



FAIR POLITICAL PRACTICES COMMISSION

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November 3, 2005

Kathryn E. Donovan
Pillsbury Winthrop Shaw Pittman LLP
400 Capitol Mall, Suite 1700
Sacramento, CA 95814-4419

**Re: Your Request for Advice
Our File No. A-05-207**

Dear Ms. Donovan:

This letter is in response to your request for advice on behalf of Pillsbury Winthrop Shaw Pittman LLP ("PWSP") and state general purpose committees represented by PWSP regarding the campaign provisions of the Political Reform Act (the "Act").¹

QUESTION

Are the campaign disclosure requirements of section 1.135, 1.134(c), 1.161.5(b) of San Francisco's Campaign and Governmental Conduct Code applicable to state general purpose committees?

CONCLUSION

Insofar as these sections require the filing of reports that are additional to or different from those already imposed on state general purpose committees under the Act, the disclosure requirements are preempted by section 81009.5 of the Act.

FACTS

The City and County of San Francisco has adopted a Campaign and Governmental Conduct Code (the "San Francisco Code") which imposes several campaign disclosure requirements that are in addition to the provisions of the Political Reform Act of 1974, as amended (the "Act").

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

Your law firm, PWSP qualified as a state major donor committee on July 12, 2005. PWSP has made two \$500 contributions to San Francisco candidates listed on the November 8, 2005 ballot since May 8, 2005 (six months prior to the November 8, 2005 San Francisco election). One contribution was made June 10, 2005 and the other was made August 17, 2005. PWSP may make payments for other expenditures prior to the November 8, 2005 election that would be reportable as "electioneering communications" or as "member communications" under the foregoing provisions of the San Francisco Code. PWSP also represents various clients who are similarly situated, because they qualify as state general purpose committees (major donors or recipient committees) and have been or are planning to be active in the November 8, 2005 San Francisco election.

The City and County of San Francisco has adopted a Campaign and Governmental Conduct Code which imposes several campaign disclosure requirements. These provisions include:

SEC. 1.135. SUPPLEMENTAL REPORTING.

In addition to the campaign disclosure requirements imposed by the California Political Reform Act and other provisions of this Chapter, any committee that makes contributions or independent expenditures totaling \$500 or more in a calendar month during the six months immediately preceding an election, to support or oppose a candidate for City elective office at that election, shall disclose, prior to the date of the election, all contributions and loans received and all expenditures made. The Ethics Commission shall prescribe the form, content and filing deadlines for these statements. The Ethics Commission may require that these statements be filed electronically.

SEC. 1.161.5. DISCLOSURE AND FILING FOR ELECTIONEERING COMMUNICATIONS.

(b) REPORTING OBLIGATIONS.

(1) Every person who makes payments for electioneering communications in an aggregate amount of \$1,000 during any calendar year shall, within 48 hours of each disclosure date, file an itemized statement with the San Francisco Ethics Commission.

(2) Each itemized statement required to be filed under this section shall be filed on a form promulgated by the San Francisco Ethics Commission and shall contain the following information:

(A) the full name, street address, city, state and zip code of the person making payments for electioneering communications;

(B) the name of any individual sharing or exercising direction and control over the person making payments for electioneering communications;

- (C) the total amount of payments made by the person for electioneering communications during the calendar year;
 - (D) a detailed description of each payment made by the person for electioneering communications during the calendar year, provided that the person has not already reported such payments on an itemized statement filed under this section; such detailed description shall include the date the payment was made, the full name and address of the person to whom the payment was made; the amount of the payment, and a brief description of the consideration for which each payment was made;
 - (E) a detailed accounting of any payments of \$100 or more that the person has received from another person, which were used for making electioneering communications, provided that the person has not already reported such payments received on an itemized statement filed under this section; such detailed accounting shall include the dollar amount or value of each payment, the date of the payment's receipt, the name, street address, city, state, and zip code of the person who made such payment, the occupation and employer of the person who made such payment, if any, or, if the person is self-employed, the name of the person's business, and the cumulative amount of payments received for the purpose of making electioneering communications from that person during the calendar year;
 - (F) the total amount of all payments reported under subsection (E) during the calendar year;
 - (G) a legible copy of the electioneering communication if in printed form, or a transcript of the electioneering communication if in spoken form; and
 - (H) any other information required by the Ethics Commission consistent with the purposes of this section.
- (3) The filer shall verify, under penalty of perjury, the accuracy and completeness of the information provided in the itemized statement, and shall retain for a period of five years all books, papers and documents necessary to substantiate the itemized statements required by this section.
- (4) The Ethics Commission may require any itemized statement to be filed electronically and may permit any required statement to be filed by facsimile. The Ethics Commission shall promulgate regulations to implement this subsection before any person shall be required to file an itemized statement electronically or permitted to file a statement by facsimile.

