FAIR POLITICAL PRACTICES COMMISSION
P.O. Box 807 • 428 J Street • Sacramento, CA 95812-0807
(916) 322-5660 • Fax (916) 322-0886

December 13, 2000

James R. Sutton, Esq.
Nielsen, Merksamer, Parrinello,
Mueller & Naylor, LLP
591 Redwood Highway, Suite 4000
Mill Valley, CA 94941

Re: Your Request for Advice
Our File No. A-00-226

Dear Mr. Sutton:

This letter is in response to your request for advice on behalf of yourself and Taxpayers for a Legal Initiative ("TLI") regarding the campaign reporting provisions of the Political Reform Act (the "Act").[1]

QUESTIONS

1. Does TLI qualify as a committee for purposes of the Act's reporting requirements?

2. Are payments received by TLI in connection with pre-election litigation challenging a Director of Election's decision (to place an initiative on the November ballot instead of the December ballot) "for political purposes"?

CONCLUSIONS

1. TLI will qualify as a committee with reporting obligations if TLI received payments of $1,000 or more in a calendar year "for political purposes."

[1] Government Code sections 81000 – 91015. Commission regulations appear at Title 2, sections 18109-18996, of the California Code of Regulations.

2. Payments made in connection with this litigation are not made "for political purposes" and will not trigger the Act's reporting requirements.

FACTS

In July 2000, proponents of a proposed amendment to the San Francisco Planning Code began circulating an initiative petition. The proponents acknowledged that they had already missed the possibility of qualifying the initiative for the November 7, 2000 San Francisco general election, and that they were instead attempting to place it on a special election ballot in December 2000. The proponents ultimately filed their petitions with the San Francisco Department of Elections in August 2000, after the deadline specified in San Francisco law for qualifying initiatives for the November ballot.

The San Francisco Director of Elections nevertheless placed the initiative ("Proposition L") on the November ballot, citing a San Francisco Charter provision which allows for consolidating special elections with regularly scheduled elections, when the special election would fall within a certain number of days of the regular election. The Director interpreted this Charter provision to allow the City to consolidate a special election with a general election scheduled before or after the dates allowed for the special election.

Soon after, your law firm filed a suit challenging the Director's interpretation of the law (*Wilson* v. *Fado*, Case No. 314739), which asked the court to take Proposition L off of the November 2000 ballot and place it on an appropriately-scheduled special election ballot. The plaintiff and others agreed to pay your legal fees. Subsequently, your law firm set up the TLI committee, with you acting as its treasurer.

TLI will not receive any money from the lawsuit's supporters who will instead make payments directly to your law firm. Additionally, TLI has not spent any money to oppose the qualification of Proposition L, to challenge any materials in the ballot pamphlet, or take any actions designed to influence San Francisco voters to oppose Proposition L.

ANALYSIS

The Act imposes filing requirements with respect to the campaign activities of candidates for elective office and persons that qualify as "committees" under the Act. (Section 84200 et seq.) Section 82013 defines a "committee" as a 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 "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. (Section 82015(a).) Based on these definitions, TLI is a "committee" with reporting obligations if TLI received payments of $1,000 or more in a calendar year for political purposes.

Under the Act, a "payment" is a payment, distribution, transfer, loan, advance, deposit, gift, or other rendering of money, property, services, or anything else of value whether tangible or intangible. (Section 82044.) Although paid to your firm and not to TLI, monetary amounts paid to your law firm for legal services rendered to TLI confer a quantifiable benefit to TLI by settling TLI's debt for legal services. Such debt settlement constitutes a rendering of value to TLI and, therefore, a "payment" under the Act. Additionally, monetary amounts to the law firm made before legal services were rendered also constitute "payments" to TLI since, as advances, they similarly render a valuable benefit to TLI. If such payments to TLI were made for political purposes, then the payments constitute "contributions." (Section 82015.)[2]

A payment, in relevant part, is made for political purposes if it is:

> "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 candidates, or the qualification or passage of any measure..." (Regulation 18215(a)(1).)

Whether a payment is for political purposes is to be determined "from the surrounding circumstances."[3] (Section 82015.) Therefore, the question is one of fact eluding a rule of universal application and must be decided on a case-by-case basis. (*Thirteen Committee* v. *Ilene Weinreb* (1985) 168 Cal.App.3d 528, interpreting parallel language presented in Section 82025.)

The court in *Yes on Measure A* v. *City of Lake Forest*, 60 Cal.App.4th 620, addressed the question of whether payments in connection with certain pre-election litigation were made for a political purpose making them reportable expenditures as

---

[2] This conclusion is consistent with previous Commission advice that when other persons make payments directly to a law firm representing a public official in litigation related to the official's status as an officeholder, the public official has received reportable contributions if the official's obligations for the legal fees are reduced as a result of the payments. (*Roberti* Advice Letter, No. I-91-292.)

[3] This letter issued in response to your request for advice discusses only circumstances to which Regulations 18215(a)(1) and 18225(a)(1) are applicable. This letter does not address Regulations 18215(a)(2) or 18225(a)(2).

defined in Regulation 18225. The language beginning "for the purpose of influencing or attempting to influence the action of the voters..." used in Regulation 18225 (defining "expenditure") is identical to the language used in Regulation 18215 (defining "contribution"). (Regulations 18215(a)(1) and 18225(a)(1).) Therefore, we apply the "expenditure" analysis presented by *Lake Forest* to your situation.

