# California Fair Political Practices Commission

December 20, 1989

Jonathan Levin
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Your Request for Advice
Your File No. AOR 1989-31
Our File No. I-89-687

Dear Mr. Levin:

You have asked for comments on a request for an advisory opinion received by your office from Congressman Don Edwards concerning his campaign disclosure obligations under California's Political Reform Act (the "PRA").[1]

QUESTION

Congressman Edwards has asked whether contributions made from his principal campaign committee, Don Edwards Congressional Campaign Fund, to California state and local candidates and ballot measures are subject to the PRA's disclosure requirements or if the requirements are preempted by Section 453 of the Federal Election Campaign Act (the "FECA"). He has expressed concern that the PRA's requirements for registration, disclosure of receipts and expenditures and filing deadlines are so different from those imposed on federal candidates and their committees under the FECA that imposition of the state requirements would be overly burdensome.

CONCLUSION

Congressman Edwards is required to file campaign disclosure reports required by California's PRA if he makes contributions to California state or local candidates totaling $10,000 in any calendar year. These reports would disclose contributions and independent expenditures Congressman Edwards has made to state or

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1/ Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated. Commission regulations appear at 2 California Code of Regulations Section 18000, et seq. All references to regulations are to Title 2, Division 6 of the California Code of Regulations.

428 J Street, Suite 800 • P.O. Box 807 • Sacramento CA 95804-0807 • (916)322-5660

**local candidates or committees, and would be filed on a semi-annual basis. This disclosure requirement is not inconsistent with, or preempted by, the FECA.**

ANALYSIS

1. Requirements of California Law

Initially, it is necessary to explain the Commission's position as to the state campaign disclosure requirements applicable to federal candidates who contribute to state or local elections in California. As will become clear from the following explanation, the amount of disclosure required of federal candidates and their committees who become involved in state or local elections in California is not as burdensome as stated in Congressman Edwards' request for advisory opinion.

The PRA defines three types of "committees" which must file periodic campaign disclosure reports.

> "Committee" means any person or combination of persons who directly or indirectly does any of the following:
>
> (a) Receives contributions totaling one thousand dollars ($1,000) or more in a calendar year;
>
> (b) Makes independent expenditures totaling one thousand dollars ($1,000) or more in a calendar year; or
>
> (c) Makes contributions totaling ten thousand dollars ($10,000) or more in a calendar to or at the behest of candidates or committees....
>
> Section 82013.

In a letter to Jonathan Redding, No. A-81-034 (copy enclosed), the Commission advised that Section 453 of the FECA does not necessarily preempt reporting by federal candidates and their committees with respect to state or local elections. However, the letter concludes that requiring such committees to comply with California's disclosure provisions for recipient committees would not be justified. In a subsequent memorandum, the staff concluded that such committees should be required to file disclosure reports under the PRA's "major donor committee" provisions. (Memo, No. M-82-179, copy enclosed.) The disclosure requirements for persons or entities that qualify as "recipient committees" pursuant to Section 82013(a) are quite different from the disclosure requirements for persons or entities that file reports as "major donor committees" pursuant to Section 82013(c).

First, recipient committees are required to file registration statements with the Secretary of State upon receipt of $1,000 in contributions in a calendar year. (Section 84101.) Recipient committees have ongoing filing obligations until all activity has

ceased. (Section 84214.) Major donor committees are not required to register. They also terminate automatically at the end of each calendar year and must make contributions totaling $10,000 during each subsequent calendar year in order to incur additional filing obligations.

Recipient committees active at the state level file up to six disclosure statements during an even-numbered year. During an odd-numbered year, recipient committees file a minimum of two statements, and may be required to file additional statements depending on their activities. Persons or entities that qualify as major donor committees by contributing $10,000 during a calendar year file semi-annual statements for each half of the year in which contributions have been made. (Sections 84200, 84200.5.) Therefore, a person or entity which does not meet the $10,000 major donor qualification threshold until after June 30 will file only one statement for that year. In addition, a person or entity which makes qualifying contributions during the first six months of a calendar year but makes no contributions during the last six months of that year will file only one statement for that year.[2/]

Recipient committees are required to disclose all receipts and all expenditures, including detailed itemization of contributions received totaling $100 or more in a calendar year from a single source, and each expenditure totaling $100 or more. Major donor committees disclose only payments made which are contributions to California candidates or committees or are independent expenditures to support or oppose California state or local candidates and measures. The same $100 itemization threshold for expenditures and contributions applies. (Section 84211.) Enclosed is a copy of the disclosure form used by major donor committees (Form 461) as well as the FPPC "Information Manual on Campaign Disclosure Provisions of the Political Reform Act for Independent Expenditure and Major Donor Committees."

2 Are the "major donor" reporting requirements of the PRA inconsistent with, or preempted by, the FECA?

The supremacy clause of the federal Constitution requires that where there is a clear collision between state and federal law, or a conflict between federal law and the application of an otherwise valid state enactment, federal law will prevail. However, it will not be presumed that a federal statute was intended to supersede the exercise of a given power by a state unless there is a clear manifestation of intention to do, since

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2/ There are additional special reports which major donor committees may be required to file. These include special odd-year reports required under Section 84202.7 and late contribution reports required under Section 84203.

the exercise of federal supremacy will not lightly be presumed. (FEC Advisory Opinion 1978-54.) Thus, only where the provisions of the Political Reform Act conflict with the requirements of the FECA, California's law will be superseded.

a. The PRA's disclosure requirements do not regulate the same field as federal law.

The FECA controls the disclosure of expenditures with respect to election to federal office. (2 U.S.C. Sections 434, 453.) The FECA defines "expenditures" in 2 U.S.C. 431(9)(A) as follows:

> The term "expenditure" includes--
>
> (i) any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office; and
>
> (ii) a written contract, promise, or agreement to make an expenditure.
>
> (Emphasis added.)

Thus, contributions to state or local candidates are not expenditures under federal law and would not be disclosed as expenditures on federal campaign disclosure forms.[3/] (2 U.S.C. Section 431(9)(A).)

Conversely, the PRA regulates expenditures and contributions with respect to state and local candidates. Contributions are only considered in the determination of whether a person or group of persons qualifies as a committee if they meet the following definition:

> A contribution is any monetary or nonmonetary payment made for political purposes for which full and adequate consideration is not made to the donor. A payment is made for political purposes if it is:
>
> (1) For the purpose of influencing or attempting to influence the action of the voters for or against the nomination or election of a candidate or candidates, or the qualification or passage of any measure; or

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[3/] On December 14, 1989, an FEC attorney informed this office that contributions to state candidates would be treated as disbursements and disclosed as such on the federal forms. The recipients would be itemized only where the disbursements were greater than $200.

> (2) Received by or made at the behest of:
>
> (A) A candidate, unless it is clear from surrounding circumstances that the payment was received or made at his or her behest for personal purposes unrelated to his or her candidacy or status as an office holder. The term "payment" includes the candidate's own money or property used on behalf of his or her candidacy...
>
> (Regulation 18215, copy enclosed, emphasis added.)

Section 82007 defines "candidate" as an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any state, regional, county, municipal, district or judicial office which is filled at an election (Section 82033), or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any California state or local elective office. The definition of candidate in the PRA expressly excludes any person who is a candidate within the meaning of the FECA.[4/]

Consequently, California law in no way regulates the disclosure of contributions and expenditures as defined by the FECA. The Commission has consistently taken this position. (Reed Advice Letter, No. I-88-213; DeYoung Advice Letter, No. A-85-150, copies enclosed.)

