California
Fair Political
Practices Commission

June 2, 1997

John Ramirez, Esq.
Nielsen, Merksamer, et al.
591 Redwood Highway, #4000
Mill Valley, California 94941

Re: Your Request for Advice
Our File No. A-97-262

Dear Mr. Ramirez:

This letter is a response to your request for advice regarding the provisions of the Political Reform Act (the "Act").[1] We have expedited our response to allow discussion of the letter at the June 5, 1997, meeting of the Commission.

QUESTIONS

1. Do contributions made in 1997 or 1998 to retire a state candidate's (i.e., Assembly, Senate, Governor, etc.) debt incurred prior to January 1, 1997, for an election or officeholder expense which occurred prior to 1997 count against a donor's 1997-1998 $25,000 aggregate limit on contributions to all state candidates and political parties?

2. Does Section 85309, which limits the total amount of contributions a candidate may receive from non-individuals per election, apply to contributions made to retire pre-1997 debt?

CONCLUSIONS

1. No. Contributions made in 1997 or 1998 to retire a state candidate's debt incurred prior to January 1, 1997, for an election or officeholder expense which occurred prior to 1997 do not count against a donor's 1997-1998 $25,000 aggregate limit on contributions to all state candidates and political parties.

2. Yes. Section 85309, which limits the total amount of contributions a candidate may accept from non-individuals per election, does apply to contributions made after the effective date of Proposition 208 to retire pre-1997 debt.

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[1] Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18995, of the California Code of Regulations.

ANALYSIS

A. Debt Reduction During the Blackout Period

1. Section 85305

Proposition 208, enacted by the voters on November 5, 1996, became effective on January 1, 1997. Proposition 208 established contribution limits and voluntary spending limits. (Sections 85301, 85400.) In addition, Proposition 208 limited the time period in each election cycle in which contributions to candidates may be made. (Section 85305.) Section 85305, entitled "Restrictions on When Contributions Can Be Received," is fairly straightforward and understandable in its first two subsections, which provide that a candidate may not accept contributions until six or twelve months before the primary election, depending on the size of the district.

The first two sentences of subsection (c) are also relatively simple, providing that a candidate may not accept contributions more than 90 days after withdrawal, defeat, or election to office. Between the date of the election (or withdrawal) and the 90-day cutoff, contributions made must be used to pay debts.

This is where the Section 85305 highway becomes quite bumpy. The second part of subsection (c) contains an exception that appears to apply not only to the 90 day rule in (c), but to the pre-election timing restrictions in (a) and (b) as well. It is odd that such a general exception would not occupy its own subsection, but this turns out to be a minor annoyance. The exception states:

> "This section shall not apply to retiring debts incurred with respect to any election held prior to the effective date of this act, provided such funds are collected pursuant to the contribution limits specified in Article 3 (commencing with Section 85300) of this act, applied separately for each prior election for which debts are being retired, and such funds raised shall not count against the contribution limits applicable for any election following the effective date of this act."

Subsection (e) is also relevant:

> "Contributions pursuant to subdivision (c) ... shall be considered contributions raised for the election in which the debts ... were incurred and shall be subject to the contribution limits of that election."

It is critical at this juncture to say what Section 85305 *is not*. It is not a section dealing with candidate debts.[2] Its purpose is to describe when a candidate who intends to run for office *in 1997 or later years* may begin to raise money, and when he or she must stop doing so. The "blackout period" restrictions of Section 85305 apply to any "candidate" as defined in Section 82007, including officeholders who are not actively running for office. (See *Hiltachk* Advice Letter, No. I-97-129.) Please note that other laws may affect a candidate's ability to reduce debt from a 1996 or earlier election.[3]

So why does Section 85305 give a detailed blueprint for payment of debts? It does so to allow an exception to the blackout period. The last part of subsection (c) states that a candidate running after January 1, 1997, may ignore the blackout period when raising contributions to pay off debts remaining from a pre-1997 election. There is, however, a proviso. It states that the contributions raised to pay such debts must be "collected pursuant to the contribution limits specified in Article 3 (commencing with Section 85300) of this act ...." If one were to stop there, and take this phrase out of context, one could conclude that each and every "contribution limit" in Article 3 applies to contributions to retire old debt, including the Section 85310 aggregate limit of $25,000 that a person (except political parties) may contribute to all candidates and political parties in any two-year period.

