Ravi Mehta
Chairman

FAIR POLITICAL PRACTICES COMMISSION

May 21, 1997

Lance H. Olson
Olson, Hagel, Fong, Leidigh,
Waters and Fishburn
Plaza Towers
555 Capitol Mall, Suite 1425
Sacramento, California 95814

**Re: Your Request for Advice
Our File No. A-97-229**

Dear Mr. Olson:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").[1] You represent Phil Angelides, a candidate for statewide office in 1998, and ask the following questions on his behalf.

QUESTIONS AND CONCLUSIONS

1. *What expenditures count against the voluntary expenditure ceiling established by Proposition 208, i.e., what is the definition of the term "qualified campaign expenditure" as used in Section 85403?*

"Qualified campaign expenditure" means any expenditure by a candidate or a candidate's controlled committee made with a view of influencing the voters for or against a candidate in an election campaign. Section 85403 is a narrow provision governing timing and attribution of campaign expenditures whose "ceilings" are established in Section 85400, where interpretation of Article 4 must begin. Section 85400 refers only to "campaign expenditures," and plainly covers by that term all Schedule E expenditures by a committee.[2] We believe that the term "*qualified* campaign expenditures," used in Section 85403, is functionally synonymous with the "campaign expenditures" referenced elsewhere in Article 4. The word "qualified" may be a relic

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

[2] Section 82025 defines "expenditure" in broad terms that are further considered in Regulation 18225. These definitions are incorporated into the provisions of Proposition 208. (Section 85202.)

of an early draft of Proposition 208, derived from Section 107.06 of the 1991 COGEL Model Law for Campaign Finance, Ethics, and Lobbying Regulation, one of the sources employed in the drafting of Proposition 208. Whatever its origin, the current text of the law makes it clear that the "qualified campaign expenditures" referenced in Section 85403 are not to be distinguished from the "campaign expenditures" discussed elsewhere in Article 4.

2. Are expenditures made for compliance with Proposition 208 and other provisions of the Political Reform Act (e.g., campaign reporting), and other applicable laws (e.g., tax and employment laws) excluded from the definition of "qualified campaign expenditure"?

No. In the *Johnson* Advice Letter, No. I-97-138, we determined that payment of legally required taxes on interest earned on a bank account would count towards the candidate's voluntary spending limit. There is nothing in the Act suggesting an intent to exempt from the definition of "qualified campaign expenditures" any costs incurred in compliance with any law.

3. Are fundraising expenses excluded from the definition of "qualified campaign expenditure"?

No. In our recent *Bovee* Advice Letter, No. I-97-075, we concluded that funds raised to pay fundraising expenses, including the expenses of hiring a professional fundraiser, are funds that count against the contribution limits applicable to the election for which they were raised. We also indicated that, when spent, such funds would count against applicable voluntary expenditure limits.

4. How are in-kind contributions of goods or services treated for purposes of the expenditure ceiling?

In the *Johnson* Advice Letter, *supra*, we observed that the Commission does not currently require in-kind contributions to be reported as both contributions and expenditures. As a result, the *use* of an in-kind contribution is not presently regarded as an expenditure counting against voluntary expenditure limits. We anticipate, however, that the Commission will adopt a regulation in late 1997 that will treat in-kind contributions as both contributions and also as expenditures subject to the voluntary expenditure limits.

5. If your client on June 2, 1997, agrees to accept voluntary expenditure limits for the upcoming primary election, and an opponent in the same race does not agree to accept these limits, is it permissible for your client to amend his Expenditure Ceiling Statement to rescind his agreement, assuming he refunds any contributions raised under Section 85402 in excess of the limits set by Section 85301?

No. Section 85401 is unambiguous on this subject, requiring that the candidate agree or decline to abide by the voluntary expenditure limits "*before* accepting any contributions." Section 85401 permits a candidate to "change his mind" in only one instance, outlined in subdivision (c), where a candidate who declined to accept the limits in a primary or special

election may within 14 days following that election file a statement accepting the limits for the subsequent general or runoff election, if he or she had not exceeded the limits in the prior election. The provisions of the statute, which *did* consider and provide for a "change of heart" in one instance, create a presumption that no additional, unstated reversals were contemplated.

6. If your client on June 2, 1997, files a statement declining to accept the voluntary expenditure limits for the primary election and commences raising contributions under the limits of Section 85301, may he subsequently (but prior to the primary) amend his Expenditure Ceiling Statement and begin raising funds under the limits of Section 85402, assuming he has not already exceeded the voluntary expenditure limits?

No. As we have noted in answer to your previous question, the statute permits a change of position on the voluntary expenditure limits only *after* the primary election has been held.

