



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Germond and Commissioners Cardenas, Hatch and Hayward

From: Brian Lau, Acting General Counsel
Sukhi K. Brar, Senior Commission Counsel

Subject: *Andrews* Advice Letter, No. A-18-035, Disclose Act Requirements for Contributions from a 501(c)(3) Nonprofit Organization.

Date: June 9, 2018

Issue Presented

At its June 2018 meeting the Commission requested staff provide a memorandum discussing whether 501(c)(3) nonprofit contributors to general purpose campaign committees who have restricted their funds for use can be excluded from on advertisement top contributor disclosures. This question arose after the Commission's review of the *Andrews* Advice Letter, No. A-18-035, which concluded they could not be excluded unless further determination is made by the Commission via opinion or regulation.

Background

Save the Bay PAC, a general purpose recipient committee established in 2016, submitted a request for advice through its attorney, Emily Andrews, to the Legal Division regarding changes to the Act with the recent enactment of Assembly Bill 249 (Stats. 2017, Ch. 546, AB 249 Mullin), ("The Disclose Act"). The request for advice provided that for the 2018 elections, Save the Bay PAC would consider supporting state and local candidates and ballot measures. As a 501(c)(4) organization, Save the Bay PAC is permitted by tax law to support both candidates and ballot measures. Save the Bay PAC anticipated it will receive funds from 501(c)(3) organizations (and possibly other types of donors) where the funds are restricted for use on non-candidate purposes only. Save the Bay PAC indicated it is interested in producing advertisements in support or opposition to candidates or ballot measures. Some of the advertisements could support or oppose both ballot measures and candidates.

Save the Bay PAC sought guidance regarding the disclosure of top contributors on campaign advertisements when some of those funds have been restricted for use on non-candidate purposes only. In the *Andrews* Advice Letter, No. A-18-035 staff concluded that Save the Bay PAC could not exclude any organizations from its top contributor disclosures but could provide a statement next to a 501(c)(3) top contributor's name on that advertisement that funds were not used for candidate support.¹ In the request for advice it appeared the requestor preferred

¹ The advice request also noted that Section 84222(e) of the Act, which applies to multipurpose organizations, allows multipurpose organizations to exclude funds received from donors who have restricted their

an approach that would allow exclusion of contributors that have restricted their contributions from disclosures. Staff advised that that type of policy determination would require a Commission regulation or opinion.

Analysis

Allowing general purpose committees to exclude top contributors from advertisements when funds are restricted from such use is a reasonable interpretation of the Disclose Act's provisions.

Section 84501(a)(1) of the Act defines an "advertisement" as "any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures." The Act requires communications qualifying as "advertisements" to include disclaimers. The content and formatting of these disclaimers depend upon the nature and source of the advertisement.

Advertisements paid for by Section 82013(a) recipient committees that are not candidate controlled committees established for an elective office of the controlling candidate or political party committees, must include the words "committee major funding from" followed by the names of the top contributors to the committee paying for the advertisement. (Section 84503.) "Top contributor" is defined as "the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars (\$50,000) or more." (Section 84501(c)(1).)²

There is no express exception in the Disclose Act's new Section 84503 that would allow a general purpose recipient committee to refrain from disclosing top contributors on advertisements when a top contributor has restricted the use of its funds for any reason. However, the following purposes are listed in Section 2 of the Disclose Act:

"(a) For voters to make an informed choice in the political marketplace, political advertisements should not intentionally deceive voters about the identity of who or what interest is trying to persuade them how to vote.

funds for use on things other than contributions or expenditures from disclosure on campaign reports. The requestor felt this same logic should be applied to campaign committees such as Save the Bay PAC, however, staff believes such an interpretation would make it easier for contributors to intentionally avoid being disclosed as top contributors. In the case of multipurpose organizations, it makes sense to exclude donors who have restricted their funds from campaign reports because these types of organizations engage in many activities in addition to campaign activities such as charitable work, whereas campaign committees are created solely for the purpose of conducting political activity and the public interest in knowing who is behind such activity is much greater.