In *Lake Forest*, the court adopted a legal analysis that required identification of the litigation's purpose in order to determine whether payments in connection with the litigation were designed to influence the voters for or against a measure. In that case, a measure, which qualified for the November general election, proposed to amend the Orange County general plan to permit development of a commercial airport on land occupied by the Marine Corps upon the base's closure. Alleging that the proposed general plan amendment violated various state planning laws, the city filed a pre-election challenge to keep the measure off the ballot. The court agreed with a previous conclusion of the Commission opinion *In re Buchanan*, (1979) 5 FPPC Op. 14, that a city's pre-election challenge to a ballot measure based on a claim that it is unconstitutional or illegal is not an attempt to influence the electorate. The court determined that the sole purpose of the litigation was to test the legal validity of the measure as drafted, that is, whether the measure was properly placed on the ballot. The court found that the litigation was similar to actions taken by a public entity and its employees during the drafting stage of an initiative and concluded that the audience at which these activities are directed is not the electorate per se. As a result, reporting requirements did not attach.

Noting a distinction in the *Buchanan* opinion between different types of litigation, the court stated:

> Footnote 3 of the Commission's [*Buchanan*] opinion specifically distinguishes between "[l]itigation challenging the results of an election" and "litigation challenging the constitutionality or legality of a statute enacted by an initiative." Pointing out that the only connection between litigation challenging the constitutionality or legality of a measure and the election process is a "coincidental one," the Commission [in its opinion] stated that "such litigation would not give rise to any campaign disclosure obligations."

The court in *Lake Forest* found that payments in connection with the pre-election legal challenge to the constitutionality or legality of a measure were not for political purposes and not reportable. In doing so, the court expanded *Buchanan*'s conclusion regarding such legal challenges against enacted statutes to also apply to legal challenges against measures not yet approved by the voters. Consequently, this holding appears to contravene a number of Commission advice letters issued subsequent to *Buchanan* in which Commission staff determined that *Buchanan*'s conclusion applied only to already

enacted measures.[4] As a result, the fact that this type of legal challenge occurs *before* an election is no longer dispositive as to whether a payment is for a political purpose.

Therefore, to determine whether TLI is subject to the Act's campaign disclosure obligations, we examine whether the legal challenge to the determination by the Director of Elections is litigation challenging the constitutionality or legality of a measure. You have provided facts indicating that the purpose of the litigation involving Proposition L was to challenge the Director of Elections' determination to place this initiative on the November ballot instead of the December ballot. Because this purpose is analogous to the purpose of the city in *Lake Forest* in challenging whether a measure was properly placed on the ballot, we conclude that this litigation challenged the legality of Proposition L as a November ballot measure. Specifically, because proper placement of Proposition L falls under the purview of the Director of Elections and is clearly an action taken by a public entity and its employees prior to the measure's final placement on the ballot, we conclude that a legal challenge to the Director of Elections' determination is litigation aimed at influencing the action of the city. It is not designed to influence the action of the voters for or against the qualification or passage of the measure. Consequently, payments made in connection with this litigation are not made for political purposes and will not trigger the Act's reporting requirements.

Commission staff has previously stated that one condition necessary in finding that a payment for litigation was not for political purposes is that "the challenge must be to the constitutionality or the initiative or its conflict with other laws, as opposed to whether the initiative should be on the ballot or is otherwise proper under the Elections Code." (*Leidigh* Advice Letter, No. A-99-272.) That advice is contrary to our conclusion here, where a determination regarding election procedure was challenged. Therefore, the portion of the *Leidigh* letter which identifies this condition is hereby superceded.

Advice issued in this letter to you pertains only to the type of situation about which you have inquired. This letter does not address all the circumstances where a payment in support of litigation over a measure is for political purposes. Because reportability will depend on the particular facts of an individual case, we cannot formulate a rule which will cover all cases. (*In re Buchanan, supra.*)

---

[4] These letters include the *Herzig* Advice Letter, No. A-87-272; *Doyle* Advice Letter, No. I-88-202; *Schmidt* Advice Letter, No. A-92-408; and the *Lowe* Advice Letter, No. A-92-407. They are superceded to the extent that they conclude that litigation challenging the constitutionality or legality of a measure in an impending election, as opposed to an already enacted statute, is, per se, for political purposes. The *Leidigh* Advice Letter, No. A-99-272, which states that a payment in support of litigation over an initiative is not reportable if three conditions are met, is superceded with regard to its second condition addressing post-election litigation. (The first condition of the *Leidigh* letter is addressed further in our analysis; the third condition of the letter pertains to circumstances beyond the scope of this letter and is not addressed herein.) Please note that this letter does not attempt to evaluate whether these superceded letters would have reached the same conclusions in absence of the more narrow interpretation of *Buchanan*'s footnote by Commission staff.

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

Sincerely,

Sue Ellen Wooldridge
General Counsel

By: Natalie Bocanegra
Staff Counsel, Legal Division

SW:NB:jg
I:\AdviceLtrs\00226.doc