7. If your client agrees on June 2, 1997, to accept the voluntary expenditure limits for the primary election, and abides by those limits throughout the primary campaign, is it permissible for him after the primary to amend his Expenditure Ceiling Statement declining to accept the limits for the general election?

Again, the answer is "no." A candidate who had *declined* to accept the limits is permitted under Section 85401(c) to file a statement *accepting* the voluntary expenditure limits under the circumstances of your question. The statute does not, however, sanction a corresponding opportunity for a candidate to *revoke* his or her initial agreement. The silence of the statute on this point reflects an intent to encourage reconsideration *in favor of* accepting the limits, an intent that would be ill served by reading into the statute an opportunity to move in the other direction.

8. Is it permissible for your client to contribute to his own campaign (including goods and services) or to loan funds within the limits of Section 85307, prior to June 2, 1997?

Yes. The "blackout" period of Section 85305 does not apply to contributions (including loans) from a candidate to his or her own campaign. (*Moll* Advice Letter, No. A-97-013.)

9. Is it permissible for your client to solicit and receive contributions for both the primary and the general election prior to the primary election?

Yes. Your client may solicit and receive contributions for both the primary and the general election on or after June 2, 1997. (*Abdelnour* Advice Letter, No. A-97-183.)

10. *Are there any special rules or disclaimers which are required in connection with such solicitations?*

The new contribution limits of Proposition 208 state that "no person ... shall make to any candidate or the candidate's controlled committee ... and no such candidate or the candidate's controlled committee shall accept from any person a contribution or contributions totaling more

than" the specific limit for each election. (Sections 85301 and 85402.) While Proposition 208 does not specifically prohibit *solicitation* of contributions in excess of the limits, it is a violation for a person to make a contribution or for a candidate to accept a contribution in excess of the applicable limits. Under Proposition 208, contribution limits vary for different jurisdictions, and many contributors will be unaware of the limit that applies to a particular candidate's election. Although candidates are not currently required by regulation to do so, we have advised that they place a notice similar to that set forth in Regulation 18532 on their fundraising materials. (*Ackerman* Advice Letter, No. A-97-065.) The notice should state the specific contribution limit that applies to the candidate's election. Commission staff may propose amendments to Regulation 18532 in the future to *require* notice of Proposition 208's contribution limits to appear on candidates' fundraising solicitations.

In addition, we have advised that persons making combined contributions to primary and general elections must expressly earmark in writing the amount attributable to each election, if the total amount of the contribution exceeds the contribution limits of either election. (*Abdelnour* Advice Letter, *supra.*)

11. Are there any restrictions on the expenditure of general election contributions prior to the primary election?

Such expenditures must be allocated to the appropriate election under the rules provided in Section 85403. Pre-primary expenditures of general election contributions are permissible if they are early expenditures made *as part of the general election campaign*. This would include expenditures for limited general election purposes, such as prepayments for goods and services to be used in that campaign, or to cover a proportionate share of expenses incurred during the primary campaign but attributable to both campaigns, e.g., the purchase of computer equipment to be used in both campaigns.

12. If your client wins the primary and has campaign funds left over, may he use those funds in connection with the general election?

If a contribution was designated in writing for the primary by the contributor, and some or all of it was not spent during the primary, the candidate must return it to the contributor or obtain a redesignation in writing from the contributor for another election. Please note that the use of primary funds in a general election may be affected by the surplus funds rules. (See Section 89519.) The Commission will have to determine whether those rules preempt redesignations by the contributor from one election to another.

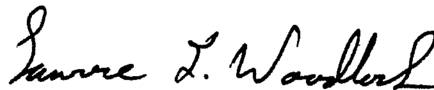
13. What is the definition of "representative" as used in Section 85702? Specifically, does the term include professional fundraisers hired by the candidate, employees and independent contractors of the candidate's committee, and the chair and members of the candidate's finance committee?

A "representative" within the meaning of Section 85702 is a person who receives contributions on behalf of a candidate, but whose role as "intermediary" in such transactions does not result in attribution of the contributions to *both* the intermediary *and* the contributor. We have clarified the application of the term "representative" in our *King* Advice Letter, No. A-97-127, noting that "representative" includes officers, employees or agents of the candidate or the candidate's committee receiving compensation for their services, and/or the principal officers listed on a statement of organization pursuant to Section 84102(c). All of the persons listed in your question seem to be included within the term "representative," with the possible exception of the chair and members of the candidate's finance committee. If these persons serve for compensation or are "principal officers" listed on the committee's statement of organization, they too would be regarded as "representatives" of the candidate under Section 85702.

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

Sincerely,

Steven G. Churchwell
General Counsel



By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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