



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

September 3, 2008

Tony Krvaric, Chairman
The Republican Party
of San Diego County
5703 Oberlin Drive, Suite 107
San Diego, CA 92121

Re: Your Request for Advice
Our File No. A-08-145

Dear Mr. Krvaric:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹ Please bear in mind that our advice is limited to provisions of the Act and its implementing regulations. We offer no advice on potential violations of federal law, or of California law beyond the purview of the Act.

QUESTION

If a candidate who has chosen to accept a voluntary expenditure ceiling negotiates and executes a contract for campaign advertisements with a vendor, and the applicable disclaimers for the advertisements (if any) state that they are paid for by the candidate, do payments on that contract count against the candidate's voluntary expenditure ceiling if a political party actually pays for the advertisements with funds sent directly to the vendor, which are at no time deposited into the candidate's campaign account?

CONCLUSION

The transaction you describe is an "in-kind" or "non-monetary" contribution by the political party to the candidate. Regulation 18540(c) expressly provides that a non-monetary contribution is deemed to be a campaign expenditure made by the candidate, which counts against a candidate's voluntary expenditure limit if an expenditure for equivalent goods or services would have been a "campaign expenditure" as defined in subdivision (a) of that regulation. The goods and services you describe are radio and

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.

television campaign advertisements, payments for which are "campaign expenditures" as defined in Regulation 18540(a)(2).

FACTS

You are the Chairman of the San Diego County Republican Party ("SDCRP"), which wishes to support candidates for state elective offices, including a legislative candidate who has accepted the Act's voluntary spending ceilings pursuant to Sections 85400 et seq. In your capacity as Chairman of SDCRP you intend to coordinate with one or more candidates who have accepted the voluntary expenditure limits in the following transaction:

1. The candidate, through his or her campaign committee, will sign contracts with a number of radio, television and cable television stations to broadcast advertisements in support of the candidate;
2. These contracts will be signed by an agent of the candidate, and will be personally verified by signed affidavit by the candidate himself, stating that the candidate's campaign committee will be purchasing the contracts;
3. The contracts will provide for the "lowest unit rate" or preemptible advertisement rate, the former of which is afforded only to political candidates by law, and is the lowest rate offered by the television stations;
4. The advertisements broadcast pursuant to these contracts will include the disclaimer that they were paid for by the candidate's campaign committee;
5. The cost of these contracts, when aggregated with the candidate's previous expenditures, would otherwise cause the candidate to exceed the applicable voluntary expenditure limit;
6. However, the payment for these advertisements will be made directly to the television stations by the SDCRP, with funds that will never be deposited into the candidate's campaign bank account.

It is your understanding that, even though payments under these contracts would otherwise cause the candidate to exceed the voluntary expenditure ceiling, and the advertisements will affirmatively state that the candidate paid for the advertisements, expenditures on the advertisements will not count against the candidate's expenditure limit because the expenditures were actually made by the SDCRP, not by the candidate.

You seek advice confirming that the plan outlined above does not violate the Act, a conclusion that you believe is suggested by the resolution of a complaint lodged with the Commission on October 31, 2006 by the California Republican Party (FPPC Case No. 060909). This complaint alleged that Steve Clute, then the California Democratic Party's nominee for the 80th Assembly District seat, had violated the Act's voluntary expenditure limit through a transaction similar to the one you outline above. By letter dated June 4, 2007, the Commission's Executive Director advised the complainant that the Commission would close the matter without instituting an enforcement action, for a number of reasons including the following comment: "However, since the expenditures

from the central committees were made on behalf of Steve Clute for Assembly, they do not count towards the voluntary expenditure ceiling.”

The Executive Director’s letter concluded by noting that “[t]his response permits you to proceed with a civil action in accordance with section 91007(a)(2).”

ANALYSIS

Proposition 34, passed by the voters at the General Election in November 2000, introduced “voluntary expenditure ceilings” at Sections 85400 et seq. A candidate who agrees to abide by the voluntary expenditure ceiling for a particular office may not make campaign expenditures in excess of the pertinent limit, in return for certain incentives provided to encourage acceptance of the expenditure ceiling, including most importantly notice to the voters of the candidate’s acceptance of the expenditure ceiling.

Proposition 34 also established limits on contributions that could be made to candidates, including candidates for state legislative office, by persons *other than* a political party committee. There is thus no limit on the amount of money that may be contributed by a political party committee to a candidate for state legislative office. (See Section 85301.) The SDCRP is a “political party committee” as defined at Section 85205, and it is therefore free to contribute unlimited sums of money to candidates for state legislative office.

