

LEGISLATIVE COUNSEL BUREAU

A TRADITION OF TRUSTED LEGAL SERVICE TO THE CALIFORNIA LEGISLATURE

LEGISLATIVE COUNSEL  
Dwight P. Boyer-Vine

CHIEF OF STAFF  
Jeffrey A. DeLand  
Danyel A. Weinman

PRINCIPAL COUNSEL  
Joe Walla  
Alan D. Gross  
Kirk S. Legg  
William K. Stark

Emily M. Cardullo  
E. Christopher C. Brown  
Debra Zulich-Coburn  
Bobby S. Hen  
Michael R. Kelly  
Thomas J. Keith  
Diana G. Lim  
Romulo J. Lopez  
Robert A. Pratt  
Patricia Gates Rhodes  
Jeff Thom  
Lance E. Thurston  
Richard B. Weisberg

OFFICE  
Stephanie E. Abel  
Jennifer M. Barry  
Michelle E. Basso  
Amanda S. Bellard  
Ann M. Barastov  
Sara A. Cavallo  
Sergio A. Capiro  
William Chan  
Matthew J. Christy  
Plam V. Cho  
Byron D. Dagnon, II  
Stephanie G. DeBret  
Eric D. Deo  
Sharon E. Everett  
Krista M. Lewis  
Suzanne R. Fisher  
Lisa C. Gorkikhil  
Lauren S. Goshen  
Mara A. Gorman  
Megan Holakow, Barlow  
Amy E. Hays  
Jacob D. Heringer  
Stephanie E. Hylton  
Raymond H. Holder  
Valerie R. Jones  
Patricia Hart-Jorgensen  
Liz Ann Koop  
Michael J. Keenan  
Lisa B. Knutson  
C. Erik Lange  
Lithia A. Lee  
Mina A. Macias  
Marina Mamm  
Anthony P. Marquet  
Christina S. Marotta  
Clare Maynard  
Fred A. Messeri  
William E. Nischelberg  
Sheila R. Nishan  
Suzanne R. Nixson  
Kendry A. Nisbaum  
Gerardo Parola  
Sgt. Ann Peterson  
Michael E. Pinkerton  
Lisa M. Plummer  
Christina M. Reiner  
Cameron Rhoads  
Robert D. Roth  
Michelle C. Sampson  
Amy E. Schweitzer  
Melissa M. Seckler  
Anton D. Silva  
Jessica E. Steele  
Mark Franklin Terry  
Joanna E. Varner  
Kevin Wallack  
Bradley S. Webb  
Rachelle M. Wood  
Armin G. Yardi  
Lenny C. Yoo  
Jack Zeman

LEGISLATIVE COUNSEL BUREAU  
925 F STREET  
SACRAMENTO, CALIFORNIA 95814  
TEL: (916) 311-8000  
FAX: (916) 311-8020  
WWW.LEGISLATIVECOUNSEL.CA.GOV

June 28, 2010

Honorable Roy Ashburn  
Room 3060, State Capitol

**BOND UNDERWRITERS - #1008348**

Dear Senator Ashburn:

You have asked us to discuss whether a school district or other local agency may enter into an agreement with an underwriter to underwrite a bond on the condition that the underwriter also provide campaign services in support of that bond measure or another bond measure proposed by the school district or other local agency.<sup>1</sup> You have asked us to presume that the school district or other local agency would pay more for the underwriter's underwriting services if its agreement with the underwriter were conditioned on the underwriter also providing campaign services in support of the bond election. For the reasons discussed below, we conclude that a school district or other local agency may not condition the award of an agreement to provide bond underwriting services on the underwriter also providing campaign services in support of the bond election.

