RAVI MEHTA
CHAIRMAN

FAIR POLITICAL PRACTICES COMMISSION

April 2, 1997

Mark Shaw
Administrative Director
California League of Conservation Voters
965 Mission Street, Suite 625
San Francisco, California 94103

Re: Your Request for Advice
Our File No. A-97-066

Dear Mr. Shaw:

This letter is a response to your request on behalf of the California League of Conservation Voters (the League) for advice regarding the provisions of the Political Reform Act (the "Act").[1]

I. QUESTIONS

1. May that portion of a contribution to the League's independent expenditure committee which exceeds the $250 per person per election contribution limit to committees that make independent expenditures of $1,000 or more supporting or opposing candidates be subsequently transferred to the League's corporate account, thereby avoiding a violation of the contribution limit?
2. Alternatively, may the League deposit contributions of more than $250 in the League's corporate account, and subsequently transfer not more than $250 to the independent expenditure committee account?
3. If the League asks a candidate to respond to questionnaires and to submit to an interview, will subsequent expenditures in support of the candidate or in opposition to his/her opponent be considered to be contributions? Does the interview, in and of itself, qualify as coordination or consultation which makes independent expenditures impossible?

[1] Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

II. CONCLUSIONS

1. No. If the amount of the contribution exceeds the applicable contribution limit, a violation may be avoided by returning the entire contribution. However, a violation may not be avoided by merely transferring the excess to another account.
2. Yes, the League may deposit contributions of more than $250 in the League's corporate account, and subsequently transfer not more than $250 to the independent expenditure committee account if that part of the overall contribution intended for the committee is properly "earmarked," and if the costs incurred by the League in processing and forwarding the contribution component to the committee are properly accounted for and reported.
3. If the requirements of regulation 18225.7(c) are satisfied, expenditures in support of a candidate or in opposition to his/her opponent are not considered to be contributions just because the candidate goes through an interview process such as the one you describe.

III. FACTS

The League, which maintains an independent expenditure committee, continuously raises money from its members. Some of these contributions may exceed $250.

As part of its candidate evaluation process, the League asks candidates to respond to questionnaires, and interviews those candidates who respond to the questionnaires. In the interviews, questions on the following subjects are typically asked:

a. Which organizations and individuals support the candidate, and which support his/her opponent.
b. Which campaign activities, such as precinct walking, fund-raising, voter communications (mail, radio, television), the candidate plans to use.
c. Polling information.
d. Which consultants the candidate plans to hire.
e. How much money the candidate has raised, and how he/she plans to spend it.
f. Which issues the candidate plans to emphasize in his/her campaign, and whether the candidate will campaign on the environment in particular.
g. What the candidate perceives to be his/her own strengths as compared to his/her opponent.

IV. ANALYSIS

A. Questions 1. and 2.

Proposition 208 added several new rules regarding independent expenditures to the Act. Among them is subdivision (b) of section 85500,
provides that any committee[2] that makes independent expenditures[3] of $1,000 or more in support of or opposition to a candidate shall not accept any contribution of more than $250 per election. Note that the operative restriction applies to the committee receiving the contribution.

A monetary contribution is "received" by a committee on the date that the committee (or its agent) obtains possession or control of the check or other negotiable instrument by which the contribution is made. (Regulation 18421.1(c).)[4] Thus, from the perspective of your independent expenditure committee, the member contribution is received when the committee obtains possession or control of the check. You may not avoid a violation of the contribution limits by transferring the amount of the contribution in excess of $250 to another account. However, the contribution is not deemed accepted (and therefore there will be no violation) if the contribution is not cashed, negotiated, or deposited, and is returned to the contributor before the closing date of the campaign statement on which it would otherwise be reported. (Section 84211(q).)

The League may deposit a contribution check in its corporate account and subsequently transfer not more than $250 to the independent expenditure committee account under certain circumstances. First, and most importantly, the contributor must, at the time he or she originally makes the contribution, unambiguously intend that a specific portion of the contribution be forwarded to the independent expenditure committee. In the vernacular, this is known as "earmarking." The properly earmarked component of the overall contribution is considered to be from the contributor to the committee, even though it "passed through" the League.

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[2] See section 82013 for the Act's definition of "committee."

[3] In a nutshell, an "expenditure" is a payment for political purposes. (Section 82025.) An "independent expenditure" is an "expenditure made by any person in connection with a communication which expressly advocates" for or against a particular candidate or measure which is not "made to or at the behest of" an affected candidate or committee. (Section 82031.)

[4] If the League is the sponsor of the independent expenditure committee (see section 82048.7), and the contributions to the independent expenditure committee are collected by the League by means of membership dues, then regulation 18421.1(d) determines when a contribution is received by the sponsored committee.

Second, the transaction costs incurred by the League in processing and forwarding the component of the contribution intended for the independent expenditure committee must be accounted for and reported. Unless the League is a sponsor of the independent expenditure committee (see section 82048.7),[5] these transaction costs may represent an "in-kind" contribution from the League to the independent expenditure committee to whatever extent they are unreimbursed. (Section 82015; Regulation 18215.)

