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OPINION	:	No. 13-304
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of	:	January 26, 2016
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THE HONORABLE JOHN CHIANG, CALIFORNIA STATE TREASURER, has requested an opinion on the following questions:

1. Does a school or community college district violate California constitutional and statutory prohibitions against using public funds to advocate passage of a bond measure by contracting with a person or entity for services related to a bond election campaign?

2. Does a school or community college district violate California prohibitions against using public funds to advocate passage of a bond measure if the district enters into an agreement with a municipal finance firm under which the district obtains pre-bond-election services in return for guaranteeing the firm an exclusive contract to provide bond-sale services if the election is successful?

3. In the case of an agreement as described in Question 2, does a school or community college district violate California law concerning the use of bond proceeds if the district reimburses the municipal finance firm for the cost of providing the pre-election services from the proceeds raised from the bond sale?

4. In the scenario described in Question 3, does a school or community college district violate California law concerning the use of bond proceeds, even where the reimbursement is not an itemized component of the fees the district pays to the firm in connection with the bond sale?

5. Does an entity providing campaign services to a bond measure campaign in exchange for an exclusive agreement with the district to sell the bonds incur an obligation to report the cost of such services as a contribution to the bond measure campaign in accordance with state law?

## CONCLUSIONS

1. A school or community college district violates California constitutional and statutory prohibitions against using public funds to advocate passage of a bond measure by contracting with a person or entity for services related to a bond election campaign if the pre-election services may be fairly characterized as campaign activity.

2. A school or community college district violates prohibitions against using public funds to advocate passage of a bond measure if the district enters into an agreement with a municipal finance firm under which the district obtains pre-election services (of any sort) in return for guaranteeing the firm an exclusive contract to provide bond-sale services if the election is successful, *under circumstances where* (a) the district enters into the agreement for the purpose (sole or partial) of inducing the firm to support the contemplated bond-election campaign *or* (b) the firm's fee for the bond-sale services is inflated to account for the firm's campaign contributions and the district fails to take reasonable steps to ensure the fee was not inflated.

3. In the case of an agreement as described in Question 2, a school or community college district violates California law concerning the use of bond proceeds if the district reimburses the municipal finance firm for the cost of providing pre-election services from the proceeds raised from the bond sale.

4. In the scenario described in Question 3, a school or community college district violates California law concerning the use of bond proceeds if the district reimburses the municipal finance firm for the cost of providing pre-election services from the fees the district pays to the firm in connection with the bond sale, whether or not the reimbursement is evident as a component of the fees the district pays to the firm in connection with the bond sale made on an itemized service-by-service basis.

5. Where an entity provides campaign services to a bond-measure committee in exchange for an exclusive agreement with the district to sell the bonds, the entity has an obligation to report the value of its services as a contribution to the bond-measure campaign in accordance with state law.

## ANALYSIS

In this opinion, we consider several questions on the topic of school construction bonds. We have been asked about the propriety of certain practices related to bond elections, in particular the process for securing the voter approval necessary for a school or community college district to issue such bonds. Our central task is to determine whether these practices constitute permissible uses of public funds. Because it is illegal to use public funds to influence the outcome of an election<sup>1</sup> (which would include advocating or campaigning for the passage of a bond measure), and because there are constitutional and statutory restrictions on how bond proceeds may be used, we must carefully examine each of the practices and methods described here. Before delving into the specific questions posed, however, it will be useful to provide some background to show how the bond practices in question work, and how they have come under scrutiny.

### **School district bonds and bond elections**

“The usual method of funding new school construction in California has been for school districts to obtain voter approval for the issuance of general obligation bonds. . . . The bonds are repaid by an annual levy of an ad valorem tax on real (and certain personal) property located within the area of the district.”<sup>2</sup> The governing board of a school or community college district<sup>3</sup> may submit a proposed bond measure to the voters “when in its judgment it is advisable.”<sup>4</sup>

Bond elections typically involve a range of pre-election activities, which can include: conducting opinion surveys to evaluate voters’ attitudes toward a bond issue;

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<sup>1</sup> See *Stanson v. Mott* (1976) 17 Cal.3d 206, 209-211, 217-218 (*Stanson*).

<sup>2</sup> *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1395 (*San Lorenzo Valley*), quoting 62 Ops.Cal.Atty.Gen. 209, 210 (1979); see also Cal. Const., art. XIII A, §1, subd. (b); *id.*, art. XVI, § 18; Ed. Code, § 15000 et seq.

<sup>3</sup> We use the term “school district” to include both elementary/secondary school districts and community college districts, as there is no material difference between these types of districts for the purposes of this opinion.

<sup>4</sup> Ed. Code, § 15100.

developing a financial plan; determining appropriate bond issuance size and tax rates; drafting documents needed to place a bond measure on the ballot; conducting a public-information program; training staff to inform the community about funding needs and bond financing; preparing a tax-rate statement for the voter pamphlet; providing information to the election campaign; conducting informational workshops; and preparing the ballot question itself. Although district staff may be able to provide some or all of these functions, it is common for districts to contract with private vendors to perform or support them.

A practice has developed within the municipal financing industry whereby investment bankers, financial consultants, and bond attorneys (collectively referred to here as “municipal finance firms” or “firms”) offer to contract with a school district to provide the pre-election services that the district seeks. Under such an arrangement, the firm agrees to provide the *pre*-election services at no, or reduced, charge to the district in exchange for the district’s promise to select the firm as its contractor to provide *post*-election bond services, if the bonds are approved by the voters.<sup>5</sup> Naturally, it is within the firm’s financial interest to be awarded the contract to provide post-election bond services.

If the bond measure passes, the municipal finance firm under an arrangement like this will recoup the cost of the pre-election services from its substantially greater post-election earnings.<sup>6</sup> Indeed, the comparative value to the firm of the post-election earnings is manifest in the fact that these firms risk losing the value of their pre-election services in exchange for an opportunity to provide post-election services related to the bond sale.