(c) DEFINITIONS. Whenever in this section the following words or phrases are used, they shall mean:

(1) "Disclosure Date" shall mean:

(A) the first date during any calendar year when an electioneering communication is distributed after a person has made payments aggregating \$1,000 for electioneering communications; and

(B) after a person has met the threshold under subsection (A), any date during that same calendar year when an electioneering communication is distributed, if that same person made any payments for such electioneering communication.

(2) "Distributed" shall mean any act that permits an electioneering communication to be viewed, read or heard.

(3) "Electioneering Communication" shall mean any communication, including but not limited to any broadcast, cable, satellite, radio, internet, or telephone communication, and any mailing, flyer, doorhanger, pamphlet, brochure, card, sign, billboard, facsimile, or printed advertisement, that:

(A) refers to a clearly identified candidate for City elective office or a City elective officer who is the subject of a recall election; and

(B) is distributed within 90 days prior to an election for the City elective office sought by the candidate or a recall election regarding the City elective officer to 500 or more individuals who are registered to vote or eligible to register to vote in the election or recall election. There shall be a rebuttable presumption that any broadcast, cable, satellite, or radio communication and any sign, billboard or printed advertisement is distributed to 500 or more individuals who are eligible to vote in or eligible to register to vote in an election for the City elective office sought by the candidate or a recall election regarding the City elective officer.

SEC. 1.134. EXPENDITURE CEILINGS LIFTED.

This Section shall apply only if at least one candidate for the City elective office has filed a statement with the Department of Elections pursuant to Section 1.128 indicating acceptance of the applicable expenditure limits, and the applicable expenditure limit has not already been lifted.

(c) Any person that makes expenditures or payments, or incurs expenses for the purpose of making independent expenditures, electioneering communications or member communications in support of or in opposition to any candidate in an amount of \$5,000 or more shall, within 24 hours of reaching this threshold, file a statement with the Ethics Commission, on forms to be provided by the Ethics Commission, stating that fact and any additional information required by the Ethics Commission. Thereafter, until such time as the applicable expenditure ceiling is lifted, any such committee shall file a supplemental statement with the Ethics Commission each time the committee makes expenditures or payments or incurs expenses for the purpose of making independent expenditures, electioneering communications or member communications or incurs expenses in support of or in opposition to any candidate of an additional \$5,000. The supplemental statements shall be filed within 24 hours of reaching these spending thresholds.

Based on past and contemplated conduct of PWSP in the future, PWSP has been required and may be required in the future to file reports with the City pursuant to the sections quoted above. It is your contention that these filings are “additional to or different from” the reports already required to be filed as a state general purpose committee, and are therefore prohibited by section 81009.5 of the Act.

ANALYSIS

In answering whether state general purpose committees are subject to the ordinances identified in your request, we begin with provisions in the Act which address the interaction of local and state provisions. Section 81013 provides that nothing in the Political Reform Act (“Act”) prevents a local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with the Act. The section addresses generally the authority of local agencies to impose obligations beyond those set forth in the Act and makes clear that the Act is not intended to occupy the field it regulates that state and local government agencies are powerless to enact additional regulations. (*In re Alperin* (1977) 3 FPPC Ops. 77.)

However, the authority granted to local agencies is significantly limited by section 81009.5, subdivision (b). That provision prohibits a local government agency from enacting any ordinance imposing filing requirements “additional or different” from those set forth in Chapter 4 of the Act unless the additional or different filing requirements apply only to:

“[T]he candidates seeking election in that jurisdiction, their controlled committees or committees formed or existing primarily to support or oppose their candidacies, and to committees formed or existing primarily to support or oppose a candidate or to support or oppose the qualification of, or passage of, a local ballot measure which is being voted on only in that jurisdiction, and to city or county general purpose committees active only in that city or county, respectively.”

