

THE FAIR CAMPAIGN PRACTICES ACT: SPENDING PUBLIC MONEY
SUPPORTING OR OPPOSING A BALLOT MEASURE

As the election approaches, it is important for governments, elected officials, and government employees to remember the limitations imposed by the Fair Campaign Practices Act (the “FCPA”) on the spending of public funds in connection with election campaigns. The FCPA establishes the following general rules: a government may not (1) make a contribution in a campaign involving the nomination, retention, or election of any person or (2) expend moneys from any source, or make contributions, to urge electors to vote in favor of or against most ballot measures. This summary focuses on the expenditure of public moneys to urge a vote in favor of or against ballot measures. While this summary will generally describe the FCPA rules applicable to ballot measures, governments should consult with legal counsel regarding the specific application of these rules.

What ballot measures are covered?

Ballot measures to which the FCPA limits apply include:

- A statewide ballot issue submitted for the purpose of having a title set pursuant to Section 1-40-106(1), C.R.S. or which has had a title set. This includes constitutional amendments or statutes initiated by citizen petition.
- A local ballot issue submitted for the purpose of having a title set pursuant to Section 31-11-111, C.R.S. or which has had a title set pursuant to that section. This will cover most local ballot issues.
- A measure referred by the general assembly or the governing body of any political subdivision to the eligible electors of the state or political subdivision.
- A measure for the recall of any officer that has been certified for submission to electors.

When do the FCPA restrictions commence?

Although the FCPA does not state a date on which its restrictions commence, many judicial decisions have held that the FCPA restrictions commence when a ballot title is set and the measure is submitted to the voters. For local governments, this typically occurs when the governing body adopts a resolution or ordinance calling the election and setting or “fixing” the ballot title. However, a recent Administrative Law Judge decision held that although a board actually fixed a ballot question when it adopted a resolution calling the election and approving the ballot question, it had, at a prior meeting, considered the ballot question “for the purpose of having a title fixed.” The Administrative Law Judge held that this earlier date was the date upon which the FCPA restrictions commenced, and not the later date on which the election resolution was formally adopted. This should be a consideration for cities and/or towns that approve ballot questions by ordinance and consider a ballot question on first reading. It is also a consideration for governments

who may present a ballot question to its governing body for consideration and discussion prior to its actual approval.

What are permitted activities for elected officials and employees?

The FCPA does permit certain activities by elected officials and government employees (collectively, “Covered Officials”) including:

- A Covered Official may respond to unsolicited questions.
- A Covered Official with policy making responsibilities may spend no more than \$50 of public moneys for letters, telephone calls, or other activities incidental to expressing an opinion. For example, an elected official or government manager may spend up to \$50 to send a letter to constituents expressing her or his opinion on a ballot issue.
- Elected officials may express a personal opinion on an issue.
- Covered Officials may spend personal funds, make contributions, or spend personal time to urge electors to vote for or against a measure.
- A governing body may adopt a resolution supporting or opposing an issue. The passage of the resolution may be reported through regular, established means (other than paid advertising). For example, if a government regularly sends out a newsletter reporting the actions of the governing body at its last meeting, the newsletter may report that the governing body has adopted a resolution supporting the passage of a ballot measure.

What materials may a government distribute?

Governments may spend public moneys to distribute a factual summary of a ballot measure which summary must include arguments both for and against the proposal. The summary shall not contain a conclusion in favor of or against the issue. Under the case law, the summary must be facially neutral, balanced and even-handed.

Many governments wish to distribute materials which describe the ballot measure and what it will accomplish without including arguments for and against. While there are some judicial decisions which conclude that such materials do not “urge” a voter to cast a vote in favor of or against a measure, most recent decisions have determined that if such materials are too positive or negative they do, in fact, urge the voters to cast a vote for or against a measure even if they do not say “vote yes” or “vote no.” Governments should have such materials reviewed by legal counsel before spending public funds to distribute such materials to voters.

How are FCPA restrictions enforced?

The FCPA provides that its limitations on spending public moneys may be enforced by the filing of a written complaint with the Secretary of State (“Secretary”) within 180 days of the date on which the complainant either knew or should have known of the alleged violation. The Elections Division of the Secretary of State (“Elections Division”) conducts an initial review to determine

whether the complaint (i) was timely filed, (ii) specifically identifies one or more violations of Colorado campaign finance law, and (iii) alleges sufficient facts to support a factual and legal basis for the violations of law alleged in the compliant. The Elections Division will either make a motion to the Deputy Secretary of State (“Deputy Secretary”) to dismiss the complaint for failure to satisfy one of the three complaint criteria, provide the respondent an opportunity to cure any curable violations, or conduct additional review to determine whether to file the complaint with an administrative law judge (“ALJ”). If the Elections Division determines that the respondent failed to cure an alleged curable deficiency, it will conduct additional review to determine whether to file the compliant with an ALJ. After conducting additional review of any non-dismissed complaint, the Elections Division will either make a motion to the Deputy Secretary to dismiss the complaint or it will refer the complaint to an ALJ. An ALJ may impose any appropriate order, sanction or relief and may impose a civil penalty of at least double and up to five times the amount contributed. In a recent case, an ALJ fined a county commissioner \$1,000 personally for a violation of the FCPA.

A government may seek guidance on the application of the FCPA by requesting that the Secretary issue an advisory opinion regarding the government’s specific activity. The Secretary may issue an opinion, at the Secretary’s discretion, and the government may rely on the Secretary’s advisory opinion as an affirmative defense to any complaint that is filed with the Secretary.

However, the FCPA requires any complaint arising out of a municipal campaign finance matter to be exclusively filed with the clerk of the applicable municipality. “Municipal campaign finance matter” is defined to include any campaign finance matter exclusively related to a municipal campaign, including a municipal ballot issue or ballot question. Complaints filed with the clerk of the applicable municipality must be filed in conformity with local campaign finance enforcement regulations. Therefore, each municipality should consider adopting an ordinance or resolution setting forth the enforcement procedures for municipal campaign finance matters that must be filed with the clerk.

May a government spend money to advocate for or against a measure if the FCPA does not apply?

As noted previously, the FCPA restrictions do not apply to all ballot measure elections. However, courts in Colorado and elsewhere have held that the use of public funds must reflect a balanced portrayal of the ballot measure.

Conclusion

A government should consider periodic training of elected officials and employees to assure that there are not violations of the FCPA in connection with ballot measures submitted by the government or by the state or other local governments. Not only is there the potential for the government to be subject to a civil penalty or other sanctions but government officials and employees may be personally liable for civil penalties. It is also sometimes the case that the negative press resulting from the filing of a complaint alleging an FCPA violation may influence the results of the election regardless of the ultimate disposition of the complaint.