



California  
Fair Political  
Practices Commission

**SUPERSEDED**

by: 18215(c)(6)

August 15, 1990

Daniel H. Lowenstein  
UCLA Law School  
405 Hilgard  
Los Angeles, CA 90024

Re: Your Request for Advice  
Our File No. A-90-407

Dear Mr. Lowenstein:

This is in response to your request for advice on behalf of Berman & D'Agostino Campaigns, Inc. with respect to application of the transfer and contribution limit provisions of the Political Reform Act (the "Act").<sup>1</sup>

The following represents interim staff advice. The Commission will be considering regulations on the issues of endorsements and ballot measure expenditures at its September 5, 1990 meeting which could change this advice. Until staff receives further guidance from the Commission at this meeting your clients may rely on the advice provided in this letter. (Section 83114(b).)

QUESTIONS

1. If a candidate ("A") pays for slate mail advertising containing a message of endorsement from an incumbent elected officer who is also a candidate in the same jurisdiction ("C"), has A made a contribution to C?
2. If a committee supporting or opposing a state or local ballot measure ("B") pays for slate mail advertising containing C's message endorsing B's ballot measure position, has B made a contribution to C?

<sup>1</sup> 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.

3. If A pays for a mass mailing consisting of a letter on C's letterhead and over C's signature, the content of which urges the recipient to vote for B's favored position on the ballot measure, has B made a contribution to C?

4. If B pays for a mass mailing consisting of a letter on C's letterhead and over C's signature, the content of which urges the recipient to vote for B's favored position on the ballot measure, has B made a contribution to C?

5. If A pays for a television advertisement in which C is seen and heard urging support for A's candidacy, has A made a contribution to C?

6. If B pays for a television advertisement in which C is seen and heard urging support for B's position on the ballot measure, has B made a contribution to C?

7. In questions 5 and 6, is the answer affected by whether C's appearance makes up a small (e.g., 7 seconds in a 30-second advertisement) or large (e.g., 25 seconds in a 30-second advertisement) percentage of the entire advertisement?

#### CONCLUSIONS

Staff's interim advice, pending further action by the Commission, is as follows:

1. According to the facts assumed, a simple message of endorsement by C in slate mailer advertising paid for by A would not result in a contribution from A to C.

2. An endorsement by C of B's ballot measure position, paid for by B, is not a contribution to C unless the advertising expressly advocates C's election.

3. Unless C's letter contains only a simple message of endorsement, A makes a contribution to C in violation of the transfer prohibitions of the Act if A pays the entire costs of the mailing. A and C must share the costs for the mailing in order to avoid violation of the Act.

4. The answer is the same as number 2.

5. According to the facts assumed, A would be making a contribution to C if A pays for the television advertisement since C appears in the advertisement. A and C must share the costs of the advertisement in order to avoid violation of the Act.

6. The answer is the same as number 2.

7. Our interim advice would not make a distinction based upon the length of the television advertisement.

FACTS

According to the information provided in your letter, Berman & D'Agostino Campaigns, Inc., serves as consultant to a publisher of slate mail, manages election campaigns for federal, state, and local office and for or against ballot measures, and provides political consultant services to elected officers. In these capacities, Berman and D'Agostino foresee issues arising during the upcoming general election campaign concerning situations which have arisen routinely and commonly in the past. To assist Berman and D'Agostino Campaigns, Inc. in dealing with these issues, you have provided a series of generic fact patterns and requested our advice as to whether they would result in contributions and transfers under the Act.

You have asked that we make the following assumptions for purposes of our analysis:

1. A and C are assumed to be candidates for state or local office.
2. C is also an incumbent elected officer.
3. B is assumed to be a committee supporting or opposing a state or local ballot measure.
4. C does not "control" either A's campaign committee or B within the meaning of Section 82016.
5. The communications described in each question are disseminated to voters who reside in jurisdictions within which A and C are candidates and within which the ballot measure supported or opposed by B is being voted upon.
6. It is assumed that C supports and is willing to endorse A's candidacy or B's position on the ballot measure.
7. It is assumed that agents of A or B consult and cooperate with C to the following extent:
  - a. Obtaining C's consent to distribute the endorsement;
  - b. Working with C on the content of the endorsement message; and
  - c. Obtaining C's letterhead, signature, appearance on film or tape and the like.
8. It is assumed that A or B, not C, pays for dissemination of the endorsement message and makes decisions regarding the means, extent and timing of the dissemination. However, C may make suggestions regarding these decisions.