As pertinent here, the term “contribution” is defined at Section 82015 as follows:

“(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.

“(b) (2) A payment made at the behest of a candidate is a contribution to the candidate unless the criteria in either subparagraph (A) or (B) are satisfied:

“(A) Full and adequate consideration is received from the candidate.

“(B) It is clear from the surrounding circumstances that the payment was made for purposes unrelated to his or her candidacy for elective office.

¶ . . . ¶

“(C) For purposes of subparagraph (B), a payment is made for purposes related to a candidate’s candidacy for elective office if all or a portion of the payment is used for election-related activities. For purposes of this subparagraph, “election-related activities” shall include, but are not limited to, the following:

“(i) Communications that contain express advocacy of the nomination or election of the candidate or the defeat of his or her opponent.

“(ii) Communications that contain reference to the candidate’s candidacy for elective office, the candidate’s election campaign, or the candidate’s or his or her opponent’s qualifications for elective office.

“(iii) Solicitation of contributions to the candidate or to third persons for use in support of the candidate or in opposition to his or her opponent. “(iv) Arranging, coordinating, developing, writing, distributing, preparing, or planning of any communication or activity described in clauses (i), (ii), or (iii), above.

“(v) Recruiting or coordinating campaign activities of campaign volunteers on behalf of the candidate.

“(viii) Communications directed to voters or potential voters as part of activities encouraging or assisting persons to vote if the communication contains express advocacy of the nomination or election of the candidate or the defeat of his or her opponent.”

A payment that is made by a political party committee for a communication supporting or opposing a candidate qualifies as a contribution if it is made at the behest of a candidate or committee. (See, e.g., *Fulhorst* Advice Letter, No. I-05-161.) Regulation 18225.7(a) provides that a payment is made “at the behest” of a candidate if it is made:

“. . . under the control or at the direction of, or in cooperation, consultation, coordination, or concert with, at the request or suggestion of, or with the express, prior consent of.”

Under the circumstances you describe, it is clear that the SDCRP contemplates making payments to media vendors at the behest of selected candidates. Such payments would be “non-monetary” contributions to those candidates.² Regulation 18540(c) expressly governs such a transaction, providing as follows:

“(c) A non-monetary contribution is deemed to be a campaign expenditure made by the receiving committee on the date of receipt, which counts against the voluntary expenditure limits prescribed by Government Code section 85400, if an expenditure

² A third-party payment of money to a media vendor at the behest of a candidate is a “non-monetary” contribution because the candidate does not receive the money with which to purchase the media services, but receives instead the services themselves, paid for by the money passing directly from the third party to the vendor.

for equivalent goods or services would have been a campaign expenditure described in subdivision (a) of this regulation. For purposes of Government Code section 85400, the amount of the expenditure shall be the fair market value of the contribution on the date of receipt.”

A candidate’s expenditure on a broadcast campaign advertisement is a “campaign expenditure” within the meaning of Regulation 18540(a)(2), which governs candidate expenditures “related to publications in broadcast, print or electronic media.” Thus under the express provisions of Regulation 18540 the transactions you have described will be deemed to be a campaign expenditure made by the candidate’s committee “which counts against the voluntary expenditure limits prescribed by Government Code section 85400.”

There are many reasons why the Executive Director may decide not to prosecute a particular complaint submitted to the Commission, opting instead to permit the complainant himself to prosecute the matter in court. In the case to which you refer, we note the complainant had already filed a Verified Complaint for Declaratory and Injunctive Relief in the Superior Court of Riverside County on October 30, 2006, the day *before* sending its complaint to the Commission. The complainant, moreover, failed to note the application of Regulation 18540, and the Executive Director accordingly did not consider it. In any event, the legal reasoning offered by the Executive Director in support of his decision to leave civil prosecution to the complainant does not supplant a regulation formally adopted by the Commission five years earlier.

Regulation 18540(c) specifically provides that candidates and their supporters may not circumvent the voluntary expenditure ceilings by the simple device of third-party payments bypassing a candidate’s campaign bank account. The proposal that you outline, where the source of these payments is a political party committee entitled to make *unlimited* contributions to candidates, highlights the importance of this regulation in preserving the voluntary expenditure ceilings.

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

Sincerely,

Scott Hallabrin
General Counsel



By: Lawrence T. Woodlock
Senior Counsel, Legal Division

LTW:jgl