

RAVI MEHTA  
CHAIRMAN



FAIR POLITICAL PRACTICES COMMISSION

October 7, 1996

Kenneth C. Scheidig  
General Counsel  
Alameda-Contra Costa Transit  
Office of the General Counsel  
1600 Franklin Street  
Oakland, California 94612

Re: Your Request for Advice  
Our File No. A-96-262

Dear Mr. Scheidig:

This is in response to your request for advice regarding your reporting obligations under the Political Reform Act (the "Act").<sup>1</sup>

QUESTION

May the Alameda-Contra Costa Transit District, without incurring any reporting obligations under the Act, prepare and place on its buses a flyer on Measure JJ including: (1) the text of the measure, (2) the county counsel's analysis of the measure, (3) the ballot argument submitted in support of the measure, (4) the text of the resolution authorizing the measure to be placed on the ballot, and (5) a memorandum prepared by the district outlining the district's potential use of the revenue<sup>2</sup> to be generated if the measure is passed by the voters?

CONCLUSION

At least some portion of the district's payments to create and print the flyer would constitute reportable "expenditures," if the ballot argument submitted in support of the measure is included in the flyer.

FACTS

Alameda Contra Costa Transit (the "district") is a special district created in 1955 under the provisions of Public Utilities

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<sup>1</sup> Gov. Code Sections 81000-91015. Commission regulations appear at Title 2, Sections 18000-18995 of the California Code of Regs.

Code Section 24501 et seq. Public Utilities Code Section 25892.1 permits the district to levy a uniform tax on real property within the district's boundaries, subject to voter approval. Due to limited revenue sources, AC Transit's Board of Directors has placed a ballot measure (Measure JJ) on the November 5, 1996, ballot. This measure will require a two-thirds favorable vote to be effective. The measure, if passed, would impose a tax of \$8.50 per parcel per year for a period of six years on real property within the district's boundaries and would generate approximately \$3 million in additional revenue for the district. The board of directors has identified potential uses for the monies, as well as indicated its intent to establish an oversight committee to review the expenditure of these funds.

The district is interested in providing factual information to the public regarding Measure JJ. One mechanism the district is considering is the placement of a flyer produced by the district on the district's buses. It is contemplated that the flyer will contain: (1) the text of Measure JJ, (2) the text of Resolution No. 957 authorizing the election, (3) the board of director's statement of intention regarding the use of the tax and the establishment of an oversight committee, (4) the county counsel's impartial analysis, and (5) the argument for the measure, signed, among others, by the president of the board of directors. No argument against the measure was filed.

#### APPLICABLE LAW

The Act provides that a person<sup>2</sup> who makes payments for a political purpose will have campaign disclosure obligations when certain monetary thresholds are reached.<sup>3</sup> (Sections 82013; 82015; 82025.) A political purpose includes payments intended to influence the actions of the voters for or against the qualification or passage of any ballot measure. Such payments are generally classified as either contributions or expenditures. (See Regulations 18215 and 18225.) A direct payment of money to a committee is a contribution, whereas a payment for a brochure with a political

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<sup>2</sup> "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

<sup>3</sup> A person qualifies as a committee if, in a calendar year, it receives contributions in the amount of \$1,000 or more, makes independent expenditures of \$1,000 or more, or makes contributions in the amount of \$10,000 or more to, or at the behest of, candidates or committees. (Section 82013.)

purpose may be either a contribution<sup>4</sup> or an independent expenditure.

#### DISCUSSION

The facts provided in your letter do not indicate that the district plans to solicit and receive contributions. We also assume that you are not coordinating the brochure with a committee supporting Measure JJ. (If you were, the payments might be considered reportable contributions to that committee.) Therefore, the issue is whether the brochure, or any part thereof, is an "independent expenditure" that must be reported when the \$1,000 threshold is reached.

An "independent expenditure" is defined in pertinent part as:

"[A]n expenditure<sup>5</sup> made by any person in connection with a communication which expressly advocates 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." (Section 82031.)

Since the brochure is a communication that clearly identifies Measure JJ, the only remaining question is whether it expressly advocates the passage of the special tax.

Regulation 18225 defines express advocacy as:

"A communication 'expressly advocates' 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 otherwise refers to a ... measure so that the communication, taken as a whole, unambiguously urges a particular result in an election." (Regulation 18225(b)(2).)

Express advocacy is not limited to communications using certain key phrases. (Spellman Advice Letter, No. A-94-026.) Regulation 18225 also provides that express advocacy includes speech that "taken as a whole, unambiguously urges a particular result in an

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<sup>4</sup> The brochure would be a contribution if it were printed and mailed "at the behest of" a candidate or ballot measure committee. (See Regulation 18215(b)(3); 18225.7.)

<sup>5</sup> "Expenditure" means, in pertinent part, a monetary or nonmonetary payment, unless it is clear from the surrounding circumstances that it is not made for political purposes. (Section 82025.)

election." (See Federal Election Commission v. Furgatch (9th Cir. 1987) 807 F.2d 857, 864.)<sup>6</sup>

In your letter, you state that the purpose of the flyer is to provide information concerning Measure JJ. The posted material will include a reproduction of the ballot argument submitted in support of Measure JJ. That argument states, in relevant part, "Please support this important measure." No argument or other information in opposition to the measure will be included.

Taking the brochure as a whole, it is our opinion that inclusion of the ballot argument in favor of Measure JJ would tilt the communication into clear advocacy in favor of Measure JJ. However, if the ballot argument is not included, the district would not incur any reporting obligations. We believe that the balance of the communication is merely informative.<sup>7</sup>

If you have any questions, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell  
General Counsel



By: Luisa Menchaca  
Senior Commission Counsel

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<sup>6</sup> The court in Furgatch broke down the express advocacy standard into three components: (1) the communication is express "if its message is unmistakable and unambiguous, suggestive of only one plausible meaning"; (2) the communication advocates "if it presents a clear plea for action, and thus speech that is merely informative is not covered by the Act"; and (3) "it must be clear what action is advocated." It is important to note that the intent of the speaker is not determinative; what the readers or viewers understand is equally significant. (Furgatch, supra, at 863.)

<sup>7</sup> Please note that the standard discussed in this letter for reporting an expenditure is distinct from the standard for misuse of public funds. (See, e.g., Stanson v. Mott (1976) 17 Cal.3d 206.)