²Additionally, if the advertisement supports or opposes a candidate and is paid for by an independent expenditure, then the advertisement must include a statement that it was not authorized by a candidate or a committee controlled by a candidate. If the advertisement was authorized or paid for by a candidate for another office, the expenditure shall instead include a statement that "This advertisement was not authorized or paid for by a candidate for this office or a committee controlled by a candidate for this office." (Section 84506.5.)

“(b) Disclosing who or what interest paid for a political advertisement will help voters be able to better evaluate the arguments to which they are being subjected during political campaigns and therefore make more informed voting decisions.”

The Commission has also been previously presented with questions similar to those raised in the *Andrews* request regarding former Sections 84503 and 84506, which provided a similar but slightly different top contributor disclosure requirement. In 2004, Commission staff issued the *Olson* Advice Letter, No. A-04-045 (which has since been superseded for reasons discussed below). In that letter, the requester sought advice on behalf of the California Democratic Party (a general purpose committee) on the interpretation of former Sections 84503 and 84506 as they existed at that time.³ The requestor was advised there was no allowance for committees to only disclose top contributors whose funds were used to pay for an advertisement from a segregated account. This was because former Sections 84503 and 84506 required “any” committee to disclose “any” person who was a top contributor to the committee.

After receiving this advice, the California Democratic Party along with other political party committees filed a motion for preliminary injunction against the Commission and succeeded in stopping the Commission from applying top contributor disclaimer requirements to them. In granting the motion for plaintiffs, the court found that the plaintiffs raised serious questions supporting their claim that the disclosure requirements unconstitutionally infringed on their First Amendment right to free speech and association. In support of this finding, the court noted that plaintiffs had a likelihood of success on the merits of their case in part because requiring the identification of contributors on advertisements who may not endorse the message in the advertisement could mislead voters and undermine the governmental interest of providing information to voters regarding the identity of the speaker. The court further reasoned that in the case of political party committees, which are general purpose committees that support or oppose a wide variety of issues and candidates, it would be plausible under the Commission’s interpretations of former Sections 84503 and 84506 that a top contributor who is not endorsing a particular message would be required to be displayed on the advertisement. (*Cal. Republican Party v. Fair Political Practices Comm’n*, 2004 U.S. Dist. LEXIS 22160 at pp. 18-21).

After the court granted plaintiff’s motion for preliminary injunction, the Commission rescinded the *Olson* Advice Letter, and on March 21, 2005, adopted a resolution that former Sections 84503 and 84506 were unlawful as applied against all general purpose committees. This resolution then was incorporated by reference into a court stipulated judgement of dismissal of the case that was issued on December 30, 2005. (*Cal. Republican Party v. Fair Political Practices Comm’n*, Stipulation for Judgement of Dismissal issued December 30, 2005, CIV.S-04-2144 FCD PAN.)

³ The 2004 versions of Sections 84503 and 84506 required committees to include on-advertisement disclosure statements identifying the top two contributors whose cumulative contributions were \$50,000 or more. Sections 84503 and 84506 as analyzed in the *Olson* Advice Letter have now been repealed and replaced by new provisions in the Disclose Act.

Former Sections 84503 and 84506 have been repealed and new Section 84503 imposes a similar requirement, but Section 84503 is applicable only to general purpose committees that are not political party committees. In light of the stated purposes of the Disclose Act and case law cited above, it could be argued that requiring that a contributor to be disclosed on an advertisement when the contributor has restricted their funds from being used for such purposes would not help voters better evaluate arguments to which they are being subjected during political campaigns. This is because disclosing top contributors on an advertisement who have restricted their funds from such use would mislead voters as to the identity of who or what interest is trying to persuade them on how to vote. It can also be argued that such an outcome would run contrary to the stated purposes of the Disclose Act, undermining the governmental interest of providing information to voters regarding the identity of the speaker. Therefore, to allow general purpose committees to exclude top contributors from advertisements when funds are restricted from such use is a reasonable interpretation of the Disclose Act's provisions.

While contributions from a 501(c)(3) may give a committee the opportunity to allocate unrestricted contributions to other purposes, the use of contributions from a 501(c)(3) for overhead is restricted under applicable IRS rules.

