



FAIR POLITICAL PRACTICES COMMISSION

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August 6, 2008

Mr. Mike Lowrie
Administrative Analyst
Marin County Administrator's Office
3501 Civic Center Drive, Suite 325
San Rafael, California 94903

Re: Your Request for Advice
Our File No. I-08-119

Dear Mr. Lowrie:

This letter responds to your request for advice about the campaign provisions of the Political Reform Act (the Act").¹ Because your letter does not request advice with regard to a specific set of facts, we have treated your request as one for informal advice.²

FACTS

You have attached a draft campaign finance ordinance which the Marin County Supervisors have written in cooperation with the county counsel, county administrator, county clerk and district attorney. Before you go to the full Board of Supervisors for a vote on this proposed ordinance, you would appreciate it if Commission staff could review the text to ensure that it conforms to FPPC regulations; specifically that it does not duplicate regulations already set by the state. Also, you note there has been some confusion as to whether campaign contributions are best regulated per calendar year, election cycle or simply per election, and how contributions to an incumbent's office holder account can be regulated. As you understand it, currently there are no state restrictions on contributions to these accounts or how much money from these accounts can be transferred to campaign accounts. You would appreciate any advice or experience from other jurisdictions we can share with you on these issues.

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

ANALYSIS

Generally, the Political Reform Act (the "Act") permits local governments to impose additional requirements relating to campaign finance and disclosure, so long as those requirements do not conflict with the Act. Section 81013 of the Act provides:

"Nothing in this title prevents the Legislature or any other state or local agency from imposing additional requirements on any person if the requirements do not prevent the person from complying with this title."

However, the authority granted to local agencies is limited by Section 81009.5(b). That provision prohibits a local government agency from enacting any ordinance imposing filing requirements "additional to 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."

As expressly provided, the draft Marin County ordinance is intended to be a supplement to and not conflict with the Political Reform Act and its implementing regulations. (Proposed Marin County Ordinance Section II.) We have the following comments on the draft ordinance:

1. Definition of Independent Expenditure. The definition of "independent expenditure" contained in Section III(j) of the draft Marin County ordinance is broad. You may want to consider adding the concept of express advocacy to the definition. The Act's definition of independent expenditure is found at Section 82031, with related Regulations 18225.7 and 18550.1. The Act's definition is as follows:

"'Independent expenditure' means an expenditure made by any person in connection with a communication which expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage or defeat of a clearly identified measure, or taken as a whole and in context, unambiguously urges a particular result in an election but which is not made to or at the behest of the affected candidate or committee." (Section 82031.)

Courts have applied a narrowing construction to this statutory language, and the law is generally interpreted to require express advocacy to be considered an independent

expenditure. The leading case on the issue is *Governor Gray Davis Committee v. American Taxpayers Alliance*, 102 Cal.App.4th 449, 125 Cal.Rptr.2d 534 (2002).

2. Contribution Limits. The Act contains contribution limits for state candidates and committees, but not for local candidates. However, the Act specifically permits cities and counties to enact contribution limits applicable to elections within their jurisdictions. Section 85703(a), copy enclosed, 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.”³

You ask whether contributions are best regulated per calendar year, election cycle, or simply per election. This question is a policy determination for the drafters of your ordinance and the Marin County Board of Supervisors to make after reviewing case law and other statutes and ordinances. We observe that the Act's contribution limits of \$3,600 to candidates for legislative office, \$6,000 to candidates for statewide offices, and \$24,100 to candidates for governor, apply on a per election basis. (Section 85301.) Accordingly, a person may contribute \$3,600 to a candidate for the state legislature for the primary and another \$3,600 for the general election. The Act's current contribution limits were enacted by Proposition 34 in 2000. A prior set of contribution limits added to the Act in 1988 by Proposition 73 were invalidated partly because they applied on a calendar year basis. The Ninth Circuit Court of Appeals invalidated the contribution limits imposed by Proposition 73 in *Service Employees International Union, et al. v. Fair Political Practices Commission* (1992) 955 F.2d 1312. The court found the limits to be unconstitutional because they were imposed on a “fiscal year” basis which could benefit incumbents over challengers. The federal election contribution limits also apply on a per election basis, as do many state and local limits. However, many cities and counties apply contribution limits on an election cycle basis.

The draft ordinance you sent appears to limit contributions on a per election basis, but this is not entirely clear in Sections IV(a) and XI(c). You may want to add some language clarifying whether the limits apply per election, per election cycle, or per calendar year.