Further, the FEC has concurred with this finding that state law is the ultimate controller in state elections and with respect to contributions to state and local candidates. In Advisory Opinion 1978-37, the FEC found that state laws regulating the transfer of a federal candidate's federal campaign funds to a state campaign account were not preempted by the FECA. The FEC stated:

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4/ Under the PRA, federal candidate or committee still qualifies as a person according to Section 82047 which defines "person" as an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, association, committee, and any other organization or group of persons acting in concert.

> In response to your third question, it is the opinion of the Commission that the possible transfer of funds from the 1978 Committee to Mr. Caputo's campaign for State office is not prohibited or limited by the Act. Again, 2 U.S.C. §439a and 11 CFR 113.2(c) permit the use of excess campaign funds for any lawful purpose. Also, the Commission has previously determined that excess campaign funds of a committee supporting a candidate for Federal office may be used to retire debts incurred in a previous gubernatorial campaign of that candidate in the absence of any applicable State or Federal law outside the jurisdiction of the Commission which would make this unlawful. See Advisory Opinion 1977-48 (copy enclosed). The situation you present in your third question is indistinguishable in all material aspects from that treated in the cited opinion.
>
> The Commission emphasizes that State regulation of funds received by a campaign for State office from a campaign for Federal office may not be avoided by relying on Federal preemption provisions of 2 U.S.C. §453 and Commission regulations. 11 CFR 108.7. As previously stated the Commission does not view the Act or its regulations as imposing any requirement on the 1978 Committee to campaign for State office. However, the application of any State law requiring contributor permission in this situation would not be superseded or preempted by the Act or regulations of the Commission.

Consistent with this rationale, the FEC stated the following in Advisory Opinion 1979-82, concerning the transfer of a federal candidate's federal campaign funds to his son's state campaign committee:

> Accordingly, the Commission concludes that so long as the transfer of funds from the Committee to your son's campaign fund is lawful under Ohio law, nothing in the Act or Commission regulations would prohibit such a transfer of funds. Further, because the limitations of 2 U.S.C. §441a do not apply to contributions made to or on behalf of candidates for State or local office, the Act would not limit the amount of the transfer by the Committee. However, the Commission notes that if Ohio law regulating State and local elections is applicable in this situation, the preemption provisions in 2 U.S.C. §453 and Commission regulations at 11 CFR 108.7 would not preclude the application of Ohio law.

b. 2 U.S.C. Section 453 was not intended to preempt the disclosure requirements of the PRA.

The FECA in 2 U.S.C. Section 453 provides:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (Emphasis added.)

The Code of Federal Regulations goes on to clarify this provision:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the-
>
> (1) Organization and registration of political committees supporting Federal candidates;
>
> (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
>
> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.
>
> (c) The Act does not supersede State laws which provide for the-
>
> (1) Manner of qualifying as a candidate or political party organization;
>
> (2) Dates and places of elections;
>
> (3) Voter registration;
>
> (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or
>
> (5) Candidate's personal financial disclosure.
>
> (11 C.F.R. 108.7, emphasis added.)

The FECA in 2 U.S.C. Section 431(3) defines "federal office" as "the office of President, Vice President, or Senator or Representative in, or Delegate or Resident Commissioner to the Congress." And, as stated above, the federal definition of "expenditure" is limited to payments "for the purpose of influencing any election for Federal office."

Consequently, while the statute and regulation are clear that the states cannot regulate the reporting by federal candidates and committees with respect to federal elections, they are silent as to the reporting of federal candidates and committees with respect to state and local elections. Since contributions to state or local candidates are not expenditures under federal law, state laws requiring the disclosure of payments to state and local candidates in California for California elections are not laws "with respect to election to Federal office." Consequently, the Act's disclosure requirements applicable to major donor committees are not preempted by 2 U.S.C. Section 453 or 11 C.F.R. 108.7.[1/]

c. A finding that California law is preempted is contrary to public policy.

The Political Reform Act was enacted by the people of the State of California by initiative in 1974. The purpose for the campaign disclosure provisions of the PRA was to ensure that receipts and expenditures in California state election campaigns would be fully and truthfully disclosed in order that the voters throughout California may be fully informed and improper practices may be inhibited. (Section 81002(a).)

We believe this purpose is better served by the State law. Under the State law, in addition to expanded disclosure requirements, major donor committees are required to filed their reports in the jurisdiction where they are active. This facilitates the ability of the California electorate to become informed about contributor involvement in local and state elections.

If any further questions regarding this matter, please feel free to contact me at (916) 322-5901.

Sincerely,

Kathryn E. Donovan
General Counsel

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1/ In fact, under some circumstances, even where State law has regulated contributions to federal candidates the Court's have found that such regulations were permissible and were not preempted by the federal Statute. (See, Reeder v. Kansas City Bd. of Police Com'rs (1984) 733 F.2d 543; Pollard v. Board of Police Com'rs (1984) 665 S.W.2d 333.)

FEDERAL ELECTION COMM. TEL: 202-376-5280

89 DEC -4 AM 10:52

Don
Edwards
Congressional
Campaign Fund

89 DEC -4 PM 12:37
RECEIVED
FEDERAL ELECTION COMMISSION

December 1, 1989

AOR 1989-31

Mr. Lawrence Noble
Office of the General Counsel
Federal Elections Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Noble:

I am writing to request an advisory opinion concerning the Federal Election Campaign Act of 1971 (FECA), as amended, and Commission regulations relating to a federal candidate's principal campaign committee which wishes to give funds to California political committees, regulated under State law.

Specifically, my principal campaign committee, Don Edwards Congressional Campaign Fund, and I wish to give funds to state and local candidates as well as committees formed under state law to support or oppose ballot propositions. I am informed by the State of California Fair Political Practices Commission (FPPC) that, under the Political Reform Act of 1975, should my committee give, in aggregate, ten thousand dollars ($10,000) or more, the State will consider my committee a "Major Donor Committee" under State law. The result of this transformation would be to require my principal campaign committee to register, pursuant to State law, and to follow all of the State's reporting requirements in addition to the registering and reporting requirements imposed be Federal law.

Federal candidates and their principal political committees currently are required to file regulated reports that are part of the public record. The burden of requiring Federal candidates to follow State reporting requirements would be cumbersome as it would necessitate different filing dates, different forms, different requirements for disclosure of receipts and contributors, and different thresholds.

It is my understanding that the FECA's preemption provision, 2 U.S.C. Sec.453, supersedes and preempts state law with regard to (1) the organization and registration of political committees supporting Federal candidates and (2) the disclosure of receipts and expenditures by Federal candidates and political committees, 11 CFR 108.7(b). That is, I understand that Congress specifically intended the Act to occupy the field with respect to reporting of receipts and expenditures by the principal campaign committees of Federal candidates.

P.O. Box 28127 ★ San Jose, CA 95159

Mr. Lawrence Noble
Page Two
December 1, 1989

I do not suggest that a Federal candidate's principal campaign committee, such as mine, would not be subject to any contribution limitations or prohibitions in State law. Rather, I merely suggest that the Federal law preempts the State from imposing on a Federal candidate's committee the State law requiring registration and reporting requirements.

I look forward to hearing from you soon on this important matter.

Sincerely,

DON EDWARDS
Member of Congress

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accepted for the purposes of this sec-

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**-General Provisions**

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ɣ days after February 7, 1972, its





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NOTE: *Section 1553(a)(7), (b) of Title 49, Transportation, provides that all functions, powers, and duties of the Civil Aeronautics Board under this section are transferred to and vested in the Secretary of Transportation, effective Jan. 1, 1985. Pub. L. No. 98-443.*

**§ 452. Prohibition against use of certain Federal funds for election activities**

No part of any funds appropriated to carry out the Economic Opportunity Act of 1964 [42 U.S.C. 2701 et seq.] shall be used to finance, directly or indirectly, any activity designed to influence the outcome of any election to Federal office, or any voter registration activity, or to pay the salary of any officer or employee of the Community Services Administration who, in his official capacity as such an officer or employee, engages in any such activity.

