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To: Chair Remke, Commissioners Audero, Hatch, and Hayward

From: Jack Woodside, General Counsel
Ryan P. O'Connor, Commission Counsel

Subject: Contribution Limits on Transfers from State Candidates to a State Candidate (or Candidate-Controlled Committee) to Oppose a Recall Election

Date: July 17, 2017

INTRODUCTION

A recall effort has been initiated against Senator Josh Newman. Currently, petitions are circulating and recall proponents have until October 16, 2017 to gather the requisite 63,592 petition signatures to qualify for a special recall election.[1]

On June 12, 2017, Richard R. Rios, Esq. of Olson, Hagel & Fishburn mailed a letter to the Commission requesting a determination of law to reverse the agency's interpretation that the restriction on contributions between state candidates contained in Government Code section 85305[2] imposes a $4,400 limit on the amount that a state candidate may contribute to a recall committee controlled by another state candidate. The request was made on behalf of the Senate Democratic Caucus.

Executive Director Erin V. Peth treated Mr. Rios's correspondence as a request for a Commission opinion which she denied because the question raised is covered by Commission regulations. Executive Director Peth articulated that "the Commission has consistently concluded that contributions made by other state elected officials to a state candidate's controlled recall committee are subject to the $4,400 limit on contributions between state candidates." She concluded that this has been the Commission's legal interpretation of the pertinent statutes since 2003 when the Commission approved the Fact Sheet on Recall Elections.

On June 28, 2017, Mr. Rios wrote the Commission again requesting a Commission opinion as well as a regulation regarding staff interpretation of Sections 85305 and 85315. Mr. Rios also emailed the Commission with an opinion by the Legislative Counsel Bureau at the behest of Senator de León. The opinion regards contribution limits in recall elections and concludes contributions by a state candidate to a recall committee controlled by another state candidate should not be subject to the $4,400 limit on contributions between state candidates.

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[1] See http://www.ocregister.com/2017/06/02/sen-josh-newman-recall-gains-traction.
[2] Unless otherwise indicated, all further statutory references are to this code.

QUESTION

May Members of the Senate Democratic Caucus transfer unlimited sums to a recall committee controlled by Senator Newman?

BACKGROUND

The following background on the inter-candidate transfer and recall provisions can inform the Commission's consideration of this issue.

Proposition 9 (June 4, 1974 primary election ballot, approved):

Proposition 9 created the Commission and enacted the Political Reform Act. Original Section 81002 stated in pertinent part:

> The people enact this title to accomplish the following purposes:
> [¶] … [¶]
> (b) The amounts that may be expended in statewide elections should be limited in order that the importance of money in such elections may be reduced;
> [¶] … [¶]
> (f) Laws and practices unfairly favor incumbents should be abolished in order that elections may be conducted more fairly.

Proposition 73 (June 7, 1988 primary election ballot, approved):

This proposition prohibited transfer of funds between state candidates (and their candidate-controlled committees). It also limited the amount that an individual could contribute annually to a candidate for public office to $1,000 from each person, $2,500 from each political committee, and $5,000 from a political party and each "broad based political committee."

Several of the provisions, including the prohibition of transferring funds, were challenged as unconstitutional in federal court. The Court ruled that inter-candidate transfer ban in Proposition 73 violated the First Amendment. (See *Serv. Employees Int'l Union AFL-CIO v. FPPC*, 747 F. Supp. 580, 593-94. (E.D. Cal. 1990).) However, portions of the proposition survived constitutional challenge and remain in effect, such as the one-bank account per election rule (Section 85201).

Proposition 208 (Nov. 5, 1996 general election ballot, approved):

This proposition again prohibited transfer of funds between candidates. It also limited contributors to $250 per legislative candidate and $1,000 per statewide candidate. It passed at the general election but was later enjoined by a judge for the Eastern District of California.

Several provisions of the proposition were challenged as unconstitutional in federal court. The Court found that the contribution limits imposed by the initiative were not narrowly drawn to achieve the legitimate state interest of preventing corruption or the appearance of corruption. (See *California Profile Council PAC v. Scully*, 989 F. Supp. 1282 (1998).) After the adoption of Proposition 34, which repealed many of the provisions of Proposition 208, the Court dismissed the action.

