



STATE OF CALIFORNIA  
FAIR POLITICAL PRACTICES COMMISSION  
428 J Street • Suite 620 • Sacramento, CA 95814-2329  
(916) 322-5660 • Fax (916) 322-0886

May 2, 2017

Brian T. Hildreth  
Bell, McAndrews & Hiltachk, LLP  
455 Capitol Mall, Suite 600  
Sacramento, CA 95814

Re: Your Request for Advice  
Our File No. A-17-072

Dear Mr. Hildreth:

This letter responds to your request for advice regarding the campaign reporting provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTION

Do the proposed public communications described in the facts below contain "express advocacy" that qualify them as either "contributions" or "expenditures" under the Act?

### CONCLUSION

Yes. The communications described below fall within the Act's definition of "express advocacy" in Section 82031 and Regulation 18225. Therefore, expenditures of funds for these communications would be subject to the Act's campaign reporting and advertising disclosure requirements.

### FACTS<sup>2</sup>

Your firm represents the Howard Jarvis Taxpayers Association ("HJTA"), a nonprofit corporation exempt from federal income tax under Internal Revenue Code Section 501(c)(4). It receives financial support from tens of thousands of individuals in varying amounts. And seeks to educate the public about taxation issues at all levels of government. The HJTA has long advocated that voters should be required to approve tax increases and that the information provided to them be fair and accurate. In this regard, HJTA is considering spending a considerable amount of money in connection with several local tax measures in various cities on upcoming ballots throughout the state.

---

<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> The Fair Political Practices Commission is 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.

You ask whether the proposed communications pertaining to the local ballot measures described below would be considered “express advocacy” and thus subject to reporting, disclosure and disclaimers under the Act or “issue advocacy” excluded from campaign reporting and disclaimer rules.

You state that these communications would be made independent of any coordination or cooperation with candidates for elective office or any existing campaign committees. The communications will be made during the 30-day period immediately preceding the date of the election.

Proposed HJTA Multi-Media Campaigns.

HJTA is contemplating a \$1 million multi-media advertising campaign relating to several local tax measures on upcoming ballots in the state. For example, on March 2, 2017, the Seaside City Council approved a ½-cent sales tax increase measure for the June 6, 2017 ballot. The revenues of the proposed tax increase would be used to fund “essential services” such as “police, fire, 9-1-1 response and youth violence prevention projects.” HJTA is contemplating a multi-media campaign to educate and alert Seaside residents about the measure.

HJTA may spend up to \$100,000 on communications related to the tax measure. The advertising campaign will include television spots; internet advertisements; Twitter and Facebook posts; and an informational website. The following are HJTA’s proposed communications relative to the Seaside tax increase measure.

*Proposed Television Spot #1 (15-second spot):*

Superimposed Graphic:  
[NAME], SEASIDE RESIDENT  
Single Mother • Formerly Homeless

Voiceover [In First Person]:  
*“Times have been tough for residents and taxpayers in Seaside. I feel like I am breaking a cycle. We’re back on our feet, now. But I am not sure I can afford to pay more in taxes for food, clothing and shelter. Think Seaside.”*

Superimposed Graphics:  
MEASURE A on June 6 Ballot  
Seaside Sales Tax Initiative  
Higher Taxes. Lasting Costs.  
<http://seaside-tax-increase.hjta.net/>

Full-Screen Graphic:  
Are you ready?  
VOTE JUNE 6

\* \* \*

*Proposed Television Spot #2 (15-second spot):*

**Superimposed Graphic:**  
**[NAME], SEASIDE RESIDENT**  
**Veteran • Taxpayer**

**Voiceover [In First Person]:**  
***“The last few years have been tough for veterans like me. I got laid off and I was homeless for seven years. Now I am back on my feet and taking care of myself. But money is still tight for me ... and every penny counts. Higher taxes? Think Seaside.”***

**Superimposed Graphics:**  
**MEASURE A on June 6 Ballot**  
**Seaside Tax Increase Ballot Measure**  
**Higher Taxes. Lasting Costs.**  
**<http://seaside-tax-increase.hjta.net/>**

**Full-Screen Graphic:**  
**Are you ready?**  
**VOTE JUNE 6**

\* \* \*

**Proposed HJTA Internet/Twitter/Facebook Communications**

HJTA's Twitter feed and Facebook timeline are available for viewing by the general public (including residents in Seaside). HJTA is proposing to promote an ad campaign related to the Seaside tax increase ballot measure featuring the following graphics (and similar) through their Twitter and Facebook accounts. HJTA may also pay to promote these communications through various social media outlets directed specifically to residents of Seaside.