**§ 453. State laws affected**

The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

**§ 454. Partial invalidity**

If any provision of this Act, or the application thereof to any person or circumstance, is held invalid, the validity of the remainder of the Act and the application of such provision to other persons and circumstances shall not be affected thereby.

**§ 455. Period of limitations**

(a) No person shall be prosecuted, tried, or punished for any violation of subchapter I of this chapter, unless the indictment is found or the information is instituted within 3 years after the date of the violation.

(b) Notwithstanding any other provision of law—

(1) the period of limitations referred to in subsection (a) of this section shall apply with respect to violations re-

FEDERAL ELECTION COMM. TEL: 202-376-5280

89 DEC -4 AM 10:52

Don Edwards Congressional Campaign Fund

December 1, 1989

AOR 1989-31

RECEIVED FEDERAL ELECTION COMMISSION 89 DEC -4 PM 12:37

Mr. Lawrence Noble
Office of the General Counsel
Federal Elections Commission
999 E Street, N.W.
Washington, D.C. 20463

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Federal candidates and their principal political committees currently are required to file regulated reports that are part of the public record. The burden of requiring Federal candidates to follow State reporting requirements would be cumbersome as it would necessitate different filing dates, different forms, different requirements for disclosure of receipts and contributors, and different thresholds.

It is my understanding that the FECA's preemption provision, 2 U.S.C. Sec.453, supersedes and preempts state law with regard to (1) the organization and registration of political committees supporting Federal candidates and (2) the disclosure of receipts and expenditures by Federal candidates and political committees, 11 CFR 108.7(b). That is, I understand that Congress specifically intended the Act to occupy the field with respect to reporting of receipts and expenditures by the principal campaign committees of Federal candidates.

Mr. Lawrence Noble
Page Two
December 1, 1989

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I look forward to hearing from you soon on this important matter.

Sincerely,

DON EDWARDS
Member of Congress

plete, true, and legible copy of the original report or statement filed.

**§ 108.6 Duties of State officers (2 U.S.C. 439(b)).**

The Secretary of State, or the equivalent State officer shall carry out the duties set forth in 11 CFR 108.5(a) through (d):

(a) Receive and maintain in an orderly manner all reports and statements required to be filed;

(b) Preserve such reports and statements (either in original form or in facsimile copy by microfilm or otherwise) filed under the Act for a period of 2 years from the date of receipt;

(c) Make the reports and statements filed available as soon as practicable (but within 48 hours of receipt) for public inspection and copying during office hours and permit copying of any such reports or statements by hand or by duplicating machine, at the request of any person except that such copying shall be at the expense of the person making the request and at a reasonable fee;

(d) Compile and maintain a current list of all reports and statements or parts of such reports and statements pertaining to each candidate.

**§ 108.7 Effect on State law (2 U.S.C. 453).**

(a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.

(b) Federal law supersedes State law concerning the—

(1) Organization and registration of political committees supporting Federal candidates;

(2) Disclosure of receipts and expenditures by Federal candidates and political committees; and

(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

(c) The Act does not supersede State laws which provide for the—

(1) Manner of qualifying as a candidate or political party organization;

(2) Dates and places of elections;

(3) Voter registration;

(4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or

(5) Candidate's personal financial disclosure.

**§ 108.8 Exemption for the District of Columbia**

Any copy of a report required to be filed with the equivalent officer in the District of Columbia shall be deemed to be filed if the original has been filed with the Clerk, Secretary, or the Commission, as appropriate.

## PART 109—INDEPENDENT EXPENDITURES (2 U.S.C. 431(17), 434(c))

Sec.
109.1 Definitions (2 U.S.C. 431(17)).
109.2 Reporting of independent expenditures by persons other than a political committee (2 U.S.C. 434(c)).
109.3 Non-authorization notice (2 U.S.C. 441d).

AUTHORITY: 2 U.S.C. 431(17), 434(c), 438(a)(8), 441d.

SOURCE: 45 FR 15118, Mar. 7, 1980, unless otherwise noted.

**§ 109.1 Definitions (2 U.S.C. 431(17)).**

(a) "Independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate which is not made with the cooperation or with the prior consent of, or in consultation with, or at the request or suggestion of, a candidate or any agent or authorized committee of such candidate.

(b) For purposes of this definition—

(1) "Person" means an individual, partnership, committee, association, or any organization or group of persons, including a separate segregated fund established by a labor organization, corporation, or national bank (see Part 114) but does not mean a labor organization, corporation, or national bank.

(2) "Expressly advocating" means any communication containing a message advocating election or defeat, including but not limited to the name of the candidate, or expressions such as "vote for," "elect," "support," "cast your ballot for," and "Smith for Con-

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

FAX TRANSMITTAL

Date: 12/6/89

To: Kathy Donovan

FAX #: 916-327-2026

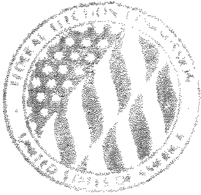
From: Jonny Levin

FAX #: (202) 376-5280

Telephone #: 376-5690

Page Count 3, including cover sheet.

JWW -
Here's an assignment for you. I'd like you to research the federal preemption question. We need to reply by 12/20, so this is a priority job.
thanks
Ked



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C.

FAX TRANSMITTAL

Date: 12/6/89

To: Kathy Donovan

FAX #: 916-327-2026

From: Jonny Levin

FAX #: (202) 376-5280

Telephone #: 376-5690

Page Count 3, including cover sheet.

Don Edwards
Congressional
Campaign Fund

89 DEC -4 AM 10: 52

89 DEC -4 AM 10: 37

RECEIVED
FEDERAL ELECTION COMMISSION

December 1, 1989

AOR 1989-31

Mr. Lawrence Noble
Office of the General Counsel
Federal Elections Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Noble:

I am writing to request an advisory opinion concerning [illegible] Federal Election Campaign Act of 1971 (FECA), as amended [illegible] Commission regulations relating to a fede[illegible] candida[illegible] principal campaign committee which wishes [illegible] California political committees, regulated unde[illegible]

Specifically, my principal campaign committee, Do[illegible] Congressional Campaign Fund, and I wish to give funds to [illegible] and local candidates as well as committees formed under state [illegible] to support or oppose ballot propositions. I am informed by [illegible] State of California Fair Political Practices Commission ([illegible] [illegible] under the Political Reform Act of 1975, should my commi[illegible] [illegible] in aggregate, ten thousand dollars ($10,000) or more, [illegible] [illegible] will consider my committee a "Major Donor Committee" un[illegible] [illegible] law. The result of this transformation would be to re[illegible] my principal campaign committee to register, pursuant to [illegible] law, and to follow all of the State's reporting requiremen[illegible] [illegible] to the registering and reporting requirements impose[illegible] Federal law.

Federal candidates and their principal political commi[illegible] currently are required to file regulated reports that are pa[illegible] the public record. The burden of requiring Federal candidat[illegible] to follow State reporting requirements would be cumbersome [illegible] would necessitate different filing dates, different [illegible], different requirements for disclosure of receipts and contributors, and different thresholds.

It is my understanding that the FECA's preemption provision, [illegible] superse[illegible] and preempts state law with regard to [illegible] political committees supporting Federal candidates [illegible] of receipts and expenditures by Federal candidates and political committees, 11 CFR 108.7(b). That is, I understand that Congress specifically intended the Act to occupy the field with respect to reporting of receipts and expenditures by the principal campaign committees of Federal candidates.