In discussing the *Andrews* Advice Letter, No. A-13-035, the question of whether a 501(c)(4) organization's or its general purpose committee can use a 501(c)(3) organization's contributions for overhead expenses when the committee supports or opposes both candidates and measures was also posed. IRS Chief Counsel Memorandum No. 200504031 provides that a 501(c)(3) organization will not jeopardize its exempt status even though it distributes funds to organizations that are not themselves charities. However, the 501(c)(3) must ensure use of the funds for permitted purposes by limiting distributions to specific projects that further its own purposes. The 501(c)(3) also needs to retain control and discretion as to the use of the funds and maintain records establishing that the funds were used for section 501(c)(3) purposes. (Rev. Rul. 68-489, 1968-2 C.B. 210.) Additionally, a 501(c)(3) and 501(c)(4) may share employees, equipment, and office space, but the 501(c)(4) must pay at least its full share of all salary, equipment costs, and rent for running the day-to-day operations of the 501(c)(4) in order to ensure that the 501(c)(3) does not subsidize the 501(c)(4). (*Regan v. Taxation with Representation*, 461 U.S. at 544 n.6; *Center on Corporate Responsibility, Inc. v. Schultz*, 368 F. Supp. 863, 866 n.2 (D.D.C. 1973) and Bolder Advocacy's *The Connection 2018* at <https://bolderadvocacy.org/the-connection-2018-pdf-download-page> at pp 42.)

Ultimately, the receipt of additional contributions even if restricted gives a committee more freedom in allocating other contributions. However, the use of contributions from a 501(c)(3) for overhead is restricted under applicable IRS rules.

Conclusion

Even absent express statutory language, staff finds that the intent of the Disclose Act and relevant case law support the interpretation that a general purpose committee should not be required to disclose the name of a 501(c)(3) contributor as a top contributor when the 501(c)(3)'s contributions are not permitted to be used in support of the advertisement. Staff recommends withdrawing the *Andrews* Advice Letter, No. A-13-035. Staff further recommends initiating a formal rulemaking procedure to further consider the issues raised in the letter through a generally applicable regulation.⁴ Alternatively, the Commission could request that Save the Bay PAC to seek an opinion pursuant to Section 83114 and Regulation 18320. However, the immunity provided by Government Code section 83114 extends only to the person or persons identified in the opinion.

⁴ For example, further direction is needed as to whether all contributors who have restricted their contributions be excluded from top contributor lists, or just those that must restrict the use of their funds by law, such as a 501(c)(3) organizations.

18-035

Law Offices of

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February 25, 2018

VIA EMAIL: ADVICE@FPPC.CA.GOV

Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

RE: Advice Regarding New Disclaimer Requirements Imposed by AB 249

To Whom It May Concern:

I write to you on behalf of my client, Save the Bay Action Fund PAC (ID #742617) to request advice regarding application of the new "major funding" disclaimer provisions imposed by AB 249. Save the Bay Action Fund PAC is a general purpose committee that was established in 2016.

Heading into the 2018 elections, the committee is considering supporting state and local candidates and ballot measures. As a 501(c)(4) organization, the committee is permitted by tax law to support both candidates and ballot measures. In addition to raising funds from individuals, the committee anticipates raising funds from organizations, some of which may be exempt from tax under Section 501(c)(3) of the Internal Revenue Code. The committee anticipates it will receive funds from 501(c)(3) organizations (and possibly other types of donors) where the funds are restricted for use on non-candidate purposes only.

Under Government Code Section 84503, any advertisement paid for by a recipient committee under Section 82013(a), other than a political party committee or a candidate controlled committee established for an elective office of the controlling candidate, is required to include the words "committee major funding from" followed by the names of the top contributors to the committee paying for the advertisement. Section 84501(c) defines "top contributors" to mean the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of \$50,000 or more.

