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July 25, 2017

VIA ELECTRONIC MAIL

Ms. Jodi Remke, Chair
and Commissioners Audero, Hatch and Hayward
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95814

RE: Request for Commission Legal Opinion

Dear Chair Remke and Commissioners:

I write on behalf of my client, the Senate Democratic Caucus, to urge the Commission to order a legal opinion concluding that the Political Reform Act does not impose limits on the amount that may be contributed by a state candidate to another state candidate's recall committee. This conclusion is not only consistent with a common sense reading of the Political Reform Act, but it is supported by the legislative intent of voters in passing Proposition 34 as well as applicable case law.

In my prior communications with the Commission, I pointed out that the 2006 decision in Citizens to Save California v. California Fair Political Practices Commission (2006) 145 Cal.App.4th 736 should guide the Commission's decision here because substantially similar issues were involved in that case. The Citizens to Save California case invalidated Commission regulations imposing contribution limits on candidate controlled ballot measure committees because, according to the court, the voters' intent "indicates that Proposition 34 was designed to limit contributions to a candidate's election or reelection campaign committee, not other committees." (See Citizens to Save California, supra, at 752.) Commission staff did not analyze or mention the Citizens case in either the Johnson Advice Letter or the Staff Memorandum prepared for this hearing.

It is important to note that this is not a partisan issue. Lawyers for Republicans, Democrats, and now the non-partisan Legislative Counsel have all concluded that the Commission's current interpretation of the law is wrong. The Johnson Advice Letter (A-08-032), which was the basis for this opinion request, was sought by lawyers for Republican Senator Jeff Denham and his supporters when Denham was the target of a recall election. In its advice request, Senator Denham's counsel made substantially similar

arguments to those we make here. (Letter for FPPC Advice to Scott Hallabrin, Mr. Jimmie Johnson, Bell McAndrews & Hiltachk, February 29, 2008.)

For these reasons and the reasons discussed in more detail below, we request that the Commission issue an opinion reversing its interpretation that the Political Reform Act imposes limits on contributions made by state candidates to a recall committee controlled by another state candidate.

ANALYSIS

Chapter 5 of the Political Reform Act sets forth various contribution limits that apply to state candidates. Government Code Section 85301¹ imposes limits on the amount of contributions that may be made to and accepted by state candidates depending on the office being sought. Subdivision (a) of Section 85301 imposes a limit on candidates for the state legislature, subdivision (b) provides a higher limit for statewide candidates other than governor, and subdivision (c) provides a higher limit for candidates for governor. Section 85305 separately imposes a limit on the amount that may be contributed from one candidate for elected state office to another candidate for elective state office. The limit imposed by Section 85305 is currently \$4,400.

Recall elections involving state candidates are different from regular state candidate elections because contribution limits do not apply on contributions to committees to support or oppose a recall election. That is, any donor may contribute an unlimited amount to a recall committee controlled by a state candidate. The exception to the contribution limits for state candidate recall elections is found in Section 85315 and it reads in relevant part as follows: “An elected officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contribution limits set forth in this chapter.” (Emphasis added.)

Despite the clear language in Section 85315 exempting recall committees from all contribution limits contained in Chapter 5 of the Political Reform Act, Commission staff interprets these provisions to allow anyone but state candidates to contribute unlimited amounts to a state candidate’s recall committee. The basis for this interpretation is set forth in the Johnson Advice Letter (A-08-032) and in the Staff Memorandum prepared for this hearing, both of which conclude that while Section 85315 allows a state candidate to “accept” unlimited contributions from any source, Section 85305 limits the amount of contributions that may be “made” from a state candidate to a recall committee controlled by another state candidate.

¹ All references are to the California Government Code unless otherwise indicated.

Staff concludes that Section 85315 does not allow unlimited contributions from a state candidate to another state candidate's recall committee because Section 85305 imposes an "inter-candidate transfer limit" to which Section 85315 does not apply. (FPPC Staff Memorandum, Contribution Limits on Transfers from State Candidates to a State Candidate to Oppose a Recall Election, July 17, 2017, p. 8.) Staff points to two provisions in the Proposition 34 ballot pamphlet to support this claim, as follows:

This measure repeals a provision of Proposition 208 that bans transfers of funds from any state or local candidate or officeholder to any other candidate, but establishes limits on such transfers from state candidates. (Ballot Pamphlet, Proposition 34, Analysis by the Legislative Analyst, 2000 General Election, p. 14.)

Proposition 34 Stops Political Sneak Attacks – In no-limits California, candidates flush with cash can swoop into other races and spend hundreds of thousands of dollars at the last minute to elect their friends. Proposition 34 stops those political sneak attacks. (Ballot Pamphlet, Proposition 34, Arguments in Favor, 2000 General Election, p. 16.)