Providing bond services can be quite lucrative, typically allowing a percentage of the bond sale as compensation.<sup>7</sup> Bond-issuance costs, including underwriting costs, are a

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<sup>5</sup> We will refer to these arrangements as “contingent-compensation” arrangements.

<sup>6</sup> “Obviously, all of those upfront costs and expenses are rolled into the cost of the deal—it is not rocket science to figure it out.” (Former Assemblymember Joe Cancimilla, quoted in Jensen, *Brokers’ Gifts That Keep Giving*, *The Bond Buyer* (Jan. 13, 2012) [http://www.bondbuyer.com/issues/121\\_10/california-broker-dealer-contributions-school-bond-issue-1035266-1.html](http://www.bondbuyer.com/issues/121_10/california-broker-dealer-contributions-school-bond-issue-1035266-1.html).)

<sup>7</sup> An underwriter, for example, can garner substantial sums from its participation in a bond issuance. One treatise explains: “The compensation to the underwriter for the underwriting is in the form of gross underwriter spread (GUS). GUS is measured as the discount per bond (each bond has a value of \$1,000). If a government issuer is to issue a \$100 million bond and the GUS is \$5 per bond, then the total compensation to the underwriter would be \$500,000. It is a discount because this amount is deducted from

charge against the bond sale and, therefore, reduce the amount of revenue garnered by the school district.<sup>8</sup> One commentator has observed: “In 2003, state and local governments in the United States issued over \$452 billion in debt. Investment banks contract with state and local governments to sell the debt in the form of bonds. If investment banks collected even 0.75% of that in fees, investment banks received \$3.39 billion in 2003.”<sup>9</sup> Recently the Los Angeles Times reported that one underwriter earned \$1.45 million from selling the initial \$130 million in notes issued by the Garden Grove School District in 2010.<sup>10</sup> The underwriter was said to have agreed to provide all campaign services free of charge if the bond measure failed. If it passed, the underwriter would receive 1.1% of the value of the bonds.<sup>11</sup>

State law prohibits school districts from campaigning in support of a bond measure—a restriction that we will discuss further. However, a municipal finance firm is free to contribute to a campaign. Indeed, under an arrangement like this, it is clearly in the firm’s financial interest to do so.<sup>12</sup> This is the primary circumstance that gives rise to

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the bond proceeds of \$100 million, meaning the issuer will actually receive \$99,500,000. . . . The GUS is by far the largest single issuing cost.” (Feldstein & Fabozzi, *The Handbook of Municipal Bonds* (Wiley & Sons 2008) p. 54 (hereafter, *Handbook*)).

<sup>8</sup> See Ed. Code, § 15145, subd. (a) (“ . . . All expenses incurred for the preparation, sale, and delivery of the school bonds, including but not limited to, fees of an independent financial consultant, the publication of the official notice of sale of the bonds, the preparation, printing and distribution of the official statement, the obtaining of a rating, the purchase of insurance insuring the prompt payment of interest and principal, the preparation of a certified copy of the transcript for the successful bidder, the printing of the bonds, and legal fees of independent bond counsel retained by the school district or community college district issuing the bonds are legal charges against the funds of the district issuing the bonds and may be paid from the proceeds of sale of the bonds.”); § 15146, subd. (f) (school bonds may be sold at a discount not to exceed five percent).

<sup>9</sup> Opp, *Ending Pay-to-Play in the Municipal Securities Business: MSRB Rule G-37 Ten Years Later* (Winter 2005) 76 U. Colo. L. Rev. 243, 244.

<sup>10</sup> Weikel, *School Bond Reforms Sought*, Los Angeles Times (June 3, 2013) <http://articles.latimes.com/print/2013/jun/03/local/la-me-bond-donations-20130603>.

<sup>11</sup> *Ibid.*

<sup>12</sup> In one superior court proceeding, for example, it was reported that a firm under contract to provide financial services to a district donated “a registered voter database, computer software services, and occasional campaign advice” to the bond-measure campaign. (*Juliano v. Long Beach Unified Sch. Dist.* (Super. Ct. L.A. County, 2000, No. BC 207556).) The firm’s vice-president reportedly testified that he “had provided advisory services to independent campaign committees in relation to the past 30 bond

suspicious that such contracts between school districts and a municipal finance firms allow school districts to circumvent the law's restriction on the use of public funds for campaign purposes.<sup>13</sup> Not only do these contingent-compensation contracts implicate important constitutional issues involving the proper use of public funds, but it may also reasonably be inferred that the costs to school districts from these underwriting agreements are higher than if the contracts were competitively bid.<sup>14</sup> However, school districts are *not* legally required to allow competitive bidding for consultant contracts.<sup>15</sup>

All of this brings us to the questions posed here, which call for consideration of rulings articulated in 1976 by our Supreme Court in *Stanson v. Mott*.<sup>16</sup> That case involved a dispute about whether the Department of Parks and Recreation was authorized to spend more than \$5,000 of public funds to promote passage of a bond issue for the acquisition of park land and recreational and historical facilities. The Court observed that, “the use of the public treasury to mount an election campaign which attempts to

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elections in which he was involved.” (See *Juliano v. Long Beach Unified Sch. Dist.* (App. No. B147546, May 23, 2003) 2003 WL 21205986, p. \*4.)

<sup>13</sup> News articles have reported evidence of links between campaign contributions and contrarcts with municipal finance firms. According to the Los Angeles Times, “[a] securities broker in California . . . said underwriters and other financial professionals practically get shaken down to donate to school bond campaigns.” (Weikel, *supra*, *School bond reforms sought*.) The trade publication The Bond Buyer reported “a nearly perfect correlation between broker-dealer contributions to California school bond efforts in 2010 and their underwriting subsequent bond sales.” (Jensen, *supra*, *Brokers’ Gifts That Keep Giving*; see also Ely & Calabrese, *To Give is to Get: The Promotional Role of Investment Bankers in Local Government Bond Elections*, *The American Review of Public Administration* (Jan. 8, 2014) at p. 6, <http://arp.sagepub.com/content/early/2014/01/06/0275074013515546.full.pdf+html>.)

