

THE SUTTON LAW FIRM

July 25, 2017

VIA EMAIL ONLY

Jodi Remke, Chair
Erin Peth, Executive Director
California Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

RE: In re Rios Opinion Request

Dear Chair Remke and Executive Director Peth:

On behalf of the Sutton Law Firm, this letter is to provide the Fair Political Practices Commission with input regarding its July 27, 2017 consideration of Richard Rios's request for an opinion regarding the staff's interpretation of sections 85315 and 85305 of the Political Reform Act.

As political and election law attorneys who regularly interact with the Commission and who consistently engage with the Political Reform Act (the "Act"), our firm agrees with Mr. Rios and believes that the Commission should issue a formal opinion reversing the staff's interpretation of Government Code sections 85315 and 85305 as imposing a \$4,400 limit on the amount which a state candidate may contribute to a recall committee.

This request is supported on at least two grounds. First, the Commission has never formally stated that such a limit should apply, and staff should not rely upon an advice letter as legal precedent to set contribution limits not considered by the Commission. Second, section 85315 plainly permits contributions to recall committees "without regard to the campaign contribution limits" imposed by section 85305, or, in the alternative, is entirely inapplicable to recall committees.

The Commission should issue a formal opinion or regulation before instituting a contribution limit. The Act, in several of its sections, sets contribution limits for specific types of committees (e.g., section 85301 [limits on contributions from persons] and section 85303 [limits on contributions to committees and political parties], etc.). Recall committees are contemplated in section 85315 and are not subject to contribution limits. Therefore,

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contribution limits to recall committees are not contemplated by the Act's plain language, and are based only on Commission staff interpretation of section 85305. We believe that if any contribution limit is to be set forth based on Commission interpretation, then it should be done through regulation or opinion by the Commission, and not via Commission staff.

In denying Mr. Rios's request for an opinion, the Legal Division relied on the Johnson Advice Letter (4/11/08) No. A-08-032 – formal advice given nearly a decade ago, which was not approved by the Commission. The formal advice process is important, and provides factually specific answers to particular situations. Law firms and others regularly rely on formal advice and on the work of Legal Division staff to answer questions about the Act. However formal advice is not, and should not be, a means of setting forth contribution limits or other material interpretations of the Political Reform Act.

Mr. Rios reasonably requests that the Commission review an interpretation made by the Legal Division which resulted in the de facto implementation of a contribution limit to recall committees. Without a formal Commission opinion or regulation, the FPPC is in essence treating formal advice as a common law ruling sufficient to materially interpret the Act. We therefore urge the Commission to issue a formal opinion in this instance.

Section 85315 exempts recall committees from contribution limits. As stated in both Mr. Rios's request and Legislative Council Opinion 1716447, the plain language of section 85315 permits a recall committee to receive contributions "without regard to the campaign contribution limits" imposed by Chapter 5 of the Act. Section 85305 sets forth contribution limits for candidates within Chapter 5 of the Act, and therefore does not apply to recall committees. Under section 85315, recall committees should be permitted to accept contributions without regard to limits, irrespective of whether those contributions are from individuals, PACs, corporations, or state candidates.

Section 85315 is not applicable to recall committees. In the Johnson Letter, the FPPC Legal Division differentiated between the receipt of contributions by a recall committee, and the making of contributions to a candidate for state elective office. While arguably congruent, that rationale is incorrect because section 85315 contemplates recall committees "to oppose the qualification of a recall measure, and the recall election." A recall committee is therefore a ballot measure committee, and is not a campaign committee for state elective office.

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Moreover, in Citizens to Save California v. California Fair Political Practices Commission (2006) 145 Cal.App.4th 736, the Third Appellate District overturned a Commission regulation limiting contributions to candidate-controlled ballot measure committees. The case held that the FPPC does not have the authority to set contribution limits for ballot measure committees because section 85303(c) prohibits the Act's limits from being applied to contributions which are "used for purposes other than making contributions to candidates for elective state office." Under this rationale, section 85305 is not applicable to recall committees.

Because the plain language of the relevant statute either exempts recall committees from the contribution limits of section 85305, or because 85305 is not applicable to recall committees, the Commission should issue a formal opinion permitting state candidates to contribute to recall committees without regard to section 85305's contribution limits.

We of course appreciate the hard work which the Legal Division puts into each formal advice request, and we know that the FPPC is the best resource for deciphering the complex campaign finance, conflict of interest and lobbying rules in California. This is a rare situation in which we believe the Legal Division erred, and improperly implemented a contribution limit via the Johnson letter even though such a limit, if it can be implemented at all, could only be implemented by the Commission via regulation or opinion.

Thank you for your consideration of this important matter, and if we may provide additional comments or information, please feel free to contact us.

Sincerely,



Nicholas L. Sanders

cc: Commissioners Audero, Hayward and Hatch

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