BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	
Opinion Requested by: Charles H. Bell, Jr., Chairman of the California Political Attorneys Association; and Lance H. Olson, Secretary of the California Political Attorneys Association	)	No. 88-002 November 9, 1988

BY THE COMMISSION: We have been asked the following question by Charles H. Bell, Jr., and Lance H. Olson, the Chairman and Secretary, respectively, of the California Political Attorneys Association. Requestors are treasurers of various political committees and represent several candidates for elected office. Their opinion request is on behalf of themselves, their clients and others similarly situated.

QUESTION

What, if any, of Proposition 68 (the "Campaign Spending Limits Act") survives the passage of Proposition 73 (the "Campaign Contribution Limits Without Taxpayer Financing Amendments to the Political Reform Act") by a greater number of votes?

CONCLUSION

Most of the provisions of Proposition 68 conflict with Proposition 73 or are not severable from the provisions which do conflict. This includes:

1. All of the contribution limits[1/]

1/ The many specific contributions limits imposed by Proposition 68 are discussed provision-by-provision in the analysis section of this opinion. They include provisions governing:

1. Off-year elections
2. Return of contributions
3. Campaign loans
4. Family contributions
5. Total contributions from certain organizations
6. Aggregate limits to all legislative candidates
7. Aggregation of contributions from related entities
8. Aggregate limits on contributions from non-individuals

2. Expenditure limits

3. Public financing

4. Limits on independent expenditures

5. Increased criminal penalties

6. Increased civil penalties

7. The title, purposes and definitions

8. The duties of the Commission and the Franchise Tax Board concerning public financing

A few provisions are severable and should become operative on or before January 1, 1989. These include:

1. Notice requirement on independent mass mailings (operative January 1, 1989)

2. Notice requirement for independent expenditures exceeding $10,000 (operative January 1, 1989)

3. Commission duty to prescribe forms and do studies (operative June 8, 1988)

4. Clarification that administrative penalties are $2,000 per violation (operative June 8, 1988)

5. Requirement that controlled committee name include controlling individual's name (operative June 8, 1988)

6. Intermediary definition (operative June 8, 1988)

7. Severability, amendment, liberal construction and effective date provisions (operative June 8, 1988)

ANALYSIS

General Guidelines for Interpreting Conflicting Initiative Statutes

Both Propositions 68 and 73 were adopted by the voters at the June 1988 statewide primary election. Both propositions address campaign finance reform, but the specifics of each initiative differ. The California Constitution specifies the following method to determine the operative law in this situation:

> If provisions of 2 or more measures approved at the same election conflict, those of the measure receiving the highest affirmative vote shall prevail.
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> Cal. Const., Art. II, Sec. 10(b).

Proposition 73 received more affirmative votes than Proposition 68. Accordingly, where provisions of the two measures conflict, the provisions of Proposition 73 prevail.

The Commission is responsible for implementing and enforcing Proposition 73 and any portions of Proposition 68 which survive despite the enactment of Proposition 73. The following legal analysis seeks to determine the conclusions a court is likely to reach about the validity of Proposition 68.

First, we must determine the method of analysis. Two alternative approaches have been suggested: (1) Because Propositions 68 and 73 both sought to enact comprehensive campaign finance reform schemes, the scheme enacted by Proposition 73 conflicts with Proposition 68 in its entirety, and nothing of Proposition 68 survives; or (2) Propositions 68 and 73 must be examined provision-by-provision; only where a conflict exists will Proposition 73 prevail over Proposition 68. The language of the Constitution supports the second approach, since Section 10(b) of Article II specifically refers to <u>provisions</u> in conflict. Case law also supports that interpretation.

In <u>Estate of Gibson</u> (1983) 139 Cal. App.3d 733, the Court of Appeal considered two conflicting initiative statutes. Both initiatives repealed the state inheritance tax, but they specified different effective dates for the repeal. In concluding that the different effective dates were clearly in conflict, the court stated the following general rule:

> It is a cardinal rule of statutory construction that statutes relating to the same subject matter must be read together and reconciled whenever possible....This rule applies to initiative measures enacted as statutes as well as to acts of the Legislature.... However, in case of an irreconcilable conflict between the provisions of two or more measures approved at the same election, California Constitution, article II, section 10, subdivision (b) provides that "those of the measure receiving the highest affirmative vote shall prevail."
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> <u>Estate of Gibson</u>, <u>supra</u> at 736.

Thus, case law requires that Propositions 68 and 73 be harmonized, and that effect be given to both measures, except where "irreconcilable conflict" exists. Where such a conflict does exist, the relevant provisions of Proposition 73 will supersede those of Proposition 68.

After the provisions of Proposition 68 which conflict with Proposition 73 are identified, it is necessary to determine whether any remaining provisions of Proposition 68 will become operative. In this regard, Section 10 of Proposition 68 provides:

> If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of this Act, to the extent it can be given effect, or the application of those provisions to persons or circumstances other than those as to which it was held invalid, shall not be affected thereby, and to this end, the provisions of this Act are severable.

Applying this severability clause, any remaining provisions of Proposition 68 take effect in conjunction with Proposition 73, but only if they can be severed from the conflicting provisions of Proposition 68. Any portions of Proposition 68 that cannot be severed from the parts in conflict with Proposition 73 are tainted by that conflict and become void. (See, In re Blaney (1947) 30 Cal.2d 643, 655; People's Advocate, Inc. v. Superior Court (1986) 181 Cal. App.3d 316, 330.)

The courts have applied three tests to determine if any portion of a statute is severable from those portions declared invalid. (Santa Barbara Sch. Dist. v. Superior Court (1975) 13 Cal.3d 315, 330-331; People's Advocate, Inc., supra at 330-333.) First, the language of the statute must be mechanically or grammatically severable, such as where the valid and invalid parts can be separated by paragraph, sentence, clause, phrase, or even single words. (Santa Barbara Sch. Dist. v. Superior Court, supra at 330-331.) Thus, the courts cannot save a statute by inserting words or limitations; however, the courts may give effect to discrete portions of a statute that remain after the conflicting portions are excised. (In re Blaney, supra, 30 Cal.2d at 655.) Accordingly, the provisions of Proposition 68 to be severed must be grammatically complete and distinct from those in conflict with Proposition 73.

