

**Fair Political Practices Commission
Memorandum**

To: Chairman Schnur, Commissioners Garrett, Hodson, Montgomery, and Rotunda

From: Scott Hallabrin, General Counsel

Subject: Discussion of Recommendation by the Chairman's Task Force on the Political Reform Act on Campaign Reporting by Multi-Purpose Organizations

Date: February 8, 2011

Introduction

The final report of the Chairman's Task Force on the Political Reform Act¹ (Government Code Sections 81000 – 91014; hereafter, the "Act"), which the Commission heard at its January 28, 2011 meeting, contained a recommendation that the Commission consider a regulation relating to campaign reporting by "multi-purpose" organizations.

The recommendation in question is set forth in Part II, paragraph 3.E. on page three of the final report and reads as follows:

E. Revise FPPC rules for campaign filings by multi-purpose organizations so that there is a single standard and clear transparency in reporting the donors to the organizations. We recommend that the Commission consider a last-in, first-out ("LIFO") formula for identifying a multi-purpose organization's donors.

The purpose of this memorandum is to discuss this recommendation in more detail, provide the Commission with staff's planned approach to this regulation, and receive any additional guidance the Commission may have on this issue.

Background

This recommendation would govern reporting by all types of non-profit organizations, which in California's campaign finance parlance are called "multi-purpose" organizations because they do not primarily engage in supporting or opposing California candidates or ballot measures. These organizations range from the smallest local PTA to the largest national charitable organization, church, union or chamber of commerce. In advice letters, we have also essentially included in this group federally regulated political committees and would likewise include other out-of-state political committees that might occasionally make contributions or independent expenditures in state or local elections.

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.

The Task Force recommendation is an attempt to obtain accurate identification of donors to these organizations whose funds are used by the organizations to make contributions and independent expenditures to and on state and local candidates and ballot measures. As explained below, staff has several practical concerns on this matter and believes it would be beneficial to obtain additional information from the regulated public before presenting a regulation addressing this issue.

Practical Concerns

Campaign reporting by multi-purpose organizations has been a troublesome issue for the Commission because of difficulties in trying to determine: (1) when these organizations become committees subject to the Act, and (2) which donors to the organization most likely gave the money used for the contribution or independent expenditure.

In many other jurisdictions in the nation, the political activities of nonprofits go unreported. However, as examined in more detail below, the Commission has attempted to obtain contributor information from nonprofit or other multipurpose organizations that are sporadically active in California elections by allowing streamlined reporting covering only the amount of the organization's political activity in California and the actual or presumed sources of funds that comprise its political contributions or expenditures.

1. When does a multi-purpose organization become a committee?

Under the Act, when an organization receives donations of \$1,000 or more in a calendar year for the purpose of making contributions or independent expenditures, it becomes a "recipient committee" and has to report its contributors. But "contributors" may be difficult to identify with multi-purpose organizations because much if not most incoming funds are received for purposes other than making contributions or independent expenditures.

To at least address when these organizations become recipient committees under the Act, the Commission crafted the so-called "one bite" rule, which is in Regulation 18215(b)(1). This rule provides that a multi-purpose organization only receives a contribution (and thus becomes a recipient committee that has to report its contributors) when a donor to the organization knows or has reason to know the donated money will be used to make a contribution or independent expenditure. It further states that a donor is presumed not to "have reason to know" the money will be used to make a contribution or independent expenditure unless the organization has made a contribution or independent expenditure within the four years immediately preceding the donation.²

Thus, when a donor makes a donation, it is a contribution if: (1) the donor knows the donation will be used to make a contribution/independent expenditure, or (2) the organization has made a contribution/independent expenditure sometime during the previous four years. Otherwise, the organization gets to make one free contribution or independent expenditure ("one bite") during each four year period and never becomes a recipient committee. But once it makes the second one, it becomes a recipient committee and has to identify the contributors who paid for that second contribution or independent expenditure.

² This presumption is, of course, not conclusive: it does not shield donors with actual knowledge that their donations will be used to make a contribution or independent expenditure.

2. How does the organization identify its contributors toward its contribution or independent expenditure?

If donors give to the organization either at a fundraiser for, or in response to, a specific request for donations to be used to make contributions or independent expenditures, they “know” the intended use of their donations and should be reported by the organization as contributors.