In 2013, the Los Angeles County Treasurer proposed new rules that would require underwriters to agree *not* to give political donations to school bond campaigns. (See Memo of Los Angeles County Treasurer and Tax Collector, *Proposed Underwriter Pool Changes* (Aug. 8, 2013) pp. 2-3 <http://ttc.lacounty.gov/proptax/docs/Underwriter%20Pool%20Memo.pdf>.)

<sup>14</sup> Except when underwriting contracts are let by competitive bidding, underwriter compensation is negotiated between the underwriter and the bond issuer—in this case, the school district. (See, e.g., Government Finance Officers Assn. (GFOA), *BEST PRACTICE: Expenses Charged by Underwriters in Negotiated Sales (1996, 2010, and 2012)* [http://www.gfoa.org/index.php?option=com\\_content&task=view&id=1589](http://www.gfoa.org/index.php?option=com_content&task=view&id=1589).)

<sup>15</sup> See Pub. Contract Code, § 20111, subd. (c).

<sup>16</sup> *Stanson*, *supra*, 17 Cal.3d. 206.

influence the resolution of issues which our Constitution leave[s] to the ‘free election’ of the people (see Cal. Const., art. II, § 2) . . . present[s] a serious threat to the integrity of the electoral process,”<sup>17</sup> and that a “fundamental precept of this nation’s democratic electoral process is that the government may not ‘take sides’ in election contests or bestow an unfair advantage on one of several competing factions.”<sup>18</sup> Following from this constitutional premise, the Court held that, “at least in the absence of clear and explicit legislative authorization, a public agency may not expend public funds to promote a partisan position in an election campaign.”<sup>19</sup>

The *Stanson* Court did, however, allow that the Department could legitimately expend public funds “for informational purposes, to provide the public with a ‘fair presentation’ of relevant information relating to a park bond issue on which the agency has labored.”<sup>20</sup> Post-*Stanson* litigation has typically involved the question whether the official conduct at issue amounted to impermissible campaigning or merely the permissible provision of information—the so-called “campaign/informational dichotomy.”<sup>21</sup>

Following *Stanson*, Education Code section 7054 provides, in pertinent part:

(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 . . . .

(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.

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<sup>17</sup> *Id.* at p. 218.

<sup>18</sup> *Id.* at p. 217.

<sup>19</sup> *Id.* at pp. 209-210.

<sup>20</sup> *Id.* at p. 221; see also *Vargas v. City of Salinas* (2009) 46 Cal.4th 1, 24 (*Vargas*).

<sup>21</sup> *Vargas, supra*, 46 Cal.4th at p. 25.

Similarly, Government Code section 8314 provides, in relevant part: “It is unlawful for any elected state or local officer . . . to use or permit others to use public resources for a campaign activity . . . .”<sup>23</sup> We consider the questions posed in light of these judicial and statutory restrictions.

### Question 1

The first question asks whether a school district violates California constitutional or statutory prohibitions against using public funds to advocate passage of a bond measure by contracting for services related to a bond election campaign. The short answer to this question is that such contracts are not permissible if the particular pre-election services may be fairly characterized as campaign activity.

School districts have broad authority to conduct their affairs as they see fit,<sup>24</sup> so long as that authority is not exercised in a manner that is “in conflict [with], inconsistent [with], or preempted by state law.”<sup>25</sup> Generally speaking, school districts may contract for services related to a bond election campaign. We have previously concluded, for example, that school districts may pay for printing, handling, translating, and mailing of trustee candidate statements contained in the voters’ pamphlet.<sup>26</sup> We have also concluded that, in preparation for submitting a bond measure to the electorate for approval, a community college district may use district funds to hire a consultant to conduct surveys and establish focus groups to assess voter support for the measure and the feasibility of developing a bond measure that could win voter approval.<sup>27</sup> In doing so,

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<sup>22</sup> See *San Leandro Teachers Assn. v. Governing Board* (2009) 46 Cal.4th 822, 833-834 (*San Leandro*) (purpose of 1995 amendment to Education Code section 7054 was to incorporate the principles set forth in *Stanson*).

<sup>23</sup> Gov. Code, § 8314, subd. (a).

<sup>24</sup> See Cal. Const., art. IX, § 14; Ed. Code, §§ 35160, 35160.1.

<sup>25</sup> Ed. Code, § 35160; see *Hartzell v. Connell* (1984) 35 Cal.3d 899, 915; 92 Ops.Cal.Atty.Gen. 1, 3 (2009).

<sup>26</sup> 85 Ops.Cal.Atty.Gen. 49 (2002). We noted that the content of the statements would be prepared by the candidates themselves and that all candidates would be treated equally in having their statements paid for by the district. (85 Ops.Cal.Atty.Gen., *supra*, at p. 53.)

<sup>27</sup> 88 Ops.Cal.Atty.Gen. 46 (2005).

we noted that a district’s governing board has express authority to place a bond measure on the ballot “when in its judgment it is advisable” to do so.<sup>28</sup>

In assessing the permissibility of specific expenditures in this area, we relied on *League of Women Voters v. Countywide Criminal Justice Coordination Committee*,<sup>29</sup> which approved public expenditures for “research into the need for the proposed initiative measure in question; formulating, drafting, and considering various substantive proposals; investigating potential problems associated with the specific proposals; and investigating the probable expense and alternative means of successfully qualifying the proposed measure for the ballot.”<sup>30</sup> We noted, too, that at the planning stage there was as yet no “campaign,” so these activities had not yet “crossed the line of improper advocacy or promotion of a single view in an effort to influence the electorate.”<sup>31</sup>

However, we also concluded that a district may not use public funds to hire a consultant to develop a strategy for building support for the measure. Impermissible activities could include, for example, assisting the district chancellor in scheduling meetings with civic leaders and potential campaign contributors in order to gauge their support for the bond measure, if the purpose or effect of such actions were to develop a campaign to promote the bond measure.<sup>32</sup> Surveying the relevant judicial decisions, we reasoned that “a community college district board may not spend district funds on activities that form the basis for an eventual campaign to obtain approval of a bond measure.”<sup>33</sup>

Synthesizing the approach taken in our earlier opinions, we conclude that a school district violates prohibitions against using public funds to advocate passage of a bond measure by contracting for services related to a bond election campaign if those services may be fairly characterized as campaign activity.