In asserting that Section 85305 constitutes an "inter-candidate transfer limit" and not a contribution limit, staff fails to consider the clear language of the statute and the fact that courts treat inter-candidate transfer limits as contribution limits. Section 85305 expressly says that a state candidate may not make a "contribution" to another state candidate in excess of the "limits" set forth in Section 85301(a). The use of these specific terms in the statute indicates that Section 85305 does, in fact, impose a contribution limit that is exempt from the Chapter 5 contribution limits under Section 85315. Although the Legislative Analyst described the limit on contributions between state candidates as a "transfer," the Analyst's description is not dispositive because the clear language of the statute indicates that Section 85305 is a contribution limit. Further, courts consistently treat inter-candidate transfer restrictions as contribution limits. For example, the Ninth Circuit Court of Appeals found that Proposition 73's ban on inter-candidate transfers were contribution limits "because it limits the amount one candidate may contribute to another." (Service Employees International Union v. Fair Political Practices Commission (1991) 955 F.2d 1312, 1322.)

Staff's analysis of voter intent regarding the adoption of Proposition 34 is also incomplete because it fails to discuss contrary indicia of voter intent and does not fully consider others. For example, staff fails to discuss the Legislative Analyst's statement that Proposition 34 repeals a provision in Proposition 208 "limiting contributions to political committees which operate independently of a candidate's campaign committee." (Ballot Pamphlet, Analysis by the Legislative Analyst, *supra*, p. 13-14.) As campaign committees that cannot be used for purposes of electing or re-electing the controlling candidate, recall committees are undoubtedly

independent of a candidate's campaign committee.² Additionally, the statement in the ballot argument that says "candidates flush with cash can swoop into other races . . . to elect their friends" appears to support the position that Section 85305 was intended to apply to contributions to elect or re-elect candidates because it characterizes the limitations to prevent the election of candidates' "friends." It does not refer to non-candidate elections such as recall elections. We therefore disagree with staff's contention that the legislative history of Proposition 34 supports its interpretation that Section 85305 imposes a limit on contributions from one state candidate to another state candidate's recall committee.

Staff also claims that its interpretation is correct because it ensures that Section 85305 has a "function beyond duplicating certain portions of Section 85301." (See Staff Memorandum, *supra*, at p. 11.) However, this statement is incorrect because even if Section 85305 is interpreted not to impose limits on contributions to a state candidate's recall committee, the statute will continue to serve the purpose of specifying what limits apply to contributions between state candidates. That is, Section 85305 will still impose a \$4,400 limit on contributions from one state candidate to another state candidate's election or re-election committee, even though the limits will not apply on contributions to recall committees.

As discussed above, we believe the court's decision in Citizens to Save California v. California Fair Political Practices Commission, *supra*, strongly supports reversing staff's determination that Section 85305 imposes limits on the amount a state candidate may contribute to another state candidate's controlled recall committee. In Citizens, Governor Schwarzenegger successfully challenged an FPPC regulation that limited contributions to ballot measure committees controlled by state candidates. In reaching its decision, the court rejected the FPPC's rationale that the contribution limits were valid as limits on candidates for elective state office. According to the court, candidate controlled ballot measure committees "are formed for the purpose of supporting or opposing state or local ballot measures, which means that contributions to the committee are contributions to oppose or support the ballot measure in question, not the controlling candidate." (Citizens to Save California, *supra*, at 749-50.)

Here, like in the Citizens case, Commission staff is attempting to impose a contribution limit on a candidate controlled committee that is not the candidate's election or re-election committee. In this context, it is important to note that the Political Reform Act includes a recall election within the definition of a "measure." (Section 82043.) To the extent that a candidate's recall committee can be considered a measure committee under the Act, it is eligible for the same treatment as other ballot measure committees. The Citizens court summarized how these committees should be treated as follows:

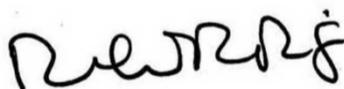
² FPPC Regulation §18531.5 governs the operation of recall committees and requires a target officer to deposit contributions accepted in the recall committee in a single bank account that is separate from any other bank account held by the officer, including any campaign bank account. (Emphasis added.)

It appears the FPPC recognized that [Citizens Against Rent Control v. Berkeley (1981) 454 U.S. 290] precludes limits on contributions to ballot measure committees and attempted to evade this prohibition by the legal fiction that contributions to a candidate's ballot measure committee are made to the candidate and thus may be subjected to the candidate contribution limits . . . But the FPPC does not treat these contributions consistently as being made to the candidate. If contributions to candidate-controlled ballot measure committees are limited in accordance with the amount permitted for the candidate's office because the contributions are deemed made to a candidate for elective state office, then the other rules pertaining to candidates must also apply. (Citizens to Save California, supra, at 751.)

In light of the statutory framework of Chapter 5, the legislative history of Proposition 34, and applicable case law, it is evident that Section 85315 imposes a broad exception to the contribution limits for state candidate controlled recall committees. This exception applies to Section 85305's limit on contributions from one state candidate to another. Section 85305 should be interpreted to limit contributions between state candidates' election or re-election committees and not other controlled committees. We therefore request that the Commission issue an opinion concluding that the exception to the contribution limits provided by Section 85315 applies to allow state candidates to make unlimited contributions to the recall committee of another state candidate.

Very truly yours,

OLSON HAGEL & FISHBURN LLP



RICHARD R. RIOS

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