

Memorandum

To : Mr. E. L. Sorensen, Jr.
Chief Counsel

Date: April 23, 1993

From : Ani Kindall
Staff Counsel

Subject: **Amended Contribution Disclosure Opinion 92-13**

A Board Member Who Directs or Solicits a Contribution on Behalf of Another Candidate Has Not Received a Contribution; Proposed Regulation 7007 is Consistent with Government Code Section 82015; Participation in a Fundraiser for Another Candidate Does Not Constitute a Contribution to the Participating Board Member.

On February 8, 1993, Ms. Mary Armstrong asked that I prepare a follow-up opinion to the October 28, 1992 letter to Mr. James R. Sutton of the Law Offices of Nielsen, Merksamer, Parrinello, Mueller & Naylor (Contribution Disclosure Opinion 92-13), based on a question posed by several of the Board Members' staff. Specifically, she asked me to research whether a Board Member who participates in a fundraising function for another candidate has received a contribution and is therefore disqualified from participation pursuant to the Kopp Act (Government Code section 15626) if the amount received is \$250 or more. She also asked me to research whether proposed 18 Cal. Code of Regulations, section 7007 is consistent with Government Code section 82015 which defines the term "contribution."

During the course of researching these questions, I concluded that the requirements of Government Code section 15626 regarding disclosure and disqualification would not be applicable to a Board Member who directs or solicits a contribution on behalf of another candidate. Ms. Armstrong asked me to address a memorandum to you which sets out my research on this issue.

Directing or Soliciting a Contribution:

Question 1 of Contribution Disclosure Opinion (CDO) 92-13 asked whether a party involved in an adjudicatory proceeding

before the Board may contribute to another candidate or Board Member at the request of a Board Member. The letter concluded "that if a 'party,' 'participant' or 'agent' to an adjudicatory proceeding pending before the State Board of Equalization makes a contribution to another candidate [or Board Member] at the behest of the Board Member, the contribution disclosure/disqualification requirements of section 15626 would apply providing, of course, that the contribution or contributions were of the amount of \$250 or more." Based on the analysis set forth below, it appears that this conclusion creates disclosure and disqualification requirements that are not called for by the Kopp Act.

The Kopp Act does not contain language which directly prohibits or restricts a Board Member from directing or soliciting a contribution. In pertinent part, the Kopp Act provides the following:

(b) Prior to rendering any decision in any adjudicatory proceeding pending before the State Board of Equalization, each member who knows or has reason to know that he or she received a contribution or contributions within the preceding 12 months in an aggregate amount of two hundred fifty dollars (\$250) or more from a party or his or her agent, or from any participant or his or her agent, shall disclose that fact on the record of the proceeding.

(c) No member shall make, participate in making, or in any way attempt to use his or her official position to influence, the decision in any adjudicatory proceeding pending before the board if the member knows or has reason to know that he or she received a contribution or contributions in an aggregate amount of two hundred fifty dollars (\$250) or more within the preceding 12 months from a party or he or her agent, or from any participant or his or her agent, and if the member knows or has reason to know that the participant has a financial interest in the decision, as that term is used in Article 1 (commencing with Section 87100) of Chapter 7 of Title 9.

(Section 15626(b)&(c), emphasis added.)

A comparison of the language of the Kopp Act with that of Government Code section 84308, a similar provision of the Political Reform Act (Government Code sections 81000 - 91015) dealing with contributions to members of appointed boards or

commissions, is helpful in determining whether a Board Member may direct or solicit a contribution without having received a contribution for purposes of section 15626. Section 84308(b) provides that:

No officer of an agency shall accept, solicit, or direct a contribution of more than two hundred fifty dollars (\$250) from any party, or his or her agent, or from any participant, or his or her agent, while a proceeding involving a license, permit, other entitlement for use is pending before the agency (Emphasis added.)

Although 2 Cal. Code of Regulations, section 18438.6 was enacted to interpret section 84308 only, its provisions are instructive. According to the regulation "[a] person 'accepts' or 'receives' a contribution only if the contribution is for that person's own candidacy or own controlled committee." (Regulation 18438.6(a).) "A person 'makes a contribution' to an officer or candidate only if the contribution is made for that officer's or candidate's own candidacy or controlled committee." (Regulation 18438.6(b).)

As we have seen, section 84308 specifically prohibits an officer of an agency from soliciting or directing a contribution. Regulation 18438.6 also defines the terms "solicits" and "directs." Regulation 18438.6(c) provides that:

"An officer 'solicits' a contribution only if he or she knows or has reason to know that the person being solicited for a contribution is a party or agent of a party, or is a participant or agent of a participant and either: (1) The officer or candidate personally requests a contribution for his or her own campaign or controlled committee, or for any other candidate, public official or committee, either orally or in writing; or (2) the agent of the officer or candidate with the officer or candidate's knowledge, requests a contribution for the officer or candidate's own campaign or controlled committee.