By way of background, underwriting is the process of purchasing all or any of a new issue of municipal securities from the issuer and offering those securities for sale to investors. An underwriter is a dealer who purchases a new issue of municipal securities for resale. The underwriter may acquire the securities either by negotiation with the issuer or by an award on the basis of competitive bidding (subd. (a), Sec. 15146, Ed. C.; Secs. 53508.7 and 53508.9, Gov. C.). A bond purchase agreement is the contract between the underwriter and the issuer, setting forth the final terms, prices, and conditions upon which the underwriter purchases a new issue of municipal securities (see generally Sec. 6585, Gov. C.).

Typically, when a school district wants to utilize a bond to raise funds, the governing board of the district may, when in its judgment it is advisable, order the county superintendent of schools to call an election and submit to the electors of the district the

<sup>1</sup> The underwriting agreement would be contingent upon the voters' approval of the bond measure.

## Honorable Roy Ashburn — Request #1008348 — Page 2

question of whether the bonds of the district are to be issued and sold (Sec. 15100, Ed. C.). Similarly, when any other local agency wants to utilize a bond to raise funds, the governing body adopts a resolution or ordinance stating, among other things, its intent to sell a bond and calling an election therefor (see generally Secs. 43735 and 53398.40, Gov. C.). If the bonds are approved for issuance by the voters, the school district or other local agency will utilize the services of an underwriter to sell the bonds to the public to raise the money. The school district or other local agency is responsible for paying the principal and interest. In return for guaranteeing to sell bonds, an underwriter traditionally receives a fee that varies depending on the size of the issuance. In this regard, the underwriter has an interest in seeing that the bond measure passes so that he or she may receive the compensation for selling the bonds.

No statute prohibits a bond underwriter from providing campaign activities in support of a bond the underwriter is contracted to underwrite. School districts and other local agencies are statutorily prohibited, however, from spending public funds to support or reject a ballot measure (Sec. 7054, Ed. C.; Secs. 8314 and 54964, Gov. C.).<sup>2</sup> Notwithstanding

---

<sup>2</sup> Section 7054 of the Education Code reads as follows:

"7054. (a) No school district or community college district funds, services, supplies, or equipment shall be used for the purpose of urging the support or defeat of any ballot measure or candidate, including, but not limited to, any candidate for election to the governing board of the district.

"(b) Nothing in this section shall prohibit the use of any of the public resources described in subdivision (a) to provide information to the public about the possible effects of any bond issue or other ballot measure if both of the following conditions are met:

"(1) The informational activities are otherwise authorized by the Constitution or laws of this state.

"(2) The information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

"(c) A violation of this section shall be a misdemeanor or felony punishable by imprisonment in the county jail not exceeding one year or by a fine not exceeding one thousand dollars (\$1,000), or by both, or imprisonment in a state prison for 16 months, or two or three years." (Emphasis added.)

Section 8314 of the Government Code reads, in relevant part:

"8314. (a) It is unlawful for any elected state or local officer, including any state or local appointee, employee, or consultant, to use or permit others to use public resources for a campaign activity, or personal or other purposes which are not authorized by law.

(continued...)

## Honorable Roy Ashburn — Request #1008348 — Page 3

the prohibition, public funds may be used to provide information to the public about a ballot measure if the informational activities are not otherwise prohibited and are presented in a fair and impartial manner (*Ibid.*). The distinction between informational activities, which may be financed by public funds, and campaign activities, which may not, is not always clear.

The difference between informational activities and campaign activities was first examined by the California Supreme Court in *Stanson v. Mott* (1976) 17 Cal.3d 206 (hereafter *Stanson*). In *Stanson*, the court stated, for example, that "the use of public funds to purchase such items as bumper stickers, posters, advertising floats, or television and radio spots unquestionably constitutes improper campaign activity ... as does the dissemination, at public expense, of campaign literature prepared by private proponents or opponents of a ballot measure" (*Stanson*, *supra*, at p. 221). "On the other hand, it is generally accepted that a public

---

(...continued)

\* \* \*

"(d) Nothing in this section shall prohibit the use of public resources for providing information to the public about the possible effects of any bond issue or other ballot measure on state activities, operations, or policies, provided that (1) the informational activities are otherwise authorized by the constitution or laws of this state, and (2) the information provided constitutes a fair and impartial presentation of relevant facts to aid the electorate in reaching an informed judgment regarding the bond issue or ballot measure.