The second test of severance is whether the sections to be severed are capable of independent application.

> The part to be severed must not be part of a partially invalid but unitary whole. The remaining provisions must stand on their own, unaided by the invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations. They must be capable of separate enforcement.
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> People's Advocate, Inc. v. Superior Court, supra at 332.

Thus, if the sections of Proposition 68 to be severed can operate independently of those in conflict with Proposition 73, they meet this test. However, if they are inextricably related to the provisions in conflict with Proposition 73, they too are void.

The final test is whether the voters would have adopted the remaining provisions by themselves.

> [T]he provisions to be severed must be so presented to the electorate in the initiative that their significance may be seen and independently evaluated in the light of the assigned purposes of the enactment. The test is whether it can be said with confidence that the electorate's attention was sufficiently focused upon the parts to be severed so that it would have separately considered and adopted them in the absence of the invalid portions.
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> People's Advocate, Inc. v. Superior Court, supra at 333.

Thus, the statements of purpose and intent in Proposition 68 and the analysis and arguments presented to the voters in the ballot pamphlet must be considered in applying this last test. These materials provide insight into the voters' perspective on Proposition 68. If they indicate that the voters adopted Proposition 68 based, at least in part, on the provisions to be severed, those provisions will be given effect.[2/]

2/ The third test is the most difficult to apply, since statements about the intent of the voters in enacting initiative statutes are primarily conjecture. Because the entire text of each initiative measure is presented to the voters in the ballot pamphlet, we are reluctant to conclude that the voters are completely unaware of specific initiative provisions. Thus, we have not relied solely on the third test to invalidate provisions of Proposition 68.

In summary, the first step in analyzing the validity of provisions in Proposition 68 is to determine which portions are in "irreconcilable conflict" with Proposition 73. The remaining provisions of Proposition 73 survive if: (1) they are mechanically severable, (2) they are complete unto themselves, and (3) they would have been adopted by the voters independent of the portions in conflict with Proposition 73. We next apply these principles to the provisions of Propositions 68 and 73.

Which Provisions of Proposition 68 are in Conflict with Provisions of Proposition 73?

We turn now to application of the foregoing principles to a discussion of which provisions of Proposition 68 conflict with provisions of Proposition 73. There are many differing views on this subject. Some have argued that Proposition 68 conflicts in its entirety with Proposition 73. Others have argued that much of Proposition 68 can somehow be harmonized with Proposition 73 to give maximum effect to both measures. Based upon our research, we believe that the answer lies somewhere between these two extremes: While a few of Propositions 68's provisions can become effective, most are in conflict with Proposition 73 or cannot be severed from those provisions which are in conflict.

General Considerations

Initially, two significant factors need to be considered. First, unlike totally new initiative enactments, which would be judged entirely on their own, standing alone, these two measures amend the pre-existing Political Reform Act (the "Act")[3]. As a result, the drafters of each measure were aware of and presumably took into account certain provisions, including definitions, contained in the Act. Consequently, in certain instances either measure's "silence" on a particular subject must be examined in light of the surrounding circumstances of the Act.

Second, an argument can be made that the analysis can be simplified if one part of Proposition 68 is considered first. Proposition 68's contribution limits, expenditure limits, and public financing all were clearly intended to relate only to legislative candidates. Proposition 73 intended that its similar restrictions apply to all candidates.[4]

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[3] Government Code Sections 81000-91015. All statutory references are to the Government Code unless otherwise indicated.

[4] This intention is evidenced in part by Propositions 73's express exception allowing for lower limitations enacted by local governmental entities. (Section 85101.)

For example, some of Proposition 68's legislative limitations are different for Senate and Assembly candidates. (Sections 85303 and 85305.) Proposition 73's limits apply equally to candidates for either office, as well as for all other offices. The ballot pamphlet bolsters this conclusion:

> Proposition 73 is the ONLY CAMPAIGN FINANCE PROPOSAL THAT APPLIES TO ALL CALIFORNIA ELECTED OFFICES including State Senate, State Assembly, statewide constitutional offices and local offices.
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> Argument in Favor of Proposition 73, California Ballot Pamphlet, June 7, 1988, at p. 34 (emphasis in original).

The ballot argument in favor of Proposition 68 makes numerous references to "Sacramento" and to legislators and legislative races. (California Ballot Pamphlet, supra at p. 14.) The analysis by the Legislative Analyst clearly points out Proposition 68's focus on legislative races and Proposition 73's broader application. (Compare the "Proposal" portion of the analysis of Proposition 68, which appears at page 12 of the ballot pamphlet, with the comparable portion of the Proposition 73 analysis, which appears at page 32.)

In their argument in opposition to Proposition 73, the supporters of Proposition 68, among them Walter Zelman for California Common Cause, recognized the extent to which passage of Proposition 73 would nullify much of Proposition 68:

> . . .Passage of Proposition 73 could prevent Proposition 68 from taking effect.
> DON'T BE FOOLED!!!
> PROPOSITION 73 IS A TRICK DESIGNED TO DEFEAT THE REAL CAMPAIGN REFORM CONTAINED IN PROPOSITION 68 AND TO PROHIBIT THE CITIZENS FROM EVER CONTROLLING CAMPAIGN SPENDING.
>
> Argument Against Proposition 73, California Ballot Pamphlet, supra at p. 35 (emphasis in original).

There is a counter argument to the foregoing argument for a simplified analysis of the conflicts: By passing both Proposition 68 and Proposition 73, the voters intended to place contribution limits on all candidates, but intended to place certain additional restrictions on legislative candidates. Where those additional restrictions do not "irreconcilably" conflict with the provisions of Proposition 73, the restrictions contained in Proposition 68 should be given effect.

Without deciding the relative merits of the two sides of this argument, we turn to a step-by-step analysis of which, if any, of Proposition 68's provisions do not conflict with those of Proposition 73.

Assemblymember Ross Johnson, one of the proponents of Proposition 73, has submitted an opinion prepared by the Legislative Counsel's Office. Based on that opinion, Mr. Johnson asserts that none of the provisions of Proposition 68 survive the passage of Proposition 73.