Regulation 18438.(e) provides that:

A person 'directs' a contribution if he or she acts as the agent of another person or of a committee other than his or her own controlled committee in accepting a contribution on behalf of, or transmitting a contribution to, such other person or committee.

Based on regulation 18438.6, an official only receives a contribution if it is made to his or her candidacy or controlled committee. Therefore, if we were to apply the same standard to section 15626, a Board Member who directed or solicited a contribution to another Board Member or candidate would not have received a contribution.

There are three Fair Political Practices Commission (FPPC) Advice Letters which, although not directly on point, are also helpful in determining whether a Board Member who directs or solicits a contribution has received a contribution.

The Wieser Advice Letter (I-92-560) says that the Political Reform Act does not prohibit a candidate (the term includes elected officials) from suggesting or requesting that supporters make contributions to other candidates. Also, "[a]s long as the candidate making the request or suggestion does not act as an intermediary for the contribution, he or she is not required to disclose the activity."^{1/}

The Speers Advice Letter (I-92-567) says that, under section 84308, a local elected official who also serves as an appointed voting member of another agency may be prohibited from accepting, soliciting, or directing contributions on behalf of an initiative committee. The Speers letter refers to the Benninghoven Advice Letter (I-89-669) for further discussion of this subject.^{2/} Both letters make it clear that, absent the applicability of section 84308, which explicitly prohibits appointed officials from directing or soliciting contributions, there is nothing in the Political Reform Act which requires disclosure or disqualification.

What these letters indicate is that candidates are not prohibited from directing or soliciting contributions to other candidates and are not required to report contributions to

^{1/} The advice letter goes on to say: "If you merely suggest to supporters that they make contributions directly to other candidates, or if they give you contribution checks which are made payable and which you merely deliver to other candidates, you are not acting as an intermediary and are not required to disclose the activity." Wieser page 2.

^{2/} The trust and transfer discussion of the Benninghoven letter is no longer accurate because of Service Employees International Union, et al. v. Fair Political Practices Commission (E.D. CA 1990) 747 F. Supp 590. Also, the definition of intermediary no longer includes an individual who merely delivers a contribution.

other candidates made at their request unless they are subject to the prohibitions and restrictions of section 84308. Since Members of the Board of Equalization are not subject to section 84308 while serving on the Board,^{3/} and since Government Code section 15626 does not specifically prohibit Board Members from directing or soliciting contributions, we are of the opinion that neither a prohibition nor a reporting requirement appears to exist.

The conclusion of CDO 92-13, that a contribution is attributable to a candidate when he or she "asks a party to make a contribution to another candidate", is based on the interpretation that a payment made to the recipient candidate is a contribution to the requesting candidate because it is "made at the behest" of the requesting candidate. The advice letters discussed above indicate that the FPPC has not adopted this interpretation. Therefore, it appears that CDO 92-13 overly restricts the ability of Board Members to direct or solicit contributions.

Regulation 7007

Turning now to proposed regulation 7007,^{4/} a comparison of the language of this regulation with the language of the regulations interpreting Government Code section 84308 is also helpful in determining whether regulation 7007 is consistent with Government Code section 82015 which defines contribution.

Regulation 7007(b) states: "A person 'accepts' or 'receives' a contribution only if the contribution is for that person's own candidacy or own controlled committee." Regulation 7007(c) states: "A person 'makes a contribution' to a board member or candidate only if the contribution is made for that board member's or candidate's own candidacy or controlled committee."

Subsections (b) and (c) of section 7007 are consistent with subsections (a) and (b) of regulation 18438.6. This indicates that regulation 7007 is also consistent with the FPPC's interpretation of section 82015 since the FPPC would have taken section 82015 into consideration when it adopted regulation 18438.6.

^{3/} Government Code section 84308(a)(3) specifically excludes the Board of Equalization.

^{4/} For convenience, the term "proposed" will be omitted from future references to the regulation. It should be understood that this regulation has not been adopted by the Board.

Fundraising Functions:

Finally, returning to the question that prompted this research, since there is no prohibition against directing or soliciting contributions and no requirement to disclose contributions directed or solicited by a Board Member, a Board Member who participates in a fundraising function for another candidate does not received a contribution and is not disqualified from participation pursuant to the Kopp Act.

