



Campaign Activities and Compliance with the FCPA

Fair Campaign Practices Act

The Fair Campaign Practices Act (“FCPA”), in combination with the Colorado Constitution, are Colorado’s campaign finance laws. The FCPA prohibits political subdivisions of the state, such as a school district, from “expend[ing] any public moneys from any source, or mak[ing] any contributions to urge electors to vote in favor or against” ballot questions or ballot issues presented by a political subdivision to the electors of that political subdivision. *Colo. Rev. Stat. § 1-45-117(a)*. School director candidates, district employees and board members, have greater freedom to campaign for or against ballot questions or ballot issues.

The purpose of this memorandum is to discuss generally what campaign activities are allowed and how the FCPA applies to school districts, district employees, boards, board members and board candidates. It is important to have a clear understanding of the limitations on expenditure of public funds to avoid having a complaint filed for a campaign violation. Opponents in a campaign are fond of using the campaign reform law to continue the battle, even after the issue has been decided at the polls.

Specific questions should be referred to the school district’s or candidate’s own legal counsel.

BOARD OF EDUCATION

Factual summary

The FCPA allows the school district to spend public money (no limit on the amount) or make a contribution in kind to dispense a factual summary on any issue of “official concern” before the electorate. *Colo. Rev. Stat. § 1-45-117(1)(b)*. An issue of “official concern” is defined as one that will appear on the election ballot in the jurisdiction.

The factual summary must include arguments both for and against the proposals on the ballot. The summary may not state a conclusion or opinion in favor of or against any particular issue addressed by the summary. Generally, school districts prepare factual summaries on their own ballot issues and rely on the “blue book” published by the state for information on the statewide initiatives.

If public funds are going to be used to dispense a factual summary, the board should adopt a resolution that expresses the issue of official concern and specifically authorizes an expenditure of public funds and/or contributions in kind to dispense the summary.

Expressing opinions and advocacy

The FCPA specifically allows the board to pass a resolution and/or take a position of advocacy on state and local ballot issues. It is permissible for district personnel to assist the board in drafting the resolution and to perform other incidental tasks related to its passage.

It is also permissible to report passage of the resolution and to distribute the resolution through established, customary means (other than paid advertising) by which information about board resolutions is regularly

provided to the public. *Colo. Rev. Stat. § 1-45-117(1)(b)(III)*.

BOARD MEMBERS

Expressing opinions and advocacy

Board members may express a personal opinion on any matter before the electorate. *Colo. Rev. Stat. § 1-45-117(1)(b)(II)*.

State law allows a board member to spend up to \$50 of public money in the form of letters, telephone calls or other activities incidental to making himself or herself available to the press or the public for the purpose of responding to questions about the ballot issue or expressing an opinion on the subject. *Colo. Rev. Stat. § 1-45-117(1)(a)(II)*.

This provision does not authorize policymakers to make a direct contribution of public funds to the campaign. This provision is in state law simply to cover incidental

expenses that might occur and should not be used otherwise or “pooled” to cover a larger expenditure.

SCHOOL DISTRICT EMPLOYEES

Unsolicited questions

Employees are allowed to respond to unsolicited questions about state and local ballot issues. This is allowed by statute to assure that information about ballot issues is available.

Assisting the board in passage of a resolution

It is permissible for district personnel to assist the board in drafting the resolution and to perform other incidental tasks related to its passage.

Expressing opinions and advocacy

Employees are allowed to use personal funds and personal time to urge electors to vote in favor of or against an issue. *Colo. Rev. Stat. § 1-45-117(1)(b)(III)(C)*. However, employees are not allowed to conduct campaign activities while they are “on duty.”

State law allows an employee who has “policy-making responsibility” to spend up to \$50 of public money in the form of letters, telephone calls, or other activities incidental to making himself or herself available to the press or the public for the purpose of responding to questions about the ballot issue or expressing an opinion on the subject. *Colo. Rev. Stat. § 1-45-117(1)(a)(II)*.

This provision does not authorize policymakers to make a direct contribution of public funds to the campaign.

ELECTRONIC MAIL AND WEBSITE PUBLICATIONS

Any activity that is permitted by the FCPA, as discussed above, may be done electronically. Thus, for example, the factual summary on a ballot issue may be posted on the district’s website. School employees may respond to *unsolicited* email questions about state and local ballot questions via the district’s email system.

The prohibitions of the FCPA also apply equally to electronic mail communications and website publications. School district employees and board members may not use the district’s website or email system to advocate for or against a particular ballot issue. Further, a school district may not use an employee’s work time or technical expertise to post arguments in favor of or against a ballot issue on the school district’s website or to set up another website with arguments for or against a ballot issue.

Again, however, a school district employee may, on his or her own personal time, advocate for a particular ballot issue by taking information available to the public on a school district’s website and use that information to create content on an independent (*i.e.*, not affiliated with the school district) website. District employees may also use their personal time and personal email addresses to urge electors to vote for or against an issue. Such emails should not state or imply that the district endorses the email’s content or message.

SCHOOL BOARD CANDIDATES

Once a person declares himself or herself a candidate, he or she must fill out the candidate affidavit required under the FCPA within 10 days of becoming a candidate. *Colo. Rev. Stat. §1-45-109(1)(c); §1-45-110 (1)*. In completing the candidate affidavit, the person is declaring that he or she is familiar with the provisions of the FCPA. *Colo. Rev. Stat. §1-45-110 (1)*. The candidate must submit the notarized affidavit by mail or hand delivery to the secretary of state.