\* \* \*"

Section 54964 of the Government Code reads, in relevant part:

"54964. (a) An officer, employee, or consultant of a local agency may not expend or authorize the expenditure of any of the funds of the local agency to support or oppose the approval or rejection of a ballot measure, or the election or defeat of a candidate, by the voters.

\* \* \*

"(c) This section does not prohibit the expenditure of local agency funds to provide information to the public about the possible effects of a ballot measure on the activities, operations, or policies of the local agency, if both of the following conditions are met:

(1) The informational activities are not otherwise prohibited by the Constitution or laws of this state.

(2) The information provided constitutes an accurate, fair, and impartial presentation of relevant facts to aid the voters in reaching an informed judgment regarding the ballot measure.

\* \* \*"

## Honorable Roy Ashburn — Request #1008348 — Page 4

agency pursues a proper informational role when it simply gives a fair presentation of the facts in response to a citizen's request for information" (Ibid.). The court recognized that at times it may be hard to distinguish between "campaign' expenditures" and "proper 'informational' activities" (Ibid.). In those cases where that distinction is difficult, "the determination of the propriety or impropriety of the expenditure depends upon a careful consideration of such factors as the style, tenor, and timing of the publication; no hard and fast rule governs every case" (Id., at p. 222; footnote omitted).

The California Supreme Court recently reaffirmed and refined the *Stanson* holding in *Vargas v. City of Salinas* (2009) 46 Cal.4th 1 (hereafter *Vargas*). In *Vargas*, the proponents of a local ballot measure brought suit against the City of Salinas for actions taken by the city that the proponents claimed amounted to the improper use of public funds to campaign against the measure. Prior to the election, the city council held a number of public meetings during which it was discussed at length what services the city would have to cut should the measure pass (*Vargas*, supra, at pp. 9-11). The information presented during those discussions was posted on the city's Web site (Id., at p. 11). The city also adopted a resolution specifying those services that would be cut should the measure pass (Id., at p. 12), and published a one-page document describing the measure and again listing the services that would be cut if the measure passed (Ibid.). The city included similar information in its regular quarterly newsletter that was mailed to all city residents shortly before the election (Ibid.).

The *Vargas* court examined the "style, tenor, and timing" of the city's actions to determine whether the city's expenditures were valid informational activities or inappropriate campaign activities (*Vargas*, supra, at pp. 34-35). After examining all the facts presented, the court found that the city's actions were informational and were therefore lawful. In that regard, *Vargas* held that "*Stanson* does not preclude a governmental entity from publicly expressing an opinion with regard to the merits of a proposed ballot measure, so long as it does not expend public funds to mount a campaign on the measure" (*Vargas*, supra, at p. 36).

In posing your question, you ask us to presume that the school district or other local agency will pay more for the underwriter's underwriting services when the contract for the underwriting services is conditioned upon the underwriter's also providing campaign services in support of the bond to be underwritten or another bond proposed by the district or agency. Under these facts, the school district or other local agency would be using public funds to pay for the campaign services provided by the underwriter in support of a bond measure. This would violate the statutory prohibition against the use of public funds to support a ballot measure.


Accordingly, it is our opinion that a school district or other local agency may not condition the award of an agreement to provide bond underwriting services on the

Honorable Roy Ashburn — Request #1008348 — Page 5

underwriter also providing campaign services in support of that bond measure or another bond measure proposed by the school district or other local agency.

Very truly yours,

Diane F. Boyer-Vine  
Legislative Counsel

By 

Amy J. Haydt  
Deputy Legislative Counsel

AJH:clr