BELL, McANDREWS & HILTACHK, LLP
ATTORNEYS AND COUNSELORS AT LAW

455 CAPITOL MALL, SUITE 600
SACRAMENTO, CA 95814

(916) 442-7757
FAX (916) 442-7759

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By Email: CommAsst@fppc.ca.gov

Chair Miadich and Commissioners Baker,
Gómez, Wilson, and Wood
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811

RE: Staff Memorandum, Opinion Requested Regarding Application of Amendments to Section 84308

Dear Chairman Miadich and Commissioners Baker, Gómez, Wilson, and Wood:

Almost immediately after the SB 1439 was signed by the Governor, we received numerous requests for advice regarding the law's greatly-expanded application to many local government decisions. No question was more urgent than whether lawful contributions made in 2022 would trigger disqualification of local elected officials in 2023.

We submit this letter in opposition to the Legal Division staff's memorandum regarding the *Opinion Requested Regarding Application of Amendments to Section 84308*. Although Legal Division staff asserts that the proposed Opinion "does not constitute an impermissible 'retroactive' application of law," that is exactly what the Opinion proposes. There are both legal and troublesome practical issues with the proposed Opinion. First, the Opinion fails to reference or follow the previous decision of the Commission on the exact same legal issue presented. Second, the Opinion states, but disregards California law, which specifically disfavors retroactive application of the law. And finally, the Opinion does not fairly characterize the difficulty in making "refunds" in order to avoid required disqualification.

Commission Adoption of Regulation 18438

This is not the first time the Commission has faced this identical issue regarding the proper application of Section 84308. Section 84308 was originally signed into law in September 1982. (Levine Act, Added by Stats. 1982, Ch. 1049.) At that time, the Commission was asked to interpret the Levine Act and determine whether the prohibitions set forth in the newly-adopted statute applied to contributions received prior to the effective date. In proposing its regulatory package in 1982, the Commission relied upon the legislation itself, the Political Reform Act, and the Commission's report entitled "Campaign Contributions and Governmental Decision Making," October 8, 1980, and also held several public hearings on the matter.

On January 26, 1983, after evaluating the law and public policy considerations, Regulation 18438 was adopted by the Commission, stating:

> The prohibitions and requirements of Government Code Section 84308 do not apply to contributions made or received prior to January 1, 1983.

Legal Division staff is now urging the Commission to depart from the approach historically applied to Section 84308. Shockingly, the memorandum does not even reference the Commission's regulation or prior analysis. In 1983, the Commission concluded that Section 84308 should not apply to contributions made or received prior to the effective date of the new statute, and we see no reason why the Commission's determination then should be different from its determination now. Today, Legal Division staff reaches the opposite conclusion, but provides no discussion or evaluation of why the prior decision in 1983 was incorrect.

Retroactive Application of the Law is Disfavored

After reviewing the relevant law and legislative history, Legal Division staff advises that, "as drafted, Section 84308 may be applied in a manner that considers contributions received by local elected officials and proceedings conducted throughout 2022." The following explanation of the general rules of statutory construction explains why Section 84308 should NOT be applied in this manner. Our Supreme Court has long-stated that:

> Generally, statutes operate prospectively only. (*Myers, supra,* 28 Cal.4th at p. 840; see also *Evangelatos v. Superior Court, supra*, 44 Cal.3d at pp. 1206–1208.) [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly.... For that reason, the 'principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.' (*Landgraf, supra,* 511 U.S. at p. 265, fns. omitted; see also *Myers, supra*, at pp. 840–841.) The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. (*Landgraf, supra*, at p. 270.)

(*McClung v. Emp. Dev. Dep't*, (2004) 34 Cal. 4th 467, 475.) In California, new laws are presumed to apply prospectively, and where ambiguity exists as to whether the law may apply retroactively, the general rules apply the law prospectively. (*Quarry v. Doe I*, 53 Cal. 4th 945, 955 (2012).)

