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June 21, 2004

VIA MESSENGER DELIVERY

Liane Randolph, Chair
Philip Blair, Commissioner
Sheridan Downey, Commissioner
Pam Karlan, Commissioner
Tom Knox, Commissioner
Fair Political Practices Commission
428 J Street, 8th Floor
Sacramento, CA 95814

RE: Proposed Regulation 18530.9
(Contributions to Controlled Ballot Measure Committees)

Dear Chair and Commissioners:

This firm serves as legal counsel to Governor Schwarzenegger, and I serve as treasurer to the Governor's California Recovery Team (a controlled general purpose ballot measure committee), Yes on 57 and 58 (a controlled primarily formed ballot measure committee controlled by both Governor Schwarzenegger and Controller Westly), and Governor Schwarzenegger's Committee for Fair Share Gaming Agreements.

The Governor opposes adoption of proposed Regulation 18530.9 and urges caution in proposing a sweeping change to existing law with wide-ranging policy and legal implications. Moreover, drastic changes in the law mid-election cycle raise serious constitutional concerns and questions of fundamental fairness.

The Governor understands the concerns of those who support the proposed regulation and notes that Assemblywoman Wolk has introduced a bill on the same subject. The enactment of legislation, which provides the opportunity to address the policy and legal implications more fully is preferable to a piecemeal regulatory approach that may not be statutorily authorized. The Governor pledges to work with Assemblywoman Wolk and other interested legislators on her bill this summer in an effort to address the important matters raised by the Commission and those discussed below.

A. What is the Policy Objective?

The origin of proposed Regulation 18530.9 stems from the Commission's attempt to interpret and apply Government Code section 85310(c), which imposes a contribution limit on persons making public communications featuring a candidate during the period immediately preceding an election in which the candidate is also on the ballot. Thus, Proposition 34 attempted to "close a loophole" that would allow candidates to be involved or direct expenditures by other persons, including individuals, organizations and committees, for the purpose of supporting that candidate's candidacy while not expressly advocating that candidate's candidacy.

If that is the policy objective of the Commission, then proposed Regulation 18530.9 overreaches. We believe that existing law (Gov. Code § 85310) and proposed Regulation 18531.10 adequately address any perceived abuse of the contribution limits arising from that occurrence and will immediately serve to prevent abuse in the upcoming election.

Some commentators have suggested a new policy objective, namely imposing contribution limits on candidate controlled ballot measures to prevent the appearance of corruption. However, the focus of the statute defining a candidate controlled committee focuses on "expenditures," not fundraising. (Gov. Code § 82016). I am not aware that the Commission has ever opined that fundraising by a candidate for a ballot measure equates to "control" under the statute. Indeed, the advice letters regarding candidate controlled committees conclude that a candidate can raise funds for a ballot measure, can serve as an "honorary chair" of a committee, and can appear on the committee's letterhead, all without triggering "control." (Woodruff Advice Letter, No. I-89- 180; Madden Advice Letter, No. A-85-197; Trimbur Advice Letter, No. A-00-067; Erenbaum Advice Letter, No. I-01-242).

Since adoption of the proposed regulation would not prevent unlimited fundraising by candidates for ballot measure committees, the stated new objective would not be served without a comprehensive statutory scheme amending the Act.

Rather, the proposed regulation would merely force a candidate to disassociate from participating in campaign strategy and spending decisions regarding important policy matters facing our state. The Commission would be inundated with pre-election complaints alleging that a non-controlled committee was in fact controlled, so as to impose contribution limits on the committee.¹

¹ For example, the likeness of the Governor and his public endorsement or opposition to a ballot measure was used in campaign commercials in the March election by committees in which the Governor had no involvement and did not consent to the use of his likeness. Opposition campaigns might reasonably suspect that the Governor was involved in the campaigns and might allege that he "controlled" the committee in an attempt to impose contribution limits on the opposition. Thus, not only would the Commission be burdened with pre-election complaints, so too would the wrongly accused candidate.

B Statutory Scheme

The staff memorandum concedes that the clause found in Sections 85301 and 85302 (“a person... may not make to any candidate for elective state office”) has heretofore been understood to apply to a candidate’s committee for elective office. Proposed Regulation 18530.9 effectively re-interprets Proposition 34 in a way not contemplated by anyone since its inception (neither the drafters, authors of the ballot arguments, the voters, or the Commission).

The term “candidate” is already a defined term under the Act and means a person who is listed on a ballot as a candidate or is receiving contributions or making expenditures to bring about his or her election to office. Moreover, a candidate retains that status so long as the candidate maintains a committee. (Gov. Code § 82007.) Thus, many persons who are not currently in public office are still “candidates” under the Act.

If Proposition 34 were intended to apply to candidate controlled ballot measure campaigns, the text could have merely referred to contributions to “a candidate” or could have referred to “a candidate and all committees controlled by a candidate.” It does not.

Moreover, other related provisions of Proposition 34 using similar terms clearly apply to candidacy campaigns, not ballot measure campaigns. For example, Sections 85317 and 85318 permit “a candidate for state elective office” to use excess funds raised for a primary election in the general election for the same office and to raise contributions for a general election prior to the primary election for the same elective office. Neither of these provisions would have any application in the context of a ballot measure.

Additionally, Section 85400 provides “a candidate for elective state office” with the opportunity to accept voluntary expenditure limits and sets those limits based on the specific office sought. Of course, that section does not make any reference to ballot measures.

Thus, the question arises, should a regulatory agency enact sweeping changes in the law on its own, without legislative consideration, and unnecessarily raise legal questions concerning its statutory authority to enact such changes?