## Question 2

The second question is whether a school district violates prohibitions against using public funds to advocate passage of a bond measure if it enters into an agreement with a

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<sup>28</sup> 88 Ops.Cal.Atty.Gen., *supra*, at p. 48; see Ed. Code, § 15100.

<sup>29</sup> *League of Women Voters v. Countywide Crim. Justice Coordination Com.* (1988) 203 Cal.App.3d 529 (*League of Women Voters*).

<sup>30</sup> *Id.* at pp. 552-553; see 88 Ops.Cal.Atty.Gen., *supra*, at p. 49.

<sup>31</sup> 88 Ops.Cal.Atty.Gen., *supra*, at pp. 49-50.

<sup>32</sup> 88 Ops.Cal.Atty.Gen., *supra*, at pp. 50-53.

<sup>33</sup> 88 Ops.Cal.Atty.Gen., *supra*, at p. 53.

municipal finance firm under which the district obtains pre-election services in return for guaranteeing the firm an exclusive contract to provide bond-sale services if the election is successful. We conclude that such agreements run afoul of state law when (a) the district enters into the agreement for the sole or partial purpose of inducing the firm to contribute to the bond-election campaign either financially or with in-kind services, or when (b) the firm's fee for its post-election bond-sale services is inflated to account for its campaign contributions and the district fails to take reasonable steps to ensure the fee was not inflated.

We note at the outset that these contingent-compensation contracts are generally "no bid," or exclusive, consultant contracts. State law permits school districts to let contracts for consultant services on a "no bid" basis,<sup>34</sup> and the Legislature has made no exception for consultant contracts related to bond elections. We are not aware of any limitation on a school district's contracting authority that would preclude such pre-election arrangements. As for post-election services, the Legislature has expressly declined to require school districts to sell bonds by competitive bidding, permitting them instead to sell their bonds by negotiated sale.<sup>35</sup> Accordingly, a school district may guarantee that a municipal finance firm will be selected as the underwriter of the district's bond issuance, should the issuance be approved by the voters, in exchange for the firm's performance of pre-election services.

Of course, school districts must comply with those legal requirements that are in place. Specifically, if a district chooses to sell its bonds by negotiated sale, the district

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<sup>34</sup> Pub. Contract Code, § 20111, subd. (a).

<sup>35</sup> Ed. Code, § 15146; see MSRB Glossary of Municipal Securities Terms, "Negotiated Sale" <http://www.msrb.org/Glossary/Definition/NEGOTIATED-SALE.aspx> ("The sale of a new issue of municipal securities by an issuer directly to an underwriter or underwriting syndicate selected by the issuer. A negotiated sale is distinguished from a sale by competitive bid, which requires public bidding by the underwriters. Among the primary points of negotiation for an issuer are the interest rate, call features and purchase price of the issue. The sale of a new issue of securities in this manner is also known as a negotiated underwriting").

In 2005, a bill was introduced to amend Education Code section 15146 to require that bonds be sold by competitive bidding except under limited circumstances. (Assem. Bill No. 1482 (2005-2006 Reg. Sess.) as amended April 26, 2005.) The bill's authors and supporters were of the view that bonds sold by competitive bidding were less costly to districts. (See Assem. Comm. on Ed., Analysis of Assem. Bill No. 1482 (2005-2006 Reg. Sess.) as amended April 26, 2005, at p. 3.) The amendment was rejected.

must, “[p]rior to the sale,” adopt a resolution “as an agenda item at a public meeting.”<sup>36</sup> The resolution must include “[e]xpress approval of the method of sale[;] [s]tatement of reasons for the method of sale selected[;] [d]isclosure of the identity of bond counsel, and the identities of the bond underwriter and the financial advisor if either or both are utilized for the sale, unless those individuals have not been selected at the time the resolution is adopted, in which case the governing board shall disclose their identities at the public meeting occurring after they have been selected.”<sup>37</sup>

But when a district enters into a contingent-compensation agreement promising a firm that it will be selected as the underwriter after a successful election, the district necessarily chooses to proceed by negotiated sale rather than by competitive bidding, and the district knows the identity of the intended underwriter—all prior to a measure even being placed on the ballot. Contingent-compensation agreements may result in districts basing their choice of bond-sale method more on the free provision of pre-election services than on factors that are usually considered by prudent issuers.<sup>38</sup> However, the Legislature has placed no limits on the exercise of district discretion, so long as a resolution for negotiated sale is adopted prior to the sale of the bonds.<sup>39</sup>

So, if contingent-compensation arrangements are permissible exercises of a district’s contracting authority, can these arrangements nevertheless violate prohibitions on the use of public funds for campaigning? The answer is: Yes, they can. If the district’s purpose in entering the arrangement is to induce the firm to contribute to a bond-measure campaign, or if the firm’s fee for bond-sale services is inflated to account

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<sup>36</sup> Ed. Code, § 15146, subd. (b). This requirement was the added to section 15146 in lieu of a requirement that bonds be sold by competitive bidding. (See Stats. 2006, ch. 213, § 1, eff. Jan 1, 2007.)

<sup>37</sup> Ed. Code, § 15146, subd. (b).

<sup>38</sup> The GFOA, for example, recommends that “issuers select a method of sale based on a thorough analysis of the relevant rating, security, structure and other factors pertaining to the proposed bond issue.” (GFOA, “*BEST PRACTICE: Selecting and Managing the Method of Sale of State and Local Government Bonds*” [http://www.gfoa.org/index.php?option=com\\_content&task=view&id=1582](http://www.gfoa.org/index.php?option=com_content&task=view&id=1582); see also Handbook, *supra*, at pp. 52-57.

