from using state revenues in their election campaigns (see § 85300), and circumscribed the use of mass mailings by elected officials (§ 89001).

"Even a cursory review of these provisions makes it manifest that the majority of the electorate who voted for Proposition 73 intended to control the conduct of both incumbents and those seeking public office by restricting the use of public funds. Section 89001 in particular appears to be directed at removing at least some of the substantial advantages enjoyed by incumbent office holders over their challengers. This objective is, of course, in keeping with that portion of the Political Reform Act of 1974 which declares: 'Laws and practices unfairly favoring incumbents should be abolished in order that elections may be conducted more fairly.' (§ 81002, subd. (e).)

"The statute at issue here helps in accomplishing that goal by prohibiting elected officials from using public moneys to perpetuate themselves in public office. The legitimacy of such an objective is made clear by the Supreme Court's observation in *Stanson v. Mott* (1976) 17 Cal.3d 206, 217, [130 Cal.Rptr. 697, 551 P.2d 1]: 'A fundamental precept of this nation's democratic electoral process is that the government may not 'take sides' in election contests or bestow an unfair

advantage on one of several competing factions. A principal danger feared by our country's founders lay in the possibility that the holders of governmental authority would use official power improperly to perpetuate themselves, or their allies, in office [citations]; the selective use of public funds in election campaigns, of course, raises the specter of just such an improper distortion of the democratic electoral process."

Regulation 18901(a) clarifies and elaborates on the requirements of Section 89001 as follows:

"(a) Except as provided in subdivision (b), a mailing is prohibited by section 89001 if all of the following criteria are met:

"(1) Any item sent is delivered, by any means, to the recipient at his or her residence, place of employment or business, or post office box. For purposes of this subdivision (a)(1), the item delivered to the recipient must be a tangible item, such as a videotape, record, or button, or a written document.

"(2) The item sent either:

"(A) Features an elected officer affiliated with the agency which produces or sends the mailing, or

"(B) Includes the name, office, photograph, or other reference to an elected officer affiliated with the agency which produces or sends the mailing, and is prepared or sent in cooperation, consultation, coordination, or concert with the elected officer.

"(3)(A) Any of the costs of distribution is paid for with public moneys; or

"(B) Costs of design, production, and printing exceeding \$50.00 are paid with public moneys, and the design, production, or printing is done with the intent of sending the item other than as permitted by this regulation.

"(4) More than two hundred substantially similar items are sent, in a single calendar month, excluding any item sent in response to an unsolicited request and any item described in subdivision (b)."

With regard to Mr. Horton's posters, all the criteria in Regulation 18901 would be met if more than 200 of the items are delivered by any means to *recipients* at their residence, place of employment, business or post office box *and/or non-governmental business locations*. This is due to the following: (1) the posters feature Mr. Horton prominently on the top of the first page, including his name, office *and* photograph; (2) the mailing would be in cooperation, consultation or in concert with Mr. Horton; (3) the costs of distribution is paid with public monies; (4) more than two hundred substantially similar items will be sent in a single calendar month.

The second poster for the other BOE member includes the member's name, title and a photograph of the member, and thus would *also meet all the criteria in Regulation 18901* if more than 200 of the items are delivered by any means to *recipients* at their residence, place of employment, business or post office box *and/or non-governmental business locations*.

Thus, unless an exception applies, a state or local government agency like BOE cannot send over 200 substantially similar items in a calendar month if the mailing either features or includes the name of an elected officer affiliated with that agency. Because the BOE is paying for production of this distribution and the posters feature two of its elected board members at the top of the first page, the prohibition would therefore apply unless there is an exception.

*Exceptions to Mass Mailing Rules:*

Regulation 18901(b) contains several exceptions. It appears that some of these exceptions may apply to the posters.

As indicated above, the restrictions in Section 89001 generally do not apply to items that are not delivered or mailed to persons at a place other than their residence or place of employment (or P.O. box). Therefore, posters that are dropped off at a government agency or other public place for the public to pick up featuring either Mr. Horton or the other BOE member are not subject to the restrictions under Section 89001.

Government Entity/Official & Intra-Agency Communication:

It is only the posters that are mailed to recipients at their residence, place of employment, business or post office box and/or non-governmental offices that are subject to the restrictions under Section 89001 and Regulation 18901.