A person is a candidate for election if the person has publicly announced an intention to seek election to public office and has thereafter received a contribution or made an expenditure in support of the candidacy. *Colo. Rev. Stat. § 1-45-103(2)(c); Colo. Const. art. XXVIII, § 2(1)*. Also, a person is a candidate for election if the person is certified for inclusion on the ballot. It is important that all individuals who have submitted petitions comply with this provision, even though the individual may not be an official candidate until his/her petition is deemed sufficient. While the designated election official is required to first provide non-compliant candidates with notice and an opportunity to cure the problem (*i.e.* file an affidavit), ongoing failure to file the affidavit will disqualify the person as a candidate for election. *Colo. Rev. Stat. § 1-45-110(3)*.

Unlike candidates for state office, school board candidates do not have to make any disclosures about their personal finances. However, in

addition to the affidavit requirement referenced above, the FCPA imposes specific filing and disclosure requirements for candidates receiving OR expending money for campaign purposes. A candidate who does not accept contributions but who expends money (i.e. his or her own money) for campaign purposes is not required to form a candidate committee, *but must file disclosure reports for the reporting periods during which expenditures are made.* 8 CCR 1505-6, Rule 4.13. Candidates who receive contributions must register a candidate committee and comply with additional filing obligations. Any candidate (or candidate committee) who has received OR expended money for campaign purposes must electronically report through the secretary of state's TRACER program on Oct. 11, Oct. 28 and Dec. 1. Based on information from the secretary of state, it also appears that any active registered candidate committee must electronically report during each reporting period, even if the committee receives no contributions and makes no expenditures. More information on TRACER and filing requirements is available at the secretary of state's website. [<http://www.sos.state.co.us/pubs/elections/CampaignFinance/InfoForSchoolDistricts.html>].

CAMPAIGN COMMITTEES

An effective way for the school district to provide information to the public and also encourage a favorable response from the voters is for interested patrons to form a campaign committee. Just as individual candidates must do, campaign committees are required to file campaign disclosure information as a "political committee" with the secretary of state.

School board members may serve on campaign committees as long as the open meeting requirements are met (i.e. if three or more board members serve on the committee, all committee meetings must be noticed to the public).

CANDIDATE FORUMS

Whether to hold a candidate forum is ultimately at the board's discretion. There are some very good reasons to hold a forum. A forum would familiarize the voters with the candidates and their views on issues of importance to the community and school district. A forum would also help educate the public about the election, which in turn might increase voter turnout.

If the forum is held at a school, the board should check its policy regarding community use of school facilities to see if sponsorship of a forum would be appropriate. If the district generally makes its facilities available to the community, then allowing a candidate forum is probably consistent with the uses set forth in the district's policy. The district should ensure that the forum does not interfere in any way with the normal school day or any normally scheduled school activities.

It is also important that the school district maintain a neutral position toward all candidates. The board can help maintain neutrality by ensuring that the forum addresses many issues, by using a non-partisan moderator, by emphasizing that what the candidates say are simply their own views and not the positions of the school district or board, by stating to the public that sponsorship of the forum is not an endorsement of any candidate, and by

allotting equal time to all candidates to express their views.

All candidates should be invited to participate.

DISTRIBUTION OF CAMPAIGN MATERIAL

The district should refer to its policy on distribution of non-curricular materials to determine whether distribution of campaign materials is allowed. If the district generally allows distribution of non-curricular materials, subject to time and place restrictions, then the district should also allow distribution of campaign materials subject to the same restrictions. It is impermissible to send campaign literature home with students.

BACK TO SCHOOL NIGHTS

If the district has a policy that allows material to be distributed at back-to-school night, and the policy is applied in an even-handed fashion, then it is permissible for the district to allow campaign literature dealing with political issues to be distributed at back-to-school night. In most cases, simply providing a table on which interested persons may place materials may be the best way to accommodate the request from candidates and proponents and opponents of a ballot issue. There should be nothing in the campaign literature that implies that the district endorses or has taken any position on the issues, unless the board has taken a public position.

COMMUNITY USE OF SCHOOL FACILITIES

If the district has a policy of permitting community use of its facilities, it is permissible to allow groups opposed to or supportive of a ballot issue to use the facilities as long as the policy is applied in an even-handed manner.

OTHER STATE LAWS REGARDING CAMPAIGNS

The following are considered impermissible behaviors during campaigns:

- intentionally publishing or circulating letters or the like that are false and intended to affect voting on a specific issue or are relevant to a specific candidate *Colo. Rev. Stat. § 1-13-109*;
- making wagers regarding the outcome of the election *Colo. Rev. Stat. § 1-13-110*;
- interfering with distribution of pamphlets, handbills, yard signs, posters, or other written election materials *Colo. Rev. Stat. § 1-13-113*.

SANCTIONS

Any person who believes that a violation of the FCPA has occurred may file a complaint with the secretary of state no later than 180 days after the date of the alleged violation. *Colo. Rev. Stat. § 1-45-111.5(1.5)*. The secretary of state is to refer the complaint to an administrative law judge. *Colo. Const. Art. XXVIII, § 9(2)*. If the

administrative law judge determines that a violation has occurred, the statute and state Constitution provide weighty financial penalties. *Colo. Rev. Stat. § 1-45-111.5; Colo. Const. Art. XXVIII, §§ 9-10*. The decision of the administrative law judge is final, subject to review by the Colorado Court of Appeals. *Colo. Const. Art. XXVIII, § 9(2)*. The district's own legal counsel should be consulted whenever the possibility of a FCPA complaint arises.