<sup>39</sup> Ed. Code, § 15146, subd. (b). In comparison, we note GFOA’s caution: “Due to the inherent conflict of interest, issuers should not use a broker/dealer or potential underwriter to assist in the method of sale selection unless that firm has agreed not to underwrite that transaction.” (GFOA, *supra*, “*BEST PRACTICE: Selecting and Managing the Method of Sale of State and Local Government Bonds*.”)

for its pre-election services and the district fails to take reasonable steps to ensure the fee was not inflated, then we believe the arrangement is illegal.

**a. Improper purpose**

A contingent-compensation arrangement gives a municipal finance firm a financial incentive to contribute to a bond-measure campaign. But it is not the *firm's* motivation that is our primary concern here; rather, our focus is on the *district's* motivation.

A school district would violate Education Code section 7054 if it expended district funds or services<sup>40</sup> “for the purpose of urging the support or defeat” of a bond measure.<sup>41</sup> Similarly, a district would violate Government Code section 8314 if it were to use public resources “for a campaign activity, or . . . other purposes not authorized by law.”<sup>42</sup> And we do not believe that the prohibited purpose need be the *sole* purpose of an improper expenditure to bring it within these prohibitions. To construe these statutes otherwise would permit districts to engage in political campaigning so long as the activity also served a lawful purpose. Such easy circumvention of the statutory proscriptions would obviously frustrate the Legislature’s intent.<sup>43</sup>

In the absence of evidence to the contrary, of course, it is to be assumed that a district’s actions are proper.<sup>44</sup> We therefore would not conclude that the existence of a contingent-compensation contract, standing alone, violates the law. On the other hand, evidence of an improper campaigning motive need not be express.<sup>45</sup> Indeed, it seems to us that the Legislature understood section 7054 to proscribe the use of funds or services as an implicit inducement for others to campaign. A committee analysis regarding a 1995 amendment to section 7054 gave an example of some of the evils to be addressed

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<sup>40</sup> For purposes of our analysis, we assume that a contingent-compensation arrangement is a “district service” within the meaning of Education Code section 7054. No court appears to have addressed the question. (See *San Leandro, supra*, 46 Cal.4th at pp. 831-832 [noting parties disagreed over meaning of term].)

<sup>41</sup> Ed. Code, § 7054, subd. (a).

<sup>42</sup> Gov. Code, § 8314, subd. (a).

<sup>43</sup> See *In re Greg F.* (2012) 5 Cal.4th 393, 410 (In interpreting a statute, courts are obligated to “adopt a common sense construction over one leading to mischief or absurdity”); see also *Sorenson v. Superior Court* (2013) 219 Cal.App.4th 409, 447 (declining to read statute in manner contrary to evident legislative policy).

<sup>44</sup> Evid. Code, § 664 (presumption that official duty is regularly performed).

<sup>45</sup> See *Vargas, supra*, 46 Cal.4th at pp. 23-34.

by the measure: a district was described as offering, in connection with a bond election, to “pay bonuses to principals who achieved [an] 88.67% ‘yes’ vote in their area.”<sup>46</sup> Standing alone, the high approval rate in the principal’s area might not be directly attributable to the principal at all, and even a principal’s personal, off-duty campaigning activity could be legitimate.<sup>47</sup> But the inducement of salary bonuses conditioned on a particularly favorable voter turnout was given as an example of the problematic use of district funds.<sup>48</sup> The offer of a bonus could serve no purpose other than to induce school principals to support a campaign for a bond measure.<sup>49</sup>

Guided by these authorities and the legislative intent behind them, we therefore conclude that a contingent-compensation agreement between a school district and a municipal finance firm violates California prohibitions against using public funds to advocate passage of a bond measure if the district enters into the agreement for the purpose (sole or partial) of inducing the firm to support the contemplated bond-election campaign.

#### **b. Inflation of fee**

Education Code section 7054 limits both a school district and a municipal finance firm with respect to the use of district resources for campaigning purposes. The statute, written in the passive voice, provides that no district services “shall be used” for the purpose of urging support of any ballot measure.<sup>50</sup> The Legislature’s use of the passive voice suggests greater concern for the thing being done than for who is doing it.<sup>51</sup> And,

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<sup>46</sup> Assem. Comm. on Pub. Safety, Analysis of Sen. Bill No. 82 (1995-1996 Reg. Sess.) as amended July 1, 1995 at p. 4. A legislative committee analysis can be a helpful indicator of the Legislature’s intent. (96 Ops.Cal.Atty.Gen. 54, 58, fn. 21 (2013).)

<sup>47</sup> See Ed. Code, § 7052 (affirming political rights of school district officers and employees); see also *League of Women Voters, supra*, 203 Cal.App.3d at pp. 547-548 (discussing analysis in *Stevens v. Geduldig* (1986) 42 Cal.3d 24); 84 Ops.Cal.Atty.Gen. 106 (2001) (“A school district may not prohibit teachers from wearing political buttons while attending Back-to-School Night, an annual event where teachers meet with parents to discuss the curriculum and related matters for the coming school year”).

<sup>48</sup> See also *League of Women Voters, supra*, 203 Cal.App.3d at pp. 553-554 (describing as “problematical” an agency’s recruitment of sponsors for ballot measure).

<sup>49</sup> Unlike that example, a contingent-compensation arrangement may serve a lawful purpose. We do not categorically condemn the motives of districts that enter into such arrangements.

<sup>50</sup> Ed. Code, § 7054, subd. (a).

<sup>51</sup> See, e.g., *Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1233,

indeed, in the context of a union’s use of school faculty mailboxes to disseminate political literature, the Supreme Court noted that “there is no basis in the language of section 7054 for concluding that it applies to school districts but not employee organizations.”<sup>52</sup> Accordingly, were a firm to inflate its fee for post-election services in order to recoup its campaign contributions, the firm would violate Education Code section 7054.

