



FAIR POLITICAL PRACTICES COMMISSION

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February 9, 2004

James Stevens
Franchise Tax Board
Political Reform Audit Program
Post Office Box 651
Sacramento, CA 95812-0651

**Re: Your Request for Advice
Our File No. A-03-187**

Dear Mr. Stevens:

This letter is in response to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹ Our advice is based on the facts presented in your request; the Fair Political Practices Commission ("Commission") does not act as a finder of fact when it provides advice. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

QUESTIONS

1. Are the committees which supported or opposed the gubernatorial recall initiative subject to mandatory audits under section 90001 of the Act?
2. Are the committees which supported or opposed any of the gubernatorial candidates in the recall initiative subject to mandatory audits under sections 90001(b) or (d) of the Act?
3. (a) Are all of Gray Davis's controlled committees subject to mandatory audits under section 90001 of the Act or only his controlled committee formed to oppose the gubernatorial recall initiative?

¹ Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

(b) If an audit of his controlled committee formed to oppose the gubernatorial recall initiative is required, is the audit period to commence on January 1, 2003, or on the date that the committee was formed?

CONCLUSIONS

1. Yes. These are ballot measure committees subject to mandatory audit under section 90001(g) of the Act.

2. No. Candidate-controlled committees and committees formed primarily to support or oppose candidates for statewide office are subject to mandatory audits only in connection with direct primary or direct general elections.

3. (a) Only former Governor Davis's controlled committee formed specifically to oppose the gubernatorial recall initiative is subject to mandatory audit in connection with the recall (section 90001(g)).² His remaining controlled committee is subject to discretionary audit under section 90003.

(b) The period covered by the mandatory audit of former Governor Davis's controlled committee opposing the gubernatorial recall initiative commences on the beginning date of the first campaign statement or report filed by that committee in connection with that recall initiative. As required by section 82046(b), the beginning date of the first campaign statement or report filed by a candidate controlled committee is January 1. Thus, the audit period of former Governor Davis's committee, above, begins on January 1, 2003.

FACTS

Section 90001 of the Act describes candidates and committees which are subject to mandatory audits and investigations. These audits are generally conducted by the Political Reform Audit Program, which is a unit within the state Franchise Tax Board. (See section 90000.)³

On October 7, 2003, the State of California conducted a special election to consider a voter initiative to recall then-Governor Gray Davis and, provided that the recall initiative was adopted by a majority of the voters, elect a successor to that office. This election also considered two ballot measures (Propositions 53 and 54), however, the questions you pose do not concern Propositions 53 and 54, and only implicate candidates and committees involved in the recall procedure and special election.

² As a matter separate and apart from the recall, former Governor Davis's controlled committee for the 2002 gubernatorial election is subject to mandatory audit under section 90001(b) for the period January 1, 1999, through December 31, 2002.

³ Audits of candidates for state controller and members of the state Board of Equalization, and of committees supporting these candidates, are conducted by the Commission. (Section 90006.)

Former Governor Gray Davis controlled two committees at the time of the special election; the Governor Gray Davis Committee (2002) and Californians Against the Costly Recall of the Governor.⁴ The latter committee was formed on July 29, 2003.

ANALYSIS

Audits and investigations of certain candidates and committees are mandated under section 90001 of the Act. This section reads in relevant part:

“Audits and investigations shall be made pursuant to Section 90000 with respect to the reports and statements of:

¶...¶

“(b) Each statewide, Supreme Court, court of appeal, or Board of Equalization candidate in a direct primary or general election for whom it is determined that twenty-five thousand dollars (\$25,000) or more in contributions have been raised or twenty-five thousand dollars (\$25,000) or more in expenditures have been made

¶...¶

“(g) Each committee, other than a committee specified in subdivision (c) of Section 82013 [a major donor committee], whose participation is primarily in support of or in opposition to a state measure or state measures if it is determined that the committee has expended more than ten thousand dollars (\$10,000) on such measure or measures. . . .”

Statewide recall elections are unique because they have both the characteristics of a ballot measure and a candidate election. Most statewide recall elections have two parts: first, the question of whether the sitting official shall be removed from office; and second, if the official is removed, the election of a replacement candidate. The first part is the actual recall and falls within the definition of a “measure” under section 82043 and is treated as a ballot measure. The second part of the election is actually a candidate election, since the question posed to the voters is who shall be elected to the vacant office. Section 90001 treats each part differently for purposes of audit and investigation.

Committees Supporting or Opposing the Statewide Recall Measure

Committees formed primarily to support or oppose a statewide recall, including such committees controlled by replacement candidates, pertain to the first part of the recall election and are treated as statewide ballot measure committees. As such, they fall under section 90001(g) and are thus subject to mandatory audits.

