



# California Fair Political Practices Commission

May 3, 1991

Honorable Henry J. Mello  
State Senator, 17th Senate District  
State Capitol, Room 5108  
Sacramento, California 95814

Re: Your Request for Advice  
Our File No. A-91-150

Dear Senator Mello:

This is in response to your letter requesting advice as a California Senator with respect to the Henry J. Mello Foundation under the provisions of the Political Reform Act (the "Act").<sup>1</sup> The time available to respond to your request was extended pursuant to a telephone conversation with your office on March 27, 1991, so that we could provide a more comprehensive analysis of the various issues raised in your letter.

Please note that nothing in this letter should be construed to evaluate any conduct that has already taken place. In addition, this letter is based on the facts presented to us. In rendering advice, the Commission does not act as the finder of fact. (In re Ogelsby (1975) 1 FPPC Ops. 71, copy enclosed.)

## QUESTION

Does your involvement with the Henry J. Mello Foundation, a nonprofit organization, result in disclosure responsibilities under the Act?

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<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.

CONCLUSION

Your involvement with the Henry J. Mello Foundation will be reportable under the Act if any of the following occur:

a. You receive "income" or "gifts" from the foundation, including gifts of travel. Such income and gifts must be reported on your Statement of Economic Interests.

b. You make use of the donations to the foundation for your personal purposes. Such gifts will be treated as gifts to you and must be reported on your Statement of Economic Interests.

c. The foundation is your controlled committee. The foundation is your controlled committee if all of the following occur:

1. You, your agent, or any committee you control, exercises significant influence over the actions and decisions of the foundation or acts jointly with the foundation in making expenditures; and,

2. The foundation receives contributions of \$1,000 or more in a calendar year; and,

3. The foundation receives or expends funds for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or the qualification or passage of any measure, or the organization makes contributions to candidates or their controlled committees.

Where the foundation is your controlled committee, not only are the foundation's expenditures and contributions received reportable, but the existence of the committee may be a violation of the campaign provisions of the Act because a candidate may have only one controlled committee for each campaign.

FACTS

You have established a nonprofit foundation named the "Henry J. Mello Foundation" (the "foundation"). The foundation is a certified nonprofit corporation formed consistent with the requirements of Section 501(c)(3) of the Internal Revenue Service. The foundation is currently valued at \$100,000.

You stated that you have transferred campaign funds to the foundation. However, you also stated that neither you nor members of your immediate family benefit financially from the foundation's funds.

### ANALYSIS

A candidate's involvement with a nonprofit entity can become disclosable under many circumstances. Your letter only asked whether your interest in the foundation was a disclosable investment. However, we have expanded this response so that other issues which may concern you are also discussed.

#### I. Statement of Economic Interest

The Political Reform Act was enacted by the people of the State of California by initiative in 1974. The purpose for the disclosure and disqualification provisions of the Act was to ensure that public officials, whether elected or appointed, would perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).)

Thus, under the Act, every public official must disclose all his or her economic interests that could foreseeably be affected by the exercise of the official's duties. (Sections 81002(c), 87200-87313.) As a public official<sup>2</sup> you are required to disclose certain statutorily specified investments, real property interests, sources of income and sources of gifts.

##### A. Investments

Section 82034 provides in a pertinent part:

"Investment" means any financial interest in or security issued by a business entity, including but not limited to common stock, preferred stock, rights, warrants, options, debt instruments and any partnership or other ownership interest owned directly, indirectly or beneficially by the public official, or other filer, or his or her immediate family, if the business entity or any parent, subsidiary or otherwise related business entity has an interest in real property in the jurisdiction, or does business or plans to do business in the jurisdiction, or has done business within the jurisdiction at any time during the two years prior to the time any statement or other action is required under this title.

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<sup>2</sup> "Public official" is defined in Section 82048.

Section 82005 defines "business entity" as follows:

"Business entity" means any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association.

(Emphasis added.)

This definition excludes organizations that are not operated for profit. (See, Strauss Advice Letter, No. A-90-251, copy enclosed.) Thus, your involvement with the foundation as it is presently constituted cannot be an "investment" as defined in the Act.