This provision allows local jurisdictions some flexibility to require additional or different filing requirements for committees active exclusively in local elections. Proposition 34 appears to endorse this theme by adding section 85703. It provides:

“Nothing in this act shall nullify contribution limitations or prohibitions of any local jurisdiction that apply to elections for local elective office, except that these limitations and prohibitions may not conflict with the provisions of Section 85312.”

Section 85312, also enacted by the voters with passage of Proposition 34, provides:

“For purpose of this title, payments for communications for purpose of this title to members, employees, shareholders, or families of members, employees, or shareholders of an organization for the purpose of supporting or opposing a candidate or a ballot measure are not contributions or independent expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards, and newspaper advertisements.”

On several occasions the Commission and its staff have rendered advice on the effect of local ordinances on state committees. As we have stated in the past, while the Commission may neither interpret nor comment on the viability, enforceability, or constitutionality of a local ordinance, we are not constrained from identifying those provisions that may conflict with or impede a person’s compliance with the Act. (*Barisone* Advice Letter, No. I-01-201.) For instance, in the *Barisone* advice letter we concluded that a Santa Cruz city ordinance that might require state and county committees to file an additional pre-election report in a city election would be invalid as to those committees. (*See also, Bell* Advice Letter, No. I-92-513, advising that a local ordinance may impose additional filing requirements on candidates and committees which are active only within the local jurisdiction and that a state committee is not subject to such additional filing requirements.)

In 2001, the Commission issued the *Olson* Opinion, No. O-01-112, in which the Commission considered whether the City of Los Angeles could require state political party committees to file additional campaign reports with the city depending on the parties’ expenditures in relation to city elections. These reports were in addition to reports already required of the parties by the Act. In considering whether the city’s ordinances could stand as to state committees already regulated by the state, the Commission examined the history and intent behind section 81009.5 and found:

“Section 81009.5, which has been unchallenged for the past 16 years, was the result of state and local frustration with the confusing and often duplicative filing requirements of multiple jurisdictions. It represents a reasoned balance between the need for disclosure and the need for simplicity and accountability. The uniformity and simplicity created by section 81009.5 are not ends in themselves. Rather, they are means to foster compliance with and effective enforcement of the Act, while ensuring that the electorate remains well-informed.”

The Commission concluded, citing section 81009.5, that the Act:

“[P]rohibits local agencies from imposing additional or different filing requirements only on candidates and committees active beyond the local jurisdiction. Put another way, a local agency is free

to impose additional or different filing requirements on any candidate or committee active only in that city or county, preserving local autonomy over local candidates and committees. Section 81009.5 is crafted narrowly to reach only committees active throughout the state....”

1. San Francisco Code Section (“Section”) 1.135:

As you observe in your letter, Section 1.135 requires that, in addition to the campaign disclosure requirements imposed by state law, “any committee” that makes contributions or independent expenditures totaling \$500 or more in a calendar month during the six months immediately preceding an election to support or oppose a San Francisco candidate at that election must disclose, prior to the date of the election, all contributions and loans received and all expenditures made. That statute also requires the San Francisco Ethics Commission to prescribe the form, content and filing deadlines for these additional statements. You state that in June 2005, the Ethics Commission reversed prior policy and adopted Regulation 1.135-1 which provides that “all committees, including recipient, major donor and independent expenditure committees, regardless of whether such committees are active only in San Francisco or in jurisdictions other than San Francisco, are required to file the additional statements, if the \$500 threshold is met.”

You indicate that, based on past and projected activity, PWSP might be required to file reports under this Section if expenditure activity reaches the requisite level – reports that are additional to those required under the Act. For instance, PWSP will be required to file a year-end major donor report (Form 461) on or before January 31, 2006, disclosing all contributions made since January 1, 2005. However, Section 1.135, as implemented by the regulation above, also required PWSP to file a preelection report with the Ethics Commission, disclosing activity through September 24, 2005. Subsequent contributions to other San Francisco candidates on the November ballot would result in additional filings.