Committees Supporting or Opposing Gubernatorial Candidates

Committees formed to support or oppose candidates for Governor, including controlled committees of replacement candidates, pertain to the second part of the

⁴ Another committee controlled by former Governor Davis – the Lt. Governor Gray Davis Committee – was terminated on January 13, 2003.

statewide recall election. Ordinarily, a candidate for statewide office is subject to mandatory audit under section 90001(b) and the candidate's controlled committee supporting his or her election to that office is subject to mandatory audit under section 90001(e).⁵ Similarly, each committee, other than a major donor committee, primarily supporting or opposing a candidate for statewide office who is being audited under sections 90001(b), (c) or (d), and which has expended more than \$10,000, is subject to a mandatory audit under section 90001(f). However, section 90001(b) is qualified so that the mandatory audit provisions only apply with respect to a statewide candidate in a **direct primary or general election.**

For purposes of identifying candidates and committees subject to mandatory audit, a statewide recall election is not considered to be a direct primary or general election and is a special election (Elections Code section 356). Therefore, a replacement candidate is not deemed to be a candidate in a primary or general election subject to mandatory audit under section 90001(b). Also, the controlled committee of a replacement candidate is not subject to mandatory audit under section 90001(e) simply because the replacement candidate was a statewide candidate during the 2002 primary or general elections (see note 5, *supra*). Similarly, the mandatory audit provisions applicable to special elections for state office do not apply to gubernatorial candidates since those provisions, found at section 90001(d), pertain only to candidates for the Legislature in a special primary or special runoff election.

Likewise, the mandatory audit provisions of section 90001(h) do not apply to the replacement gubernatorial candidates or their controlled committees. This section contains language excluding from its provisions controlled committees and committees primarily supporting or opposing a state candidate (which committees would, in a primary or general election, presumably be subject to mandatory audit under sections 90001(b) and (e).) Section 90001(h) is applied to general purpose committees which have raised or expended more than \$10,000 during a calendar year to support or oppose a state candidate or state measure.

You should be aware that although the mandatory audit provisions of the Act do not apply to committees supporting or opposing these gubernatorial candidates, these committees are potentially subject to audit under the discretionary audit provisions of section 90003.

⁵ Regulation 18996(a) states in relevant part that: ". . . For purposes of Section 90002(c) [which defines audit periods, including audits under section 90001], the audit or investigation shall not include those campaign statements or reports filed in conjunction with an election *for any other office.*" [Emphasis added.] When this regulation is read together with sections 90001(e) and 90002(c), it becomes apparent that the mandatory audit of a candidate for the 2002 general election does not include that candidate's controlled committee(s) for an office (e.g., the replacement gubernatorial office) other than the one for which he or she sought election during the 2002 election.

Governor Davis's Controlled Committees

We assume that your question is meant to apply to former Governor Davis's controlled committees for statewide office, including the 2002 gubernatorial election, and also his controlled committee formed to oppose the statewide recall initiative. As discussed above, any controlled committee formed primarily to support or oppose the statewide recall initiative is considered to be a state measure committee and is subject to mandatory audit under section 90001(g).

With respect to his controlled committee for the 2002 gubernatorial election, that committee is subject to mandatory audit under section 90001(b) for an audit period closing December 31, 2002 (see section 90002(c)). Since that committee was formed for the purpose of supporting his prior candidacy for the governorship, its participation in the statewide recall election (if any) does not subject the committee to mandatory audit under section 90001(g). However, this gubernatorial committee is still subject to potential audit under the discretionary audit provisions of section 90003.⁶

Commencement of the Audit Period

The statements and reports to be considered in an audit of a ballot measure or candidate-controlled committee which is participating in an election primarily to support or oppose a ballot measure, are described in relevant portions of section 90002(c) as follows:

“. . . When the campaign statements or reports of a committee primarily supporting or opposing a measure are audited and investigated, the audit and investigation shall cover all campaign statements and reports *from the beginning date of the first campaign statement* filed by the committee in connection with the measure. . . .” [Emphasis added.]

The period covered by such statements is defined at section 82046(b):

“(b) ‘Period covered’ by a campaign statement required to be filed by this title means, unless a different period is specified, the period beginning the day after the closing date of the most recent campaign statement which was required to be filed and ending with the closing date of the statement in question. *If a person has not previously filed a campaign statement, the period covered begins on January 1.*” [Emphasis added.]

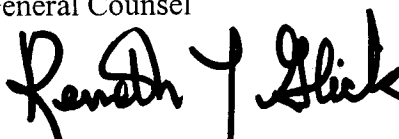
According to records of the Office of the Secretary of State, this committee was formed on July 29, 2003, and its first campaign statement (FPPC Form 460) was filed to cover the period January 1, 2003 through August 23, 2003. Thus, the audit period for this committee commences on January 1, 2003.

⁶ Similarly, the Lt. Governor Gray Davis Committee, which terminated in 2003, is subject to discretionary audit under section 90003 concerning any statements which the committee filed in 2003.

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

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in black ink that reads "Kenneth L. Glick". The signature is written in a cursive style with a large, stylized "K" and "G".

By: Kenneth L. Glick
Counsel, Legal Division

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