RAVI MEHTA
CHAIRMAN

FAIR POLITICAL PRACTICES COMMISSION

January 24, 1997

Bruce M. Brusavich
Law Offices of Agnew & Brusavich
20355 Hawthorne Boulevard
Torrance, California 90503

Re: Your Request for Advice
Our File No. I-96-358

Dear Mr. Brusavich:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").[1] Because you have not disclosed the identity of the person or persons for whom you seek this advice, we are treating this as a request for informal advice, as required under Regulation 18329 (copy enclosed).

QUESTIONS

1. Is a private cause of action available under Section 83116.5 after January 1, 1997, against persons who are alleged to have aided and/or abetted violations of the Act in 1995, at a time when they were not elected officials, candidates or treasurers?

2. Would the persons referenced in question 1 face joint and several liability under Section 91006, after January 1, 1997?

CONCLUSIONS

Question 1. Proposition 208 has changed prior law to permit assertion of a private cause of action under Section 83116.5, against persons who are not elected officials, candidates, or treasurers. However, such a cause of action may not be asserted retroactively against persons whose conduct was not at the time a violation of the Act.

Question 2. Proposition 208 directs that persons liable for violations of Section 83116.5

[1] Government Code sections 81000 - 91015. Commission regulations appear at title 2, sections 18000 - 18995, of the California Code of Regulations.

shall be liable "jointly and severally." This expansion of liability among defendants can not, however, be applied retroactively to any person whose liability arises out of acts or omissions completed prior to January 1, 1997.

ANALYSIS

Question 1

A. The Availability of a Private Cause of Action After January 1, 1997

The California Political Reform Act of 1996 ("Proposition 208"), which went into effect on January 1, 1997, changed the law implicated by your question by adding three words to, and removing the final sentence from, Section 83116.5 of the Act. In the following quoted text of Section 83116.5, the words added by Proposition 208 are highlighted in bold type, and the sentence removed by Proposition 208 is italicized:

> "Any person who violates any provision of this title, who purposely or negligently causes any other person to violate any provision of this title, or who aids and abets any other person in the violation of any provision of this title, shall be liable under the provisions of this chapter **and Chapter 11.** *Provided, however, that this section shall apply only to persons who have filing or reporting obligations under this title, or who are compensated for services involving the planning, organizing, or directing any activity regulated or required by this title, and that a violation of this section shall not constitute an additional violation under Chapter 11."*

The sentence deleted by Proposition 208 exempted from liability for "aiding and abetting" violations of the Act essentially all persons other than holders of public office, candidates for elective office, campaign chairs, and persons paid to assist them in complying with the Act. Thus, under the law in effect following January 1, 1997, there is no class of persons exempted by this statute from liability for "aiding and abetting" violations of the Act.

The final clause of the sentence removed by Proposition 208 specified that a violation of Section 83116.5 was *not* also a violation of Chapter 11 (which begins at Section 91000). If the removal of that clause left any doubt, the three words added by Proposition 208 clarify matters by expressly stating that violation of Section 83116.5 is *also* a violation of Chapter 11. This change was accompanied by repeal of former Section 91015, which expressly provided that provisions of Chapter 11 "shall not apply to violations of Section 83116.5". The changes introduced by Proposition 208 plainly indicate that violations of Section 83116.5 shall also be considered violations of Chapter 11. The enforcement provisions of Chapter 11 include a private cause of action for violation of reporting requirements under Chapter 3 of the Act. (Section 91004.)

In making violations of Section 83116.5 violations of Chapter 11 as well, Proposition 208

effectively reversed the outcome of *McCauley v. BFC Direct Marketing* (1993) 16 Cal.App. 4th 1262, insofar as that decision concluded that no private cause of action was available for "aiding and abetting" violation of reporting requirements under Section 83116.5. The grounds for the *BFC* decision were, precisely, the words of Section 83116.5 now amended by Proposition 208. (*BFC, supra*, 16 Cal.App.4th at 1268.)

To summarize, Proposition 208 changed the law pertinent to your inquiry in two ways. Under former Section 83116.5, it was not a violation of the Act for a person - apart from one with filing or reporting obligations, or their paid advisors - to "aid or abet" another person to violate the Act. After January 1, 1997, all persons are potentially liable under Section 83116.5. Secondly, as noted in *BFC,* prior law did not permit a private cause of action for violation of Section 83116.5, which was expressly not actionable under Chapter 11. Proposition 208 has eliminated the statutory basis for exempting Section 83116.5 from the enforcement provisions of Chapter 11. After January 1, 1997, violation of Section 83116.5 may be alleged in a private cause of action. To fully respond to your specific question, however, it is necessary to determine whether these changes in the law have retroactive effect.

