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Legal Concerns In Setting Up A Ballot Measure Committee February 2014

Committee Organization

A ballot measure “committee” is basically a bank account set up to support or oppose an initiative or referendum on the state or local level, and the people who make decisions about the funds in the account. This memorandum summarizes the most salient legal issues under state law involved in setting up a ballot measure committee.¹

In order to set up a ballot measure committee, one must:

1. Choose a name.

A. “Sponsorship.” If the committee has “sponsors,” its name must include the names of its sponsors. A business or organization is deemed to be the committee’s sponsor if it makes decisions regarding how the committee raises and spends funds, if it contributes 80 percent or more of the committee’s funds, or if all or nearly all of committee funds come from its employees or members. Importantly, individuals do not qualify as committee sponsors even if they make committee decisions in their individual capacity or contribute 80 percent or more of the committee funds. In the event that two or more committee sponsors are from the same industry or profession, the identification of those sponsors can simply refer to that industry or profession. (Cal. Govt. Code section 84102(a); 2 Cal. Code of Regs. section 18419(b).)

B. \$50,000+ contributors. The committee’s name must also identify the “economic or other special interests” of any individual or entity which has contributed \$50,000 or more (if not already in the name because of its sponsorship). (Cal. Govt. Code section 84504(a).)

¹Several cities and counties in California have their own campaign laws applicable to initiative and referenda campaigns in their jurisdictions, which should be reviewed before opening a ballot committee to work on a local ballot measure campaign.

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C. Candidate-controlled committees. If the committee is “controlled” by a California state or local candidate or elected official, its name must also include the official’s name. A candidate or elected official is deemed to control a committee if he or she has significant influence over committee decisions. (Cal. Govt. Code section 84504(d) & 2 Cal. Code of Regs. section 18521.5(a).)

D. Ballot letter/number. The committee’s name must also include the ballot number or letter (once assigned) and whether the committee supports or opposes the ballot measure. (Cal. Govt. Code section 84107.)

2. Open a bank account. Banks require committees to have a federal employer identification number; you should not use the FEIN of a committee sponsor.

3. Choose a treasurer and assistant treasurer. From a legal perspective, the treasurer is the most important person involved in the campaign. He or she will be responsible for reviewing all contributions and expenditures and for preparing and filing all campaign reports under penalty of perjury. (Cal. Govt. Code section 84100.) We recommend that committees appoint an assistant treasurer to authorize expenditures in the treasurer’s absence.

4. Identify the committee’s “principal officers.” The names of up to three individuals who have primary responsibility over the committee’s actions must be listed on the committee’s Statement of Organization. (2 Cal. Code of Regs. section 18402.1.)

5. File a Statement of Organization (FPPC Form 410) with the Secretary of State, and perhaps local filing officers. The Statement of Organization will list the names and addresses of the committee sponsors, controlling candidates, “principal officers,” how the committee will spend its surplus funds, and other routine information.

Fundraising

1. No limits on contributions. Contributions to ballot measure committees are unlimited as a matter of constitutional law. (Citizens Against Rent Control v. Berkeley (1981) 454 U.S. 290.)

2. Prohibited sources of support. Ballot measure committees are free to accept funds from all sources, including individuals, corporations, partnerships, trade

associations, nonprofit organizations, labor unions, PACs, political parties, etc. The only prohibited source is “foreign nationals.” An individual who is a permanent resident of the United States (i.e., has a “green card”) does not qualify as a foreign national and may contribute, as may a domestic subsidiary of a foreign company, if it has its own domestic income stream, and if a United States citizen or permanent resident makes the decisions regarding the subsidiary’s contributions. (Cal. Govt. Code section 85320; 2 U.S.C. section 441e(a); 11 Code Fed. Regs. section 110.20.)

3. Nonmonetary contributions. Ballot measure committees may accept both monetary and nonmonetary (i.e., “in-kind”) contributions. Typical nonmonetary contributions include donated equipment or office space, mailings sent out on behalf of ballot measures, donated survey results, etc. Importantly, truly volunteer time is not considered a nonmonetary contribution. Monetary and nonmonetary contributions must be reported by the committee and sometimes by the contributor.

Certain items do not count as nonmonetary contributions, even though they provide some tangible benefit to the committee:

A. An individual or company may hold a fundraising or other campaign event in their home or office without the cost being considered a nonmonetary contribution to the committee – as long as the total cost of the event (including refreshments, invitations, etc.) does not exceed \$500. (Cal. Govt. Code section 82015(f).)

B. Companies and nonprofits may allow their employees to spend up to 10 percent of their compensated time in any calendar month on ballot measures without a portion of their salaries being considered a nonmonetary contribution to the committee(s). (2 Cal. Code of Regs. section 18423(a).)