But the exception continues with specific instructions that the contribution limits must be "applied separately for each prior election for the which debts are being retired ...." Moreover, it states that "such funds raised shall not count against the contribution limitations applicable for any election following the effective date of this act." What does this reveal about the drafters' intent?

It is implicit, at least, that they were only describing the *per election* limits on contributions to candidates in Article 3: (1) the Section 85301 limits on contributions from all persons except small contributor committees and political parties; (2) the Section 85302 limits on contributions from small contributor committees; (3) the Section 85304 limit on contributions from political parties; and (4) the Section 85309 limit on contributions from non-individuals.[4] This reading comes from the detailed guidance in Section 85305(c) itself: "applied separately *for each election*" and "shall not count against the contribution limitations applicable *for any election*" after January 1, 1997. (Emphasis added.) Subsection (e) lends further support to this view by stating that such contributions are considered to be raised *for the election* in which the

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[2] But see Section 85307 [loans are subject to the contribution limitations, and extensions of credit of more than 30 days, other than commercial loans, are also subject to those limits].

[3] This would include any local ordinances with post-election debt restrictions, and special elections conducted under Proposition 73. (See Regulation 18535(d).)

[4] You argue that Section 85309 could only apply prospectively, because it contemplates that a candidate may accept or reject the expenditure limits, and that option did not exist prior to January 1, 1997. We disagree. Section 85309 merely uses the spending limits as a passive reference point for measuring the 25 percent in a particular election, and makes it *irrelevant* whether any particular candidate has actually accepted the voluntary spending limits.

debts were incurred and are subject to *that election's* contribution limits. Since the two-year aggregate limit is not a *per election* limit, it does not apply to debt retirement.

Moreover, the proviso is directed, not at contributors, but at the candidates seeking to raise these funds: "provided such funds *are collected* pursuant to the contribution limits specified in Article 3 ...." (Emphasis added.) This language also supports our view that the two-year aggregate limit on contributors does not apply to contributions used for debt reduction during the blackout period.

Finally, as you point out, even if the $25,000 aggregate limit could somehow be applied "separately for each election for which the debts are being retired," subsection (c) clearly states that funds raised to retire debt "shall not count against the contribution limitations applicable for any election" after January 1, 1997. (Section 85305(c).) That is not as strong an argument for our view as the mandate in subsection (e) that debt retirement contributions "shall be considered contributions raised for the election in which the debts ... were incurred ...." This would mean that a 1997 contribution to retire debt incurred in a 1994 election, would count against the contributor's 1993-1994 aggregate limit. That does not appear to be a desirable, nor an intended, result.[5]

2. Section 85309 Applies in the Debt Retirement Context

You also asked whether Section 85309 would apply to reduction of debt from a pre-1997 election. Section 85309 provides:

> "No more than 25 percent of the recommended voluntary expenditure limits specified in this act at the time of adoption by the voters, subject to cost of living adjustments as specified in Section 83124, for any election shall be accepted in contributions from other than individuals, small contributor committees, and political party committees in the aggregate by any candidate or the controlled committee of such a candidate. The limitation in this section shall apply whether or not the candidate agrees to the expenditure ceilings specified in Section 85400."

Given our analysis above, we believe that this section, being an Article 3 per election limit on a candidate, does apply to debt retirement. The remaining issue is how to apply it.

With regard to Section 85301, we have held that a person who contributed at or more than the applicable Proposition 208 limit to a candidate prior to January 1, 1997, may contribute again up to the limit to pay down the candidate's debt after January 1, 1997. (*Johnson* Advice

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[5] Another acceptable position would be that the drafters assumed that limits *on the contributor*, such as the biennial $25,000 limit, apply to all contributions in any context; therefore, only those limits applicable to candidates needed to be addressed in subsection (c). We believe that the better view is the one outlined above.