But practical problems may arise when the organization has not specifically requested donations for campaign purposes, but makes a contribution or independent expenditure constituting the “second bite” under Regulation 18215(b)(1). At that point, the organization must now look back and identify those donors whose donations were likely used for campaign purposes. The question then becomes: which donors and how far back in time must the donors be identified? For example, does the organization count as contributors organizations from which it received grants, which might include government agencies or 501(c)(3) organizations that cannot legally make campaign contributions and, in the case of government agencies, cannot legally make independent expenditures either? Also, if the organization is making a contribution to a candidate for state office, it cannot under the Act receive a contribution for that purpose in excess of \$6,500 in a calendar year. Therefore, the organization cannot use in excess of \$6,500 per calendar year from any one donor to make contributions to state candidates and must arrange its accounting to avoid this. In addition, what if the organization’s funds are partly from member dues and partly from donations? Or what if the organization is a federal political committee, which already reports contributors in a particular way under federal law? How should these be treated? Finally, as mentioned, what time period does the organization use for identifying the contributors?

We currently have a regulation that answers these questions for small multi-purpose committees operating under Sections 501(c)(3) or 501(c)(4) of the Internal Revenue Code and making only independent expenditures. Regulation 18413 was adopted after the U.S. Ninth Circuit Court of Appeals in *California ProLife Council v. Randolph* (507 F.3d 1172 (9th. Cir. 2006)) essentially ruled that requiring small multi-purpose organizations that make occasional independent expenditures to comply with the full scope of the Act’s committee reporting requirements was unconstitutionally burdensome. The regulation addresses the issue of how these organizations can account for contributors by permitting them to use “any reasonable method that accurately reflects the sources of funds for the [independent] expenditure, such as apportioning the donor's payments, or using the last in, first out, accounting method.” (Regulation 18413(d)(2)(C).)

We have no regulation answering these questions for the numerous other types of non-profit organizations. But, we have advised they use a similar approach. Our Multi-Purpose Organization Fact Sheet, which is on the Commission’s web site, states as follows: “If only part of a donor’s payment will be used to make contributions or expenditures, the payment may be apportioned for reporting purposes. The Act does not provide a specific accounting method for determining the amount of each donor’s or member’s payment that must be reported as a contribution. Any reasonable allocation method is appropriate.”

So, both for multi-purpose organizations covered under Regulation 18413 and for any other multi-purpose organizations not covered under the regulation, we currently leave it to them to identify which donors are properly identified as having funded the contribution or independent expenditure.

3. Practical Problems with Attempting to Obtain Accurate Reporting

The Task Force recommendation essentially asks the Commission to take a closer look at its reporting rules for multi-purpose organizations, with particular consideration of using the LIFO accounting method in some form. The staff thinks there should be a regulation delineating an accounting approach for multi-purpose organizations to identify contributors and that the LIFO could perhaps be the preferred method. However, as described above, certain practical issues may arise if the Commission requires only the LIFO approach. For example, the Commission will want to avoid having people who bought things at the recent PTA bake sale³ identified as contributors while large donors who gave prior to the bake sale would go unmentioned, or having a large foundation that makes grants on social welfare issues being identified as supporting or opposing a ballot measure it never heard of.

Because of these and other issues that could arise by requiring a straight LIFO approach, staff thinks, before adopting a regulation requiring this or any version thereof, it would be prudent to reach out to multi-purpose organizations and their representatives to get more information on matters such as: (a) their sources of funding (donations, grants, dues?); (b) their methods of funding (fundraisers for specific purposes, general donations?); (c) their ideas on the best way to accurately reflect the sources of funds for the organization's contributions or independent expenditures; and (d) the particular difficulties they will encounter in application of specific types of accounting methods.

Conclusion and Recommendation

Based on the foregoing, staff recommends that, before drafting and presenting a regulation to the Commission on an accounting method for the reporting of contributors by multi-purpose committees, the staff hold one or more interested persons meetings to gather more information as discussed above.

³ Note, however, that the Commission staff has not applied the "one bite" rule to an organization's earned income, since income is not generally paid or received for a political purpose. (See *Fishburn* Advice Letter, A-06-075.)