STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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August 13, 2024

Peter Bagatelos
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Re: Your Request for Advice
Our File No. A-24-080

Dear Mr. Bagatelos:

This letter responds to your request for advice regarding provisions of the Political Reform Act (the "Act").[1]

Please note that we are only providing advice under the conflict of interest provisions of the Act and not under other general conflict of interest prohibitions such as common law conflict of interest or Section 1090.

Also note that we are not a finder of fact when rendering advice (*In re Oglesby* (1975) 1 FPPC Ops. 71), and any advice we provide assumes your facts are complete and accurate. If this is not the case or if the facts underlying these decisions should change, you should contact us for additional advice.

QUESTION

Does Section 85320 of the Act, which prohibits making and accepting contributions from "foreign principals" to ballot measure committees, apply to H-1B visa holders, who are neither U.S. citizens nor permanent residents?

CONCLUSION

No. Although Section 85320's prohibition on "foreign principals" applies to non-U.S. citizens located "outside the United States," it does not apply to H-1B visa holders inside the United States. The legislative history of Section 85320 reveals that a broader prohibition, which would have applied to "foreign nationals" defined under federal law to expressly include any non-U.S. citizens who was not a lawful permanent resident, was initially presented to the Legislature.

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[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 18104 through 18998 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.

However, this initial language was ultimately removed in favor of a less restrictive standard, as discussed in detail below.

FACTS AS PRESENTED BY REQUESTER

You represent a ballot measure committee that would like to receive a sizeable contribution from an individual who is currently residing in the United States under an H-1B work visa from the federal government. The donor does not have a green card allowing permanent resident status. The H-1B allows for limited-time resident status in the US.

ANALYSIS

Rules of Statutory Construction

The California Court of Appeals has described the rules of statutory interpretation, which guide the Commission's interpretation, as follows:

> When interpreting statutory language, "'[w]e begin with the fundamental rule that our primary task is to determine the lawmakers' intent.' [Citation.] The process of interpreting the statute to ascertain that intent may involve up to three steps. [Citations.] … We have explained this three-step sequence as follows: 'we first look to the plain meaning of the statutory language, then to its legislative history and finally to the reasonableness of a proposed construction.'" [Citation.]
>
> [¶]
>
> We are also mindful, however, that "[o]ur primary goal is to implement the legislative purpose, and, to do so, we may refuse to enforce a literal interpretation of the enactment if that interpretation produces an absurd result at odds with the legislative goal." [Citation.]

(*Lateef v. City of Madera* (2020) 45 Cal.App.5th 245, 253.) Additionally, we are to avoid "interpretations that render any language surplusage." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1097.)

Accordingly, we begin our analysis by considering the plain meaning of Section 85320's language.

Language of Section 85320

Section 85320 establishes prohibitions relating to political contributions made by "foreign principals" in the context of state or local ballot measures. Specifically, the statute provides in its entirety:

> (a) A foreign government or foreign principal shall not make, directly or through any other person, a contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, any state or local ballot measure or in connection with the election of a candidate to state or local office.

(b) A person or a committee shall not solicit or accept a contribution from a foreign government or foreign principal in connection with the qualification or support of, or opposition to, any state or local ballot measure or in connection with the election of a candidate to state or local office.

(c) For the purposes of this section, a "foreign principal" includes the following:

(1) A foreign political party.

(2) A person outside the United States, unless either of the following is established:

(A) The person is an individual and a citizen of the United States.

(B) The person is not an individual and is organized under or created by the laws of the United States or of any state or other place subject to the jurisdiction of the United States and has its principal place of business within the United States.

(3) A partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(4) A domestic subsidiary of a foreign corporation if the decision to contribute or expend funds is made by an officer, director, or management employee of the foreign corporation who is neither a citizen of the United States nor a lawfully admitted permanent resident of the United States.

(d) This section shall not prohibit a contribution, expenditure, or independent expenditure made by a lawfully admitted permanent resident.