Frederic D. Woocher, of the Center for Law in the Public Interest, has written to the Commission on behalf of his clients, Walter Gerken, Common Cause, the League of Women Voters and Taxpayers to Limit Campaign Spending.[5] In his letter, Mr. Woocher cites authorities similar to those discussed above, then applies them to the question at hand. In so doing, he concedes that numerous provisions of Proposition 68 are in conflict with, and therefore superseded by, provisions of Proposition 73.

Professor Robert Fellmeth of the Center for Public Interest Law at the University of San Diego, has written to the Commission on behalf of Assemblyman John Vasconcellos, Consumers Union and Common Cause. Professor Fellmeth's letter primarily concerns the taxpayer financing and expenditure limitation provisions of Proposition 68. He asserts that Proposition 68 establishes a "tax credit" system; therefore, it does not provide public moneys for use in political campaigns. Accordingly, Professor Fellmeth argues that the taxpayer financing and expenditure limitation provisions of Proposition 68 are not in conflict with Proposition 73.[6]

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[5] Mr. Gerken is the formal proponent of Proposition 68. Mr. Woocher's other clients were its chief backers.

[6] The Center for Public Interest Law and Assemblyman John Vasconcellos have petitioned the Fourth District Court of Appeal for a Writ of Mandate commanding the Commission and the Franchise Tax Board to give full force and effect to the following portions of Proposition 68, effective January 1, 1989: (1) the expenditure limitation provisions (Sections 85400-85405); (2) the income tax check off and Campaign Reform Fund provisions (Sections 85500-85506 and Revenue and Taxation Code Sections 18775-18776); and (3) certain related provisions (Sections 85700-85701). (Center for Public Interest Law v. Fair Political Practices Com., No. D008786.) On October 24, 1988, the court denied the petition.

The court's denial of the petition postdates the Commission's consideration of Professor Fellmeth's arguments in the context of this opinion request. Therefore, we have set forth in this opinion Professor Fellmeth's arguments and the Commission's response to those arguments at the time of the hearing on this opinion request.

Issues Not In Dispute

In the context of this opinion request, there appears to be no disagreement that certain provisions of Proposition 68 conflict with provisions in Proposition 73. Briefly stated, the issues not in dispute are:

1. The specific contribution limitations in Proposition 68 (Article 3 at Sections 85300 through 85304, inclusive) conflict with the contribution limitation scheme in Proposition 73. (Sections 85300 through 85305.)

2. The pronibition on transfers (Section 85308) and the limitations on gifts and honoraria (Section 85310) in Proposition 68 conflict with similar provisions in Proposition 73. (Sections 85304 and 85400.)[7]

3. The provisions of Proposition 68 relating to statewide and local candidates (Section 85315), one committee and one checking account (Section 85316), and primary and general election periods (Section 85317) are directly in conflict with provisions of Proposition 73. Proposition 73 covers statewide and local candidates. Proposition 73 requires candidates to use only one campaign account. Proposition 73's fiscal year contribution limits eliminate the need for Proposition 68's definitions of primary and general election periods.

4. The title of Chapter 5 enacted by Proposition 68 is in conflict with the title enacted by Proposition 73. Hence, Section 85100 of Proposition 68 conflicts. While the findings and declarations contained in Section 85101 of Proposition 68 do not appear to conflict with any part of Proposition 73, the purposes of the chapter (Section 85102 of Proposition 68) do seem to conflict generally with the provisions of Proposition 73. (For example, see subdivisions (c), (d), (e), (f) and (h) of Section 85102 of Proposition 68. The purposes relate to Proposition 68's public financing and expenditure limitation provisions, which conflict with Proposition 73's ban on public financing as discussed previously.) On this last point, Mr. Woocher's letter appears to differ.

Issues in Dispute

Beyond these provisions on which there appears to be no major disagreement as to the conflict, there are numerous other

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7/ It should be noted that, like its contribution limits, Proposition 73's restrictions on receipt of gifts and honoraria apply alike to all elected officeholders.

provisions in Proposition 68. Some of those provisions are, in the Commission's opinion, in conflict with provisions of Proposition 73. Others are so intertwined and inseparable from those which conflict that they cannot stand alone. On many of these provisions, the Commission's opinion differs from Mr. Woocher's. On a few, the Commission's opinion differs from Assemblymember Johnson's. The Commission disagrees entirely with Professor Fellmeth.

1. Public funding for campaigns and the accompanying expenditure limits. (Article 4 and Article 5 of Chapter 5 of Proposition 68--Sections 85400 through 85506, inclusive.) These provisions of Proposition 68 clearly conflict with the express provision in Proposition 73 barring public financing of campaigns. The ballot pamphlet arguments make it clear that Proposition 73 was intended to achieve this result. (California Ballot Pamphlet, supra at pp. 34-35.)

Mr. Woocher and the proponents of Proposition 73 agree with this conclusion.[8] Professor Fellmeth does not. He concludes that Proposition 68 establishes a "tax credit" system for financing campaigns. He then distinguishes "tax credit" moneys from "public moneys." The "tax credit" moneys are deposited in the Campaign Reform Fund. If the moneys in that fund are not "public moneys," then they can be used to finance campaigns despite Proposition 73, because Proposition 73 only prohibits use of "public moneys" in campaigns. Thus, Professor Fellmeth asserts that the taxpayer financing and expenditure limits of Proposition 68 survive passage of Proposition 73 by a greater number of votes.

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[8] Subsequently, Common Cause has taken the position that the provisions of Proposition 73 which ban public financing of political campaigns are unconstitutional. Common Cause thus asserts that the public financing and expenditure limitation provisions of Proposition 68 survive passage of Proposition 73.

Section 3.5 of Article III of the California Constitution prohibits any administrative agency, including the Commission, from declaring a statute unconstitutional. It also prohibits administrative agencies from declaring a statute unenforceable or refusing to enforce a statute on the basis of its being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. Accordingly, the question concerning the constitutionality of the ban on public financing is not included in the issues discussed in this opinion.