P.O. Box 28127 ★ San Jose, CA 95159

Not printed at taxpayers expense

[illegible]
[illegible]
[illegible] 1984

I do not suggest that a Federal candidate's principal [illegible] committee, such as mine, would not be subject to [illegible] [illegible] limitations or prohibitions in State law. Rather, [illegible] suggest that the Federal law preempts the State [illegible] [illegible] on a Federal candidate's committee the State [illegible] [illegible] registration and reporting requirements.

I look forward to hearing from you soon on this important [illegible].

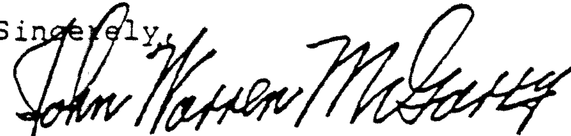
Sincerely,

Don Edwards

DON EDWARDS
Member of Congress

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. §437f.

Sincerely,



John Warren McGarry
Chairman for the
Federal Election Commission

Enclosure (AO 1979-36)

State of California
Fair Political Practices Commission
P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 9581
Technical Assistance (916) 322-5662 • • Administration 322-5660 • • Executive/Legal 322-5901 • • Enforcement 322-6441 • • Statements of Economic Int 322-6444

September 1, 1981

Jonathan W. Redding
City Clerk's Department
2180 Milvia Street
Berkeley, CA 94704

A-81-09-034

Dear Mr. Redding:

This letter is sent to follow up my letter of July 5, 1981. You asked whether the Committee for Ronald Dellums, a federal candidate's committee, had incurred any reporting obligations under the Political Reform Act by virtue of its participation in the Berkeley city elections. While it appears likely from our research that federal law would allow the application of state reporting requirements to federal candidates' committees when they participate in state/local elections, there is no federal statute, regulation, or FEC Advisory Opinion nor Commission opinion that expressly deals with this issue.

Section 453 of the Federal Election Campaign Act provides:

> The provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

The Federal Election Commission (FEC) has elaborated on the statutory declaration of preemption:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the--
>
> (1) Organization and registration of political committees supporting Federal candidates;
>
> (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and

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(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

(c) The Act does not supersede State laws which provide for the--

(1) Manner of qualifying as a candidate or political party organization;

(2) Dates and places of elections;

(3) Voter registration;

(4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or

(5) Candidates; personal financial disclosure.

11 C.F.R. Section 108.7.

As you can see, although the law is clear that states cannot regulate the reporting by federal committees <u>with respect to federal elections</u>, it is silent on the issue of reporting by federal committees with respect to state/local elections. You could infer that subsection (b)(1) prohibits the imposition of state reporting requirements on federal committees as the Dellums Committee asserts, but that interpretation is inconsistent with several FEC Advisory Opinions. See, e.g., AO 1981-18; AO 1980-47; AO 1979-82; AO 1978-37. <u>Cf</u>. AO 1980-36; AO 1978-66; AO 1978-54.

Since the issue is not resolved, we have determined that none of the filing requirements of the Political Reform Act should be imposed at the present time on the Dellums Committee. This determination is subject to change, of course, if either the FEC or the Commission issues a ruling on the matter. In deference to both the Commission's and federal efforts to streamline the filing of campaign statements, we feel that the additional burden that would be placed on the Dellums Committee if it were required to file as a recipient committee under the

Political Reform Act is not justified by significantly increased or different disclosure provided by the Political Reform Act statements than is already provided by the federal statements. The purposes of the Political Reform Act, which are to insure that campaign receipts and expenditures are fully and truthfully disclosed to the voters, are served by the existence and availability of federal statements. The federal statements of the Dellums Committee are on file both in Sacramento with the Secretary of State and in the county in which the largest number of voters who are in the Dellums' district reside. Government Code Section 84217. In addition, the receipt of any contributions made by the Dellums Committee to a local committee is reported on the local committee's statement.

Thank you for your patience. If I can be of further assistance, please feel free to call me at (916) 322-5901.

Very truly yours,

Diane Maura Fishburn
Counsel
Legal Division

DMF:plh
cc: Committee for Ronald V. Dellums

# City of Berkeley

81034

CITY CLERK DEPARTMENT
2180 MILVIA STREET
BERKELEY, CALIFORNIA 94704

(415) 644-6480

August 4, 1981

Bob Stern, General Counsel
FAIR POLITICAL PRACTICES COMMISSION
P.O. Box 807
Sacramento, CA 95804

SUBJECT: Advice Letter Dated July 6, 1981;
Request for Opinion

Dear Mr. Stern:

The advice letter of Diane Fishburn dated July 6, 1981, did not answer the most important questions relative to the valuation of the mailing lists under the circumstances described in my request for opinion. As the FPPC has never rendered an opinion as to the valuation of mailing lists, please consider this letter a request for opinion as initially requested on April 23, 1981.

For the record, this matter was treated as a request for advice, at the request of staff of the FPPC. I did not require staff to reiterate the duties of the filing officer, and would not have requested an opinion from the Commission if it had not been necessary to do so. At issue is the interpretation of the fair market value standard when applied to such intangibles as computer mailing lists, especially on an exchange basis. Staff's response makes no mention of the relevant facts of the case, and as such, constitutes a serious irresponsibility from my point of view.[1]

Furthermore, your response, "...Unless there is evidence of bad faith or of intent to violate the Act...," has been misinterpreted by persons filing under the Political Reform Act to question my authority to request amendments even in cases where the information contained in the statements is inaccurate on its face. I can hardly believe that it is the position of Fair Political Practices Commission that a finding on my part of intent to violate the Act or bad faith is a necessary prerequisite for requesting an amendment, when the information on the statement is inaccurate. Please clarify your statements in this regard immediately, as they serve to make the job of the filing officer exceedingly difficult.

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[1] Section 83113(c) states that the Commission shall ..."Provide assistance to agencies and public officials in administering the provisions of this title."

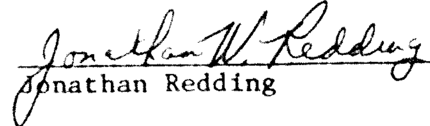
Bob Stern, General Counsel
August 4, 1981
Page Two

The documents previously submitted to the FPPC contains, I believe, the necessary facts to establish the fair market value of the mailing labels.

I will be most happy to provide you with additional details on the transactions in question if you need them. Your prompt attention to this opinion request will be appreciated.

Very truly yours,

EDYTHE CAMPBELL
City Clerk

By: 
Jonathan Redding

EC/JW:ko

# City of Berkeley

FPPC
JUL 7 11 16 AM '81

CITY CLERK DEPARTMENT
2180 MILVIA STREET
BERKELEY, CALIFORNIA 94704

(415) 644-6480

July 6, 1981

Fair Political Practices Commission
1100 K Street
Sacramento, CA 95814

SUBJECT: Opinion requests of April 23, 1981 & April 30, 1981

Dear Sirs:

On April 23, 1981 I made an official request for opinion regarding the provision of mailing lists by the Committee for Congressman Ronald V. Dellums & the McGovern 80 Committees.

On April 29, 1981 I requested an opinion to determine whether or not Congressman Ronald V. Dellums was required to file campaign statements pursuant to the Political Reform Act.

In May, 1981 Stella Levy of your Legal Division requested that the matter be treated as a request for advice since it could be considered more rapidly by the staff and I could reserve the right to submit the matter to the Commission for the issuance of an Opinion. Although I felt the questions raised by my inquiries merited an official opinion, I agreed to have the matter treated as a request for advice.

Please advise me as to the status of this request and when a detailed response will be forthcoming. In addition I request that copies of all correspondence and memos pertinent to this advice letter be promptly sent to this office.