Proposition 34 (Nov. 7, 2000 general election ballot, approved):

The Legislature voted to put Proposition 34 on the ballot to cure the First Amendment issues with Proposition 208.[3] The initiative is also known as the Campaign Contributions and Spending Limits Act of 2000. Proposition 34 limited the amount of money individuals and other entities can contribute to candidates for the Legislature and for statewide elective offices. It also limited campaign fund transfers between state candidates and regulated use of surplus funds.

The Proposition replaced the contribution limits of Proposition 208 with limits that were generally higher. As enacted by Proposition 34, the election limits on contributions were $3,000 to a state legislative candidate, $5,000 to a statewide candidate other than governor, and $20,000 to candidates for governor. For 2017-18, those limits are $4,400, $7,300 and $29,200, as adjusted for cost of living changes. Specifically, Proposition 34 repealed and enacted much of Chapter 5, entitled "Limitations on Contributions" (Sections 85100-85802), including the legislative contribution limit in Section 85301(a).

Section 85301(a) – Legislative Contribution Limits:

> (a) A person, other than a small contributor committee or political party committee, may not make to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office may not accept from a person, any contribution totaling more than three thousand dollars ($3,000) per election.[4]

Legislative leaders in the Senate and the Assembly have historically raised funds to support candidates of their party in important races. Section 85305, created by Proposition 34, was intended to limit the movement of campaign funds between state candidates. As such, the measure repealed a provision of Proposition 208 that banned transfer of funds from a state or local candidate or officeholder to any other candidate. In lieu of the ban, it established limits on such transfers from state candidates. The $4,400 inter-candidate transfer restriction applies to contributions made by any state candidate to a committee controlled by another state candidate.

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[3] See Legislative Counsel's Digest, SB 1223 Proposed Conference Report, at pp. 1-2 (Cal. 2000).

[4] Adjusted biennially by the Act's "cost of living" escalator. The contribution limit of Sections 85301(a) and 85305 is presently $4,400.

Section 85305 – Restrictions on Contributions between State Candidates:

> A candidate for elective state office or committee controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301.

Because Proposition 34 established effective contribution limits for state candidates for the first time, the statute included other complementary provisions. For example, it provided that an elected state officer who is the subject of a civil or criminal lawsuit may establish a legal defense fund and receive contributions not subject to the limits. (Section 85304.) Similarly, it provided that an elected state officer who is the subject of a recall may establish a committee to defend against the recall and receive contributions not subject to the limits. (Section 85315.)

Section 85304 – Legal Defense Fund:

Proposition 34 expressly provides that the Act's contribution limits do not apply to a legal defense fund committee established by an elected state officer to defray attorney's fees and other related legal costs.

> (a) A candidate for elective state office or an elected state officer may establish a separate account to defray attorney's fees and other related legal costs incurred for the candidate's or officer's legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. These funds may be used only to defray those attorney fees and other related legal costs.
>
> (b) *A candidate may receive contributions to this account that are not subject to the contribution limits set forth in this article.* However, all contributions shall be reported in a manner prescribed by the commission. (Emphasis added.)

Section 85315 – Elected State Officer Recall Committees:

Proposition 34 expressly provides that the Act's contribution limits do not apply to a committee established by an elected state officer to oppose a recall.[5] Section 85315 states:

> (a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the

[5] Section 82043 includes recalls within the definition of "measure," and therefore, the FPPC's interpretation has proceeded under that framework.

> Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election."

Regulation 18535. Restrictions on Contributions Between State Candidates (operative August 19, 2002):

Questions arose concerning the application of Section 85305's inter-candidate transfer limit, including (1) whether the limit amount was $3,000 across-the-board, or whether it was $3,000, $5,000 and $20,000; (2) to which committees the limit applied; (3) when Section 85305 took effect; and (4) whether the limit applied to contributions made by legislative candidates to statewide candidates.

For example, campaign treasurer Jan Wasson questioned whether proposition 34 permitted a pre-2001 candidate committee to accept unlimited contributions from candidates for elective state office and whether a candidate for elective state office may make unlimited contributions to a candidate for statewide office. Campaign attorney Tony Miller interpreted Section 85305 to mean that the limit on contributions between state candidates should be $3,000, $5,000, or $20,000, depending on the recipient of the contribution.