Professor Fellmeth's conclusions depend on characterization of the tax check off in Proposition 68 as a "tax credit." This characterization is erroneous. A "tax credit" reduces tax liability. (See Revenue and Taxation Code Sections 17052.1-17061.5.) The tax check off in Proposition 68 would not reduce tax liability. Instead, it would allow taxpayers to earmark up to three dollars of their state income tax payments for deposit in the Campaign Reform Fund, a special fund created by Proposition 68. Taxpayers who choose this option would neither reduce nor increase their tax liability. (Revenue and Taxation Code Section 18775, as added by Proposition 68.) Thus, the tax check off in Proposition 68 is not a "tax credit."

Professor Fellmeth also asserts that the moneys deposited in the Campaign Reform Fund by means of the tax check off are not "public moneys." However, he does not address the fact that the moneys in the Campaign Reform Fund are treated as public moneys by other provisions of Proposition 68.

For example, all money over $1 million remaining in the Campaign Reform Fund as of January 31 in the year following a general election must be "refunded to the General Fund." (Revenue and Taxation Code Section 18776, as added by Proposition 68.) The "refund" of surplus moneys to the State General Fund implies that the moneys are state moneys when collected. Proposition 68 also requires the State Controller to disburse moneys in the Campaign Reform Fund to candidates. (Section 85505 of Proposition 68.) Thus, Proposition 68 places responsibility for the Campaign Reform Fund with the Controller, as is typically the case with state moneys. Finally, Proposition 68 appropriates $500,000 each year from the Campaign Reform Fund to the Commission. (Section 83122.5 of Proposition 68.) Section 83122.5 of Proposition 68 specifically requires that expenditure of these funds by the Commission shall be subject to the normal administrative review given to "other state appropriations," again implying that the moneys in question are public moneys.

In summary, the Commission disagrees with Professor Fellmeth's conclusions. The Commission's position is that Proposition 68 clearly establishes a system of public financing of campaigns and imposes related expenditure limits. Proposition 73 prohibits public financing of campaigns. Thus, the public financing provisions and expenditure limits of Proposition 68 are in irreconcilable conflict with Proposition 73.

2. Because almost all of the relevant provisions of Proposition 68 are in conflict with provisions of Proposition 73, the definitions contained in Article 2 of Proposition 68 become

moot to the extent that they do not directly conflict with those contained in Proposition 73.[9]

3. The prohibition contained in Section 85309 of Proposition 68 on acceptance of contributions by legislators or legislative candidates during non-election years conflicts with the fiscal year limitations in Proposition 73.

First, this provision would apply only to legislative candidates. As previously noted, there is a question as to whether a different scheme of contribution limits for legislative candidates conflicts generally with Proposition 73's overall scheme imposing the same limits on all candidates. Proposition 73 expressly permits local jurisdictions to impose lower contribution limitations. However, there is no express authority for any lower or different limitations being imposed on legislative candidates.

Second, the fiscal year contribution limits in Proposition 73 appear to preclude the off-year ban in Proposition 68. If Section 85309 of Proposition 68 were to be read in conjunction with Proposition 73, the result would be that contributions up to Proposition 73's fiscal year limits could be received only during the last half of one fiscal year and the first half of another fiscal year. In the case of Senate candidates, contributions could be received in neither half of two fiscal years out of every four. We think the argument collapses of its own weight.

Proposition 68's contribution limitation scheme is based on an election-by-election limitation. The off-year ban fits into that scheme. (See Section 85317 of Proposition 68 defining these election periods.) Proposition 73, on the other hand, presents a scheme which is based on fiscal year limitations. (Sections 85301 through 85303 of Proposition 73.) To attempt to modify certain parts of that scheme to accommodate the off-year ban on contributions is not feasible. Therefore, we conclude that the off-year ban contained in Proposition 68 conflicts with provisions of Proposition 73.

4. Section 85313 of Proposition 68 relates to the treatment of campaign loans. It has been argued that the provisions of subdivisions (a) and (b) of Section 85313 of Proposition 68 should not be deemed in conflict with Proposition 73. Those subdivisions treat a guarantor as a maker of the loan

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[9] One possible exception to this is the definition of "Campaign Reform Fund" contained in Section 85305. This will be discussed further below.

and require loans to be evidenced by written instrument. The proponents of Proposition 68 concede that the remaining provisions of Section 85313 are in conflict with Proposition 73. (Section 85307.)

The Commission's view is that the entire section conflicts with provisions of Proposition 73. Sections 85201(c), 85301(a), 85302, 85303, 85305(c), and 85307 of Proposition 73 make it clear that loans are to be treated the same as contributions for purposes of Proposition 73's limitations. Reading Section 85313(a) and (b) into Proposition 73's limitations scheme does not further this result. Legislators and legislative candidates would be subject to one reporting standard for campaign loans while all other candidates would be subject to a different standard. It is apparent that Proposition 73 intended that uniform standards apply to all candidates.

Furthermore, since Proposition 73 takes the Act's other provisions as it finds them, the subject of reporting loans is already addressed by existing provisions in the Act. Reporting of loans to candidates and their committees is already covered by Section 84216 of the Act. Section 82015 defines a "contribution" to include a "payment," which is defined in Section 82044 to include a loan. Consequently, in drafting Proposition 73, the proponents recognized that defining loans as contributions and requiring their disclosure was already addressed in the Act.

Since Proposition 73 addresses the issue of loans as contributions and there is no indication that its "silence" on the specifics of reporting loans was anything other than an acceptance of the existing reporting provisions of the Act, we believe that the provisions of Section 85313 of Proposition 68 are in conflict with the provisions of Proposition 73.

5. It has also been argued that Section 85314 of Proposition 68, relating to <u>contributions by family members</u>, is not in conflict with provisions of Proposition 73. We cannot agree.

Section 85102(b) of Proposition 73 defines the term "person" for purposes of its contribution limitations. In so doing, the definition supersedes the general definition of "person" contained in the Act. (Section 82047.) The Act's definition includes ". . . any other organization or group of persons acting in concert." The definition of "person" contained in Section 85102(b) of Proposition 73 omits this phrase. However, the phrase "acting in concert" appears in subdivisions (c) and (d) of Section 85102. Those subdivisions define the terms "political committee" and "broad based political committee."

