



FAIR POLITICAL PRACTICES COMMISSION

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October 27, 2009

Mr. Matt Hedges
Director of Public Affairs
Sacramento Regional Builders Exchange
1331 T Street
Sacramento, CA 95811

Re: Your Request for Informal Assistance
Our File No. I-09-227

Dear Mr. Hedges:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹ Because your letter does not request advice with regard to a specified candidate, election or jurisdiction, we have treated your request as one for informal assistance.² Nothing in this letter should be construed to evaluate any conduct that may have already taken place and any conclusions contained in this letter apply only to prospective actions.

QUESTION

A member of the governmental affairs committee of the Sacramento Regional Builders Exchange ("SBE") has announced he is running for a local city council. You believe SBE's political action committee ("SBE PAC") will want to assist in the campaign of this individual in the form of an independent expenditure. You ask how SBE PAC can legally make an independent expenditure for a member of its government affairs committee?

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).)

CONCLUSION

Under the Act, an “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 . . . which is not made to or at the behest of the affected candidate . . .” An expenditure for such a communication which is made *at the behest* of the candidate (i.e., made in cooperation or coordination with the candidate) is not considered an independent expenditure, but rather a contribution to the candidate.

A determination of whether a given expenditure is made independent of or in cooperation or coordination with a candidate is fact driven. It is up to your organization, SBE, to take the necessary steps to ensure that an independent expenditure is in fact independent and not made in coordination with a candidate. In the situation you have described, SBE will be much less likely to run afoul of the coordination rules if the candidate steps down from the governmental affairs committee.

FACTS

The Sacramento Regional Builder’s Exchange, of which you are the Director of Public Affairs, is requesting advice on a political matter. SBE is active in endorsements and donating to various candidates in the region. SBE’s structure for endorsements and donations is as follows: SBE has a governmental affairs committee, which recommends the endorsements of and donations to candidates. SBE also has a political action committee which takes the recommendations of the government affairs committee, and votes on endorsements and amounts to donate to candidates. The political action committee does not necessarily vote to endorse or donate to candidates who were recommended by the governmental affairs committee – the governmental affairs committee serves as a means to interview candidates and have a broad discussion about various political races.

One of SBE’s governmental affairs committee members has announced that he will be running for a local city council. This member is not on the political action committee. Shortly after his announcement, the governmental affairs committee voted to recommend endorsement of this individual to the political action committee, during a portion of the meeting where he was not in attendance. The political action committee approved this recommendation and formally endorsed him for his race.

It is your belief that the political action committee will want to donate money to this individual in the form of an independent expenditure. The question that you need advice on is: how can you legally go about doing so? You ask whether this individual will need to immediately step down from the governmental affairs committee. Your hope is that you can avoid having him step down, as he enjoys being on the committee, and is effective. Your hope is that one of the two following scenarios will allow him to legally stay on the committee, and have the political action committee legally be allowed to

contribute to his campaign via an independent expenditure: (1) in any governmental affairs committee meeting where his campaign is being discussed, he will not be in attendance, or (2) the governmental affairs committee will be bypassed on the matter of his campaign, and instead any discussion of his campaign will be handled solely by the political action committee.

ANALYSIS

The Act defines an "independent expenditure" 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, emphasis added.)

Section 85500(b) describes when an expenditure will not be considered independent, but because it is coordinated with the candidate, will be considered a contribution to the candidate who benefits from the expenditure.

"(b) An expenditure may not be considered independent, and shall be treated as a contribution from the person making the expenditure to the candidate on whose behalf, or for whose benefit, the expenditure is made, if the expenditure is made under any of the following circumstances:

(1) The expenditure is made with the cooperation of, or in consultation with, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.

(2) The expenditure is made in concert with, or at the request or suggestion of, the candidate on whose behalf, or for whose benefit, the expenditure is made, or any controlled committee or any agent of the candidate.

(3) The expenditure is made under any arrangement, coordination, or direction with respect to the candidate or the candidate's agent and the person making the expenditure."

Regulation 18225.7, summarized below and enclosed, further describes when an expenditure is considered independent of or coordinated with a candidate. An

expenditure is *not considered independent* if:

- It is made at the request, suggestion, or direction of, or in cooperation, consultation, or coordination with the candidate or committee for whose benefit the expenditure is made.
- The candidate or committee or their agents have made or participated in making any decision about the content, timing, location, mode, intended audience, distribution or placement of the communication.
- The creator, producer or distributor, or the person paying for the communication has discussed and agreed with the candidate or committee, or their agents, regarding the content, timing, location, mode, intended audience, distribution or placement of the communication.