In circumstances where funds received by Save the Bay Action Fund PAC are restricted for non-candidate use only, the committee would like to confirm the following:

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Richard R. Rios
Lacey E. Keys

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1. When paying for an advertisement supporting a candidate, Save the Bay Action Fund PAC will not be required to disclose a contributor that restricts use of their contribution to non-candidate-activity as a top contributor to the committee, even if the donor meets the definition of "top contributor" in Government Code Section 84501(c). The concept of not disclosing funds that are not permitted to be used for a particular purpose is already embedded in the law. Under Government Code Section 84222(e)(2), a multi-purpose organization is not required to disclose funds from: (A) A donor who designates or restricts the donation for purposes other than contributions or expenditures; (B) A donor who prohibits the multipurpose organization's use of its donation for contributions or expenditures; and (C) A private foundation, as defined by subdivision (a) of Section 509 of the Internal Revenue Code, that provides a grant that does not constitute a taxable expenditure for purposes of paragraph (1) or (2) of subdivision (d) of Section 4945 of the Internal Revenue Code.
2. Assuming the answer to the first question is yes, would the committee be required to include the contributor as a major funder on an advertisement that jointly supports both candidates and ballot measures? If so, is the organization permitted to modify its disclaimer to make clear that funds from the contributor were not used to pay for candidate-support by adding the phrase "funds not used for candidate-support" in parenthesis following the name of the major funder?

Very truly yours,

OLSON HAGEL & FISHBURN LLP



EMILY A. ANDREWS



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May 22, 2018

Emily A. Andrews
Olson Hagel & Fishburn LLP
3605 Long Beach Blvd., Suite 426
Long Beach, CA 95814-4602

Re: Your Request for Advice
Our File No. A-18-035

Dear Ms. Andrews:

This letter responds to your request for advice on behalf of Save the Bay Action Fund PAC regarding the campaign advertising provisions of the Political Reform Act (the "Act").¹

Please 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.

QUESTIONS

1. May Save the Bay Action Fund Political Action Committee ("Save the Bay PAC") omit 501(c)(3) organizations as "top contributors" on advertisements that support or oppose candidates, when such organizations restrict their funds for non-candidate use only?
2. May Save the Bay PAC omit other organizations as "top contributors" on advertisements supporting or opposing candidates when such organizations have restricted their funds for non-candidate use only?
3. If Save the Bay PAC produces an advertisement that supports both candidates and ballot measures, is a 501(c)(3) organization that qualifies as a top contributor but has restricted its funds from being used for candidate support required to be disclosed as a top contributor on an advertisement? If so may the phrase "funds not used for candidate support" be added in parenthesis following the name of the top contributor to its Section 84503 "major funding from" statement?

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.

CONCLUSIONS

1. No. Save the Bay PAC may not omit 501(c)(3) organizations as top contributors on advertisements that support or oppose candidates when such organizations have restricted their funds for non-candidate use only.
2. No. Save the Bay PAC may not omit other organizations from its top contributor lists on advertisements supporting or opposing candidates when such organizations have restricted their funds for non-candidate use only.
3. Yes. Save the Bay PAC must include top contributors that have restricted their funds for non-candidate use only on advertisements that support or oppose both candidates and measures. The phrase "funds not used for candidate support" may be included after the name of the 501(c)(3) top contributor on the advertisements.

FACTS AS PROVIDED BY REQUESTOR

You are the attorney for Save the Bay PAC, a general purpose recipient committee established in 2016. Heading into the 2018 elections, Save the Bay PAC is considering supporting state and local candidates and ballot measures. As a 501(c)(4) organization, Save the Bay PAC is permitted by tax law to support both candidates and ballot measures. In addition to raising funds from individuals, Save the Bay PAC anticipates it will receive funds from 501(c)(3) organizations (and possibly other types of donors) where the funds are restricted for use on non-candidate purposes only. Save the Bay PAC may run advertisements in support or opposition to candidates or ballot measures. Some advertisements may support or oppose both ballot measures and candidates. Your questions regard changes to the Act with the recent enactment of Assembly Bill 249 (Stats. 2017, Ch. 546, AB 249 Mullin), ("The Disclose Act") requiring the disclosure of top contributors to a committee in campaign advertisements.

ANALYSIS

Section 84501(a)(1) of the Act defines an "advertisement" as "any general or public communication that is authorized and paid for by a committee for the purpose of supporting or opposing a candidate or candidates for elective office or a ballot measure or ballot measures." The Act requires communications qualifying as "advertisements" to include disclaimers. The content and formatting of these disclaimers vary greatly depending on the nature and source of the advertisement.