(e) Any person who violates this section shall be guilty of a misdemeanor and shall be fined an amount equal to the amount contributed or expended.

Based on the facts provided, the potential contributor is an H-1B visa holder and is neither a United States citizen nor a permanent resident. However, it is unclear whether the phrase "outside the United States" should be interpreted literally as referring to persons physically located outside the United States. Under such an interpretation, because an H-1B visa holder is legally and physically inside the United States, they would not qualify as a "person outside the United States" and, therefore, would not qualify as a "foreign principal."

Alternatively, the phrase "outside the United States" could be interpreted non-literally as referring generally to non-citizens. This non-literal interpretation may be evidenced by the fact that the statute subsequently specifies it "shall not prohibit a contribution, expenditure, or independent expenditure made by a lawfully admitted permanent resident." (Section 84308(d).) In other words, subdivision (d) could be interpreted as establishing an exception for permanent residents to a general prohibition on ballot measure contributions made by non-citizens. This would mean that all other persons, such as H-1B visa holders, would be prohibited from contributing to state and local ballot measure committees.

On the one hand, if the Legislature intended a non-literal interpretation, then defining "foreign principals" to include persons "outside the United States" is an odd choice of phrasing, even if somewhat clarified by subdivision (d)'s reference to permanent residents, given the usual, ordinary import of the word "outside." If the Legislature intended for "foreign principals" to include persons who are not: (1) U.S. citizens; (2) specified types of entities; and (3) or permanent residents, this could have been accomplished without use of the word "outside."

On the other hand, a literal interpretation referring to persons physically located outside the United States might seemingly produce an absurd result at odds with the legislative goal. If the goal of Section 85320 is to prevent contributions from certain foreign sources in the context of ballot measures, why would a prohibition be based on the physical location of a contributor, rather than their status as neither a United States citizen nor permanent resident? If physical location was the determinative factor, a foreign citizen otherwise prohibited from making a contribution to a ballot measure committee could permissibly do so simply by visiting the United States. This seems like a significant loophole that would easily frustrate the purpose of the legislation.

Because the statute is ambiguous as to the intended scope of "foreign principals" and persons "outside the United States," we next consider the legislative record.

Legislative Record

Legal Background

In 2011, the United States District Court for the District of Columbia upheld a federal statute prohibiting the plaintiffs—foreign citizens legally in the United States on temporary work visas—from making political contributions to candidates for office. (*Bluman v. FEC* (D.D.C. 2011) 800 F.Supp.2d 281 (aff'd by *Bluman v. FEC* (2012) 565 U.S. 1104).) As relevant to understanding the context in which Section 85320 of the Act was enacted, the court in *Bluman* explained:

> As political campaigns grew more expensive in the latter half of the 20th Century, especially with the advent of costly television advertising, money became more important to the campaign process - in terms of both contributions to candidates and political parties and expenditures advocating for or against candidates. As money became more important to the election process, concern grew that foreign entities and citizens might try to influence the outcome of U.S. elections. In 1966, Congress sought to limit foreign influence over American elections by prohibiting agents of foreign governments and entities [referred to as "foreign principals"] from making contributions to candidates. See Pub. L. No. 89-486, §8, 80 Stat. 244, 248-49 (1966). In 1974, Congress expanded that ban and barred contributions to candidates from all "foreign nationals," defined as all foreign citizens except lawful permanent residents of the United States. See Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(d), 88 Stat. 1263, 1267.

(*Bluman*, *supra*, at p. 283.)

In 1997 (the year in which Section 85320 was enacted), the relevant federal statute, 2 USC § 441e, prohibited "foreign nationals" from making contributions "in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select

candidates for any political office." (2 USC § 441e(a) (1997).) The term "foreign national" was defined as either a "foreign principal," as defined in 22 USC § 611(b), *or* an individual who is neither a citizen of the United States nor lawfully admitted for permanent residence. In other words, the term "foreign principal," as defined by 22 USC § 611(b), which referred to persons "outside the United States," was not understood to include non-U.S. citizens or non-permanent residents. If that were the case, 2 USC § 441e(b)(2)'s referral to such persons would be rendered surplusage. Rather, as noted by the *Bluman* court, prohibitions on "foreign nationals" came as an expansion on earlier prohibitions placed on foreign agents or "foreign principals."