An expenditure is *presumed to be coordinated* or “made at the behest of” a candidate or committee if it is:

- Based on information about the candidate’s or committee’s campaign needs or plans provided to the expending person by the candidate or committee.
- Made by or through any agent of the candidate or committee in the course of the agent’s involvement in the current campaign.
- The person making the expenditure retains the services of a person who provides the candidate with professional services related to campaign or fundraising strategy for that same election.
- The communication reproduces, republishes or disseminates a communication designed, produced, paid for or distributed by the candidate or committee.

When a communication expressly advocates a clearly identified candidate or measure and the communication is coordinated with or “made at the behest of” the candidate or committee, the communication will qualify as a contribution. Under Regulation 18225.7, however, an expenditure will not be considered a contribution to a candidate merely because:

- The person making the expenditure interviews the candidate on issues affecting the person making the expenditure.
- The person making the expenditure has obtained a photograph, biography, position paper, press release, or similar material from the candidate or the candidate’s agents.
- The person making the expenditure has made a contribution to the candidate or committee.
- The person making the expenditure is responding to a general request for support by the candidate or committee, but there is no discussion with the candidate or committee prior to the expenditure relating to the details of the expenditure.

- The person making the expenditures has invited the candidate or committee to make an appearance before the person's members, employees, shareholders, or the families thereof, provided that there is no discussion with the candidate or committee prior to the expenditure related to details of the expenditure.

Turning to your facts, you believe SBE PAC will be interested in making independent expenditures on behalf of a member of SBE's governmental relations committee who is running for a local city council. You are inquiring whether SBE PAC can legally make independent expenditures for a member of its governmental relations committee who is running for a local city council. Specifically, you ask whether the individual can remain on SBE's governmental relations committee if (1) he leaves the room when his city council race is discussed, or (2) you bypass the governmental relations committee with respect to his council race and leave all discussions and decisions about that race to SBE's PAC (of which the individual is not a member).

A determination of whether a given expenditure is made independent of or in cooperation or coordination with a candidate is fact driven.³ There is no single blueprint for how a committee making independent expenditures should be configured or should operate to avoid coordination with a candidate. However, such committees do set up firewalls and adopt best practices to avoid coordination with a candidate.

It is up to your organization, SBE, to take the necessary steps to ensure that an independent expenditure is in fact independent and not made in coordination with a candidate. In the situation you have described with the close working relationship between SBE's governmental affairs committee and SBE PAC, SBE would be much less likely to run afoul of the coordination rules if the candidate steps down from the governmental affairs committee. If the candidate does not step down from the governmental affairs committee, given practical considerations, it would be difficult to avoid the conversations and discussions between the candidate and SBE members concerning the candidate's campaign and communications that SBE PAC wants to produce. If such prior arrangement and coordination with the candidate takes place, SBE PAC's expenditures on behalf of the candidate will not be considered independent.

With respect to reporting, SBE PAC will have to disclose any independent expenditures on its regularly filed campaign statements (Form 460), and will likely file a supplemental independent expenditure report (Form 465). In addition, the committee

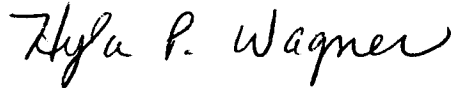
³ See, e.g., *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604 (1996), where the Supreme Court struck down the Federal Election Campaign Act's limits on independent expenditures by political parties, and held that the Colorado Republican Party's purchase of radio attack ads against the likely opponent in a federal senate election was an "independent expenditure." In finding that the expenditure was independent rather than coordinated with a candidate, the Court noted that at the time of the ad purchase the Republicans had not yet nominated a candidate and the Colorado Republican Party's chairman developed the script for the ad on his own initiative, showing it only to party staff. (*Id.* at 613-615.)

will have to disclose independent expenditures made during the last 16 days of the local election in 24-hour reports (Form 496).

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in cursive script that reads "Hyla P. Wagner".

By: Hyla P. Wagner
Senior Counsel, Legal Division

HPW:jgl

Enclosure