Your cooperation in these matters is appreciated.

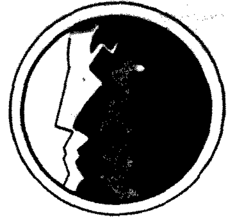
Sincerely,

Edythe Campbell
City Clerk

By *Jonathan W. Redding*
Jonathan W. Redding

F P P C
JUN 5 10 43 AM '81

# City of Berkeley



CITY CLERK DEPARTMENT
2180 MILVIA STREET
BERKELEY, CALIFORNIA 94704

(415) 644-6480

June 2, 1981

Fair Political Practices Commission
ATTN: Stella Connell Levy, Counsel
Legal Division
1100 K Street Building
Sacramento, California 95814

Dear Ms. Levy:

Jonathan Redding, an Associate Adminstrative Analyst, was hired by the City Clerk's Department in January 1981 to perform the functions of the filing officer for campaign statements for the City of Berkeley.

In making the Request for Opinion to the Fair Political Practices Commission and in all other activities related to the performance of these duties of the filing officer, he acts as the filing officer for the City of Berkeley.

If I can be of further assistance, don't hesitate to call me at 644-6480.

Very truly yours,

Edythe Campbell

Edythe Campbell
City Clerk

# State of California
# Fair Political Practices Commission

P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814

Technical Assistance (916) 322-5662 • • Administration 322-5660 • • Executive/Legal 322-5901 • • Enforcement 322-6441 • • Statements of Economic Intere 322-6444

July 6, 1981

Jonathan W. Redding
City Clerk Department
2180 Milvia Street
Berkeley, CA 94704

SEP 23 9 27 AM

Dear Mr. Redding:

This letter is sent in response to your letters dated April 23, 1981 and April 29, 1981 requesting advice from this office as to your duties under the Political Reform Act as filing officer for campaign statements for the City of Berkeley. This advice is provided pursuant to Government Code Section 83114(b).1/

The issues raised by your questions are:

1. Whether the provision of mailing labels to Berkeley Citizens Action (BCA), a campaign slate committee, for use in a mass mail fundraising effort through Mal Warwick and Associates by the Committee for Congressman Ronald V. Dellums and the McGovern 80 Committee is a reportable transaction under the Political Reform Act; and, if so, how it should be reported;

2. Whether the Committee for Ronald V. Dellums has incurred any reporting obligations under the Political Reform Act.

As you know, the duties of a filing officer with respect to statements filed pursuant to the Act are to:

(a) Supply the necessary forms and manuals prescribed by the Commission;
(b) Determine whether required documents have been filed and, if so, whehter they conform on their face with the requirements of this title;
(c) Notify promptly all persons and known committees who have failed to file a report or statements in the form and at the time required by this title;

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1/ All statutory references are to the Government Code unless otherwise noted.

(d) Report apparent violations of this title to the appropriate agencies; and
(e) Compile and maintain a current list of all reports and statements filed with this office.
Section 81010.

As to the first issue, Section 82015, as interpreted by 2 Cal. Adm. Code Section 18225, provides that contribution includes any non-monetary payment, not supported by full and adequate consideration, received by a committee. An expenditure includes any non-monetary payments by a committee.2/ Sections 82025, 82044.

If the mailing labels were provided to BCA without charge to BCA, full and adequate consideration was not received. Then the value of the mailing labels would most likely be reportable as an in-kind contribution to BCA on Schedule C. On the other hand, if there were a binding arrangement between BCA and the donors of the labels and the labels to be exchanged were of equivalent value, it could be reportable as an expenditure by BCA. Another possibility, depending on the details of the transaction, is that it is reportable both as an in-kind contribution and an expenditure if BCA provided some but not full value in the exchange. In any event, it is reportable on BCA's campaign statements.

Since it has been reported as an in-kind contribution on Schedule C, on the face of the statement, there is compliance with the Act. Unless there is evidence of bad faith or of an intent to violate the Act, in which case the matter should be referred to the civil enforcement authority, your duty to see that campaign statements conform on their face with the requirements of the Act has been performed.

On the related issue of the value of the mailing labels, Section 81011 provides that:

> Whenever in this title the amount of goods, services, facilities or anything of value other than money is required to be reported, the amount shall be the estimated fair market value at the time received or expended, and a description of the goods, services, or facilities shall be appended to the report of statement.

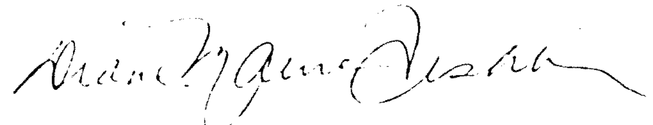
---

2/ The definition of payment includes a "distribution, transfer, loan, advance, deposit, gift or other rendering of money, property, services or anuthing else of value, whether tangible or intangible." Section 82044.

As the Information Manual points out on page 29, fair market value is the value to the recipient, not the cost to the donor. It is determined by the amount which would have to be paid to acquire similar goods or services on the open market. We do not have enough facts about the market for the mailing labels at issue here to determine their fair market value. However, the value is probably not the cost to the Dellums or McGovern 80 Committees of duplicating the labels. However, unless there is evidence that the valuation was not done in good faith and thus that there was an intent to violate the Act, we see no reason to go behind the valuation that was given since it is the responsibility of the filer to assign a valuation to in-kind contributions. Your duty to see that statements are filed promptly and completely has been done.

As to the second question you raised, we are still looking into the matter. We will inform you as to our determination in the matter as soon as we have come to a conclusion. Until that time, the Committee for Ronald V. Dellums need not file statements under the Political Reform Act.

Very truly yours,



Diane Maura Fishburn
Counsel
Legal Division

DMF:gs

cc: ✓Berkeley Citizens Action
Committee for Ronald V. Dellums

DATE: August 27, 1981 Memorandum

RECEIVED
AUG 31 1981
OFFICE OF CITY CLERK

TO: EDYTHE CAMPBELL, City Clerk
Attention: Jonathan Redding

FROM: NATALIE E. WEST, City Attorney

SUBJECT: OPINION REGARDING MAILING LISTS AS CAMPAIGN CONTRIBUTIONS

ISSUES

L. Does the provision of mailing lists and labels to a political committee constitute a non-monetary contribution?

2. If so, what is their value? Is it based on the list's commercial value or on the cost of production associated with using labels.

CONCLUSIONS

1. The provision of mailing lists and labels to a campaign committee is a reportable transaction. The transaction may be reportable as a contribution or as an expenditure, depending on the facts of the individual case.

2. The value of the list is their fair market value.

ANALYSIS

The Berkeley Fair Campaign Practices Committee requested an opinion on the above issues from the California Fair Political Practices Committee as well as this office. On July 6, 1981, the FPPC issued a written advice letter which answers those questions and which is attached hereto. Under the facts, as I understand them, Congressman Dellums and Senator McGovern furnished printed mailing labels to Berkeley Citizens' Action (BCA), a campaign slate committee, for use in a mass mailing fund raising effort during the recent campaign that preceded the April 21, 1981 election. BCA received a total of 10,552 mailing labels from the committee for Congressman for Ronald B. Dellums. These labels are available commercially at a cost of $50 per 1000 which would make the total value of the transaction $527.60. However, the labels were reproduced at a cost to the Dellums Committee of $11.90 per thousand labels. If the labels are valued on the basis of cost of reproduction, the value of the transaction is $125.57. The McGovern 80 Committee furnished 2,500 labels at a commercial value of $45 per thousand. The transaction had a fair market value of $112.50. On the other hand, the cost of reproduction is $29.75.