Senate Bill 109 (1997) Leads to Enactment of Section 85320

Although 2 USC § 441e established prohibitions on contributions from "foreign nationals" in the context of any election for political office, it did not establish similar prohibitions with respect to ballot initiatives or measures. In 1997, California Senator Quentin Kopp introduced Senate Bill 109 ("SB 109") to fill this gap. (See Senate Committee on Elections and Reapportionment, Bill Analysis for SB 109, Feb. 24, 1997.) As introduced, SB 109 provided, in relevant part:

> (a) No foreign government, foreign national, or foreign principal shall make any contribution, expenditure, or independent expenditure in connection with the qualification or support of, or opposition to, any state or local initiative or referendum measure.
> (b) No person and no committee shall solicit or accept a contribution from a foreign government, foreign national, or foreign principal.
> (c) (1) For purposes of this section, a foreign principal is a person defined in 22 U.S.C. 611(b).
> (2) For purposes of this section, a foreign national is a person who is not a citizen of the United States and who is not lawfully admitted for permanent residence as defined in 8 U.S.C. 1101(a)(20).

(SB 109 (1997-1998 Reg. Sess.) as introduced Dec. 30, 1996.)

Like 2 USC § 441e(b), SB 109 established two groups of persons from whom contributions were prohibited: (1) "foreign principals;" and (2) non-citizens and non-permanent residents.

Senate Bill 109 was presented at a Senate Committee on Elections and Reapportionment Committee hearing on February 19, 1997. Bill analysis prepared by the Committee noted that "foreign national" was defined as "a person who is not a citizen of the United States and who is not lawfully admitted for permanent residence." (Senate Committee on Elections and Reapportionment, *supra*.) The analysis also noted the bill was opposed by the American Civil Liberties Union (ACLU) and the Mexican American Legal Defense and Educational Fund (MALDEF).

Senate Bill 109 was amended on February 25, 1997, to remove all references to "foreign nationals." Subsequent bill analysis by the Senate Rules Committee noted the amendment and the fact that the prior inclusion of "foreign nationals" was "the basis for the American Civil Liberties Union and Mexican American Legal Defense Fund's opposition in committee." (Senate Rules Committee, Bill Analysis of SB 109, Mar. 19, 1997.)

Based on the legislative record, it appears the Legislature's intent in amending SB 109's initial language was to address the ACLU and MALDEF's concerns about the inclusion of "foreign nationals." This seems to imply the term was understood to cover a different group of individuals than those covered by the term "foreign principal," as defined in 22 USC § 611(b). In other words, the removal of the term "foreign nationals" was intended as a substantive amendment.

To reiterate, when Section 85320 was first enacted, it only prohibited contributions to ballot measure committees made by "foreign principals," which it defined via reference to 22 USC § 611(b). At the time, 22 USC § 611(b) defined the term "foreign principal" to include:

(1) a government of a foreign country and a foreign political party;
(2) a person outside of the United States, unless it is established that such person is an individual and a citizen of and domiciled within the United States, or that such person is not an individual and is organized under or created by the laws of the United States or of any State or other place subject to the jurisdiction of the United States and has its principal place of business within the United States; and
(3) a partnership, association, corporation, organization, or other combination of persons organized under the laws of or having its principal place of business in a foreign country.

(22 USC § 611(b) (1997).) Thus, neither Section 85320 nor 22 USC § 611(b) made any express reference to non-citizens or non-permanent residents, including visa holders. In other words, Section 85320 was akin to Congress's 1966 decision to limit the influence of foreign money by placing a prohibition on contributions by "foreign principals." However, it was not as strict as Congress's 1974 decision to expand that prohibition to all non-citizens and non-permanent residents, or "foreign nationals."