Given the definitions contained in Section 85102 of Proposition 73, it seems apparent that its drafters sought to combine contributions from more than one person acting in concert under a different limitation than the one which applies to persons acting alone. Consequently, under Proposition 73's scheme, a husband and wife may each contribute $1,000 to a candidate, individually. However, if the husband or wife acts in concert with others to give contributions to the same candidate they would be treated as a political committee, subject to Proposition 73's limitation of $2,500 in a fiscal year. (Section 85303(a).)

Under Section 85314(a) of Proposition 68, the result for husband and wife would be the same as under Proposition 73. However, the provisions of Section 85314(b) conflict. Contributions from a child under 18 would be considered under Section 85102(c) of Proposition 73 to be made in concert with the parent, thereby subject to the combined $2,500 limitation. Under Section 85314(b) of Proposition 68, the child's contribution would be attributed to each of the parents; thus, the child and parent together could contribute only the $1,000 permitted for a "person" under Proposition 73. The result under the two measures is different, and thus the two measures are in conflict.

6. Section 85307 of Proposition 68 limits the total contributions to legislative candidates from "organizations" and "small contributor political action committees." These are terms which are defined in provisions of Proposition 68 which we have already determined to be in conflict with Proposition 73. Since these groups would not exist under Proposition 73's scheme, the provisions of Section 85307 of Proposition 68 are in conflict with those of Proposition 73.

7. Section 85306 also conflicts. It places a limit on aggregate contributions from "persons" to all legislative candidates. That limit is $25,000 in the aggregate in any "two-year period." Since Proposition 68 does not specifically define the term "person," it takes the Act's definition as it finds it. As previously discussed, the Act's definition differs in a crucial regard from that contained in Proposition 73. Consequently, there is a conflict between the intended application of Section 85306, using the Act's definition of person, and the result which would be achieved if Section 85306 were read into Chapter 5 of Proposition 73.

An additional conflict arises because of the reference in Section 85306 to a two-year period. That time frame is defined in Proposition 68 to cover an odd-numbered calendar year together with the subsequent even-numbered calendar year. As discussed previously, Proposition 73 bases all of its limitations on a fiscal year schedule. The Commission believes that this was

designed to negate the scheme contained in Proposition 68. In any event, the two provisions seem clearly to conflict.

Lastly, Sections 85306 and 85307 of Proposition 68 are designed to place certain overall caps on the amounts which any specific contributor may contribute. The supporters of Proposition 68 recognized that Proposition 73 would allow specific contributors to contribute large amounts to candidates, amounts far beyond the caps contained in these two sections which they now argue should be read into Proposition 73. In the ballot argument against Proposition 73, Walter Zelman of Common Cause and others stated:

> Proposition 73's contribution limits will not solve the campaign financing problem. Proposition 73's purported "limits" are so full of loopholes that they will have virtually no impact. A single lobbying group can still give over $2 million to candidates for the Legislature at a single election! . . .
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> California Ballot Pamphlet, supra at p. 35 (emphasis in original).

In the rebuttal to the argument in favor of Proposition 73, the California Attorney General and the President of the League of Women Voters, among others, argued:

> Under Proposition 73's so-called "limits," a single special interest group could give incumbent legislators as much as $600,000 per year, or $1.2 million per election cycle. . . .
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> California Ballot Pamphlet, supra at p. 34.

As a consequence of the foregoing, it is clear that the voters were fully apprised of the fact that Proposition 73 would not limit the total amount which any specific contributor could contribute.[10]

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[10] An argument can be made that the voters passed Proposition 68 as well as Proposition 73 to include aggregate caps for legislative races. However, the underlying conflict is still present between the two measures.

For the foregoing reasons, we conclude that the provisions of Proposition 68 which place aggregate caps on contributions by specific contributors are in conflict with the provisions and intent of Proposition 73.

8. The other aggregation provision of Proposition 68 is Section 85312. This section requires that certain persons' contributions be aggregated. In general, it requires aggregation when one entity is financed or controlled by another. Again, it has been argued that this section's provisions do not conflict with Proposition 73. Again, we do not agree with that conclusion. There are several reasons for this view.

First, by its specific language, Section 85312 applies to certain enumerated sections of Proposition 68. Coincidentally, all of the sections referred to, except Section 85310, happen to duplicate section numbers in Proposition 73. Thus, by merely excising the one section number, Section 85312 could be sensibly read to apply to Proposition 73. However, the precise language of Section 85312(a) makes reference to "person, organization or small contributor political action committee." As stated previously, these terms are in conflict with terms used in Proposition 73.

Consequently, it would be impossible to apply Section 85312(a) to entities and individuals covered by Proposition 73 unless words were both deleted and added. The latter is not permitted. (See In re Blaney, supra; People's Advocate, Inc., supra.). The provisions of Section 85312(a) are therefore in conflict with Proposition 73.

Section 85312(b) states that two or more "entities" (an undefined term) will be treated as one "person" when certain circumstances apply. These include whenever entities share a majority of members or two or more officers or are in a parent-subsidiary relationship. What the subdivision endeavors to accomplish is to treat certain facts as evidence that two or more entities are acting in concert. Thus, according to subdivision (b), the entities are a "person" for purposes of contribution limits.

As previously discussed, Proposition 73 expressly defined "person" to exclude persons acting in concert. Persons acting in concert are considered political committees under Proposition 73 (or if enough persons act in concert, they are a broad based political committee). Clearly, the thrust of Section 85312(b) of Proposition 68 is in direct conflict with the express provisions of Proposition 73 regarding entities acting together (i.e., acting in concert to make contributions to a single candidate).

Section 85312(c) is subject to the same conflict. This provision treats an individual partner and any general partnership in which the individual is a partner as one person. The purpose is the same as Section 85312(b), and the conflict with Proposition 73 is the same.

Section 85312(d) endeavors to restrict membership in multiple committees supporting legislative candidates. It specifically prohibits such committees from acting in concert. Again, the thrust of this subdivision is in direct conflict with the provisions of Proposition 73.