In addition, Government Code section 8314 states that “[i]t is unlawful for any elected . . . local officer, including any . . . local appointee, employee, or consultant to use or permit others to use public resources for a campaign activity . . . or other purposes which are not authorized by law.”<sup>53</sup> This statute may be violated intentionally or negligently.<sup>54</sup> District officials are therefore obligated to take reasonable steps to ensure that a municipal finance firm’s fee for post-election services is not inflated to account for campaign expenditures.<sup>55</sup>

We therefore conclude that a contingent-compensation agreement between a school district and a municipal finance firm also violates California prohibitions against permitting others to use public funds to advocate passage of a bond measure if the firm’s fee for the bond-sale services is inflated to account for its campaign contributions, and the district fails to take reasonable steps to prevent this inflated fee.

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quoting *Dean v. United States* (2009) 556 U.S. 568, 572 (legislative use of the passive voice suggests that “[i]t is whether something happened—not how or why it happened—that matters”); see also *Capo for Better Representation v. Kelley* (2008) 158 Cal.App.4th 1455, 1463 (Legislature’s use of passive voice suggests focus on thing done rather than on person doing it).

<sup>52</sup> *San Leandro, supra*, 46 Cal.4th at p. 835.

<sup>53</sup> Gov. Code, § 8314, subd. (a).

<sup>54</sup> Gov. Code, § 8314, subd. (c)(1).

<sup>55</sup> Cf. *Golden Gate Bridge v. Filmer* (1933) 217 Cal. 754, 760-761 (public officials issuing bonds are presumed to act in good faith and to sell bonds on best terms available). To ensure its due diligence, a district may prefer to give post-election service contracts only to those municipal finance firms who did not contribute to the bond-election campaign or, failing that, retain an independent financial advisor to assist in evaluating the fees charged by a firm that secured a post-election services contract through the device of a contingent-compensation arrangement.

### Question 3

The third question is whether, in the case of an agreement as described in Question 2, a school district violates California law if the district reimburses the municipal finance firm for providing the pre-election services as an itemized component of the fee that the district pays to the firm in connection with the bond sale. We conclude that such reimbursement does violate California law.

Both the Constitution and statutory law restrict the use of bond-sale proceeds. Those proceeds may not be used to pay for services that are neither integral, nor unavoidable, to the sale of voter-approved bonds or to the effectuation of a voter-approved project. Education Code section 15100 sets out the purposes for which a school district may put a bond measure on the ballot. These uses generally involve only capital improvements;<sup>56</sup> there is no provision for the use of bond-sale proceeds to pay for services. Moreover, the state Constitution, as amended in 2000 by Proposition 39, expressly prohibits the use of bond-sale proceeds for any purpose other than capital improvements.<sup>57</sup>

We have previously concluded that Proposition 39 must be reasonably construed to authorize the use of bond-sale proceeds to pay for necessary consultant contracts and

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<sup>56</sup> See *San Lorenzo Valley*, *supra*, 139 Cal.App. 4th at p. 1404, citing *Marin Union Junior College Dist. v. Gwinn* (1930) 106 Cal.App. 12, 13-14 (*Marin Union*) (distinguishing between cost of capital expenditures and cost of maintenance); cf. 42 Ops.Cal.Atty.Gen. 37, 38 (1963) (term “equipment,” found in subdivision (e), would encompass a school library’s *permanent* collection of books, but not “[d]ocuments of a transient nature, such as current newspapers, periodicals, as well as pamphlets of a temporary character”).

<sup>57</sup> Prop. 39, § 4, as approved by the voters, Gen. Elec. (Nov. 7, 2000); see California Secretary of State, *Official Voter Information Guide* (Gen. Elec. Nov. 7, 2000) 38-42, 73 [http://librarysource.uchastings.edu/ballot\\_pdf/2000g.pdf](http://librarysource.uchastings.edu/ballot_pdf/2000g.pdf). In relevant part, Proposition 39 exempts from the general one-percent tax limitation “[b]onded indebtedness incurred by a school district, community college district, or county office of education for the construction, reconstruction, rehabilitation, or replacement of school facilities, or the acquisition or lease of real property for school facilities, approved by 55 percent of the voters . . . only if the proposition approved by the voters and resulting in the bonded indebtedness includes . . . [a] requirement that the proceeds from the sale of the bonds be used only for the [above-stated] purposes . . . and not for any other purpose, including teacher and administrator salaries and other school operating expenses.” (Cal. Const., art., XIII A, § 1(b)(3)(A), italics added; see also art. XVI, § 18, subd. (b); 92 Ops.Cal.Atty.Gen. 1, *supra* [re use of proceeds from refinancing bonds].)

salaries that arise in furtherance of an *approved* bond sale (and, therefore, in furtherance of the construction approved by passage of the bond measure). Such costs are essential to effectuating the voters’ expressed approval.<sup>58</sup> Our reasoning was adopted by the Court of Appeal in *San Lorenzo Valley, supra*, to resolve a dispute over the use of bond proceeds to pay for the administration of bond-funded construction projects.<sup>59</sup> That case also considered the question whether bond proceeds may be used to pay for bond preparation costs, such as printing and attorney fees. In response to this latter question, the court concluded that use of bond proceeds to pay these costs was permissible because they are expressly made payable by Education Code section 15145, subdivision (a) (section 15145(a)).

The enactment of section 15145 (a) predated the adoption of Proposition 39.<sup>60</sup> And although the issue was not expressly addressed in *San Lorenzo Valley*, the opinion necessarily assumed the statute to be consistent with the later-enacted constitutional provision.<sup>61</sup> Section 15145(a) does not provide for payment of services provided *before* a bond election. Section 15145 is part of an article entitled “Issuance and Sale of Bonds,” commencing with section 15140,<sup>62</sup> and bond issuance and sales are processes that necessarily *follow* voter approval of a school bond sale.<sup>63</sup> Moreover, section 15145(a) refers to expenses incurred “for the preparation, sale, and delivery of *the* school bonds”—not those of school bonds in general.<sup>64</sup> Reading section 15145(a) in a manner consistent

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<sup>58</sup> See 87 Ops.Cal.Atty.Gen. 157 (2004).