Ani Armen Kendall

cc: Mr. James R. Sutton, Law Offices of Nielsen, Merksamer,
Parrinello, Mueller & Naylor
Contribution Disclosure Binder Distribution List



STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

1020 N STREET, SACRAMENTO, CALIFORNIA
(P.O. BOX 942879, SACRAMENTO, CALIFORNIA 94279-0001)
(916) 324-5589

WILLIAM M. BENNETT
First District, Kenton

BRAD SHERMAN
Second District, Los Angeles

ERNEST J. DRONENBURG
Third District, Los Angeles

MATTHEW K. FONG
Fourth District, Los Angeles

GRAY DAVIS
Controller, Sacramento

October 28, 1992

BURTON W. OLIVER
Executive Director

Mr. James R. Sutton
Law Offices of Nielsen, Merksamer,
Parrinello, Mueller & Naylor
591 Redwood Highway, #4000
Mill Valley, California 94941

Re: Disqualification Under the Kopp Act
(Government Code section 15626)

Dear Mr. Sutton:

This is in response to your letter of October 12, 1992 to Assistant Chief Counsel Lawrence Augusta. You have requested our opinion regarding the correct application of Government Code section 15626 as it relates to adjudicatory proceedings of the State Board of Equalization. As we understand it, you represent several parties who are involved in adjudicatory proceedings before the Board, and who would like to make campaign contributions to Board Members. Specifically, you would like our opinion regarding the following:

QUESTION

1. May a party involved in an adjudicatory proceeding before the Board contribute to another candidate (e.g., a candidate for local, state or federal office other than the Board of Equalization) at the request of a Board Member? In other words, if a Board Member asks a party to make a contribution to another candidate, may the member participate in the party's adjudicatory proceeding if the party in fact makes a contribution over \$250? Does the same conclusion apply when the member solicits a contribution from the party to another member?

ANSWER

Government Code section 15626(b) provides that:

"Prior to rendering any decision in any adjudicatory proceeding pending before the

SUPERSEDED

State Board of Equalization, each member who knows or has reason to know that he or she received a contribution or contributions within the preceding 12 months ... shall disclose that fact on the record of the proceeding."

Section 15626 (h)(1) defines the term "contribution" as having the same meaning prescribed in Government Code section 82015 and the regulations adopted thereto. (See generally 2 Cal. Code Regs. § 18215.)

Government Code section 82015 provides, in pertinent part, that the term "contribution" means "a payment, a forgiveness of a loan, a payment of a loan by a third party, or an enforceable promise to make a payment except to the extent that full and adequate consideration is received unless it is clear from the surrounding circumstances that it is not made for political purposes. An expenditure made at the behest of a candidate, committee, or elected officer is a contribution to the candidate, committee or elected officer unless full and adequate consideration is received for making the expenditure."

Regulation 18215 further provides that a payment is made for political purposes if it is received by or made at the behest of a candidate. (2 Cal. Code Regs. § 18215(a)(2)(A)). Regulation 18215 (a)(2)(B) defines the term "made at the behest" as any payment made under the control or at the direction of, in cooperation, consultation, coordination, or concert with, or at the request or suggestion of a candidate, controlled committee, official committee of a political party, or organization formed or existing primarily for political purposes."

We are of the opinion that if a "party," "participant," or "agent," to an adjudicatory proceeding pending before the State Board of Equalization makes a contribution to another candidate at the behest of the Board Member, the contribution disclosure/disqualification requirements of section 15626 would apply providing, of course, that the contribution or contributions were in the amount of \$250 or more. The same conclusion would apply if the contribution was made to one Board Member at the behest of another Board Member. In such circumstances, both Board Members could be prohibited from participation. (See, however, Contribution Disclosure Opinion 91-16 (copy attached) regarding charitable contributions made at the behest of a Board Member with a different conclusion.)

QUESTION

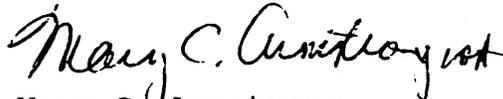
2. Are contributions from a party which is a corporation, public utility or trade association aggregated with contributions from their affiliated political action committees? In other words, if a corporation PAC has contributed over \$250 to a Board Member, but the corporation itself has not made any contributions to the member, may the member participate in the proceeding?

ANSWER

We have previously determined that section 15626 does not require contributions made by a political action committee (PAC) to be reported or aggregated with contributions made by a party, participant or agent. A PAC does not come within the definition of a party, participant or agent as those terms are defined in section 15626. As such, a contribution by a PAC does not require either disclosure or disqualification by the affected Board Member. This is true whether or not the same or a majority of the same persons in fact direct and/or control the corporation's and the PAC's contribution.

If you have further questions concerning this matter, please write this office.

Very truly yours,



Mary C. Armstrong
Senior Staff Counsel

MCA:wk

ode02-13

Attachment