9. The endorsement message expressly urges a vote for A or for B's favored position, but not for C.

10. C is identified by name and by his or her current elective office in each endorsement message. However, there is no allusion to C's current candidacy. The thrust of each message is the voting for A or for B's favored position.

#### ANALYSIS

The Act defines a contribution, in part, as follows:

"Contribution" means a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes.

An expenditure made at the behest of a candidate, committee or elected officer is a contribution to the candidate, committee or elected officer unless full and adequate consideration is received for making the expenditure....

Section 82015 (Emphasis added.)

A payment is "made at the behest" of a candidate if it is made "under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of a candidate...." (Regulation 18215(b), copy enclosed.)

The Act limits the size of contributions to candidates and committees depending upon who is making or receiving a contribution and the time made. (See Sections 85301 - 85303 and 85305.) Contributions to candidates by a person are limited to \$1,000 per fiscal year; by political committees to \$2,500 per fiscal year; and by broad based committees to \$5,000 per fiscal year. Contributions to ballot measure committees are not limited in size, even if the ballot measure committee is controlled by a candidate. (Hiltachk Advice Letter No. 89-533, copy enclosed.)

The Act prohibits candidates from transferring contributions to other candidates or their controlled committees. (Section 85304.) However, because of a current federal court injunction,<sup>2</sup> a candidate may transfer campaign funds between his or her own controlled committees.

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<sup>2</sup> Service Employees International Union, AFL-CIO, CLC, et al. v. FPCC, Case No. CIVS 89-0433 LKK-JFM, U.S. District Court, Eastern District of California.

Based upon the foregoing, staff has been conservatively advising that endorsements disseminated by a candidate-endorsee which feature a candidate-endorser and which are disseminated to the endorser's constituents, benefit both endorser and endorsee. Therefore, both endorser and endorsee must share in the costs of the communication in order to avoid an in-kind contribution to the endorser.

At the August 7, 1990 Commission meeting, the Commission was provided an opportunity to review advice provided by staff with respect to endorsements. The issue was presented in two separate contexts. Initially, the Commission reviewed candidate to candidate endorsements. The Commission then reviewed candidate endorsements in the context of communications disseminated by controlled and non-controlled ballot measure committees.

With respect to the issue of candidate to candidate endorsements, the Commission directed staff to draft a regulation to define the contexts in which an endorsement would and would not constitute a contribution to the endorsing candidate. Pending further guidance from the Commission, staff is conservatively advising that a simple statement of endorsement, which does not mention the endorser's status as a candidate and which does not include the endorser's photograph, does not constitute a contribution to the endorsing candidate, even though the communication is disseminated in the endorsing candidate's jurisdiction at the expense of the endorsed candidate. As mentioned, this is interim advice only and is subject to change by further action of the Commission.

The Commission's position as to expenditures by ballot measure committees is currently dependent upon whether the ballot measure committee is controlled by a candidate.

Expenditures by candidate-controlled ballot measure committees which benefit the controlling candidate are to be governed by pending regulation 18538.<sup>3</sup> Since the regulation is still pending, and since your letter addresses only the issue of a ballot measure committee's expenditures with respect to a non-controlling candidate, we do not discuss the anticipated application of the pending regulation.

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<sup>3</sup> At its August meeting, the Commission voted to adopt a version of proposed regulation 18538 substantially in the form proposed by staff, but directed staff to limit application of the regulation to candidate-controlled committees. Staff is in the process of clarifying the regulation to conform to the Commission's directive. The revised regulation will be distributed for a 15-day comment period and will not be deemed adopted prior to that time.

The Commission directed staff to draft a second regulation to clarify whether expenditures by non-controlled ballot measure committees may result in contributions to candidates. Pending further action by the Commission, staff's interim advice is that an expenditure for a communication by a non-controlled ballot measure committee, at the behest of a candidate, is not a contribution to that candidate unless the communication expressly advocates the election of the candidate at whose behest the communication is made. As mentioned, this also is interim advice and subject to change by further action of the Commission.

Based upon the foregoing, we now respond to your questions as follows:

1. If A pays for slate mail advertising containing C's message of endorsement of A, has A made a contribution to C?

By "slate mail advertising," we assume that you refer to payments to have a candidate included on a commercial slate mailer. We have previously advised that a candidate may make payments to a slate mailer organization for the purpose of having his or her name included on the slate mailer. The payment will not be considered a contribution to other candidates listed on the mailer provided that the total amount paid by the candidate does not exceed the reasonable production and mailing costs for sending the mailer within his or her district. (Van Winkle Advice Letter, Nos. A-90-319 and A-90-320, copy enclosed.)