#### B. Gifts and Income

Public officials must disclose the source of any gift over \$50 and the source of income of \$250 or more. However, where persons donate money to the foundation at your behest, the donations will not be gifts to you provided they are given to the foundation for its use. (In re Nejedly (1976) 2 FPPC Ops. 46; Bremberg Advice Letter, No. A-89-445, copies enclosed.) This interpretation would be different if the foundation was acting as an agent for you or a mere intermediary for personal gifts to you or your family. (In re Nejedly, supra, at 47.)

Moreover, if in the future you receive "income" or "gifts" from the foundation, as defined in the Act, you will have reporting obligations with respect to the income and gifts. Please note that a gift of travel from a nonprofit entity may still be a disclosable gift under the Act. (Section 82028; Quan Advice Letter, No. A-89-182; Riddle Advice Letter, No. A-89-200, copies enclosed.)

Finally, the personal use provisions of the Act restrict the foundation from providing gifts or income to you or your family. Under the Act, your campaign funds may not be transferred to any nonprofit entity where a substantial part of the proceeds will have a material financial effect on you or your immediate family. (Section 89515; Statham Advice Letter, No. I-89-690; Weiss Advice Letter, No. A-91-158, copies enclosed.) Staff is currently advising that a payment of \$250 or more is an appropriate standard for what constitutes a material financial effect. (Weiss Advice Letter, supra; Spain Advice Letter, I-90-410, copy enclosed.) Thus, a payment of \$250 or more to you or your family constitutes a material financial effect within the meaning of Section 89515.

## II. Campaign Contributions

### A. Controlled Committees

The Act also requires the disclosure of campaign activities of candidates including expenditures made and contributions received. (Sections 84100, et seq.) Generally, a payment received by a candidate is a contribution unless it is clear from surrounding circumstances that it was received for personal purposes unrelated to his or her candidacy or status as an officeholder. (Regulation 18215, copy enclosed.) Thus, payments to any organization controlled by a candidate could be considered contributions.

When sufficient contributions are received, the organization would qualify as a committee. (Thompson Advice Letter, No. A-88-487, copy enclosed.) A "committee" is defined as follows:

"Committee" means any person or combination of persons who directly or indirectly does any of the following:

(a) Receives contributions totaling one thousand dollars (\$1,000) or more in a calendar year.

(b) Makes independent expenditures totaling one thousand dollars (\$1,000) or more in a calendar year; or

(c) Makes contributions totaling ten thousand dollars (\$10,000) or more in a calendar year to or at the behest of candidates or committees.

A person or combination of persons that becomes a committee shall retain its status as a committee until such time as that status is terminated pursuant to Section § 84214.

### Section 82013.

If the foundation does qualify as a committee it may be a "controlled committee" pursuant to Section 82016. Section 82016 defines "controlled committee" as follows:

"Controlled committee" means a committee which is controlled directly or indirectly by a candidate or state measure proponent or which acts jointly with a candidate, controlled committee or state measure proponent in connection with the making of

expenditures. A candidate or state measure proponent controls a committee if he, his agent or any other committee he controls has a significant influence on the actions or decisions of the committee.

Thus, Section 82016 describes two ways in which the foundation may become your controlled committee. First, you might exert significant influence on the actions or decisions of the foundation. For example, where candidates are voting members of a committee's leadership, we have said they are presumed to be controlling candidates since they exercise significant influence on the actions or decisions of the foundation. (Ferguson Advice Letter, No. A-86-044, copy enclosed.)

Second, you may act in concert with the foundation in making campaign expenditures. By coordinating the expenditures, you could, in effect, bolster your campaign for office through the foundation. Under such circumstances, the foundation would also be your controlled committee. (Section 82025 and Regulation 18225, define "expenditure," copy enclosed.)