C. Candidate Control

The staff memorandum makes passing reference to “the relatively low threshold that defines a ‘controlled committee,’ but not in connection with proposed Regulation 18530.9. Rather, staff only makes the reference in its discussion of proposed Regulation 18531.10.

Under the Act, the threshold for candidate control is indeed “low” and vague. Section 82016 states:

‘Controlled committee’ means a committee that is controlled directly or indirectly by a candidate... in connection with the making of expenditures. A candidate... controls a committee if he or she, or his or her agent, ... has significant influence on the actions or decisions of the committee.

The Commission has advised in the past, for example, that a candidate is presumed to “control” a committee if the candidate or one of his or her “agents” sits as one member of a sixteen member board empowered with making expenditure decisions. (Ferguson Advice Letter, No. A-86-044; Olson Advice Letter, No. A-89-304)

Thus, if adopted, Regulation 18530.9 would impose contribution limits on the vagaries of Section 82016 – e.g., “directly or indirectly;” “acts jointly;” “his or her agent;” “controls or has significant influence;” and “on actions or decisions of the committee.” Yet, the regulation would fail to reach non-controlled ballot measure committees reliant on fundraising by candidates.

Under existing law, a candidate is either a candidate or not a candidate under very clear standards. In light of the constitutional implications of imposing contribution limits on ballot measure activity, the Commission should be concerned about the vagueness associated with “candidate control” under the Act.

D. Fairness

In the past, the Commission has considered the “fairness” of having one side of a political debate subject to contribution limits while another side of the debate is not, most recently in connection with a recall. Adoption of proposed Regulation 18530.9 requires the Commission to address this issue again.

Under California law, many legislative matters are required to be placed before the voters for adoption or rejection. Bonds, constitutional amendments, amendments to previously enacted initiatives, and referenda are all generated by the Legislature. There are recent and current examples that illustrate the complex policy issues wrought by the proposed regulation.

Last March, Governor Schwarzenegger, Controller Westly, and several legislators placed their political reputations on the line to pass Propositions 57 and 58. Both measures were placed on the ballot, as required by law. Should the elected officials responsible for placing a measure on the ballot be hamstrung in campaigning for the passage of the measure vis-a-vis opponents of the measure, who may not be subject to contribution limits?

Similarly, a legislator may expend a considerable amount of time and political capital to obtain the passage of legislation that is later subject to referendum. Such will be the case this November when voters will be asked to approve SB 2 authored by Senator John Burton. The

referendum was lawfully qualified by opponents to SB 2 using unlimited contributions. Should Senator Burton be forced to choose to either defend his legislation using limited contributions or to hope others will defend it without his “direct or indirect significant influence” over that defense? I note that Senator Burton is “termed-out” and is not seeking election to any office this November.

And lastly, two initiatives that severely limit the authority of the Governor to negotiate gaming compacts with Native American tribes have just qualified for the ballot in November. If adopted, the regulation would prevent the Governor from controlling a committee to oppose these two measures that are a direct assault on his constitutional power, unless he were to agree to oppose the well-funded campaigns for the initiatives using limited contributions. Meanwhile, the Native American tribe committee and the Gaming industry committee will be funded with unlimited gaming revenues. These issues of fairness deserve thorough consideration and debate and should not occur during a specific election.

E. Impact on Ballot Measure Campaigns Seeking Endorsements

The proposed regulation starts from a notion that a candidate is forming a controlled ballot measure campaign to evade contribution limits. In truth, many ballot measure campaigns actively seek the support and assistance of candidates and elected officials in an effort to aid in the passage or defeat of a measure. Our elected officials are valuable opinion leaders and voters desire to know the opinions of such leaders. Campaigns would now have to think twice about seeking the support of a governor, a legislator or other elected statewide officials for fear of triggering contributions limits and/or complaints to the Commission.

F. Practical Difficulties

The staff memorandum identifies a number of practical difficulties that would follow adoption of proposed Regulation 18530.9, however, several others were omitted.

The contribution limits of Sections 85301 and 85302 are on a “per election” basis. The proposed regulation applies to committees that support state and local measures. To what “election” would the limits apply? If a “primarily formed” committee exists during the course of both a primary election (perhaps while petitions are being circulated) and then appears on the general election ballot, can the candidate accept one or two contributions? What happens if a measure is intended to qualify for a specific ballot, but fails to qualify in time and then appears on a ballot two years later? (e.g., Proposition 54 on last October’s ballot).

How does a “per election” basis apply to a general purpose ballot measure committee that may support or oppose more than one initiative on a single election, or may support or oppose no initiatives at a particular election?

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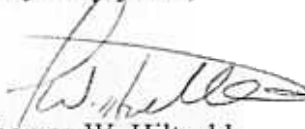
If the candidate is also on the same ballot, should the contribution to his or her ballot measure committee and candidate committee be aggregated for purposes of the contribution limits? (See, Letter from Senator Johnson posing the same issue.) If the candidate controls multiple ballot measure committees, is there a separate limit for each or are they aggregated? (e.g., the Governor could have created one committee to support Proposition 57 and a separate committee to support Proposition 58.)

Would the limits on contributions from one candidate to another in Section 85305 apply? Would the intra-candidate transfer rules of Government Code section 85306 apply to candidate controlled ballot measures? Does the loan provision of Government Code section 85307 apply to candidate controlled ballot measures?

These and other important practical implications that would be raised by the adoption of the proposed regulation have not been adequately addressed.

The November election is a mere five months away and fourteen ballot measures have already qualified for the ballot. Such a sweeping change in the scope of Proposition 34 should not be made during the course of the campaign. For these reasons, we respectfully urge the Commission to reject proposed Regulation 18530.9 and to work with Assemblywoman Wolk and other interested legislators on a comprehensive legislative proposal.

Very truly yours,



Thomas W. Hiltachk

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