With respect to including C's endorsement of A, we assume that C's name and message of endorsement are not placed on the slate in a manner which expressly advocates C's election. Based upon these assumptions, staff's interim advice is that a simple message of endorsement is not a contribution to the endorsing candidate even though paid for by the endorsed candidate.

2. If B pays for slate mail advertising containing C's message endorsing B's ballot measure position, has B made a contribution to C?

According to the assumed facts, ballot measure committee B is not controlled by candidate C. Therefore, our interim advice would be that any payment by B for dissemination of the communication is not a contribution to C unless the communication expressly advocates C's election.

In the case of a committee formed to support or oppose a state ballot measure, Section 29795 of the Elections Code imposes a trust on the funds of the committee and specifies the types of expenditures which may be made from those funds. You should consult the Secretary of State's Office with respect to interpretation of Elections Code Section 29795.

3. If A pays for a mass mailing consisting of a letter on C's letterhead and over C's signature, the content of which urges the recipient to vote for A, has A made a contribution to C?

According to the assumed facts, A is paying for a communication which will be sent to voters in a jurisdiction in which C is a candidate. C is identified by name and current elective office. C's name appears in the letterhead and the communication is in the form of a letter over C's signature. C has consented to the distribution, has worked with A on the content of the message, and C has cooperated with A in obtaining C's letterhead and signature.

If the "letter" consists only of a simple statement of support for the endorsed candidate (A) by endorsing candidate C, we would advise that it's dissemination at A's expense is not a contribution to C. However, if the letter consists of anything more than a simple statement of support, we would advise that A makes an in-kind contribution to C if A pays for the entire cost of the mailing. The mailing is sent in cooperation and consultation with C, so that it is sent at C's behest. The mailing identifies C and carries a personal message by C which is sent to persons who are eligible to vote in the jurisdiction in which C is a candidate. Under our current analysis, such a communication benefits C's candidacy sufficiently to constitute a contribution from A to C, and thus violates the Act's transfer prohibition (Section 85304).

Since A and C are both candidates, in order to avoid a transfer in violation of Section 85304, A and C must split the costs of the mailing, with each paying his or her one-half of the costs directly to the vendors.

4. If B pays for a mass mailing consisting of a letter on C's letterhead and over C's signature, the content of which urges the recipient to vote for B's favored position on the ballot measure, has B made a contribution to C?

The answer to this question is the same as the answer to question 2. B has not made a contribution to C unless the letter expressly advocates C's election.

5. If A pays for a television advertisement in which C is seen and heard urging support for A's candidacy, has A made a contribution to C?

Since C is seen in the television advertisement, we do not believe that the advertisement would be covered by the limited endorsement exception provided in our interim advice. We would therefore advise that A makes an in-kind contribution to C if A pays for the entire cost of the advertisement. The advertisement is made in cooperation and consultation with C, so that it is at C's behest. The advertisement identifies C, includes C's appearance, and carries a personal message by C which is broadcast

to persons who are eligible to vote in the jurisdiction in which C is a candidate. Such a communication benefits C's candidacy.

Since A and C are both candidates, in order to avoid a transfer in violation of Section 85304, A and C must split the costs of the communication, with each paying his or her one-half of the costs directly to the vendors.

6. If B pays for a television advertisement in which C is seen and heard urging support for B's position on the ballot measure, has B made a contribution to C?

The answer to this question is the same as the answer to question 2. B has not made a contribution to C unless the advertisement expressly advocates C's election.

7. In questions 5 and 6, is the answer affected by whether C's appearance makes up a small (e.g., 7 seconds in a 30-second advertisement) or large (e.g., 25 seconds in a 30-second advertisement) percentage of the entire advertisement?

Our interim advice is not affected by the length of C's appearance in the advertisement. However, it is possible that the Commission may issue advice in the future that makes a distinction based upon the length of C's appearance in the television advertisement.

As stated previously, this letter is based upon interim staff advice. The Commission will be reviewing regulations concerning the issue of endorsements as contributions to the endorsing candidate at its September 5, 1990 meeting.

If you have any questions regarding this matter, please contact me at (916) 322-5901.

Sincerely,

Scott Hallabrin  
Acting General Counsel



By: Margaret W. Ellison  
Counsel, Legal Division

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Enclosures