Please note that Section 85201, added by Proposition 73, provides that all contributions or loans made to a candidate, or to the candidate's controlled committee shall be deposited in a single campaign bank account. The Commission has interpreted this to mean that a candidate for elective office may have only one campaign bank account and one controlled committee for each campaign. (Regulation 18521; Riddle Advice Letter, No. A-88-409, copies enclosed.)<sup>3</sup>

#### B. Nonprofit Organizations

Regulation 18217 (copy enclosed) provides an alternate definition of "controlled committee" applicable to organizations which are characterized as exempt organizations under Section 501 of the Internal Revenue Code, provided they are not formed or existing primarily for political purposes. (Regulation 18217(f).) Regulation 18217 provides:

(a) A nonprofit organization, as defined in subdivision (f), shall be considered a controlled committee, if both of the following apply:

(1) A candidate, his or her agent, or any committee he or she controls, exercises

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<sup>3</sup> The Commission has created a narrow exception with respect to candidate controlled ballot measure committees which is not an issue in this letter. (Olson Advice Letter, No. A-89-363, copy enclosed.)

any committee he or she controls, exercises significant influence over the actions and decisions of the organization, or acts jointly with the organization in connection with the making of expenditures.

(2) The organization qualifies as a committee under Government Code Section 82013(a), and the organization is operated for political purposes. For purposes of this regulation, an organization is "operated for political purposes" if either of the following applies:

(A) The organization receives or expends funds for the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or the qualification or passage of any measure.

(B) The organization makes contributions to candidates or their controlled committees.

The purpose of subdivision (a)(2) of Regulation 18217 is to avoid classifying a nonpolitical nonprofit organization as a controlled committee merely because donations are received at the behest of candidates.

Regulation 18217 also provides that a candidate or multiple candidates may set up an organization as a nonprofit corporation without the corporation becoming an additional controlled committee of the candidate if certain criteria are met.

(b) For purposes of subdivision (a)(1), a nonprofit organization which is tax-exempt under Section 501 of the Internal Revenue Code, and which is not an organization described in Section 527 of the Internal Revenue Code, is presumed not to be significantly influenced by a candidate, his or her agent, or any committee he or she controls, if the organization complies with all of the factors set forth below:

(1) The candidate is not substantially involved in the day-to-day operations of the organization, and the organization is

controlled by a board of directors with 3 or more members, two-thirds of whom are not:

(A) Candidates;

(B) Agents, campaign staff, employees, or persons otherwise under the control of a candidate; or

(C) Brothers, sisters, parents, children, spouses, brothers-in-law, sisters-in-law, sons-in-law, daughters-in-law, mothers-in-law or fathers-in-law of a board member who is a candidate.

(2) The name of the organization does not include the name of the candidate. For purposes of this subdivision (b)(2) the term "name of the candidate" means the candidate's first and last name or some other unambiguous reference to the candidate.

(c) For purposes of subdivision (a)(2), a nonprofit organization which is tax-exempt under Section 501 of the Internal Revenue Code, and which is not an organization described in Section 527 of the Internal Revenue Code, is presumed not to be operated for political purposes if the organization complies with all of the factors set forth below:

(1) The organization does not make contributions to candidates.

(2) The name of the organization does not include the name of the candidate. For purposes of this subdivision (c)(2) the term "name of the candidate" means the candidate's first and last name or some other unambiguous reference to the candidate.

(3) The organization does not spend funds in excess of the amount permitted under Section 501(h) of the Internal Revenue Code to influence or attempt to influence legislative action.

(4) The organization does not spend funds to influence or attempt to influence the qualification or passage of any measure in an amount sufficient to qualify the organization as a committee under Section 82013 of the Government Code.

(5) This subdivision (c) shall not be construed to prevent the organization from forming a separate and independent political committee which is not controlled by any person described in subdivision (b)(1)(A)-(C).

Thus, candidates may establish and control a nonprofit organization without it becoming an additional campaign committee under the Act, provided it is formed consistent with Regulation 18217. (See, Statham Advice Letter, No. I-90-246, copy enclosed.) Further, as stated above, candidates may donate campaign funds to the controlled nonprofit organization provided: (1) the nonprofit organization is a bona fide charitable, educational, civic, religious or similar tax-exempt organization; (2) the expenditure is reasonably related to a political, legislative or governmental purpose; and, (3) the expenditure will not have a material financial effect on the candidate, his or her immediate family, or the candidate's campaign treasurer. (Section 89515.)

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

Sincerely,

Scott Hallabrin  
Acting General Counsel

*John Wallace* by JSA  
By: John W. Wallace  
Counsel, Legal Division

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Enclosures