Pursuant to section 81009.5, and as per long-standing Commission interpretation, however, such additional filing requirements of a state general purpose committee such as PWSP would be in violation of the Act. As we have advised and as clearly stated in section 81009.5, a local jurisdiction may impose different or additional filing requirements *only* to candidates seeking election in that jurisdiction, committees formed primarily to support or oppose those candidates, primarily formed ballot measure committees regarding a local ballot measure, and to city or county general purpose committees actively only in that city or county. (§ 81009.5.) As a result, PWSP is not required to make the additional filings required by the Section 1.135 of the ordinance.

2. San Francisco Code Section 1.161.5(b):

San Francisco Code Section 1.161.5(b) requires “every person” who makes payments for “electioneering communications” aggregating \$1,000 during any calendar

year to file, within 48 hours after such communications are distributed, an itemized statement with the Ethics Commission containing detailed information about the funding of the electioneering communications, as set forth above in the factual discussion of this letter.

As a result, if PWSP pays at least \$1,000 for one or more promotional pieces for clients and prospective clients that mentions, among other things, the firm's pro bono work for the City of San Francisco and refers to San Francisco City Attorney Dennis Herrera, a candidate for reelection on November 8, 2005, and that communication is distributed to 500 or more persons who are registered to vote or eligible to vote in the City of San Francisco (other than PWSP partners and employees), section 1.161.5(b) would require PWSP to file a report with the Ethics Commission within 48 hours, detailing the expenses incurred. This filing is in addition to any major donor or other campaign filing requirements imposed on PWSP by the Act. By virtue of the section's breadth to reach "any person," it appears that a state recipient committee or state independent expenditure committee engaged in similar conduct also would be required to file the report with the Ethics Commission within 48 hours.

Based on the analysis above in the context of the discussion of Section 1.135, to the extent the ordinance reaches committees beyond those identified in section 81009.5, such additional filing requirements run afoul of the Act and thus are prohibited. Accordingly, such reports need only be filed by the persons identified in section 81009.5.

3. San Francisco Code Section 1.134(c):

Section 1.134(c) requires any person that makes independent expenditures, electioneering communications in support of or in opposition to any City candidate totaling \$5,000 or more to, within 24 hours thereafter, file a statement with the Ethics Commission reporting that fact and providing additional information as required by the Ethics Commission.

You state that if PWSP were to, in addition to the electioneering communications described previously, spend at least \$2,000 for a letter to its employees expressly advocating for two specific candidates for elective City office on the November 8, 2005, ballot, and at least \$2,000 for a letter to its clients and their employees, expressly advocating for the same two candidates, and the total cost of all such communications was \$5,000 or more, PWSP would be required to file a report with the Ethics Commission within 24 hours concerning these expenditures.

The San Francisco report would be in addition to the supplemental independent expenditure report required by section 84203.5 of the Act, which PWSP would be required to file on or before October 27, 2005, as a result of spending \$2,000 for the letter to clients expressly advocating for two candidates on the November 8, 2005, ballot. With respect to member communications, in light of section 85312 of the Act and given the status of PWSP as a state general purpose committee, additional filings beyond those

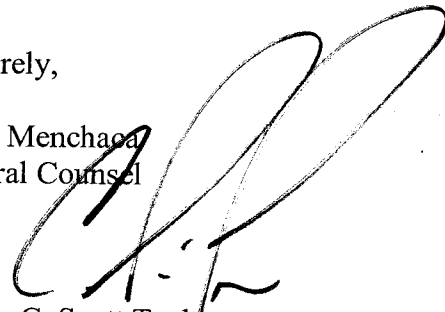
already required of the Act regarding membership communications are preempted by section 81009.5 and 85312. (*See Olson Opinion, supra.*)

With respect to the independent expenditure and electioneering communications provisions of the San Francisco Code Section 1.134(c), we agree that insofar as this provision attempts to impose filing requirements on state major donor committees, state recipient committees, and state independent expenditure committees that are "in addition to or different from" the filing requirements imposed by the Act, such filings are preempted by section 81009.5.

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

Sincerely,

Luisa Menchaca
General Counsel

A large, stylized handwritten signature in black ink, appearing to read 'C. Scott Tocher', is written over the typed name and title.

By: C. Scott Tocher
Senior Counsel, Legal Division

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