



To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, Wood
From: Dave Bainbridge, General Counsel
Subject: *In Re Henning – Bray Opinion Request*
Date: May 6, 2021

Request

The California State Association of Counties (CSAC) and California School Board Association (CSBA) requested a Commission opinion on the Commission’s 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, and Regulation 18901.1, which identifies when a mass mailing sent at public expense is campaign related.² Specifically, CSAC and CSBA ask:

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?

Law

Regulation 18420.1 provides in relevant part:

(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)³, 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 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 so the following, while specifically discussing Regulation 18420.1, also applies to Regulation 18901.1.
³ All statutory references are to the California Government Code unless otherwise indicated.

(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 Commission based the “unambiguously urges a particular result in an election” standard found in Regulations 18420.1 and 18901.1 on the California Supreme Court cases of *Stanson v. Mott* (1976) 17 Cal. 3rd 206 and *Vargas v. City of Salinas* (2009) 46 Cal. 4th 1. Those cases involved questions of 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. The Commission’s regulations employ the same analysis as the 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.

FPPC Interpretation

The Commission has not previously provided a formal interpretation of the regulations since adopting them in 2009. On three occasions, the Commission has approved a “Stipulation, Decision, and Order” (“stipulation”) where a public agency made expenditures that unambiguously urged a particular result in an election pursuant to Regulation 18420.1. In each of these cases, the communications at issue concerned ballot measures and contained campaign materials that sought to influence voters, as detailed in the stipulations.⁴ Commission staff have also advised through advice letters that a government agency may pay for radio and television broadcasts without triggering the Act’s campaign and advertising disclosure requirements so long as the broadcasts do not constitute campaign activity.⁵ Commission staff have not advised that a communication by a government agency that was not campaign material required disclosure under the Act.

Staff’s interpretation is that Regulation 18420.1, subdivision (b)(1) and 18901.1, subdivision (c) apply when the communication at issue relates to an election, and is clearly campaign material, not any circumstance where the agency uses one of these means to communicate with citizens. The “unambiguously urges a particular result in an election” definition turns on whether something is “clearly campaign material or campaign activity.” The phrase “bumper stickers, billboards, door-to-door canvassing, or other mass media advertising including, but not limited to, television, electronic media or radio spots” are examples of forms of communication that are campaign materials and activity if related to a campaign. But if such communications are unrelated to an election or campaign, they would not result in a contribution or independent expenditure as they would clearly be outside the scope of the regulation. The

⁴ See *In the matter of San Francisco Bay Area Rapid Transit District (BART)*, FPPC No. 16/19959 (stipulation approved December 20, 2018); *In the matter of Los Angeles County*, FPPC Case No. 17/150 and 18/1258 (stipulation approved August 20, 2020); *In the matter of City of Fountain Valley*, FPPC No. 16/20109 (stipulation approved March 18, 2021).

⁵ See *Casher Advice Letter*, No. A-18-187 and 187a, and *Carden Advice Letter*, No. A-13-149.

regulation's examples must be read in context with the immediately preceding phrases "campaign material" and "campaign activity," as well as the overarching criterion "unambiguously urges a particular result in an election."

Litigation

This opinion request comes after a recent County of Los Angeles Superior Court order denying CSAC and CSBA's claims that Regulations 18420.1 and 18901.1 are invalid. (*CSAC v. FPPC*, Case Number BS174653, Order filed December 14, 2020.) CSAC and CSBA filed a petition for writ of mandate in response to the Commission's Enforcement Division pursuing enforcement actions against public agencies that failed to report campaign activity. In one such case, the County of Los Angeles failed to comply with the Act's campaign reporting and advertising disclosure requirements for television, radio, and electronic advertisements paid for by the county to support a local ballot measure in 2017. The case resulted in the county agreeing to pay a fine of \$1,350,000 for failing to comply with the Act's campaign reporting and advertising disclosure requirements.

CSAC and CSBA asserted in their trial brief in the *CSAC v. FPPC* civil litigation that Regulation 18420.1 was invalid due to its "*per se* categorization of television, radio, and electronic media as campaign."⁶ The Commission's opposition brief stated that the language in question did not create a "per se" rule regarding television, radio and electronic communications but rather provided examples of the sorts of communications, if related to an election, that could be campaign material due to the nature of the communication.⁷ CSAC and CSBA's assertion that the regulations create a "per se" rule prohibiting the use of television, radio, and other mass media to communicate with the public ignores the preceding phrases "campaign material" and "campaign activity" in the regulation, as well as the underlying determination of whether the communication "urges a particular result in an election."

Recommendation

If the Commission is inclined to issue an opinion, staff recommends the opinion interpret the Regulations at issue consistent with the FPPC's recent court pleadings and the staff's interpretation discussed above.

⁶ See "Memorandum of Points and Authorities in Support of Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief," at page 24.

⁷ See "Opposition to Petition for Writ of Mandate" at page 21. In arguing Regulation 18420.1, subdivision (b) does not create a per se rule regarding the use of television, radio, and electronic communications by government agencies, the FPPC does not concede that if Regulation 18420.1 did create such a per se rule that the rule would result in the regulation being invalid, as CSAC and CSBA have alleged.