It should be noted that Section 85312 deals not only with aggregation of contributions but also with gifts and honoraria. Gifts and honoraria under Proposition 73 are also restricted; however, the limitation is on gifts and honoraria received from a "single source." (Section 85400.) This term differs from "person" and will need to be defined at a later date.

9. Section 85305 of Proposition 68 takes a different approach from those sections just discussed. Section 85305 places an aggregate cap on contributions to a legislative candidate from all non-individuals. Unlike the sections which use the term "person," this section uses an undefined term--"non-individual." The use of this term does not directly conflict with Proposition 73.

However, other aspects of Section 85305 do conflict with provisions of Proposition 73. The limits set forth in Section 85305 are different for candidates for the Senate and the Assembly. Proposition 73's provisions evidence an intent that all candidates be treated equally (except for those situations where local jurisdictions set lower limits). Consequently, there is an incongruity between the differential limits in Section 85305 and the scheme of limits contained in Proposition 73. Excising the differential limits from Section 85305 eliminates the limits entirely and makes the section meaningless.

10. It has been argued that Section 85506(b), spelling out how surplus funds should be returned, does not conflict with Proposition 73. We have previously concluded that all of Article 5 of Chapter 5 of Proposition 68 conflicts with Proposition 73, since Article 5 deals with public financing. However, because of the argument raised over this specific subdivision, we will address it specifically here.

Section 85506(a) specifies disposition of surplus campaign funds where public financing has been accepted. The proponents of Proposition 68 have endeavored to sever subdivision

(b) from subdivision (a) in order to argue that there is no conflict. We do not believe that the patient can survive the surgery. It is clear from the context that Section 85506(b)'s provisions were to apply only where a candidate had accepted public financing, which Proposition 73 explicitly bans. If it had been intended to apply to all legislative candidates, rather than only to those who accepted public financing, Section 85506(b) would have been situated elsewhere in the initiative, such as in Article 3. As a result, we conclude that both subdivisions of Section 85506 of Proposition 68 conflict with Proposition 73.

11. The independent expenditure provisions of Proposition 68 fall into a different category than the contribution limitation provisions discussed in paragraphs 3 through 10, above. On this topic, Proposition 73 is generally silent. However, Section 85303(c) of Proposition 73 states that:

> Nothing in this Chapter shall limit a person's ability to provide financial or other support to one or more political committees or broad based political committees provided the support is used for purposes other than making contributions directly to candidates for elective office.
>
> (Emphasis added.)

The Commission believes that this provision evidences the intent on the part of the drafters of Proposition 73 to expressly not limit in any way the ability to make independent expenditures. Thus, the provisions in Proposition 68 which endeavor to limit independent expenditures under the guise of controlling contributions are in conflict with Proposition 73. This includes Sections 85601 (contribution limits), 85602 (limits on independent expenditures by contributors), and 85603 (reproduction of materials).

Unlike those sections, Sections 85600 and 85604 do not act to limit either contributions or independent expenditures. Instead they merely require disclosure of information relative to independent expenditures. Section 85600 requires inclusion of a notice on mass mailings supporting or opposing legislative candidates, if sent independently. This requirement parallels a federal requirement which is similar in nature, although broader in scope. (2 U.S.C. Section 441d(a)(3).)

Section 85604 requires any person who makes independent expenditures of more than $10,000 in support of or in opposition to a legislative candidate to notify the Commission and the other

candidates whenever that threshold is met. Again, this is merely a disclosure requirement that would seem to in no way conflict with the provisions of Proposition 73.[11]

12. Article 7 of Chapter 5 of Proposition 68 sets forth responsibilities for the Commission and the Franchise Tax Board. Clearly, the audit duties of the Franchise Tax Board set forth in Section 85701 are not severable from the public funding provisions contained in Article 5 and consequently would not have been independently enacted by the voters.

Section 85700 provides for certain duties to be carried out by the Commission. Subdivisions (a) (adjustment of limits) and (c) (verification of requests for public funding) specifically relate to the public funding provisions described above and are not severable from those provisions.

However, subdivisions (b) and (d) do not specifically relate to the public funding provisions of Proposition 68. Subdivision (b) requires the Commission to prescribe the necessary forms for filing the appropriate statements. This provision can easily apply to preparation of the forms for filing the declaration of intent and notification of bank account required by Section 85200 and Section 85201(b) of Proposition 73.

Subdivision (d) states that the Commission shall:

> Prepare and release studies on the impact of this title. These studies shall include legislative recommendations which further the purposes of this title.
>
> (Emphasis added.)

It is obvious from the language of the subdivision that it is in no way tied to the public funding or contribution or expenditure limitation provisions of Proposition 68. Title 9 includes the entire Political Reform Act. There is nothing about this language which makes it either non-severable from other provisions in Proposition 68 or in conflict with any provisions in Proposition 73.

11/ As to Sections 85600 and 85604, there is no disagreement between the Commission and the proponents of Proposition 68. The disagreement is with the proponents of Proposition 73.

13. It is generally agreed that Section 3 of Proposition 68, which repealed the income tax deduction for political contributions, is made moot by the Legislature's previous repeal of the section.

14. There is a substantial question regarding the severability of Section 2 of Proposition 68. The proponents of Proposition 68 have argued that since the Campaign Reform Fund cannot be used for its primary purpose--the public financing of campaigns--that the entire fund should be scrapped.

Section 18775, which Proposition 68 adds to the Revenue and Taxation Code, creates the Campaign Reform Fund by way of a tax checkoff on state income tax forms. This fund is to be used (1) to support the Commission and (2) to fund legislative campaigns. While the money obviously cannot now be used to finance legislative campaigns, the other use established for the funds might be determined by a court to be severable.

The notice and check off which would be required to appear on tax returns merely makes reference to the Campaign Reform Fund. It does not specify that funds will be given to candidates. The other use of the funds (see Section 4 of Proposition 68) is to fund the operations of the Commission. If the Campaign Reform Fund receives excessive tax checkoff funds, the initiative requires them to be returned to the General Fund of the state. (Section 18776 of the Revenue and Taxation Code, also enacted by Proposition 68.) Therefore, excess funds, which cannot be used to finance legislative campaigns, would be returned to the General Fund after payment of the Commission appropriation.