Therefore, copies of the posters featuring Mr. Horton or the other BOE member that will be distributed and/or mailed to *BOE offices* and *governmental entities*, need *not* be counted towards the 200 mass mailing limitation because those posters would be considered exempt under the "government entity/official" and "intra-agency communication" exemptions to the mass mailing rules. (Regulation 18901(b)(3) and (b)(4).)

Agency Meeting Exception:

The "agency meeting" exception in Regulation 18901(b)(9)(A)(1) and (A)(2) permit an announcement of any meeting or event to an elected officer's constituents if the meeting is directly related to the elected officer's incumbent governmental duties, which is to be held by the elected officer, and which the elected officer intends to attend, or a meeting for which the agency is providing the use of its facilities, staff or other financial support so long as the announcement *does not include* the elected officer's *photograph or signature*, and there is *only a single mention of the elected officer's name*, unless otherwise permitted under another exception.

This agency meeting exception would *not* apply to either Mr. Horton's posters (which includes more than one reference and includes a photograph), nor to the other BOE member's poster, which also includes the member's name, title and photograph.

Letterhead Exception:

Regulation 18901(b)(1) states that a mass mailing is not prohibited by Section 89001 if:

“(1) Any item in which the elected officer's name appears only in the letterhead or logotype of the stationery, forms (including “For Your Information” or “Compliments of” cards), and envelopes of the agency sending the mailing, or of a committee of the agency, or of the elected officer, or in a roster listing containing the names of all elected officers of the agency. In any such item, the names of all elected officers must appear in the same type size, typeface, type color, and location. Such item may not include the elected officer's photograph, signature, or any other reference to the elected officer, except as specifically permitted in this subdivision (b)(1) or elsewhere in this regulation.”

Pursuant to this exception, the name and title of the elected official may appear once in the letterhead or logotype of the stationery used for these mass mailings. However, unless another exception applies, no further mention of the elected official's name or title is permissible and the official's photograph or signature may not appear in the document. (*Logorio Advice Letter*, No. A-91-185.)

Although the regulation does not specifically define the term “letterhead,” the intent behind the letterhead exception was to let officials send out information to their constituents with basic identifying characteristics so the recipient of the mail could at least identify their elected official. (December 1, 1989 Staff Memorandum to Commission regarding Regulation 18901.) The regulation, however, was specifically intended to continue the prohibition on mailings which “featured” the elected officer. (*Ibid.*) Thus, the regulation carefully limits personal mention of the public official to only necessary basic information such as the official's name and address and identifying information about the agency, such as the agency seal. The regulation specifically prohibits the official from placing his or her photograph, signature or any other personal reference to the official in the letter. (Regulation 18901(b)(1).)

You ask whether the 25-30 posters that will be mailed or delivered to non-governmental entities in the other BOE member's district should be counted towards Mr. Horton's 200 mass mailing limitation.

The other BOE member's poster will detail VITA events in the other BOE member's district. Although Mr. Horton is "featured"<sup>3</sup> quite prominently in the other BOE member's poster by placement of his name on the top of the poster and the larger typeface that "singles out" his name and title, the other BOE member's poster will not be sent to Mr. Horton's constituents, nor will the "meeting" in the other BOE member's district be held by Mr. Horton. In addition, there is no indication that Mr. Horton plans to attend these events outside his district.

The other BOE member's poster contains *one* reference to Mr. Horton, which can conceivably fall under the "letterhead/logotype" exemption under Regulation 18901(b)(1). Accordingly, because we find that the "letterhead" exception applies<sup>4</sup> to the reference to Mr. Horton, the other BOE member's poster will not count towards Mr. Horton's mass mailing limitation.

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

Sincerely,

Zackery P. Morazzini  
General Counsel

By: Emelyn Rodriguez  
Counsel, Legal Division

ER:jgl

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<sup>3</sup> Regulation 18901(c)(2) states a mailing "[f]eatures an elected officer" when the item mailed "includes the elected officer's photograph or signature, or singles out the elected officer by the manner of display of his or her name or office in the layout of the document, such as by headlines, captions, type size, typeface, or type color."

<sup>4</sup> Although we find that the "letterhead" exception to the mass mailing restrictions may apply in this case, we do not reach any conclusions regarding the public purpose of this communication or the appropriate use of public funds for such a mailing.