B. Retroactive Effect

In asking whether a private cause of action may now be brought for conduct prior to January 1, 1997, against persons whose conduct was not a violation of Section 83116.5 prior to January I, 1997, you are asking whether the pertinent portions of Proposition 208 will be given retroactive effect. Retroactive application of legislation, including initiative measures, has long been disfavored in California, as a matter of policy succinctly stated by a recent decision of the Third District Court of Appeal, as follows:

> "In many instances there are constitutional prohibitions and in all instances there is a constructional policy against the retroactive application of legislation. [Citations omitted.] In general, legislation that makes certain conduct unlawful cannot be applied to conduct that was lawful and completed before its enactment." (*Beck Development Co., Inc. v. Department of Toxic Substances Control* (1996) 44 Cal.App.4th 1160, 1207 (citations omitted); see also *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207.)

In *Evangelatos* the California Supreme Court provided a lengthy and instructive analysis of the possible retroactive application of Proposition 51, a tort reform initiative affecting, among other things, joint and several liability among tortfeasors. The Supreme Court emphasized that the question whether a statute is to apply retrospectively or prospectively is, in the first instance, a policy question for the legislative body which enacted the statute, and that the question of legislative intent must be resolved before taking up any constitutional problems peculiar to retroactive application of the statute at hand. (*Evangelatos, supra*, 44 Cal.3d. at 1206.) Initiative measures are subject to the ordinary rules and canons of statutory construction. (*Id.* at 1212). As

a result, the language of the initiative is examined for any statement of intent on the question. If there is evidence from voter pamphlets and similar election materials that the voters differed from the drafters in their intent on prospective or retrospective application, then the intent of the voters will prevail. (*Ibid.*) Any evidence of intent must, however, meet the high standard articulated in an earlier California Supreme Court decision, *Aetna Cas. & Surety Co. V. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393: "It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Id.* at 1207.)

Nothing within the four corners of Proposition 208 suggests an intent to apply Section 83116.5 retroactively. Nothing in the materials presented to voters suggests any such intent. Ballot pamphlet arguments sought to characterize Proposition 208 as more conservative and more likely to survive constitutional challenge than the rival Proposition 212; to the extent such arguments can be read as bearing on the question of retroactive application, they suggest a disinclination to expose Proposition 208 to constitutional attack through retroactive application.

Finally, the objectives of Proposition 208, as evidenced by the Findings and Declarations at Section 85101, and the statement of purpose at Section 85102, do not call for or require retroactive application of Section 83116.5. Because there is no evidence of intent, whether on the part of the drafters or on the part of the voters, to apply it retroactively, Section 83116.5 can only be given prospective application.[2] (*Aetna, supra*, 30 Cal.2d at 393.)

Because clear evidence of intent is lacking, it is unnecessary to discuss the possible constitutional implications of an attempt to apply Section 83116.5 retroactively. (*Evangelatos, supra*, 44 Cal.App 4th at 1206.)

Question 2

Section 91006, prior to the enactment of Proposition 208, simply provided that, "[i]f two or more persons are responsible for any violation, they shall be jointly and severally liable." As noted above, the provisions of Chapter 11 were not applied to violations of Section 83116.5 under former law. Proposition 208 preserved the language of Section 91006, but added to it the language of Section 83116.5. The evident intent and effect of the additional language is to provide that joint and several liability shall prevail, after January 1, 1997, among two or more persons who have aided and abetted a violation of the Act.

"Joint and several liability" is a means of allocating damages among two or more persons *each of whom is liable in some measure* for an injury. We therefore must presume, for purposes

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[2] A prohibition against retroactive application includes a prohibition against any action or proceeding initiated after January 1, 1997, based on conduct prior to that date, which was not a violation of the Act at the time the conduct was completed. (*Evangelatos*, supra, 44 Cal.3d. at 1206; *Beck*, supra, 44 Cal.App. 4th at 1207.)

of this question, that there is some basis for a finding that the persons in question have violated Section 83116.5, as it existed prior to the effective date of Proposition 208. The issue then becomes whether, when one or more codefendants is unable to pay the full amount of damages awarded, the others can be required to pay the shortfall, and whether a cause of action for indemnity is available to a defendant inequitably burdened in such cases. The preceding discussion on retroactive application of Proposition 208 is dispositive. There is no evidence of any intent to employ Section 91006 retroactively.

While it may be argued that retroactive application of Section 91006 should be permissible to the extent that it does not threaten persons whose conduct was lawful under prior law, such arguments were considered and rejected by the Supreme Court in *Evangelatos*, *supra.* In the absence of clear evidence to the contrary, an initiative statute must be presumed to have prospective application exclusively. As a result, if joint and several liability did not apply among any set of defendants under the law in effect prior to Proposition 208, it can not be asserted in any proceeding arising out of acts or omissions completed prior to January 1, 1997.

If you have any other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Steven G. Churchwell
General Counsel

Lawrence T. Woodlock

By: Lawrence T. Woodlock
Staff Counsel, Legal Division

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