The proposed ordinance sets contribution limits for candidates for county offices of \$1,000 on contributions from individual donors and \$1,500 on contributions from organizational donors. (Draft Ordinance Section IV(a).) These limits double if

³ Section 85312 establishes the member communications exception to contributions and independent expenditures, providing that: “. . . payments for communications 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 expenditures, provided those payments are not made for general public advertising such as broadcasting, billboards and newspaper advertisements.” Pursuant to Section 85703, local jurisdictions with ordinances that impose contribution limitations or prohibitions in connection with local elections must also provide for this exception in some fashion.

candidates accept voluntary expenditure limits. Candidates who accept an expenditure ceiling of \$75,000 for Board of Supervisors or \$100,000 for other county offices are subject to a contribution limit of \$2,000 from individual donors and \$3,000 from organizational donors. (Draft Ordinance Section XI(c).) You will no doubt be reviewing the recent U.S. Supreme Court case *Davis v. Federal Election Commission*, 554 U.S. ___, and assessing what impact, if any, this case may have on the structure of the contribution limits contained in the draft ordinance.

3. Aggregate Cap on Contributions from Outside Marin County. Section IV(b) of the draft ordinance caps aggregate contributions that a county candidate or committee may receive from outside Marin county at 25 percent of the total contributions received to date. There is nothing in the Act that would prohibit such an ordinance. Some legal issues raised by a limit on out-of-district contributions are discussed in the cases *Vannatta v. Keisling*, 151 F.3d 1215 (9th Cir. 1998), *cert. denied*, 525 U.S. 1104 (1999) (enjoining the enforcement of an Oregon campaign finance measure), *State v. Alaska Civil Liberties Union*, 978 P.2d 597 (Alaska 1999), *cert. denied*, 528 U.S. 1153 (2000) (upholding the majority of an Alaska campaign finance bill), and an article by Andrew Hyman titled "Alaska Gives Ninth Circuit the Cold Shoulder: Conflicts in Campaign Finance Jurisprudence" at 15 U. Pa. L. Rev. 1453.

4. Recall Elections. The draft ordinance imposes contribution limitations on committees that collect contributions for the purpose of making expenditures in support of or opposition to the recall of an elective county officer. The Act has its own provisions concerning the recall of elected state officers, which generally treat a recall as a ballot measure to which contribution limits do not apply, though the replacement candidates are subject to contribution limits. (Section 85315 and Regulation 18531.5.)

However, the draft ordinance's provisions applying contribution limits to local recall elections do not conflict with those in the Act. The comment to Regulation 18531.5 specifically states:

"[P]ursuant to Government Code sections 81013 and 81009.5, nothing in the Act prevents a local jurisdiction from adopting a local ordinance with additional or different requirements applicable to candidates or committees involved in recall elections in that jurisdiction, including applying contribution limits to all candidates and committees participating in the recall, so long as the local ordinance does not prevent the persons from complying with the Political Reform Act.

The city of San Diego has long applied its candidate contribution limits to recall elections. (*Angus Advice Letter*, No. A-97-173.)

5. Officeholder Accounts. You ask how contributions to an incumbent's office holder account can be regulated. In 2006, provisions were added to the Act regulating the officeholder accounts of state elected officials. (Section 85316(b), copy enclosed.) Interpreting the new state officeholder account limits, the Commission adopted regulation

18531.62 (copy enclosed). Under the rules applicable to state candidates, funds from officeholder accounts *may not* be transferred to campaign accounts. The Act does not contain restrictions governing officeholder accounts for local elected officials, so adding these provisions to the Marin ordinance would not conflict with the Act. Many cities and counties have adopted ordinances regulating local officeholder accounts which you may wish to review.

6. Aggregation of Contributions. The aggregation of contributions provisions in Section V of the draft ordinance generally do not appear to conflict with those in the Act. With respect to contributions from family members, the proposed Marin County Ordinance Section V(e) automatically attributes contributions made by children under eighteen years old as contributions by their parents or legal guardians.⁴ In contrast, Section 85308 of the Act contains a rebuttable presumption that contributions made by a child under 18 years of age is a contribution from the parent or guardian of the child.⁵ The Commission concluded that a Los Angeles ordinance similar to the proposed Marin County ordinance, which automatically attributed a minor's contribution to his or her parents or guardians, did not conflict with the Act because it was a permissible additional local contribution limitation. (*In re Pelham* (2001) 15 FPPC Ops. 1, copy enclosed.) The U.S. Supreme Court considered the issue of contributions by minors in *McConnell v. FEC*, 124 S.Ct. 619, 711 (2003) where it invalidated Section 318 of the Bipartisan Campaign Reform Act of 2002 which prohibited contributions by minors 17 years old or younger.⁶

If you have other questions about the draft ordinance that we can assist with, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel



By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl
Enclosures

⁴ Proposed Marin County Ordinance Section V(e) states: "Contributions by children under eighteen (18) years of age shall be treated as contributions by their parent(s) or legal guardian(s), one-half to each parent or guardian unless only one (1) parent or guardian has legal custody of such child in which event any such contributions shall be attributed solely to the custodial parent."

⁵ Section 85308(b) of the Act states: "A contribution made by a child under 18 years of age is presumed to be a contribution from the parent or guardian of the child."

⁶ Further discussion of contributions by minors is contained in the article "*Breaking the Piggy Bank: An Alternative Approach to Campaign Contributions by Minors After McConnell v. FEC*," by Heather Davis, 73 Geo. Wash. L. Rev. 353 (2005).