This presumption is particularly true when a statutory amendment "substantially changes the legal consequences of past events." (*McClung, supra*, 34 Cal. 4th at p. 472; See also, *Landgraf v.*

USI Film Products (1994) 511 U.S. 244; and accord, *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 839.) In addition, where criminal liability and penalties would apply, as here, retroactive application of the law can itself create a conflict with the Constitution. Interestingly, Legal Division staff's memorandum provides no analysis on California's constitutional prohibition against *ex post facto* laws, despite the new criminal penalties imposed by SB 1439. (See Cal Const. art. I § 9.)

That is not to say that a statute may never be applied retroactively. "[A] statute may be applied retroactively only if it contains express language of retroactivity or if other sources provide a clear and unavoidable implication that the Legislature intended retroactive application." (*Myers, supra*, at p. 844.) SB 1439 does not contain any express language of retroactivity and we do not believe there is any implication of such either. And, in light of the fact that the statute indicates that it applies depending on the officials "knowing" acceptance of an applicant's contribution, such "knowledge" can only be made by knowing the legal prohibitions applicable at the time of a receipt of a contribution.

As such, Section 84308 cannot be applied in a manner that considers contributions received by local elected officials and proceedings conducted through 2022. Based on the legal considerations, we urge the Commission to reject the Legal Division staff's proposed Opinion.

Practical Problems Relating to the Ability to "Refund" Contributions to Avoid Disqualification

Legal Division staff argues that their proposed application of Section 84308 impacts only future events, and then quickly dismisses the requestors' valid concerns of "fairness" by assuming that officeholders will be able to avoid disqualification by simply refunding any excessive contribution made before the law became effective. However, this assumption has very real practical problems in reality – presuming the ability to make such refunds of contributions.

With the November General Election concluded, any given campaign finance report will show that local candidates and officials had been actively seeking contributions (in excess of the $250 threshold, but within local limits) in connection with the election from persons who may, at some point in 2023, have applications or proceedings before legislative bodies (city councils or boards of supervisor) without knowing that there may be legal implications attached to each of these contributions.

At the local level, it is more common than not, that contributions raised prior to the General Election will have been largely spent in connection with the election. Thus, it is unlikely that a donor could seek, or that an official would have the ability to "return," the contribution in order to avoid future disqualification, as suggested by Legal Division staff. Moreover, it is quite likely that when these officials realize that there is a disqualification issue, they will not be able to legally raise funds in order to make these refunds due to the post-election fundraising restrictions in Government

Code section 85316.

Staff might suggest that such officials can simply open new committees for future elections to secure campaign funds to make "refunds," as necessary. However, many local jurisdictions impose fundraising bans or restrictions in "off-years" which again limits the legal ability to raise funds to make refunds[1] and some officials may be termed out or have no intention to run for another term of office. Thus, these "real world" concerns highlighted by the requestors are not "to a large degree mitigated" at all, as staff suggests.

The Commission has the opportunity to level the playing field for all candidates who were successful in 2022 by determining that the prohibitions and requirements of Government Code section 84308 do not apply to contributions made or received prior to January 1, 2023. As a matter of public policy, there is no question that this approach is advisable. As a matter of law, it becomes clear that the Legal Division staff's opposite approach changes the legal consequences of past conduct for these officials who have no funds remaining for refunds, which would be considered retroactive.

Conclusion

Taking the above into consideration, we support the Commission issuing an Opinion stating that Section 84308's lookback period does NOT apply to contributions and proceedings that occurred in 2022, before SB 1439's amendments took effect. Thank you for your consideration of this letter in your evaluation of the proposed Opinion.

Sincerely,

Thomas W. Hiltachk

[1] If Commissioners are interested in reviewing local campaign ordinances, most ordinances have been posted online by staff at https://www.fppc.ca.gov/learn/campaign-rules/local-campaign-ordinances.html