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BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:)
Opinion requested by)
California State Association)
of Counties and California)
School Boards Association)

No. O-21-002
June 17, 2021

BY THE COMMISSION: The California State Association of Counties and California School Board Association have requested the Commission’s opinion on its interpretation of California Code of Regulations, title 2, section 18420.1,¹ the Commission’s regulation that identifies when a payment by a state or local agency qualifies as a contribution or independent expenditure under the Political Reform Act (the Act), and Regulation 18901.1, which identifies when a mass mailing sent at public expense is campaign related. Specifically, the requestors ask the following question:

QUESTION

Do the Act and FPPC Regulations 18420.1 and 18901.1 create a per se reportable campaign expenditure whenever public agencies engage in communications regarding ballot measures through the means of television, radio, and electronic media, including social media, regardless of the content of the communications?

CONCLUSION

No. Regulations 18420.1 and 18901.1 do not create a per se rule that TV, radio or other electronic media communications are campaign expenditures. To qualify as a campaign expenditure by a state or local agency under Regulations 18420.1, subdivision (b) or 18901.1, subdivision (c), a communication must be campaign material that unambiguously urges a particular result in an election. The mode of communication does not solely determine whether the communication is a campaign expenditure.

ANALYSIS

A. Regulation 18420.1.²

Regulation 18420.1 provides in relevant part:

¹ All references to regulations are to Title 2 of the California Code of Regulations.

² The relevant portions of Regulations 18420.1, subdivision (b) and 18901.1, subdivision (c) are substantively identical. Thus, in this Opinion, any specific discussion of Regulation 18420.1 also applies to Regulation 18901.1.

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(a) A payment of public moneys by a state or local governmental agency, or by an agent of the agency, made in connection with a communication to the public that expressly advocates the election or defeat of a clearly identified candidate or the qualification, passage, or defeat of a clearly identified measure, as defined in Section 82025(c)(1), or that taken as a whole and in context, unambiguously urges a particular result in an election is one of the following:

(1) A contribution under Section 82015 if made at the behest of the affected candidate or committee.

(2) An independent expenditure under Section 82031.

(b) For the purposes of subdivision (a), a communication paid for with public moneys by a state or local governmental agency unambiguously urges a particular result in an election if the communication meets either one of the following criteria:

(1) It is clearly campaign material or campaign activity such as bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots.

(2) When considering the style, tenor, and timing of the communication, it can be reasonably characterized as campaign material and is not a fair presentation of facts serving only an informational purpose.

(Emphasis added.)

The “unambiguously urges a particular result in an election” standard set forth in Regulations 18420.1, subdivision (b) is based on the California Supreme Court cases *Stanson v. Mott* (1976) 17 Cal. 3rd 206 and *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1. These cases addressed whether a public agency’s use of public funds on communications constituted campaign activity, which would be a misuse of public funds absent express statutory authority for the expenditure. Regulations 18420.1 and 18901.1 set forth the same analysis as the Supreme Court for determining when a communication by a public agency qualifies as campaign activity to ensure a consistent standard for both misuse of public funds prohibitions and campaign disclosure requirements.

B. Regulation 18420.1 Does Not Categorize All Radio, Television and Electronic Media as Campaign Activity.

Under Regulation 18420.1, subdivision (b), a communication from a public agency can qualify as a campaign expenditure even if it does not expressly advocate for or against a candidate or measure if the communication “unambiguously urges a particular result in an election...” A communication “unambiguously urges a particular result in an election” if it is clearly campaign material. If it is not clearly campaign material on its face, the “style, tenor, and timing” of the communication is then considered to determine if the communication unambiguously urges a particular result in an election, or if it is a “fair presentation of facts serving only an informational purpose.”

While Regulation 18420.1, subdivision (b)(1) lists “bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots” as examples of forms of communications that are campaign

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materials and activity, the examples should be read in context³ with the immediately preceding phrases “campaign material” and “campaign activity,” as well as the overarching determination of whether the communication “unambiguously urges a particular result in an election...” “[T]he meaning of the enactment may not be determined from a single word or sentence; the words must be construed in context.” (*Comm’n on Peace Officer Standards & Training v. Superior Court* (2007) 42 Cal.4th 278, 294.) If a particular communication is not clearly campaign material or activity on its face and is not reasonably characterized as campaign material based on the style, tenor, and timing of the communication, it does not urge a particular result in an election and is outside the scope of the regulation.

For these reasons, Regulations 18420.1 subdivision (b)(1) and 18901.1 subdivision (c)(1) deem a communication by a public agency a reportable campaign expenditure if the communication is clearly campaign material or activity. The medium used to make the communication is not solely dispositive of whether the communication is clearly campaign material or activity that unambiguously urges a particular result in an election which would result in an expenditure under the Act.

WE CONCUR:

³ See *People v. Hudson* (2006) 38 Cal.4th 1002, 1010 [stating that “interpretations that render statutory terms meaningless as surplusage are to be avoided.”]