There is nothing in either Proposition 68 or Proposition 73 or in the ballot arguments accompanying them which would provide any indication that the voters did not wish the Commission to have additional funding to carry out its duties under these two measures. In fact, the Legislative Analyst's fiscal analysis of each measure clearly informed the voters that the Commission would need additional funding in order to implement the voters' will. The fiscal analysis for Proposition 68 further advised the voters that the funding would come from the tax checkoff fund.

> Administrative Costs. State administrative costs will be about $1.9 million a year. Most of this cost (up to $1.2 million) will be incurred by the Fair Political Practices Commission and will be financed out of the designated income tax funds. . . .
>
> California Ballot Pamphlet, *supra* at p. 13.

It is clear that whatever the ultimate resolution of the overlap of Proposition 68 with Proposition 73, the provisions of Proposition 73 standing alone will necessitate additional appropriations for the Commission's activities. For instance, the Commission's preliminary estimates are that over 27,000 elected offices exist statewide which are now subject to Proposition 73. As a result, it is anticipated that as many as 104,000 officials and candidates will need to file the declaration of intent and notification of establishment of account required by Sections 85200 and 85201(b) of Proposition 73. A massive education effort must be undertaken, not to mention the filing and information retrieval systems which must be created.

Furthermore, the Commission will incur greater enforcement responsibilities in implementing Proposition 73, with or without Proposition 68. Numerous clarifying regulations will need to be formulated and adopted. Campaign reporting statements and schedules will have to be coordinated, taking into account the current calendar year filing schedules and Proposition 73's fiscal year limits.

There is nothing in either Proposition 73 nor in the ballot materials to suggest that the appropriation contained in Section 83122.5 of Proposition 68 is in conflict with Proposition 73. The issue is whether the appropriation is severable from provisions of Proposition 68 which are in conflict with Proposition 73.

We conclude that neither the Campaign Reform Fund nor the appropriation to the Commission survives passage of Proposition 73. The primary purpose of the Campaign Reform Fund is to provide for public financing of election campaigns and thereby support spending limits on those campaigns. Because this primary purpose of the Campaign Reform Fund conflicts with Proposition 73, we conclude that the Fund itself is in conflict with Proposition 73.

Provisions Not in Conflict

On the following provisions of Proposition 68, there also is some disagreement between the Commission and the proponents of Proposition 68. These provisions of Proposition 68 are not in conflict with Proposition 73. The next question is whether they are severable from the parts of Proposition 68 which are in conflict. The Commission has concluded that the provisions of Proposition 68 concerning return of contributions and criminal and civil penalties are not severable. Otherwise, the conclusion is that the remaining provisions do not conflict with Proposition 73 and are severable from those provisions of Proposition 68 which do conflict. However, some others, including the proponents of Proposition 73, disagree.

15. Section 85311 of Proposition 68 allows legislative candidates to return undeposited contributions within 14 days of receipt. In such event, the contribution is treated as if never received. It has been argued that this provision does not conflict with Proposition 73 and should be used to supplement Proposition 73. It is the Commission's view that it is not severable from the other contribution limitation provisions of Proposition 68 which are in conflict with Proposition 73.

Given that Proposition 73 leaves intact most of the definitions and other campaign-related provisions of the Act, the provisions contained in Section 84211(q) regarding refunding contributions would apply. Those provisions allow candidates and committees to return contributions within certain time frames, so long as the contributions have not been cashed, negotiated or deposited.

Consequently, there is no inherent need to try to read Section 85311 of Proposition 68 into Proposition 73. Provisions exist in the Act to allow for return of certain contributions before they have been deposited.

16. Section 5 of Proposition 68 amends Section 91000 of the Act. That section provides for criminal penalties for violation of the Act. The amendments permit felony or misdemeanor prosecution for violations of contribution limits. (Current law limits criminal penalties to misdemeanor prosecution.)

There is no comparable provision in Proposition 73, nor is there any provision of Proposition 73 which indicates a specific intent to negate the amendment to Section 91000 made by Proposition 68. No changes would be necessitated in the language of the amended Section 91000 in order to have it operate in conjunction with Proposition 73.

It can be argued that the amendment to Section 91000 to increase the potential criminal penalties for violation of contribution limitations evidences the public's concern that the limits be strictly adhered to by candidates and contributors alike. However, it also can be argued that more severe criminal sanctions were desired because of Proposition 68's provision for public financing of campaigns, but there was never any guarantee that any legislative candidate would ever have taken advantage of public financing since its acceptance was tied to the acceptance of expenditure limits. In that event, only the contribution limitation provisions of Proposition 68 would have been subject to possible violation. Under those circumstances, prosecution under the strengthened Section 91000 would still have been permitted. This fact supports the view of the proponents of Proposition 68

that the amendments to Section 91000 do not conflict with Proposition 73 and are severable from provisions of Proposition 68 which do conflict.

Proponents of Proposition 73, on the other hand, argue that the amendments to Section 91000 permitting felony prosecution are specifically tied to the Chapter 5 which would have been added to the Political Reform Act by Proposition 68. That Chapter 5, like the Chapter 5 added by Proposition 73, would have imposed various contribution limitations. However, it would also have established partial public financing and imposed related expenditure limits. Since that specific Chapter 5 will not become operative, the proponents of Proposition 73 believe that the alternate felony-misdemeanor penalty scheme also cannot become operative.

This is a close question. On balance, however, we believe that the felony penalties are not severable from conflicting provisions of Proposition 68.

17. Section 6 of Proposition 68 amends Section 91005 of the Act. Section 91005 provides for civil liability for violation of certain enumerated sections of the Act. Proposition 68 added numerous specific sections of its provisions to the list. To the extent that these sections are in conflict with Proposition 73, their addition to Section 91005 can be of no effect and their enumeration arguably can be severed from the section.

The other amendment to Section 91005 raised the amount recoverable in certain cases as civil damages from $500 to $1,000. This amendment does not conflict with anything in Proposition 73 and is arguably severable from other aspects of Proposition 68. It increases the amount recoverable as civil damages for various campaign and lobbying violations. Again, there is nothing in the ballot materials concerning Proposition 73 which would evidence an intent not to increase liability for violations of the state's existing campaign and lobbying statutes.