Subsequent Amendments

In 2000, the Legislature replaced the reference to 22 USC § 611(b) with language that was substantively similar but specified that "a person outside of the United States" did not refer to United States citizens living abroad. Bill analysis for the amendment noted the author's intent "to correct a mistake in previous legislation, which inadvertently prohibited United States citizens living in foreign countries from participating financially in ballot measure campaigns." (Senate Committee on Elections and Reapportionment, Bill Analysis for Assem. Bill 746 ("AB 746"), May 3, 2000.) The Legislature also amended the statute to include language specifying that the statute does not prohibit contributions by "a lawfully admitted permanent resident." (AB 746 (Reg. Sess. 1999-2000) as amended Feb. 24, 2000.)

Assembly Bill 746's amendments indicate that 22 USC § 611(b)'s reference to persons "outside the United States" *was* understood as establishing a prohibition based in part on the person's geographical location. Further, including additional language further clarifying the statute's inapplicability to permanent residents made sense in that context because, like a U.S. citizen, a permanent resident could temporarily live abroad and return to the United States under certain conditions. In contrast, such a situation would be much less relevant or likely for lawful residents who do not (or do not yet) qualify as permanent residents, such as certain refugees, asylees, and visa holders. Consequently, we do not think AB 746's amended language referring to permanent residents was intended to imply the statute prohibits H1-B visa holders from contributing to ballot measure committees while in the United States.

Reasonableness

The reasonableness of a conclusion that Section 85320 is most accurately understood as establishing a prohibition that applies only to "foreign principals," a group of persons that does not include H-1B visa holders residing within the United States, is further supported by two primary factors:

First, as discussed above, it is apparent that a separate, more restrictive prohibition could have been and initially *was* placed on "foreign nationals," which would have included all non-U.S. citizens and non-permanent residents. However, SB 109 was amended to remove such a prohibition.

Second, while federal law establishes prohibitions on contributions from non-U.S. citizens and non-permanent residents in the context of elections involving candidates, it does not establish similar prohibitions for initiatives and measures. Congress could have made this decision for several reasons, such as the absence of initiatives and measures at the federal level or concerns regarding the constitutionality of such a prohibition. Alternatively, as the *Bluman* court wrote, "Congress could reasonably conclude that the risk of undue foreign influence is greater in the context of candidate elections than it is in the case of ballot initiatives [citation omitted]." (*Bluman*, *supra*, 800 F.Supp.2d at p. 291.) Similarly, the California Legislature could have reasonably concluded that a prohibition on "foreign principals" was sufficient protection against improper foreign influence on ballot initiatives and measures.

Taking these factors into consideration, we conclude that Section 85320 establishes a prohibition that applies only to "foreign principals," a group of persons that does not include H-1B visa holders residing within the United States, and that this determination is supported by the legislative record and is not an unreasonable interpretation that would produce absurd results. Consequently, we advise that the ballot measure committee you represent would not violate Section 85320 by accepting a contribution from an H-1B visa holder inside the United States.

However, we note that our conclusion is based on the factual circumstances of the question presented and we are only narrowly concluding that Section 85320 does not prohibit an H-1B visa holder from contributing to a ballot measure committee while present in the United States. We express no opinion regarding the permissibility of a contribution by a non-citizen, who is merely visiting the United States, under the provisions of Section 85320.[2]

[2] We note that proposed federal bill S.4145 may prohibit contributions by foreign nationals in the context of state and local ballot measures, initiatives, and referenda. However, any such change to federal law would fall outside the Commission's jurisdiction and we express no opinion on the applicability of any federal law or proposal.

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

Sincerely,

Dave Bainbridge
General Counsel

By: 
Kevin Cornwall
Senior Counsel, Legal Division

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