C. Articles printed in a company’s or organization’s regularly published newsletter regarding a ballot measure are not considered contributions if circulation is limited to members, employees, shareholders, etc., and the newsletter is not expanded in size or circulation. (2 Cal. Code of Regs. section 18215(c).)

4. Fundraising Disclaimers. Fundraising solicitations must contain the following information:

A. A statement that “contributions are not tax deductible” in a separate paragraph or at the beginning of a paragraph. (Int. Rev. Code section 6113(a).)

B. A request for the name, address, occupation and employer of any contributors who are individuals. (The committee will not be able to deposit the contribution check without this information.) (Cal. Govt. Code section 85700.)

C. The name and address of the committee. (Cal. Govt. Code 84305.)

D. A “disclosure statement” identifying the committee’s two largest contributors of \$50,000 or more (if any).

5. Tax Considerations. Contributions to ballot measures are not deductible as charitable contributions. (Int. Rev. Code section 6113.) In addition, contributions to ballot measures are not deductible as ordinary and necessary business expenses, because they are considered “lobbying expenses” under federal tax law. (Int. Rev. Code section 162(e) [defining ballot measure contributions as “grassroots lobbying expenditures”]; Cammarano v. U.S. (1959) 358 U.S. 498; see also Cal. Rev. & Tax. Code section 24343.) Under certain circumstances, the IRS may consider contributions to a ballot measure committee to be subject to the “gift tax.” In any case, we always recommend that contributors consult their own tax counsel about the tax treatment of their contributions to the committee.

Campaign Communications

1. Libel and slander. In general, campaign communications are protected free speech. Nevertheless, ballot measure committees should insure that all factual statements in their campaign pieces are accurate and substantiated, and that all statements of opinion are expressed as such. They also must ensure that they have proper authorization from any individuals or entities they list as opposing the ballot measure. (Cal. Penal Code section 115.1.)

2. Disclaimers. Different types of campaign communications require different types of disclaimers. The committee’s name must generally appear on all of its campaign communications preceded by “paid for by” (Cal. Govt. Code section 84305 & 84501 et seq.), including but not limited to:

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A. Mailings (and faxes) of 200 or more pieces. Must be at least 10-point type, appear on the outside of the mailing, and include the committee's address – though the address technically only needs to be in 6-point type. (Cal. Govt. Code sections 84305 & 84507.)

B. TV ads and “You Tube” videos. Must say “Paid for by,” be legible to the average viewer (4 percent of TV screen height, or 20 scan lines of a 483 scan line picture TV screen, will most likely suffice), appear at the beginning or end of the ad, and stay on-screen for at least 5 seconds of a 30 second spot, or 10 seconds of a 60 second spot; need not be spoken. (47 Code Fed. Regs. section 73.1212(a); 2 Cal. Code Regs. section 18450.4.)

C. Radio ads. Must say “Paid for by,” be clearly audible, air at the beginning or end of the ad, and air for at least 3 seconds. (47 U.S.C. section 317(a); 47 Code Fed. Regs. section 73.1212(a); 2 Cal. Code of Regs. section 18450.4.)

D. Website. Must be the same size as the majority of the text in the website. (2 Cal. Code of Regs. section 18450.4.)

E. E-mails. Must be the same size as the majority of the text of the e-mail. (2 Cal. Code of Regs. section 18450.4.)

F. Text messages. May use the committee's FPPC number rather than its full name. (2 Cal. Code of Regs. section 18450.4.)

G. Print ads. Must be at least 10-point type. (Cal. Govt. Code section 84507.) Newspaper ads must also state “**Paid Political Advertisement.**” (Cal. Elec. Code section 20008.)

H. Billboards. Must be at least 5 percent of the billboard's height. (2 Cal. Code Regs. section 18450.4(b)(3)(D).)

I. Street and yard signs, bus shelter signs, bus signs and banners. Must be at least 5 percent of a sign's or banner's height. (2 Cal. Code Regs. section 18450.4.)

J. Door hangers. Must be at least 10-point type. (2 Cal Code Regs. section 18450.4.)

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K. Pamphlets and other handouts. Must be at least 10-point type. (2 Cal. Code Regs. section 18450.4.)

L. Pre-recorded telephone messages to 200 or more households. Must include the committee's full legal name and "disclosure statement" (discussed below), be clearly audible, and must include the committee's address or telephone number. (Cal. Govt. Code sections 84310 & 84501; 2 Cal. Code of Regs. section 18440(a); 47 U.S.C.A. section 227(d)(3); 47 Code of Fed. Regs. section 64.1200(b).) "Paid for by" not required. The contract with the vendor must require compliance with this disclaimer requirement.

M. Live telephone calls to 500 or more households. Must disclose the committee's full name and must be clearly audible. (Cal. Govt. Code section 84310.) "Paid for by" not required; disclosure statement not required. The contract with the vendor must require compliance with this disclaimer requirement.