The arguments in favor and against the severability of this provision are similar to the arguments concerning criminal penalties. Although this is perhaps an even closer question, we conclude that this provision also is not severable for the reasons stated above.

18. Section 7 of Proposition 68 amends Section 83116 of the Act. The amendments clarify that the administrative penalties which may be imposed by the Commission are cumulative in scope. Again, there is nothing in Proposition 73 which conflicts with this amendment. The amendment applies to all violations of the

Act, which now includes Proposition 73. This amendment is clearly severable from the provisions of Proposition 68 which conflict with Proposition 73.

19. Section 8 of Proposition 68 adds a new provision to Chapter 4 of the Act. New section 84106 requires a controlled committee to have the name of the controlling individual or entity in the name of the controlled committee.

Again, this requirement does not appear to in any way conflict with any of the provisions of or the intent of Proposition 73. It does conflict in numbering with existing Section 84106 of the Act, which contains a similar requirement for sponsored committees. A renumbering of one of the sections will be needed for clarity at some point in the future, but this type of numbering error has not invalidated duplicative sections in the past. (See Section 82048.5.)

20. Section 9 of Proposition 73 adds Section 84302.5 to the Act to define "intermediary." Again, nothing in Proposition 73 appears to conflict, either directly or indirectly, with this definition. In fact, the section's provisions would seem to help clarify matters under both the Act and Proposition 73's additions to the Act. The placement of Section 84302.5 immediately following Section 84302, which governs required disclosures when contributions are made by an agent or intermediary, makes it clear that the intent was to provide clarity in that area. With contribution limits in effect, this distinction takes on added importance.

21. Section 10 of Proposition 68 contains its severability provisions which have been discussed previously. This section of the proposition is uncodified and does not conflict with Proposition 73. It is an aid to the effort to determine which provisions of Proposition 68 should be given effect.

22. Section 11 establishes the procedure for legislative amendment of Proposition 68. This section does not conflict with Proposition 73 and contains an important difference from the similar provision in Proposition 73. Section 11 of Proposition 68 covers all of that measure's provisions, including the amendments to the Revenue and Taxation Code to establish the tax checkoff and Campaign Reform Fund. Proposition 73's comparable provision applies only to Chapter 5 of that measure. Hence, Section 11 of Proposition 68 should be given effect as to that measure's provisions which are given effect.

23. Section 12 of Proposition 68 is an uncodified provision that the measure is to be liberally construed. To the extent that Proposition 68's provisions may be given effect, this section should likewise be given effect. Nothing about it conflicts with Proposition 73, which, as an amendment to the Act, is subject to the Act's similar provision contained in Section 81003.

24. Section 13 of Proposition 68 contains its effective date. The Commission has previously advised that the operative date is January 1, 1989, for most parts of the measure. The proponents are in agreement.

Of the provisions in Proposition 68 which we have concluded survive passage of Proposition 73, several are provisions which the Commission previously advised would become effective and operative June 8, 1988. These provisions are:

(1) Commission duty to prescribe forms and to studies. (Section 85700(b) and (d).)

(2) Clarification that administrative penalties are $2,000 per violation. (Section 83116.)

(3) Requirement that controlled committee name include controlling individual's name. (Section 84106.)

(4) Intermediary definition. (Section 84302.5.)

(5) Severability, amendment, liberal construction and effective date provisions. Sections 10 through 13 of Proposition 68.)

Summary

In conclusion, we can summarize the Commission's views on the overlap and conflict between Proposition 68's provisions and those of Proposition 73 in the following chart. Unless otherwise indicated, provisions of Proposition 68 which survive passage of Proposition 73 become operative January 1, 1989.

Provision of Proposition 68	Commission's Conclusion
Section 1. Chapter 5	
Article 1.	
Title of Measure	Conflict with 73
Findings and Declarations	No Conflict with 73
Purposes	Conflict with 73
Article 2.	
Definitions	Conflict with 73 or Not Severable
Article 3.	
Contribution Limitations (including provisions governing off-year elections, return of contributions, campaign loans, family contributions, total contributions from organizations and small contributor PACs, aggregate limits to all legislative candidates, aggregation of contributions from related entities, and aggregate limits on contributions from non-individuals)	Conflict with 73 or Not Severable
Article 4.	
Expenditure Limitations	Not Severable
Article 5.	
Public Financing (including provisions governing disposition of surplus funds)	Conflict with 73

Article 6.

Independent Expenditures

Disclaimer on Mailings	No Conflict with 73 and Severable
Contribution Limits	Conflict with 73
Limits on Expenditures by Contributors	Conflict with 73
Reproduction of Materials	Conflict with 73
Disclosure for $10,000 Independent Expenditures	No Conflict With 73 and Severable

Article 7.

Duties of Commission

Regarding Public Financing	Conflict with 73
Prescribe Forms*	No Conflict with 73 and Severable
Studies*	No Conflict with 73 and Severable
Duties of Franchise Tax Board	Not Severable

Section 2.

Repeal of Tax Deduction	Moot

Sections 3 and 4.

Campaign Reform Fund and Appropriation to Commission	Conflict with 73

Section 5.

Increased Criminal Penalties	Not Severable

Section 6.

Increased Civil Liability	Not Severable

*Indicates provisions operative June 8, 1988.

Section 7.	
Clarification Regarding Administrative Penalties*	No Conflict with 73 and Severable
Section 8.	
Identification of Committees*	No Conflict with 73 and Severable
Section 9.	
Definition of Intermediary*	No Conflict with 73 and Severable
Section 10.	
Severability Clause*	No Conflict with 73 Remains for Guidance
Section 11.	
Legislative Amendments*	No Conflict with 73 and Severable
Section 12.	
Construction of 68*	No Conflict with 73 Remains for Guidance
Section 13.	
Effective Date*	No Conflict with 73 Remains for Guidance

*Indicates provisions operative June 8, 1988.

Approved by the Commission on November 9, 1988. Concurring: Chairman Larson, Commissioners Fenimore, Lee, Montgomery and Roden.

John H. Larson
Chairman