

BELL, McANDREWS & HILTACHK, LLP
ATTORNEYS AND COUNSELORS AT LAW
455 CAPITOL MALL, SUITE 600
SACRAMENTO, CALIFORNIA 95814

(916) 442-7757
FAX (916) 442-7759
www.bmhlaw.com

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BY EMAIL / U.S. MAIL DELIVERY

Jodi Remke, Esq., Chair
And Commissioners
Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: **Request By Senate Democrats To Permit Unlimited Campaign
Contributions To Candidates In Recall Elections.**

Dear Chair Remke:

This law firm represents the California Republican Party. This letter responds to the demand by the California State Senate Democratic Caucus ("Senate Democrats") that the Fair Political Practices Commission overturn long-standing formal Commission advice and, in its place, issue a formal Commission Opinion permitting unlimited contributions by state candidates to candidate-controlled recall committees. The Senate Democrats are requesting this emergency opinion not because there has been a change in law, either statutorily or by court ruling, or because of some unintended consequence resulting from the current interpretation of the law. Instead, the Senate Democrats seek an emergency change in the law merely to benefit one of their own.

In April of this year, 60 registered voters in the 29th State Senatorial District commenced a recall effort against State Senator Josh Newman. Three weeks ago, those proponents of the recall submitted petitions containing signatures of more than 90,000 voters, seeking a public vote on whether Mr. Newman should continue in his seat. Apparently sensing the need for more money, Senate Democrats now want to open the floodgates and let unlimited campaign money wash over the 29th State Senatorial District in an effort to ensure Mr. Newman keeps his seat.

The FPPC advice that the Senate Democrats seek to overturn is the *Johnson Advice Letter* (A-08-032) in which the Commission's Legal Division advised that contributions by candidates to candidate controlled recall committees were subject to limits.

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In *Johnson*, the Commission concluded that while the Political Reform Act (pursuant to section 85315) permits the target of a recall to accept contributions “without regard to the campaign contributions limitations” in Chapter 5, Section 85305 (limiting state candidate-controlled committee contributions to recall committees) is not one of the “contributions limitations” encompassed by Section 85315. More specifically, the FPPC’s legal division advised that Section 85305 is a separate statute limiting inter-candidate *transfers*. According to *Johnson*, Section 85305’s purpose is to limit contributions a candidate may make to another candidate to the amount permitted by Section 85301(a).

The FPPC in *Johnson* refused to “assume that Section 85305 is simply a pointless echo of Section 85301, a ‘contribution limit’ duplicative of Section 85301 which could be deleted from the Act without any effect whatever.” The FPPC instead analyzed the legislative intent underlying Section 85305, and confirmed that Section 85305 “serve[s] a purpose entirely separate and distinct from Section 85301.”

In conducting its statutory interpretation in *Johnson*, the Commission followed the same canons of statutory construction employed by the courts: “If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs.” (See *Johnson Advice Letter*, No. A-08-032, citing *Britton v. Dallas Airmotive, Inc.* (2007) 153 Cal.App.4th 127, 132.) In *Johnson*, the FPPC determined that the legislative intent of Section 85305 was to impose a “special rule applicable to contributions by one candidate to another, to limit the transfer of funds, including campaign war-chests, among incumbent officeholders to cement political alliances or to stave off challenges by outsiders.” Thus, the FPPC concluded, Section 85305 should be construed as a “specific candidate use limitation, standing separate and apart from the more general contribution limitations elsewhere set forth in Chapter 5.” The FPPC also concluded that Section 85305 is intended to limit the movement of campaign money between state candidates, noting that the legislative analyst provided in the Proposition 34 ballot pamphlet as follows: “This measure repeals a provision of Proposition 208 that bans transfers of funds from any state or local candidate or officeholder to any other candidate, but establishes limits on such transfers from state candidates.” As the Commission also pointed out, the ‘Argument in Favor’ of Proposition 34 in the ballot pamphlet provided:

Proposition 34 Stops Political Sneak Attacks - In no-limits California, candidates flush with cash can swoop into other races and spend hundreds of thousands of dollars at the last minute to elect their friends. Proposition 34 stops those political sneak attacks.

In the face of the reasoned interpretation in *Johnson*, and the subsequent aides (like the FAQs), the Senate Democrats ask the Commission to re-write the law. The Senate Democrats seek to treat Section 85305 as a contribution limitation equivalent to Section 85301. Of course, this would render Section 85305 meaningless apart from duplicating Section 85301, while the other portions of Section 85305, which expressly address a particular *use* of funds by a candidate, would be nullified. The contribution limits of Chapter 5, such as Section 85301, are expressed in language similar to Section 85315, which addresses the amounts that may be "accepted" by the recipient candidate. Section 85305 contains no such language.

Moreover, the Senate Democrats proposed reading would defeat Section 85305 if Section 85315 were construed to suspend the 85305 (as one of the "campaign contributions limits set forth in this chapter") to permit the transfer of funds by a candidate to assist when a candidate is threatened by a recall election. In addition, our Supreme Court has emphasized on a number of occasions that an administrative agency such as the FPPC does not have the authority to "alter or amend" a statute, or "enlarge or impair its scope." (See *Morris v. Williams* (1967) 67 Cal.2d 733, 737; see also *First Industrial Loan Co. v. Daugherty* (1945) 26 Cal.2d 545, 550 ["A ministerial officer may not ... vary or enlarge the terms of a legislative enactment or compel that to be done which lies without the scope of the statute and which cannot be said to be reasonably necessary or appropriate to subserving or promoting the interests and purposes of the statute."].) In our view, the interpretation sought by the Senate Democracy would essentially write the statute out of existence.

In summary, Section 85315 lifts the contribution limits of Chapter 5 in the event of a recall election, but we cannot conclude that Section 85305 is one of the contribution limitations referenced by this statute. The legislative purpose of Section 85305 is also best served by recognizing that it is not suspended by operation of Section 85315.

The FPPC has condensed its advice in *Johnson* on its "Frequently Asked Questions: Recall Elections" document (since at least 2008), available on its website: (http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/Recall_Elections.pdf.)

19. Q. Are contributions made by other elected officials to the target candidate or to a replacement candidate's controlled committee subject to limits?

A. Yes. Under the Act's provisions restricting transfers of funds between state candidates, state candidates and officeholders (and their controlled committees) may not make contributions in excess of the contribution limit in Section 85301(a) (\$4,400 for 2017-18) to any committees controlled by other state candidates, including a state candidate's controlled committee supporting or opposing a recall. (Section 85305; Regulation 18535; *Johnson* Advice Letter, No. A-08-032.)

In sum, no valid justification has been presented for an emergency re-write of the FPPC's long-established advice on this statutory scheme. In fact, allowing candidates to contribute unlimited amounts to recall committees would almost certainly have the immediate unintended consequence of every supportive incumbent legislator opening new gubernatorial or other statewide committees (where the contribution limits are much higher -- \$7,300 to \$29,200 per donor) to raise huge amounts of cash from special interest groups, and then immediately funneling those funds to Mr. Newman's recall committee. Indeed, the Senate Pro Tempore already has a Lt. Governor committee in which he raises funds well above the \$4,400 limit applicable to a Senate candidate. For this and the other important reasons stated herein, the FPPC's *Johnson* letter should remain as the logical interpretation of the statutory scheme.

Please feel free to contact me if you have any questions or require additional information.

Very truly yours,

A handwritten signature in black ink, appearing to read "B. Hildreth", with a long horizontal flourish extending to the right.

Brian T. Hildreth