Advertisements paid for by Section 82013(a) recipient committees, that are not candidate controlled committees established for an elective office of the controlling candidate or political party committees, such as Save the Bay PAC, must include the words "Paid for by" followed by the name of the committee. (Section 84502.) Advertisements must also include the words "committee major funding from" followed by the names of the top contributors to the committee paying for the

advertisement. (Section 84503.)² “Top contributor” is defined as “the persons from whom the committee paying for an advertisement has received its three highest cumulative contributions of fifty thousand dollars (\$50,000) or more.” (Section 84501(c)(1).)

You state that Save the Bay PAC may receive contributions from entities such as 501(c)(3) organizations and others that have restricted their funds for use on non-candidate purposes. You wish to reflect this restriction by not listing these organizations as “top contributors” on advertisements that support or oppose candidates. However, Section 84503 applies to “any advertisement” paid for by a committee such as Save the Bay PAC, and there are no caveats or restrictions placed on the listing of top contributors. Similarly, Section 84501(c) places no caveats or restrictions on the definition of “top contributors” that would allow for the omission of top contributors that have restricted the use of its funds.³ On its face, there is no apparent exception provided in the Act’s new Disclose Act provisions that allows Save the Bay PAC to exclude top contributors from being disclosed on advertisements. Therefore, Save the Bay PAC must disclose all qualifying top contributors on its advertisements, even those that have restricted their funds.⁴

We are aware that Internal Revenue (“IRS”) Code Section 501(c)(3) tax exempt organizations are “absolutely prohibited” from directly or indirectly participating in, or intervening in, any political campaign on behalf of (or in opposition to) any candidate for elective public office. According to the IRS website, violating this prohibition may result in denial or revocation of tax-exempt status and the imposition of certain excise taxes.⁵

² Additionally, if the advertisement supports or opposes a candidate and is paid for by an independent expenditure that advertisement must include a statement that it was not authorized by a candidate or a committee controlled by a candidate. If the advertisement was authorized or paid for by a candidate for another office, the expenditure shall instead include a statement that “This advertisement was not authorized or paid for by a candidate for this office or a committee controlled by a candidate for this office.” (Section 84506.5.)

³ The only provision affecting the determination of top contributors found in The Disclose Act is with respect to the order of determination. (Section 84501(c)(2).) Additionally, if a committee primary formed to support or oppose a candidate or ballot measure contributes funds to another committee primarily formed to support or oppose a candidate or ballot measure that were earmarked to support or oppose the ballot measure, the committee receiving the earmarked funds must disclose the contributors who earmarked the funds as the top contributor or contributors if the definition of top contributor is met. (Section 84501(c)(3).)

⁴ In your request for advice you noted that the Act contains provisions in Section 84222(e) that exempt a multipurpose organization from disclosing donors who designate or restrict a donation for purposes other than contributions or expenditures or prohibit the multipurpose organization’s use of its donation for contributions or expenditures on its campaign reports. Should an organization qualify as a committee under Section 84222, it would not be required to disclose donors on advertisements that they are not required to disclose as contributors on campaign reports. However, these provisions do not apply to Save the Bay PAC because it is not a Section 84222 multipurpose organization. Moreover, to the extent that Sections 84503 and 84501(c) could be interpreted to extend a similar exception, any such finding would require a policy determination best made through a Commission Opinion or by the adoption of a regulation. (See Regulation 18329(b)(8)(E).)

⁵ See (Internal Revenue Service, *The Restriction of Political Campaign Intervention by Section 501(c)(3) Tax Exempt Organizations*, available at <https://www.irs.gov/charities-non-profits/charitable-organizations/the-restriction-of-political-campaign-intervention-by-section-501c3-tax-exempt-organizations>.)

Save the Bay PAC requests to include a statement in parentheses following the name of a 501(c)(3) organization top contributor stating, "funds not used for candidate support," on advertisements that jointly support or oppose candidates and ballot measures. There is nothing in the Act that prohibits addition of this language should Save the Bay PAC choose to include it, where it is applicable.

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

Sincerely,

Brian G. Lau
Assistant General Counsel



By: Sukhi K. Brar
Senior Counsel, Legal Division

SKB:jgl