There are two factual issues which must be resolved in order to determine BCA's specific reporting obligation. (1) There is a difference of opinion as to whether the transactions were contributions or exchanges. In any event they are reportable and BCA has reported the transactions as a contribution on its amended campaign statement filed April 17, 1981. (2) There is a difference of opinion as to whether the value of the mailing list if their commercial value or the cost of reproduction. Both the State and local Campaign Disclosure Acts require that the value of the goods be reported as the "estimated fair market value at the time received or expended". Govt. Code Section 81011, Berkeley Municipal Code Section 2.12.055. As the Fair Political Practices Committee stated, "Fair market value is the value to the recipient not the cost to the donor. It is determined by the

DATE: August 27, 1981

Memorandum

TO: EDYTHE CAMPBELL, City Clerk
Attention: Jonathan Redding

FROM: NATALIE E. WEST, City Attorney

SUBJECT: OPINION REGARDING MAILING LISTS AS CAMPAIGN CONTRIBUTIONS

amount which would have to be paid to acquire similar goods or services on the open market." The FPPC further observed that "the value is probably not the cost to the Dellums or McGovern 80 Committees of duplicating the labels." The determination of fair market value is a factual conclusion, not a legal conclusion, and does not properly rest with this office. The Berkeley FCPC has apparently made a determination that the fair market value of the mailing list is the commercial rate for the use of the Dellums and McGovern mailing lists. (See FCPC minutes, April 15, 1981 at 2). Accordingly the commission may wish to take steps to enforce its opinion.

NATALIE E. WEST
City Attorney

Attachments

State of California

Fair Political Practices Commission
P.O. BOX 807 • SACRAMENTO, 95804 • • • 1100 K STREET BUILDING, SACRAMENTO, 95814
Technical Assistance (916) 322-5662 • • Administration 322-5660 • • Executive/Legal 322-5901 • • Enforcement 322-6441 • • Statements of Economic Intere 322-6444

May 25, 1981

Mr. Jonathan W. Redding
City Clerk Department
2180 Milvia Street
Berkeley, CA 94704

RE: FPPC No. GC-81/04-01

Dear Mr. Redding:

As we discussed by telephone on May 21, 1981, it is Commission staff policy that matters such as those you have addressed in your recent correspondence to us be pursued at the local level as authorized by Government Code Section 91001(b).

As I mentioned, the Commission staff will provide legal/technical assistance to the District Attorney as requested.

We appreciate the time and effort you have put into this matter. If I can be of further assistance, please do not hesitate to contact me at (916) 322-5772 or ATSS 492-5772.

Very truly yours,

Cyrus J. Rickards

Cyrus J. Rickards
Counsel
Enforcement Division

CJR:sf
cc:Bob Blasier
Stella Levy

The Committee for Congressman
RONALD V. DELLUMS



FPPC
MAY 4 11 58 AM '81

Luke Abrams
Hugh Bassette
Robert Benson
Betty Berry
Stalfana Broadhead
Roberta Brooks-Halterman
Charles Brown
Keith Carson
Louise Clark
Joe Close
Dona Cutting
Margot Dashiell
Michael Dieden
Mamie Dillard
Lodi Dupree
Leandro Duran
Walter J. Edwards
Rick Ellis
Nate Everett
Carmen Flores
Susie P. Gaines
Vivian Gales
John George
Mike Gleason
Lenny Goldberg
Gigi Guerrero
H. Lee Halterman
Larry Hansen
Donald R. Hopkins
Robert Johnson
William Lightbourne
Carlos Lopez
Pat McClintock
John McElheney
Beth Meador
Gus Newport
Steve Paskowitz
Tim Reagan
Gwendolyn E. Reed
Wilson Riles, Jr., Chairperson
Gil Romero
Kaye K. Rosso
Robert A. D. Schwartz
Maudelle Shirek
William Short
Arlene Slaughter
Rick Smith
Nancy Snow
Andrew Sun
Sandre Swanson
Elijah Turner
Kunio Uehara
Mal Warwick
Bobbie Williams
Micheale Williams
Patricia Wright
Frank Yoon

May 1, 1981

Chair and Members
Fair Political Practices Commission
1100 "K" Street
Sacramento, CA 95814

Dear Chair and Members:

We are in receipt of Mr. Jonathan W. Redding's April 29, 1981 letter to the FPPC entitled SUBJECT: REQUEST FOR OPINION AND NOTIFICATION OF APPARENT VIOLATIONS OF THE POLITICAL REFORM ACT.

I would appreciate the Commission's consideration of the following:

1. We urge that the request for opinion regarding the filing requirement of the Committee for Ron Dellums (hereinafter the Committee) under State statute and local ordinance be separated from the request for opinion regarding the issue as to whether or not the exchange of mailing lists can be characterized as a political contribution within the meaning of Federal and State law and local ordinance. These issues will be referred to as issue one and issue two respectively.

We believe that fundamentally different questions are involved in these two issues and propose that a division of the questions would allow for a clearer expostulation of the facts and legal theories involved in each.

2. We urge the Commission to reject the request for opinion on issue one. It is our contention that Federal law governing the filing of statements preempts and supersedes State law and, *a fortiori*, local ordinance. *See*, 2 FPPC Opinions 61, No. 75-117; 2 U.S.C. 453; 11C.F.R.108.7(b)(2); Cal Gov't. Code 82007; and, 1974 U.S. Code, Cong. & Admin. News 5587, 5668 and 1972 U.S. Code, Cong. & Admin. News 1773, 1800.

It is the position of the Committee that while a transfer of funds from it to another political committee might be a contribution for the purposes of the receiving committee that it is, in fact, an expenditure which the Committee has undertaken in order to pursue the electoral interests of its principal: The Federal candidate. No decision to spend money, and a relatively insubstantial portion of the Committee's money is spent attending functions, purchasing tickets from other committees or transferring funds to another committee, is undertaken without first determining that it will benefit the political interest of its candidate. It is, therefore, an expenditure which is ultimately

EB 57

3126 Shattuck Avenue
Berkeley, CA 94705

in connection with a federal election and is, therefore, reported to the Clerk, U.S. House of Representatives.

Moreover, the language of 11C.F.R.108.7(b) contains no words limiting its operation to direct expenditures in federal elections only. It covers all expenditure disclosure.

It was precisely for the purpose of avoiding multiple filings that the Congress undertook specifically to preempt the field and to supersede any existing state laws. And, since the interest of "timely" disclosure is served by the fact that the State/local controlled committee must report the receipt of the funds in a timely fashion, it cannot be imagined that the Congress would have intended that such a filing requirement could also be imposed upon a Federal committee.

3. If the Commission determines that it will issue an opinion with regard to issue one, the Committee requests that it be allowed to submit a brief to the points of this question under Comm'n Reg. 18322(b); that it be advised of the draft opinion as an interested party under Comm'n Reg. 18322(c); and, that it be allowed to present oral argument under Comm'n Reg. 18323(b).

4. Since we contend that the question raised in issue one is largely a question of Federal law, we urge the Commission to solicit the opinion of the General Counsel of the FEC as to this question. <u>See</u> 2, FPPC 61, 63, No. 75-117.

5. Additionally, since the Committee has relied in good faith upon earlier Commission determinations and interpretations of Federal law which would indicate to a reasonable person that it was exempt from such a filing requirement, we request that any ruling issued by the Commission which would require Federal Committees to file be made prospective only.

6. With respect to issue two, the Committee requests that the Commission, if it does not reject the request for opinion, allow the Committee to submit a brief under Comm'n Reg. 18322(b); that it allow the Committee to receive a draft of the opinion under Comm'n Reg. 18322(c); and that it allow the Committee to present oral argument under Comm'n Reg. 18323(b).