N. Certain campaign communications do not require a disclaimer at all (2 Cal. Code Regs. section 18450.1), including:

- Mailings of less than 200 pieces
- Live calls to fewer than 500 households
- Pre-recorded telephone calls to fewer than 200 households
- Buttons (under 10 inches in diameter)
- Bumper stickers (under 60 square inches)
- T-shirts, hats, balloons, etc.

3. All ads must also include a "disclosure statement" including the actual names of the committee's two largest contributors of \$50,000 or more (if any). (Cal. Govt. Code section 84503.) On TV or radio ads of 15 seconds or less, and print ads of 20 square inches or less, the committee must only disclose its single largest \$50,000+ contributor. (Cal. Govt. Code section 84508.) This disclosure statement must include words such as "paid for by" or "major funding by." (2 Cal. Code Regs. section 18450.4(a)(1).) If the name of a \$50,000+ contributor appears in the committee's name (because the contributor is a sponsor, or to identify the contributor's economic interest), the name would satisfy this requirement.

4. The campaign must retain copies of its mass mailings, telephone scripts and pre-recorded messages for at least 4 years.

Campaign Reporting

1. Reporting by committee.

A. Campaign reports. Ballot measure committees must file detailed campaign reports with the Secretary of State or local filing officers (FPPC Form 460) disclosing all contributions received and expenditures made. (Cal. Govt. Code section 84211.) Reports itemize all contributions and expenditures of \$100 or more; contributions and expenditures of less than \$100 are disclosed as a lump sum. Except for the six-month period when the initiative or referendum appears on the ballot, ballot measure committees must file reports on a quarterly basis; thereafter, they must file two pre-election reports and semiannual reports. (Cal. Govt. Code section 84202.3.)

All state and local ballot measure committees must file a special report within 24 hours of receiving contributions of \$1,000 or more during the 90 days preceding the election. (Cal. Govt. Code sections 84203 & 85309(b).) In addition, state-level ballot measure committees must file special reports within 10 days of receiving contributions of \$5,000 or more. (Cal. Govt. Code section 85309(d).)

B. Tax returns. Ballot measure committees are exempt from taxation under section 501(c)(4) of the Internal Revenue Code. Although 501(c)(4) organizations are not legally required to file a formal application for tax exempt status with the IRS, they must file an annual tax return with the IRS (IRS Form 990).

2. Reporting by contributors. Contributors to ballot measure committees may incur their own filing obligations. Any individual or entity which contributes \$10,000 or more in a calendar year to all California state and local ballot measures, candidates, PACs and political parties combined qualifies as a “Major Donor” and must file semiannual campaign reports (FPPC Form 461) disclosing their contributions. (Cal. Govt. Code section 82013(c).)

Major Donors must also file special reports within 24 hours of making monetary or nonmonetary contributions of \$1,000 or more during the 16 days preceding an election. PACs must also file a special report within 10 days of contributing \$5,000 or more to a statewide ballot measure campaign. (Cal. Govt. Code section 84204.5.)

Potential Lawsuits

The process of qualifying and passing a statewide initiative can generate several different types of litigation. Potential lawsuits include:

- The format of the petition does not comply with technical requirements.
- The Title and Summary prepared by the Attorney General (or county counsel or city attorney) is inaccurate or misleading.
- Circulators are harassing potential signers or being harassed by opponents, or are not registered voters.
- The proposed initiative violates the “single subject rule.”
- The referendum petition does not attach all documents referenced in the underlying law.
- The committee has not properly identified its sponsors or economic interests.
- The committee has violated campaign reporting requirements.
- Ballot arguments are inaccurate or misleading.
- Campaign communications are slanderous.

In addition to lawsuits brought by campaign opponents or the Secretary of State, ballot measure committees are regulated by the Fair Political Practices Commission (“FPPC”), the state agency charged with enforcing the state’s campaign laws, and perhaps a local ethics commission. The FPPC has the authority to issue administrative fines of \$5,000 per violation of campaign reporting or disclaimer rules, and may also pursue civil fines up to the amount not properly reported. (Cal. Govt. Code sections 83116 & 91004.) In addition, statewide initiative committees are subject to mandatory audit by the Franchise Tax Board. (Cal. Govt. Code section 90001(g).)

Other legal concerns

This memorandum does not discuss all potential legal concerns of supporting or opposing ballot measures. Legal issues not discussed in this memorandum include:

1. Whether a ballot measure committee should incorporate and/or apply for tax exempt status as a 501(c)(4) nonprofit organization.
2. Appropriate insurance coverage, including workers comp, general liability and D&O coverage.
3. Compliance with employment laws, including categorizing workers as employees v. independent contractors, wrongful termination, sexual harassment training, state and federal employment tax returns.

Please feel free to call us with any questions regarding setting up a state or local ballot measure committee.

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