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MEMORANDUM

VIA EMAIL

To: Members, Governing Board, CIRM
CIRM Team Members

From: James C. Harrison & Kristen M. Rogers

Date: March 30, 2017

Re: Use Of Public Resources In Relation To Ballot Measures

INTRODUCTION

You have asked us to describe the rules applicable to a public agency's participation in the drafting and consideration of a ballot measure. Below, we provide a brief overview regarding the permissible uses of public agency resources with respect to ballot measures.

In addition, we have provided examples of permissible and impermissible activities. However, because these issues are complex and the inquiry is fact-intensive, we recommend that legal counsel review any proposed activities relating to ballot measures, including communications, before they are undertaken.

A. Overview

Public agencies often play a critical role in formulating and informing the public about ballot measures. However, the use of public funds in connection with these activities is subject to important restrictions. As discussed in more detail below, CIRM may expend public resources to research and draft a ballot measure and to prepare an objective analysis of a ballot measure, often referred to as "informational material." It may not use public funds to disseminate "campaign materials," such as communications that expressly advocate for or against the ballot measure. When a communication or activity falls into the gray area between

these two types of communications, courts will consider the “style, tenor, and timing” of the communication or activity, including whether the activity or communication is one in which the agency routinely engages, in order to determine if it is permissible or impermissible.

1. Activity Before A Measure Qualifies For The Ballot

Public agencies are not permitted to advocate for or against ballot measures because they are barred from using public funds in an effort to convince the voters with respect to a particular policy position. However, a public agency may conduct research and draft a ballot measure because these activities are not aimed at persuading voters.¹

2. Activity Concerning A Measure On The Ballot

Public entities are permitted to disseminate informational material to provide the public a “fair presentation” of the issues surrounding ballot measures. They are not, however, permitted to engage in campaign activity to promote or oppose a measure.

Ballot measure activities undertaken by public agencies fall into one of three categories: (1) activities that are clearly impermissible (*i.e.*, campaign activities), (2) activities that are clearly permissible (*i.e.*, informational activities), or (3) activities that require further analysis as to the “style, tenor, and timing” of the communication.² To determine whether a public entity has acted appropriately, courts analyze each activity on its own. For example, if CIRM were to prepare staff reports analyzing the effect of the ballot measure on its programs and post the report to its website, and separately send a mailer informing the public of its position, a court would assess the propriety of each action independently.³

Activities that have been deemed to be appropriate include preparing objective analyses of the effects of the measure and providing similar information in response to requests from the public, including accepting invitations to provide objective information at public meetings. Likewise, it would be permissible for CIRM to disseminate an email about the measure to CIRM’s interested persons list so long as the information contained in the email relates to past or present facts and avoids inflammatory or argumentative rhetoric, because the manner of the communication is consistent with CIRM’s established practices. In contrast,

¹ *Santa Barbara Cty. Coal. Against Auto. Subsidies v. Santa Barbara Cty. Assn. of Gov'ts*, 167 Cal. App. 4th 1229, 1241 (2008) (citations omitted).

² *See Vargas v. City of Salinas*, 46 Cal. 4th 1, 24- 25 (2009).

³ *See id.* at 38-40.

activities that are presumptively impermissible include disseminating bumper stickers, mass media advertisement spots, billboards, and door-to-door canvassing.

In practice, it is sometimes difficult to predict whether an activity will be deemed to fall into the “clearly permissible” category. Courts have declined to hold that certain types of communications or activities are conclusively permissible, opting instead to exercise discretion when it comes to determining whether a public entity has crossed the line: “no hard and fast rule governs every case.”⁴ Out of an abundance of caution, CIRM should prepare its communications in such a way as to satisfy both the “clearly permissible” test, and the “style, tenor, and timing” test.

As CIRM begins to consider specific activities or communications, it should keep a few pointers in mind. Communications about a ballot measure should be delivered through CIRM’s ordinary communication methods, like its website, blog, newsletter, emails to interested persons, and public meetings, in the style CIRM normally uses to communicate other information. It should avoid passionate or inflammatory language and modes of communication that it does not regularly employ, and should not encourage voters to vote in a particular manner. CIRM should also take care to state past or present facts in a fair and dispassionate manner, and avoid using graphics or text aesthetics that are similar to campaign advocacy (and different from CIRM’s normal practices). Taking steps like these will help ensure that the Fair Political Practices Commission or a court will conclude that CIRM is engaging in information-sharing, rather than overt campaigning.

B. List of Impermissible And Permissible Activities

Below are some examples of what may constitute permissible and impermissible activity. Of course, these are merely illustrative examples. Each activity must be assessed in context, and legal counsel should review each activity and communication or activity before it is distributed or conducted.

1. Public Funds *May Not Be Used To:*

- Gather signatures on an initiative or referendum;
- Promote an initiative or referendum measure or urge a particular vote on the measure;

⁴ *Id.* at 26.

- Produce “typical campaign” materials, such as bumper stickers, posters, advertising “floats,” television and radio “spots,” billboards, or engage in “typical campaign activities,” such as door-to-door canvassing;
- Urge voters to contact legislators about a bill, including a bill to place a measure on the ballot;
- Provide a link on the agency’s website to a campaign website or to campaign materials or otherwise provide contact information for a campaign committee to members of the public;
- Prepare materials for members of the public or advocacy groups to use in support of its position on the initiative;
- Provide the public with one-sided promotional material about the initiative;
- Design, produce, or send a mass mailing of over 200 pieces to the public that expressly advocates the qualification, passage, or defeat of the initiative, or when taken as a whole and in context, unambiguously urges a particular result with respect to the initiative;
- Coordinate with a ballot measure committee to make expenditures in support of, or in opposition to, a ballot measure;
- Contribute funds or resources to a ballot measure campaign; and
- Recruit individuals or organizations to campaign for the ballot initiative.

2. **Public Funds *May Be Used To:***

- Draft or review an initiative;
- Seek a sponsor for an initiative;
- Take a position on ballot measure in an open and public meeting and disseminate the agency’s position in the same manner that the agency informs the public about other agency decisions;
- Prepare staff reports and other analyses to assist decision-makers in determining the impact of the measure and what position to take;
- Provide the public with impartial educational information about the initiative;
 - The materials must be a fair presentation of the facts, and not one-sided;

- Fact sheets, reports, newsletters, responses to requests for information and similar publications that are routinely published by the agency are allowed;
- The issues may be discussed and debated at a public hearing;
- Respond to inquiries about ballot measures in ways that provide a fair presentation of the facts about the measure and the agency's view of the merits of a ballot measure;
- Accept invitations to present the its views before organizations interested in the ballot measure's effects;
- Make its position on the initiative available to the public upon request;
- Send a report providing its evaluation of the initiative to a member of the public upon request;
- Make impartial information regarding the initiative available on its website;
- Announce its position on a measure at a public meeting, state that position in the hearing minutes of the meeting, and post those minutes on the website; and
- Publish its position on its website or in a regularly published electronic newsletter.