B. Question 3.

Under section 85500(c), added by Proposition 208, any contributor of more than $100 to a particular candidate is considered to be acting in concert with the candidate. Such a contributor may not make contributions to and independent expenditures in connection with that candidate which, when combined, exceed the contribution limits set out in section 85301 et seq. (Section 85500(c).) Subdivision (d) of section 85500 goes on to specify a number of conditions under which expenditures are not considered to be independent. Thus, expenditures which satisfy these conditions are considered to be contributions, not independent expenditures.

The operative words in subdivision (d)(1)-(3) are "cooperation," "consultation," "in concert with," "at the request or suggestion of," and "arrangement, coordination, or direction." (Section 85500(d)(1)-(3).)[6] The principle behind this language is essentially identical to the principle behind the existing rules about expenditures "made at the behest" of a candidate. It has long been the rule that expenditures "made at the behest of" of a candidate are considered to be contributions to the candidate, no matter how the parties characterize the expenditure. (Section 82015.) Indeed, the Commission's existing regulation clarifies when an expenditure is "made at

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[5] Providing that certain conditions are met, the support that a sponsor provides to its sponsored committee is not characterized as a "contribution" in the first place. Emergency regulation 18215(c)(16) *excludes* from the definition of contribution,

> "A payment by a sponsoring organization for the establishment and administration of a sponsored committee, provided such payments are reported. Any monetary payment made under this subdivision to the sponsored committee shall be made by separate instrument. A 'sponsoring organization' may be any person (see Gov't Code [sec.] 82047) except a candidate or other individual (see Gov't Code [sec.] 82048.7). 'Establishment and administration' means the cost of office space, phones, salaries, utilities, supplies, legal and accounting fees, and other expenses incurred in setting up and running a sponsored committee." See the *Krausse* Advice Letter, No. A-96-349.

Emergency regulation 18215(c)(16) has been challenged in state court. Although the Commission and staff are confident of its validity, it is nonetheless possible that it may be invalidated by the court. *If emergency regulation 18215(c)(16) is invalidated, this advice will necessarily be subject to modification.* Also, emergency regulation 18215(c)(16) expires, by operation of law, on May 29, 1997. We expect the Commission to address this issue on May 1, 1997.

[6] The remaining provision, subdivision (d)(4), pertains to expenditures by candidates or officeholders to other candidates or officeholders, and is not relevant to your request for advice.

the behest of" a candidate (regulation 18225.7) uses virtually the same verbs as new subdivisions 85500(d)(1)-(3).[7]

We discern nothing in subdivisions 85500(d)(1)-(3) which indicates that the voters intended to change substantively this distinction between independent expenditure and contribution. Therefore, we interpret the new language in subdivisions 85500(d)(1)-(3) to be a restatement of the principle that expenditures "made at the behest" a candidate are contributions, not independent expenditures. Consequently, regulation 18225.7 clarifies when an expenditure is "made at the behest of" a candidate, and is therefore a contribution. The regulation also clarifies new subdivisions 85500(d)(1)-(3).

Subdivision (c) of regulation 18225.7 provides,

> "(c) An expenditure is not made at the behest of a candidate or committee merely when:
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> "(1) A person interviews a candidate on issues affecting the expending person, provided that prior to making a subsequent expenditure, that person has not communicated with the candidate or the candidate's agents concerning the expenditure; or
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> (2) The expending person has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate's agents."

As a general matter, the evaluation and interview process described in your advice request does not, in and of itself, qualify as cooperation, consultation, or coordination which automatically results in the characterization of any subsequent expenditures in support of that candidate (or in opposition to his/her opponent) as contributions. This conclusion assumes that there is no communication subsequent to the interview and prior to the expenditure.

Turning to the particular topics enumerated in your advice request, each is permissible (i.e., within the scope of regulation 18225.7(c)) as long as the focus remains on the issues, rather than possible coordination between your organization and the candidate. You should be aware that several of the topics are "close to the line." For example, one of the proposed topics is "how much money the candidate has raised, and how much he/she plans to spend." A person considering an independent expenditure connected to a candidate could reasonably want to know this information. Presumably the person has only so much money to spend on independent expenditures, and could reasonably want to spend that money on a relatively "poorer" favored candidate rather than on a relative "richer" favored candidate. However, note the critical difference between asking a candidate *how much* he/she has raised and how he/she plans to spend it and asking the candidate *how* he/she plans to spend it. The latter question facilitates

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[7] "... under the control or at the direction of, in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of." (Regulation 18225.7(a).)

coordinated expenditures between the candidate and the person.

This same reasoning applies to another proposed topic, "what campaign activities, such as precinct walking, fund-raising, voter communications (mail, radio, television), the candidate plans." Again, a person considering an independent expenditure supporting a candidate could reasonably want to know this information. The person may reasonably want to support only those candidates who run a particular kind of campaign (e.g., one who raises or does not raise money from certain groups, or who avoids negative campaign advertising). However, this information could also easily be used to coordinate expenditures by the candidate and the person. Because we are hesitant to give you advice which unnecessarily impedes your ability to communicate with the candidates and to participate in the political process fully, we do not advise you that such questions are *per se* improper. However, you should be aware that this is a close call. Whether questions such as this lead to coordinated expenditures which would be characterized as contributions to the candidate is a case-by-case determination, depending upon the precise question(s) asked and the subsequent conduct of the parties.

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

Sincerely,

Steven G. Churchwell
General Counsel

By: John Vergelli
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