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COLORADO GENERAL ASSEMBLY**

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MEMORANDUM

TO: Interested Persons

FROM: Office of Legislative Legal Services

DATE: August 12, 2010

SUBJECT: Campaign finance restrictions on use of public resources by legislators in a ballot measure campaign¹

BACKGROUND:

This memorandum addresses the ability of legislators to explain and express the legislator's position or opinion on an initiated or referred ballot measure in light of the limitations and prohibitions on the use of public moneys and resources to support or oppose a referred measure contained in the Fair Campaign Practices Act, article 45 of title 1, C.R.S. ("the FCPA"). This would include, for example, the dissemination of a legislator's opinion in a newsletter, op-ed piece, e-mails, or by other written means to a legislator's constituents specifically or to the electorate generally in advance of the election on such a measure.

DISCUSSION:

Section 1-45-117, C.R.S., of the FCPA generally prohibits state departments and agencies, including the legislative branch, from expending public moneys or making contributions in kind to urge electors to vote in favor of or against a ballot measure. This section specifies several permissible actions that a member of the General Assembly may take in connection with a ballot measure:

¹ This legal memorandum results from a request made to the Office of Legislative Legal Services (OLLS), a staff agency of the General Assembly. OLLS legal memoranda do not represent an official legal position of the General Assembly or the State of Colorado and do not bind the members of the General Assembly. They are intended for use in the legislative process and as information to assist the members in the performance of their legislative duties.

1. A legislator may respond to questions about a ballot measure, if the legislator has not solicited the question. Section 1-45-117 (1)(a)(II), C.R.S.
2. A legislator may expend not more than \$50 of public moneys "in the form of letters, telephone calls, or other activities incidental to expressing his or her opinion" on a ballot measure. Section 1-45-117 (1)(a)(II), C.R.S. Thus, an expenditure of public moneys in this context generally includes utilization of legislative staff, equipment (phones, computers, copiers, etc.), and materials (paper, office supplies, postage, etc.).
3. A legislator, as an elected official, can express a personal opinion on any measure before the electorate. Section 1-45-117 (1)(b)(II), C.R.S.
4. A legislator may expend personal funds, make contributions, or use personal time to urge electors to vote in favor of or against a ballot measure. Section 1-45-117 (1)(b)(III)(C), C.R.S.
5. A state agency or department, including the legislative branch, may expend public moneys or make contributions to dispense a factual summary containing arguments for and against a ballot measure, so long as the summary does not "contain a conclusion or opinion in favor of or against any particular issue." Section 1-45-117 (1)(b)(I), C.R.S.

Given these FCPA provisions, we offer a few suggestions relating to the creation and dissemination of written communications expressing a member's explanation, position, or opinion on an initiated or referred ballot measure:

- Although a member may expend up to \$50 of public moneys for letters, phone calls, and other activities incidental to expressing his or her opinion on a ballot measure, it may be advisable to avoid any expenditures of public moneys for the purpose of creating or disseminating a written communication containing that opinion. Practically, it may be difficult to account for and easy for one to challenge the amount of legislative time² that a member spends and the extent of legislative resources described in 2. above that are utilized in connection with expressing and disseminating the member's opinion on

² Perhaps the best guide here is time spent during normal working hours on days for which a legislator claims a state per diem.

a ballot measure. If history is any indication, this kind of activity by a public official in connection with a ballot measure may invite a complaint under the FCPA, even if the writing does not clearly advocate one way or the other on the measure and the \$50 threshold has not been exceeded. Therefore, notwithstanding the FCPA's \$50 allowance, it seems advisable to abstain from using any legislative staff, stationery, copiers, computers, or offices to create and disseminate a written communication expressing the member's position or opinion on a ballot measure in connection with the campaign on that measure.³

- The Colorado Supreme Court has held that utilizing governmental staff during working hours to create press releases opposing a statewide ballot measure is a contribution in kind for purposes of determining whether the \$50 threshold has been exceeded.⁴ The Court stated that "The statutory language of the FCPA unambiguously expresses the general assembly's intent to prevent state agencies and officials from using public funds to influence the outcome of an initiative election."⁵ This principle should guide legislators and their staff in connection with questions and requests for information on an initiated or referred ballot measure in the months preceding the election.
- A written communication generated with public funds that discusses a ballot measure need not contain words of express advocacy in order to be violative of the FCPA. A communication "urges" electors to vote for or against a ballot measure if it "advocates", "demands earnestly or

³ For **candidate** campaigns this Office has indicated that it is probably improper under the FCPA to use state equipment or services to generate communications related to an election campaign or to use state-subsidized office space as a campaign headquarters or a place from which to solicit campaign contributions. It seems prudent and consistent to apply the same standard for the utilization of public resources by legislators in expressing an opinion on a pending ballot measure.

⁴ See: *Coffman v. Common Cause*, 102 P.3d 999 (Colo. 2004). "[T]he staff time Treasurer Coffman caused to be expended in opposing Amendment 23 falls within the purview of a contribution in kind. We note that he was not the payer for those services - the State of Colorado was, but he was certainly the supervisor and could direct staff time as he saw fit. There is evidence in the record regarding the hourly rate attributable to the individuals involved which is equivalent to the fair market value of the services. There is also evidence in the record that the services were provided as part of regular job duties, were during work hours and were not volunteer services. Hence, Treasurer Coffman did contribute services in kind in excess of the fifty-dollar limit." *Id.*, at 1012-1013.

⁵ *Id.*, at 1013.

pressingly", or "openly and publicly seeks passage of the measure."⁶ "[W]hen public funds are used to inform the public about a pending ballot measure, the information provided must represent both sides of the issue."⁷

- A legislator may respond to questions on a ballot measure in his or her role as an elected official during traditional work hours, if the legislator has not solicited the question. While any such response could presumably include a personal opinion, a legislator would still be well-advised to consider the FCPA's limitations prior to using *any* state resources in providing that response, regardless of whether the response is a written or verbal one.
- A legislator may expend personal funds, make contributions, or use his or her personal time to urge electors to vote in favor of or against an initiated or referred measure. The FCPA does not prevent a legislator from using his or her personal time and resources away from the Capitol to create and disseminate written communications on a ballot measure. In this regard, it seems prudent for legislators to work on a ballot measure campaign before or after traditional legislative hours in order to avoid any possible inference that state moneys are being spent on the campaign.

A violation of the FCPA's restrictions on the use of public moneys in an election campaign subjects the legislator to a complaint and the administrative process described in Colo. const. art. XXVIII, sec. 9(2) or sec. 10 (1), any appropriate order or relief,⁸ or a potential ethics complaint under the House or Senate Rules. **Sanctions for violating the contribution limits under art. XXVIII include a civil penalty of at least double and up to five times the amount contributed, received, or spent in violation of the applicable provisions.⁹ The FCPA includes as an available sanction an order directing the person making the unlawful contribution or expenditure to reimburse the fund from which such moneys were**

⁶ *Skruch v. Highlands Ranch Metro. Dist. Nos. 3&4*, 107 P.3d 1140 (Colo. App. 2004).

⁷ *id.*, at 1143.

⁸ See section 1-45-117 (4), C.R.S.

⁹ Colo. const. art. XXVIII, sec. 10 (1).

diverted for the amount of the contribution or expenditure.¹⁰

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Created: August 12, 2010
Reviewed: September 18, 2020

¹⁰ See section 1-45-117 (4), C.R.S.