In addition, we would urge the Commission to solicit the advise and opinion of professionals working in the direct mail business as to the "common business practice" regarding exchanges of mailing lists among political and non-political committees.

7. Finally, the Committee requests that all matters regarding the conformance of BCA to State and local requirements (other than with respect to the issue of contribution in issue two) be separated from any proceeding regarding the Committee.

respectfully submitted,

H. Lee Halterman
District Counsel

cc: Lawrence L. Duga, Esq.
Berkeley FCPC, c/o Steve Maier, Esq., Chair
Mr. Jonathan W. Redding
William C. Oldaker, General Counsel, FEC
Legal Division and Enforcement Division, FPPC
Natalie West, Berkeley City Attorney

**LAWRENCE L. DUGA**
ATTORNEY AT LAW
1440 BROADWAY
SUITE 1000
OAKLAND, CALIFORNIA 94
TELEPHONE (415) 452-1300

F P P C MAY 11 11 12 AM '81 81 002

May 7, 1981

Fair Political Practices Commission
1100 K Street
Sacramento, CA. 95814

ATTENTION: Legal Division

Dear Gentlepeople:

I am in receipt of a copy of a letter sent to you from one Jonathan W. Redding, an employee in the City Clerk's Office in Berkeley. I enclose a copy of that letter with this letter so that you can match up the two. I have several comments to make.

As you are probably aware, the City of Berkeley has its own campaign disclosure law. The commission set up under that ordinance is assigned staff by the City Manager. Mr. Redding, a clerk, has been designated as staff to the commission. At commission meetings, he represents himself as the local compliance officer under the state law. His rationale is that the City Clerk is designated as compliance officer and that since he is "staff" to the local commission, the mantle falls upon his shoulders. I think this a very questionable legal premise. It is likewise very questionable whether Mr. Redding is empowered to speak for the City of Berkeley. He alleges, in his letter, that the opinion he seeks is an official request for opinion from the City of Berkeley. In fact, neither the City Council nor the local commission has requested the opinion. To be sure, any individual may seek an opinion, but I think it is of significance to what follows that Mr. Redding represents himself as a state officer to our commission, but does not describe himself that way to the State Commission, and that he arrogates to himself the power to request opinions in the name of the City when no such power or authorization has been given.

It would be fair to say that I and my client, Berkeley Citizens Action, view Mr. Redding's enforcement of the law as something less than even-handed. Any alleged infraction of the law by B.C.A. is viewed as a major item requiring a flurry of letters, phone calls and placements on the commission agenda. Discrepencies in the filings of our opposition are by and large ignored, even after they are pointed out. Indeed, without the intervention of the chair of the commission, the most major violation would be ignored by Mr. Redding.

Mr. Redding's letter is both inaccurate and incomplete. It is not true that B.C.A. has failed to honor requests for information. In fact, all the information requested was supplied in a timely

and representatives of the organization, as well as Mal Warwick, of Warwick and Associates, appeared at the commission's last meeting and answered all questions asked by the commission.

B.C.A. agreed to file a supplemental report, under protest, so that the information would be available even though we contest the necessity of such a filing. Accordingly, the implication that B.C.A. engaged in a course of conduct designed to hide information from the public is both false and unwarranted.

The crux of the dispute has to do with the practice of exchanging lists among and between mail solicitation firms. Mal Warwick and Associates was hired by B.C.A. to do direct mail solicitation. Mr. Warwick obtained mailing labels from the Committee for Ronald V. Dellums and the McGovern 80 Committee on the promise of supplying to these committees a list of contributors generated by his efforts on behalf of B.C.A. It is our understanding that this is a customary practice and we are prepared to supply you with a statement to that effect from one or more mail solicitation firms, if you so desire. All payments to Warwick and Associates by B.C.A.have been reported as have all contributions received by B.C.A. as a result of his efforts.

A secondary issue is the fair market value of these lists. The supplemental report filed under protest, indicates the fair market value of the lists is determined by the list management fee and the cost of duplicating the labels in a usable form. Mr. Redding is of the view that a different higher figure should used as the fair market value.

I would suggest that you obtain a transcript of the proceedings relative to this issue which took place before the commission. Unfortunately, there is no transcript,and record keeping by our local commission is far from sufficient. Accordingly, I offer to answer any questions for you, as I am able to, or in the alternative, to find any information that you need in order to render your opinion.

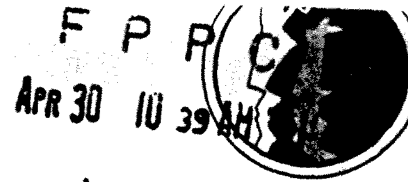
Very truly yours,

Lawrence L. Duga

LAWRENCE L. DUGA

LLD:GB
enc/

# City of Berkeley




CITY CLERK DEPARTMENT
2180 MILVIA STREET
BERKELEY, CALIFORNIA 94704

(415) 644-6480

April 29, 1981

Fair Political Practices Commission
State of California
Legal Division and Enforcement Division
1100 Kay Street
Sacramento, California 95814

Gentlemen:

SUBJECT: <u>REQUEST FOR OPINION AND NOTIFICATION OF APPARENT VIOLATIONS OF THE POLITICAL REFORM ACT</u>

On April 27 and 28, 1981 I spoke with Lynn Montgomery regarding the necessity of Congressman Dellums to file campaign statements pursuant to the Political Reform Act. Pursuant to our conversation, I am forwarding a letter from the Committee for Congressman Ronald V. Dellums (Federal I.D. 004332) in which his district counsel alleges some sort of immunity from complying with California State law and contests staff's determination that the lists provided by the Committee for Congressman Ronald V. Dellums constitutes an in-kind contribution.

Please consider this letter as an <u>official opinion request</u> to determine whether or not Congressman Ron Dellums must file campaign statements pursuant to the Political Reform Act and notification pursuant to 81010(d) of apparent violations of the Political Reform Act if it is found that Congressman Dellums should file. In additon, I bring to your attention the apparent failure of BCA to report the $1,000 late contribution from Congressman Ron Dellums' Committee, as well as contributions from Ilona Hancock, Teresa Bergman and Mark Goldowitz, within 48 hours of receipt.

For your information, my preliminary investigation leads me to believe that neither Congressman Dellums or any committee which he controls has filed a campaign statement in the City of Berkeley or in the State of California in compliance with the Political Reform Act although he has likely met threshold requirements for a number of years.

For example in 1980, according to the Berkeley Citizens Action (BCA) Campaign Statement covering the period 10/21/80 to 12/31/80 his committee's cumulative contributions to BCA totaled $2,450.

Most recently, in connection with the April municipal election, the Committee for Congressman Ronald V. Dellums made a late contribution to Berkeley Citizens Action and failed to notify the City as required within 48 hours of making the contribution. (Refer to the enclosed late contribution report from BCA in which they reported the $1,000 contributions from the Committee for Congressman Ronald V. Dellums on April 20, 1981, 5 to 7 days after the contribution was reported as received.) The matter of the late reporting of contributions less than $1,000 which are not within your jurisdiction as well as those of $1,000 will be discussed by the Berkeley Fair Campaign Practices Commission, however, your attention to the late reporting of the $1,000 contributions is appreciated.

Very truly yours,

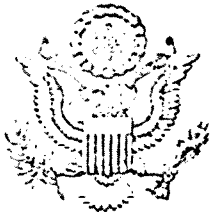
EDYTHE CAMPBELL
City Clerk

By: Jonathan W. Redding
Jonathan W. Redding

EC:JWR:dh
Enclosure

cc: Natalie West
Berkeley Citizens Action
The Committee for Congressman
Ronald V. Dellums
Lynn Montgomery

# The Committee for Congressman RONALD V. DELLUMS



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April 23, 1981

Mr. Steve Mayer, Chair
Berkeley Fair Campaign Practices Commission
2180 Milvia St., City Hall
Berkeley, CA 94704

Dear Mr. Mayer:

We have received a copy of Mr. Duga's April 21, 1981 letter to you regarding the required reporting of the "in kind contributions from the Dellums' Committee and the McGovern Committee" required by the Commission. As you are aware, I was present when the Commission issued this order.