Letter, No. A-97-316a; *Sutton* Advice Letter, No. I-97-079.) Similarly, the ratio of contributions received by a candidate before January 1, 1997 (individual versus non-individual), will not be considered in applying the limit of Section 85309 to debt retirement.

Thus, for example, a candidate on the November 1996 ballot may have received 100 percent of his or her contributions from non-individuals both before *and after* the election, prior to January 1, 1997. Nevertheless, that candidate may receive up to 25 percent of the voluntary expenditure limit for that office[6] from persons other than individuals, small contributor committees, and political parties to retire debt from that election after January 1, 1997.

B. Debt Reduction Outside the Blackout Period

This is where the Proposition 208 highway ends. Oddly, the only statutory guidance on pre-208 debt retirement is in the context (discussed above) of allowing contributions for that purpose during the blackout period, as long as certain conditions are met. Once the blackout period ends for a particular candidate with preexisting debt, the Commission has three choices: (1) allow no debt reduction contributions; (2) place some or all of the limits of Proposition 208 on such contributions; or (3) allow them without limits.

Option one can be eliminated fairly quickly, since it makes little sense to allow these types of contributions during the blackout period, but not during the time when fundraising is permitted. Option three was the choice of the Federal Election Commission when faced with this question following passage of the 1974 amendments to the Federal Election Commission Act. Its regulation is a model of simplicity:

> "*Contributions to retire pre-1975 debts.* Contributions made to retire debts resulting from elections held prior to January 1, 1975 are not subject to the limitations of 11 CFR part 110, as long as contributions and solicitations to retire these debts are designated in writing and used for that purpose. Contributions made to retire debts resulting from elections held after December 31, 1974 are subject to the limitations of 11 CFR part 110." (11 C.F.R. § 110.1(g).)

This option would further the goal of encouraging candidates to pay their debts as quickly as possible. Proposition 208 does not encourage campaign debt. In fact, it is downright hostile to it. (See Section 85307.) On the other hand, the public might perceive a large contribution to an officeholder to be used to pay outstanding debts to be as potentially corrupting as a contribution for a future campaign.

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[6] Since there was no voluntary expenditure limit in place, state candidates must use the expenditure ceilings specified in Section 85400 to determine the correct limit. For local races, the applicable limit, if any, would be set by the local ordinance. If there is no ordinance or no spending limit, the limit would be $1 times the number of residents. (See *Moll* Advice Letter, No. I-97-013.)

Option two is a compromise. It brings added complexity–the bane of our existence, as well as fodder for critics of reform. In return, the goals of Proposition 208 are better preserved. Ultimately, the Commission will have to decide this issue and adopt it as a regulation.

Until that time, we interpret Proposition 208 to apply the same Article 3 limits outlined above to the period when fundraising is permitted. No other contribution limits, including the $25,000 aggregate limit apply. Contributors must designate in writing that their contribution is for pre-1997 debt retirement and specify the date of the election. In addition, if they have reporting obligations (e.g., PACs or major donors), their campaign reports also must contain a notation. The recipient candidate must also provide a notation on his or her campaign report.

An example is clearly needed. Jennifer is a statewide officeholder, elected in November 1994. She plans to run for reelection in 1998, but has debts of $40,000 remaining from the 1994 general election. Tara is a friend who would like to help retire the debt and assist in her reelection bid. Tara has never made a political contribution.

Under Proposition 208, as construed in this letter, Tara may give Jennifer $500, *if* designated in writing for debt retirement. (Even if Jennifer has accepted the Proposition 208 spending limits, she may not accept $1,000 for the 1994 debt retirement.) Tara then may give Jennifer $2,000 (beginning June 2) for the 1998 primary and general elections (assuming Jennifer has accepted the voluntary spending limits). Only the $2,000 will count against Tara's two-year aggregate limit for contributions in California.

We stress that the Commission has enormous latitude under the statute to adopt rules regarding retirement of old debt, especially outside the blackout period, and its final regulation may allow more or less flexibility than what we have described here.

If you have any other questions regarding this matter, and I am sure you will, please do not hesitate to contact me.

Sincerely,

Steven G. Churchwell
General Counsel

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