<sup>59</sup> *San Lorenzo Valley, supra*, 139 Cal.App.4th at pp. 1401-1403.

<sup>60</sup> Stats. 1996 ch. 277, § 2 (Sen. Bill No. 1562), operative Jan. 1, 1998.

<sup>61</sup> See, e.g., *California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 279-280 (“We presume a legislative act is constitutional and must uphold it unless a conflict with a provision of the state or federal Constitution is clear and unquestionable” [internal quotation marks omitted]). As with the approved-construction costs that the court had already allowed (*San Lorenzo Valley, supra*, 139 Cal.App.4th at 1401-1403), the costs made payable by section 15145(a) are only direct issuance costs that are integral to the sale of the bonds that the voters approved.

<sup>62</sup> See Stats. 1996, ch. 277, § 1, p. 1840; *Kurtin v. Elieff* (2013) 215 Cal.App.4th 455, 484 (“Chapter and section headings may be considered in ascertaining legislative intent and are entitled to ‘considerable weight’”).

<sup>63</sup> The question presented to the voters is “whether the bonds of the district *shall be issued and sold* for the purpose of raising money [for the specified purposes].” (Ed. Code, § 15100, emphasis added.)

<sup>64</sup> “The Legislature’s use of the definite article ‘the’ is significant because the definite article ‘the’ refers to a specific person or thing. . . . In contrast, use of the indefinite articles ‘a’ or ‘an’ signals a general reference.” (*Honchariw v. County of Stanislaus*

with Proposition 39, as we must,<sup>65</sup> we construe the phrase “the bonds” to mean the bonds whose issuance has been approved by the voters. The costs of preparation, sale, and delivery attending the issuance and sale of those bonds would not arise but for the voters’ approval, and the costs are therefore incurred in furtherance of the sale of those approved bonds. They are accordingly, essential and integral to effectuation of the voters’ intent.

However, based on the reasoning of *San Lorenzo Valley* and our own 2004 opinion, we do not believe that Proposition 39 permits bond proceeds to be used to pay for pre-election services, such as opinion surveys, public-information programs, staff-training programs, providing information to the campaign, or attending workshops. While such services may be useful to a district in deciding whether an election is “advisable,”<sup>66</sup> we cannot conclude that their costs are payable from bond proceeds.

In construing Proposition 39, our aim is “to determine and effectuate the intent of those who enacted the constitutional provision at issue.”<sup>67</sup> We look first to the language of the text, and read the provision in accordance with the natural and ordinary meaning of its words.<sup>68</sup> The Constitution plainly states that voters will be assured that school bond proceeds will be used “only” for the purposes outlined in Article XIII A, section 1(b)(3), “and not for any other purpose, including teacher and administrator salaries and other school operating expenses.”<sup>69</sup>

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(2013) 218 Cal.App.4th 1019, 1033; see also 66 Ops.Cal.Atty.Gen. 407, 412, fn. 2 (1983); cf. 69 Ops.Cal.Atty.Gen. 290, 293 (1986) (contrasting “any” and “the”).)

<sup>65</sup> *People v. Superior Court (Zamudio)* (2000), 23 Cal.4th 183, 193; 81 Ops.Cal.Atty.Gen. 189, 194 (1998).

<sup>66</sup> Ed. Code, § 15100.

<sup>67</sup> *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, 418.

<sup>68</sup> 87 Ops.Cal.Atty.Gen., *supra*, at p. 161, fn. 5; *Hi-Voltage Wire Works, Inc. v. City of San Jose* (2006) 24 Cal.4th 537, 559.

<sup>69</sup> Cal. Const., art. XIII A, § 1, subd. (b)(3)(A). “The word ‘only’ is a common example of an exclusionary term.” (3 Sutherland, *Statutory Construction* (7th ed.) § 57:9; see also *PlayMedia Systems, Inc. v. America Online, Inc.* (C.D. Cal. 2001) 171 F.Supp.2d 1094, 1115 (discussing effect of term “only”).) “[T]he word ‘only’ means ‘only[.]’” (*People v. Garcia* (2006) 145 Cal.App.4th 782, 788.) On the other hand, “The term “includes” is ordinarily a word of enlargement and not of limitation. . . . The statutory definition of a thing as “including” certain things does not necessarily place thereon a meaning limited to the inclusions.” (*In re Marriage of Cochran* (2001) 87 Cal.App.4th 1050, 1061 [internal quotations and citations omitted].)

Proposition 39 draws a sharp line between capital improvements, on the one hand, and services that are not essential or integral to capital improvements.<sup>70</sup> To the extent that payment from bond proceeds for services has been approved, it is only because the services were “incidentally but directly related” and “integral” to the approved construction or approved bond sale.<sup>71</sup>

We conclude that a school or community college district violates California law concerning use of bond proceeds if it reimburses a municipal finance firm for the cost of providing pre-election services (of any sort), from the proceeds raised from the bond sale, as a component of the fees the district pays to the firm in connection with the bond sale.

#### **Question 4**

While the third question contemplated a circumstance wherein a district might reimburse a municipal finance firm from bond proceeds on an itemized fee-for-service basis, our fourth question asks whether the same results obtain if the firm merely inflates its post-election services fee to account for its costs of providing pre-election services, without itemizing or charging separately for pre-election services. Our conclusion is the same under both scenarios.