*Proposed internet Twitter/ Facebook communication #1:*

***“From veterans to the needy, #MeasureA will hurt Seaside's most vulnerable.”***

***The City of Seaside Sales Tax Initiative***

***Measure A Hurts:***

***Veterans, Seniors, Families and Kids, Young People, Homeless Adults, The Disabled***

**Higher Taxes. Lasting Costs.**  
**<http://seaside-tax-increase.hjta.net/>**

\* \* \*

*Proposed internet Twitter/ Facebook communication #2:*

***“#Measure A is a tax increase that will cost Seaside residents \$1.9 million in additional taxes every year.***

***The City of Seaside Sales Tax Initiative***

***Measure A Means:***

***35,000 Residents Taxed  
\$1,900,000 Add'l Taxes. Every Year. Forever.***

**Higher Taxes. Lasting Costs.  
<http://seaside-tax-increase.hjta.net/>**

\* \* \*

*Proposed Content on HJTA Internet Website:*

The Association also will dedicate part of its internet website to the Seaside tax increase measure. The website (<http://seaside-tax-increase.hjta.net/>) will promote the theme of “Seaside Tax Increase Ballot Measure” and “Higher Taxes. Lasting Costs.” The website will not ask visitors to expressly cast a “no” (or “yes”) vote on the tax increase measure.

**ANALYSIS**

Section 82031 defines “independent expenditure,” as:

“an expenditure made by any person . . . 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.”

Regulation 18225(b)(2) elaborates on the definition of “express advocacy” in Section 82031, as follows:

“(2) A communication ‘expressly advocates’ the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure if it contains express words of advocacy such as ‘vote for,’ ‘elect,’ ‘support,’ ‘cast your ballot,’ ‘vote against,’ ‘defeat,’ ‘reject,’ ‘sign petitions for’ or, within 60 days prior to an election in which the candidate or measure appears on the ballot, the communication otherwise refers to a clearly identified candidate or measure so that the communication, taken as a whole, unambiguously urges a particular result in an election.

“(A) Except for those communications paid for with public monies by a state or local government agency and subject to Regulation 18420.1, a communication, taken as a whole, unambiguously urges a particular result in an election if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure. A communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure when, taken as a whole, it could only be interpreted by a reasonable person as containing an appeal to vote for or against a specific candidate or measure because:

“1. The electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and

“2. Reasonable minds could not differ as to whether it encourages a vote for or against a clearly identified candidate or measure, or encourages some other kind of action on a legislative, executive or judicial matter or issue.

“(B) The following non-exhaustive examples, referring to candidates or measures on the ballot in an upcoming election, illustrate statements that in most contexts would be ‘susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure:’ ‘Smith’s the One;’ ‘No Measure A;’ ‘Rally ‘round O’Malley;’ ‘Create jobs with Measure X;’ ‘Only Nancy Brown can clean out City Hall;’ ‘Proposition 123 - your last chance to save California;’ ‘Joe Green will earn your trust;’ ‘Bob Boone is an unqualified, special-interest puppet;’ ‘Shirley Hall - bad for California, bad for you.’

“(C) The following non-exhaustive examples, referring to candidates or measures on the ballot in an upcoming election, illustrate statements that would be susceptible of a reasonable interpretation other than as an appeal to vote for or against a specific candidate or measure: “Assembly-member Nancy Brown needs to be tough on criminals. Call her and tell her to stand firm on AB 100;” “Poor children need a home too. Support the Mayor’s stance against more budget cuts;” “Thank you, Supervisor Smith, for continuing to support our farmers.”

“(D) Safe Harbor. A communication does not ‘expressly advocate’ the nomination, election or defeat of a candidate or the qualification, passage or defeat of a measure, within the meaning of this regulation, if:

“1. It does not mention an election, candidacy, political party (unless required by law), opposing candidate, voting by the general public, and does not take a position on the character, qualifications or fitness for office of a candidate or officeholder, or the merits of a ballot measure, and;

“2. it focuses on a legislative, executive or judicial matter or issue, either urging a candidate to take a particular position or action with respect to the

matter or issue, or urging the public to adopt a particular position and to contact the candidate with respect to the matter or issue.

“(E) Rules of Interpretation. If a communication does not qualify for the safe harbor defined above, the Commission shall consider whether the communication has an interpretation other than as an appeal to vote for or against a clearly identified candidate or measure, in order to determine whether, on balance, the communication is susceptible of no reasonable interpretation other than as an appeal to vote for or against a clearly identified candidate or measure.”

As set forth in the regulation, depending on when the communication is made, one of two different tests applies to determine whether the communication contains express advocacy. You have indicated that the communications will be made during the 30-day period immediately preceding the date of the election.