While the Commission has no jursidiction with respect to Committees controlled under Federal law, we would appreciate the opportunity to make a special appearance in order to argue against this determination. Because it is our desire to promote the effective operations of all of the election reform laws and because of conflicts which might appear between your determination and that of the FEC, we believe that it is important for us to appear. Your cooperation in advising us of the Hearing and scheduling us for the presentation of testimony would be appreciated.

For your information, I will be on vacation the week of 4 May 1981, but am otherwise available for a Hearing at the Commission's pleasure.

Sincerely,

H. Lee Halterman
District Counsel

cc: Lawrence L. Duga, Esq.

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FEDERAL ELECTION COMMISSION
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NOV 16 P5: 03

November 16, 1981

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ADVISORY OPINION 1981-46

H. Lee Halterman
District Counsel
The Committee for Congressman
Ronald V. Dellums
3126 Shattuck Avenue
Berkeley, California 94705

Dear Mr. Halterman:

This responds to your letter dated September 18, 1981, supplemented by your letters dated September 22 and 23, 1981, requesting an advisory opinion on behalf of the Committee for Congressman Ronald V. Dellums concerning application of the Federal Election Campaign Act of 1971, as amended, ("the Act"), and Commission regulations to certain aspects of the Committee's direct mail fundraising program.

You explain that the Committee has retained the firm of PARKER/DODD and Associates to do direct mail fundraising. PARKER/DODD has developed a direct mail program to raise funds for the Committee, and acts as a "custodian/broker" of the Committee's contributor list. In return, the firm is paid a "standard industry fee" by the Committee.

You indicate that a part of the service package offered by the fundraising firm involves the firm's negotiation with other organizations for the use of their mailing lists to increase the list of names from which the Committee may solicit contributions. Two commercially acceptable ways of "paying for" the use of another organization's mailing list are 1) for the user to pay the list owner a fee "determined by the market's view of the value of the list;" and 2) for the user to exchange names of corresponding value with the

list owner. The exchange may be a direct exchange of the same number of names, a multiple use of a smaller number of names or some other variation which the parties believe is an exchange of equal value. Both payment methods, you indicate, are accepted in the industry as full consideration. The Commission responds to your specific questions about the described industry practices in the order in which they appear in your request.

You ask first whether the Committee's exchange of names from its contributor list for the use of names of corresponding value from the list of another political committee, non-profit organization, individual or corporation is considered by the Commission to be payment of the "usual and normal charge" for goods within the meaning of 11 CFR 100.7(a)(1)(iii)(B) and if so, whether the transaction is reportable under the Act.

As you know, the regulations provide that "the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution." 11 CFR 100.7(a)(1)(iii)(A). A mailing list or a contributor list would fall within that provision. The regulations provide further that the " 'usual and normal charge' for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution..." 11 CFR 100.7(a)(1)(iii)(B).

In response to your first question, the Commission concludes that if the exchange of names on a contributor list is an exchange of names of equal "value" according to accepted industry practice, the exchange would be considered full consideration for services rendered.*/ Thus, no contribution or expenditure would result and the transaction would not be reportable under the Act.

With regard to a situation where a corporation exchanges names with the Committee, the issue arises as to whether the equal exchange represents a "payment" which would constitute a corporate contribution prohibited by 2 U.S.C. §441b. The Commission again concludes that an exchange of this kind is not a prohibited corporate contribution but rather, a bargained-for exchange of consideration in a commercial transaction.

*/ The Commission adopted a similar approach with respect to direct mail fundraising practices in Advisory Opinion 1979-36, copy enclosed. There, the Commission based its conclusion that the proposed activity was permissible under the Act on the requestor's assertion that the proposed activity was consistent with "normal industry practice."

Your second question is whether a contribution would result if the Committee provides names to another "Federal political committee" or another kind of organization in exchange for a future use of a corresponding number of names belonging to that committee.

The Commission concludes, based on its response to your first question, that a current use of names in exchange for a future use of the names of another political committee does not result in a contribution within the definition of 2 U.S.C. §431(8)(A). Based on the assertion that this kind of exchange is an accepted practice in the field of direct mail fundraising, the Commission takes the position that when the Committee provides names to another political committee in exchange for its own future use of a corresponding number of names which are of equal value, that this constitutes an arms length business transaction between the committees and is not a reportable contribution under the Act. Of course, this conclusion assumes the fact that the future use will occur. If that future use does not occur for any reason a contribution may result depending on the circumstances of the particular situation and the status of any person who does not provide or obtain the promised future use.

The result is not altered if the Committee arranges for a future exchange with a "non-profit organization." The exchange would not be a contribution and would not be reportable. Similarly, if the non-profit organization is incorporated, an arrangement for the future use of names in exchange for a current use does not result in a contribution provided the value to be exchanged represents the "usual and normal charge." Nor would the §441b prohibition against corporate contributions apply. Thus, the transaction would be neither reportable nor subject to the limits of 2 U.S.C. §441a.

If a profit-making corporation provides names to the Committee in exchange for a future use of a corresponding number of names, no contribution would result assuming the exchange represents the "usual and normal charge" for the use of contributor lists. The transaction would only become a prohibited corporate contribution if the Committee exchanged names which were of lesser value than those names provided by the corporation for the Committee's future use. 2 U.S.C.§441b.

Your third question concerns the production costs connected with the brokering of contributor lists. You indicate that the production costs of printing address labels are understood in the direct mail fundraising field to be included in the amount that the owner of a list charges for the use of the names on the list.

You ask whether the payment of such production costs is a contribution from the list owner to the list user. The Commission concludes that assuming it is an accepted business practice for the costs of label production to be part of the usual and normal charge for the use of a list, payment of such costs by the list owner is not a contribution to the list user or purchaser.

This conclusion is not altered when the Committee deals with a list owner which is incorporated. No prohibited corporate contribution results unless the corporation provides use of a list that is of greater value (with reference to "usual and normal" rate) than the value of names on the Committee's contributor list. Similarly, if the Committee deals with a list owner who is a state or local committee that receives contributions prohibited by the Act, no contribution would occur for purposes of the Act if the Committee "charged" the state or local committee the "usual and normal" rate for the use of its list. Such transactions are not reportable under the Act. The Commission, however, reaches no issue and expresses no opinion with respect to application of any State or local law in the situation where the Committee exchanges lists with a state or local committee that is not a political committee under the Act or Commission regulations.

To summarize, you have indicated in your request that an accepted method of payment for the use of a committee's contributor list in the direct mail fundraising industry is an exchange of names of corresponding value with another organization. The Commission takes the position that as long as the exchange is for names of equal value, that is, that the exchange represents the "usual and normal" charge required by 11 CFR 100.7(a)(1)(iii)(B), no contribution results. The same conclusion is reached if the consideration for the bargain is the future use of names on the Committee's contributor list. Assuming the exchange of names, either current or future, represents the normal and usual charge for such use, it is permissible for the Committee to exchange names with an incorporated or an unincorporated non-profit organization, a corporation or a state or local political committee which receives corporate or union contributions. Such an exchange is not subject to the prohibitions of 2 U.S.C. §441b or the limitations of 2 U.S.C. §441a, and it is not a reportable transaction under the Act.