District boards have “a fiduciary duty to the State of California and its citizens that public monies be expended only for the purposes prescribed by the Legislature.”<sup>72</sup> If a

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<sup>70</sup> We emphasize that the question here is not whether payment for pre-election costs is a permissible expenditure of public funds in general. (See, e.g., 73 Ops.Cal.Atty.Gen. 255 (1990) [city, county, or district public funds may be used to draft an initiative or referendum measure].) We discussed that issue in response to Question 1. Rather, Question 3 asks whether payment of such pre-election costs is a permissible purpose to which *bond proceeds* may be put.

<sup>71</sup> See *San Lorenzo Valley, supra*, 139 Cal.App.4th at 1402; 87 Ops.Cal.Atty.Gen., *supra*, at p. 161. Our conclusion does not distinguish between pre-election costs incurred by municipal finance firms and pre-election costs incurred by school districts performing their own pre-election work. That is because, unlike post-election costs of issuance, the Legislature has not spoken on the question whether bond proceeds may be used to pay pre-election costs. (Cf. Ed. Code, § 15145, subd. (a) [post-election costs of issuance].)

This opinion does not address the question whether official charges mandated by Education Code section 5420 for county services related to the conduct of a bond election may be paid from bond proceeds.

<sup>72</sup> *Compton College Federation of Teachers v. Compton Community College Dist.* (1982) 132 Cal.App.3d 704, 716 (district officials have “a fiduciary duty to the State of

school district knowingly permits a municipal finance firm to inflate its fees for post-election services in order to recoup the cost of providing pre-election services, then the district has violated the laws limiting the use of bond proceeds,<sup>73</sup> whether or not the charge for non-reimbursable services appears on the bill.

Government Code section 8314 provides that “[i]t is unlawful for any elected . . . local officer, including any . . . local appointee, employee, or consultant, to use or permit others to use public resources for campaign activity or personal or other purposes which are not authorized by law.”<sup>74</sup> The statutory language is plain on its face: Because bond-sale proceeds may not be used to pay for pre-election services, district officials must exercise due care to ensure that a municipal finance firm’s fee for post-election services has not been inflated to account for the cost of pre-election services. Section 8314 may be violated either knowingly or negligently.<sup>75</sup>

We conclude that a school district violates the laws concerning use of bond proceeds if the district reimburses a firm for pre-election services from the proceeds of a bond sale, whether or not the services are itemized as a component of the fees charged in connection with the bond sale.

### **Question 5**

The fifth question asks whether an entity that provides campaign services to a bond measure campaign, in exchange for an exclusive agreement with the district to sell the bonds, incurs an obligation to report the cost of such services as a contribution to the bond measure campaign in accordance with state and local campaign disclosure laws. We believe that it does.

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California and its citizens that public monies be expended only for the purposes prescribed by the Legislature”); see also *Stanson, supra*, 17 Cal.3d at 225 (“[P]ublic officials who either retain custody of public funds or are authorized to direct the expenditure of such funds bear a peculiar and very grave public responsibility . . .”).

<sup>73</sup> See Ed. Code, § 15284.

<sup>74</sup> Gov. Code, § 8314, subd. (a).

<sup>75</sup> Gov. Code, § 8314, subd. (c)(1). We are informed that some firms expressly provide in their contingent-compensation contracts that there is to be no remuneration for pre-election services. It seems to us that it would be imprudent for a district to rely exclusively on such a self-serving promise to ensure that public funds will not be used for illegal purposes. It would be wiser to retain the services of an independent financial advisor to assist in evaluating the fees contained in a contingent-compensation arrangement.

The Political Reform Act requires “committees” to file periodic campaign statements disclosing contributions received and expenditures made during the applicable reporting period.<sup>76</sup> An entity may qualify as a committee by making “contributions” of \$10,000 or more in a calendar year.<sup>77</sup> A “contribution” means a “payment,” except to the extent that full and adequate consideration is received, unless it is clear from the surrounding circumstances that it is not made for political purposes.<sup>78</sup> A “payment,” in turn, includes any rendering of services as well as money.<sup>79</sup> Thus, a “contribution” may be either monetary or non-monetary.

If a municipal finance firm provides uncompensated consulting services to a bond-measure campaign, the firm is making non-monetary or in-kind “contributions” to the campaign. If the value of the in-kind contributions totals \$10,000 or more in a calendar year, the firm qualifies as a major donor “committee” and must file campaign statements disclosing the contribution.

We conclude that where an entity provides campaign services to a bond-measure committee in exchange for future financial consideration, such as an exclusive agreement with the district to sell the bonds, the entity has an obligation to report the value of the services as a contribution to the bond-measure campaign in accordance with state law, if the value of the contribution totals \$10,000 or more in a calendar year.<sup>80</sup>

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<sup>76</sup> Gov. Code, § 84200 et seq.

<sup>77</sup> Gov. Code, § 82013, subd. (c). This type of committee is commonly referred to as a “major donor committee.” (See, e.g., Cal. Code Regs., tit. 2, § 18427.1, subd. (b).)

<sup>78</sup> Gov. Code, § 82015, subd. (a).

<sup>79</sup> Gov. Code, § 82044.

<sup>80</sup> The question assumes that the municipal finance firm is providing uncompensated consulting services to the bond measure committee “in exchange for” a future guaranteed contract if the measure passes. The Fair Political Practices Commission, which has primary responsibility for interpreting the Act (Gov. Code, §§ 83111, 83112, 83114), has found that a “committee” under the Act can include a single person or a “combination of persons” who make contributions, and that that a “combination of persons” can refer to an alliance of persons or entities formed for the purpose of influencing the passage or defeat of a measure and that the alliance “can be evidenced by an agreement or mutual understanding *which can be implied or expressed.*” (*In re Lumsdon* (1976) 2 FPPC Ops. 140 (Sept. 7, 1976), 1976 WL 38773, p \*2, 1976 FPPC Ops. LEXIS 7.) While the specific facts of each case must be considered, the reasoning of the *Lumsdon* opinion suggests that a school district itself could be considered a source of in-kind campaign contributions if the district bargained for the campaign committee to receive such services as a condition of the district’s awarding a bond finance contract.

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