Where, as here, the communication is made within the 60-day period before an election in which the identified candidate appears on the ballot, the applicable test includes not only express words advocating an electoral result, such as “vote against,” “reject,” or similar expressions, but communications which, taken as a whole, unambiguously urge a particular result in the election. (Regulation 18225(b)(2).)

The provisions of Regulation 18225(b)(2)(A) – (E) provide a detailed explanation of the “unambiguously urges” test.

Subparagraph (A) provides that a communication “unambiguously urges” if it is susceptible of no reasonable interpretation other than as an appeal to vote for or against the measure. It further provides that the communication is only “susceptible” to such an interpretation when, taken as a whole, it can only be interpreted by a reasonable person as containing an appeal to vote for or against the measure because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages a vote for or against the measure or encourages some other kind of action on a legislative, executive or judicial matter or issue. In other words, if the communication can be reasonably read to possibly communicate a message other than to vote for or against the measure, there is no express advocacy.

Subdivisions (B) and (C) provide examples of communications that meet and do not meet the “unambiguously urges” test and subdivision (D) provides a “safe harbor,” which describes the types of communications that would definitively not contain express advocacy. For the safe harbor provision to apply, the communication must, among other things, not mention an election or take a position on the or the merits of a ballot measure, focus on a legislative, executive or judicial matter or issue, and either urge the candidate to take a position on the matter or urge the public to contact the candidate on the matter. (Regulation 18225(b)(2)(D)1 and 2.) If the safe harbor provision does not apply, the general test in subparagraph (A) applies. (See Regulation 18225(b)(2)(E).)

None of the communications described above contain express words advocating an electoral result as set forth in Regulation 18225(b)(2). Therefore, we must determine if any of these communications contain express advocacy, as set forth in Regulation 18225(b)(2)(A) – (E).

None of these communications meet the “safe harbor” requirements in Regulation 18225(b)(2)(D). Two of those requirements are that the communication does not mention an election or take a position on the merits of a ballot measure. Two of the communications include the language “VOTE JUNE 6” and all communications include the words “Higher Taxes. Lasting Costs,” a commentary on the merits of the ballot measure and its long-lasting impact. This would reasonably be interpreted by the reader to take a position against Measure A. Therefore, the safe harbor provision would not apply to any of the communications. Therefore, we analyze them to determine if they contain express advocacy under the general provisions of subparagraph (A).

We focus on whether these communications, *taken as a whole*, when broadcast or otherwise disseminated during the 60-day period before Measure A appears on the ballot, can be reasonably interpreted to communicate a message other than a vote for or against the measure. If they can, there is no express advocacy.

The proposed television spots both reference the election, and include the phrase “Higher Taxes. Lasting Costs.” In addition, they include statements by Seaside residents, both of whom are identified as being formerly homeless, and who indicate that paying more money through higher taxes would pose a financial burden, followed by the phrase “Think Seaside.” We believe a reasonable viewer of these communications would conclude that a tax increase would be harmful to Seaside residents, particularly lower-income working people, and that, taken as a whole, encourage the viewer to vote no on the tax increase. In addition, in all of the four above communications, only the upcoming vote on the tax increase measure A is at issue. The communications do not encourage viewers to take some other kind of action on a legislative, executive or judicial matter; they do not encourage viewers to support legislation, contact their elected representative, or take other action as certain issue advocacy communications may do.

Proposed internet Twitter/ Facebook communication #1 includes the language: “From veterans to the needy, #MeasureA will hurt Seaside’s most vulnerable” and “Measure A Hurts” followed by the words “Veterans, Seniors, Families and Kids, Young People, Homeless Adults, The Disabled.” “Higher Taxes. Lasting Costs.”

Proposed internet Twitter/ Facebook communication #2 includes the language: “#MeasureA is a tax increase that will cost Seaside residents \$1.9 million in additional taxes every year.” “The City of Seaside Sales Tax Initiative” “35,000 Residents Taxed” “\$1,900,000 Add’l Taxes. Every Year. Forever.” “Higher Taxes. Lasting Costs.” We believe a reasonable viewer of these communications would conclude that a tax increase would have a negative financial effect on Seaside residents, and that there is no other plausible alternative reading of this information other than encouraging the viewer to vote no on the tax increase.

Accordingly, we conclude the four communications you described fall within the Act’s definition of express advocacy and are subject to the Act’s campaign reporting and advertisement disclaimer requirements.

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

Sincerely,

Hyla P. Wagner  
General Counsel



By: Zachary W. Norton  
Senior Counsel, Legal Division

:jgl