CLIENT NEWS BRIEF

School Districts and Community Colleges May Not Pay for Pre-Election Services with Bond Proceeds

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In light of a recent Attorney General opinion, school districts and community colleges are advised to examine their contracts with municipal finance firms for their planned future bond elections and post-election issuance services, particularly where the agency will pay for such services on a contingency basis. According to Attorney General Kamala Harris, in her Opinion No. 13-304, released January 26, 2016, a school or community college district violates California law concerning the use of bond proceeds if the district pays for "pre-election services" from the proceeds raised from the bond sale. In the opinion, the term "municipal finance firm" casts a wide net to include investment bankers, financial advisors, and bond attorneys. The opinion suggests a significant change in how municipal finance firms structure fee arrangements, since fees for pre-election services are usually paid out of bond proceeds as a separate item or, as the Attorney General suggests, covered under an inflated rate for issuance service fees, payable only upon a sale of bonds.

An Attorney General opinion does not carry the force of law. Nevertheless, in the absence of controlling authority, an Attorney General opinion on point is considered persuasive to a court. In the opinion, the Attorney General raises her concerns over what has been an industry-standard practice for many years: the entry into a contingent-fee arrangement with a municipal finance firm that includes pre-election services (i.e., opinion surveys, public information programs, preparing the project list, preparing bond ballot measure language, and drafting the district's resolution of intention), where the payment for such services is contingent on a successful campaign.

While not declaring such a contingent-fee contract illegal *per se*, the opinion concludes that fees for any pre-election services may **not** be paid from proceeds of a bond issue. The Attorney General declares that only expenses "directly related and integral to the *approved* construction or approved bond sale" are permitted to be paid from bond proceeds. According to her opinion, pre-election services are necessarily outside the scope of statutory authority precisely because they occur *before* approval from the electorate.

In addition to addressing payment for pre-election services, the opinion reiterates existing law that certain pre-election services may never be paid from public funds. The California Constitution and statutes prohibit expenditure of public funds on pre-election services that may be fairly characterized as campaign activity. Per the Attorney General, a district runs afoul of the law where it enters into an agreement with a municipal finance firm where *either* the sole or partial purpose is to induce the firm to contribute to the bond-election campaign (financially or with in-kind services) *or* the firm's fee for its post-election services is inflated to account for its campaign contributions (and the district fails to take reasonable steps to make sure it was not inflated).

The issue here is whether the pre-election services to be performed by a municipal finance firm are considered "campaigning" (i.e., advocacy for the passage of a bond measure) or merely informational, as California courts have articulated in *Stanson v. Mott* (1976) 17 Cal.3d. 206, and its progeny, and the

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Legislature has codified at Education Code section 7054. The *Stanson* court made it clear that, in the absence of legislative authorization, a district may not expend public funds to promote a partisan position in an election campaign. The Attorney General has clarified what Lozano Smith has long advised our clients: namely, that this includes bond campaigns. There are limited exceptions to this rule, such as preparation by the governing board, district staff, or consultants of an argument supporting the bond campaign, or conducting a poll to determine if there is support for a potential bond campaign. Other gray areas in the dichotomy between informational activities and prohibited campaigning require a careful factual analysis, and districts are advised to consult their legal counsel.

Lozano Smith has expertise in public finance matters, serving as bond counsel on over $1 billion of school district and community college district bond issues since 2008. If you have any questions regarding this Attorney General opinion, or about navigating a future bond campaign, please contact one of our nine offices located statewide. You can also visit our website, follow us on Facebook or Twitter, or download our Client News Brief App.