In the *Wasson* Advice Letter, No. I-02-048, staff concluded that "Section 85305 limits the *making* of contributions by state candidates to other state candidates, not the *acceptance*. Under Section 85305, other candidates for elective state office may not make contributions to any other candidate for elective state office more than the $3,000 limit set forth in Section 85301(a). Though Section 85305 does not prohibit a pre-Proposition 34 committee from accepting such contributions, it generally prohibits other candidates for elective state office from making contributions to the committee in excess of $3,000." (Emphasis added.) Under Section 85305, a committee controlled by a legislative candidate, whether pre-or post-Proposition 34, may not contribute to any other candidate for elective state office more than $3,000 per election.

To clarify the interpretation of Section 85305, the Commission considered and adopted Regulation 18535. Regulation 18535 provides that Section 85305's limit on contributions between state candidates incorporates the $3,000 monetary limit of section 85301(a) and includes no other limit. The regulation states that Section 85305 prohibits a legislative candidate and his or her controlled committees, whether pre-2001 or post-2001, from contributing to a statewide candidate more than $3,000 [now $4,400]. And significantly, the regulation states that the limit on contributions between state candidates applies to the aggregate total of contributions made from the personal funds of a state candidate and contributions made by any committees controlled by that candidate, to any committees controlled by another state candidate.[6]

[6] See Attachment A, July 26, 2002 staff memo supporting adoption of Regulation 18535.

Since the adoption of Regulation 18535, the FPPC has consistently interpreted the inter-candidate transfer limit, currently $4,400, to apply to a contribution from one state legislator to another state legislator, whether that contribution be to the legislator's election committee, recall committee, legal defense fund, or candidate-controlled ballot measure committee.

Regulation 18535 provides in part as follows:

> (a) Under Government Code section 85305, a candidate for elective state office, as defined in Government Code section 82024, and any committee(s) controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of $3,000 per election. This amount is adjusted for inflation in January of every odd-numbered year, pursuant to Government Code section 83124 and implementing regulations, and is $3,000 in 2002.
>
> (b) The $3,000 limit of Government Code section 85305, as adjusted for inflation, applies to contributions made by officeholders or candidates for Governor, other statewide elective offices, the Legislature, and the Board of Administration of the Public Employees' Retirement System, and their committee(s), to other candidates for elective state office…
>
> (c) The restrictions of Government Code section 85305 on contributions made by one candidate for elective state office to another apply to the aggregate total of contributions made from the personal funds or assets of the candidate and contributions made by all committees controlled by that candidate, as defined in Government Code section 82016 and 2 Cal. Code Regs. Section 18217.
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> (d) The restrictions of Government Code Section 85305 on contributions made by one candidate for elective state office to another apply to all contributions made from, and all contributions made to, any committees controlled by a candidate for elective state office, including committees formed for a pre-2001 election…

Fact Sheet on Recall Elections:

The FPPC has had a fact sheet on recall elections available since 1999.[7] It has been presented to and approved by the Commission several times. The question about recalls and the inter-candidate transfer limit has remained consistent since 2003 and reflects the FPPC's current position on the issue.

[7] The most recent recall election fact sheet can be accessed using the following URL: http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/Recall_Elections.pdf.

- **March 2003.** The March 2003 fact sheet updated a 1999 version on recall elections. The revised fact sheet included statutory changes made to the Act by Proposition 34. An updated fact sheet was proposed for adoption at the July 2003 meeting.

- **Adopted July 2003.** The July 2003 fact sheet merged the March 2003 fact sheet with new questions and issues concerning Regulation 18531.5 and the Gray Davis recall.[8] Question 19 inquires: "Are contributions made by other elected officials to the target candidate or to a replacement candidate's controlled recall committee subject to limits?" It answers: "Yes. Contributions from candidates (and officeholders) for elective state office (and their controlled committees) may not make contributions to *any* committees controlled by other candidates in excess of $3,200, including a ballot measure committee. (Section 85305; Regulation 18535.)"[9]

- **Adopted April 28, 2008, updated March 2011.** Despite the fact sheet receiving an update five years later, Question 19 was carried over verbatim.

- **Fact Sheet on Recall Elections currently on FPPC website.** Question 19 remains the same for all intents and purposes. It currently reads:

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

  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.)

The FPPC has also repeatedly published the existing interpretation of the transfer restrictions in another fact sheet (updated every two years). Under the ancillary information about Legal Defense Funds, Recall Elections and Ballot Measure committees, the longstanding Contribution Limits Fact Sheet summarizes Section 85305 as follows:

> Contributions from State Candidates and Officeholders.
> A state candidate or state officeholder may not contribute more than $4,400 to a committee controlled by another state candidate or state officeholder (including a state or local election committee, legal defense fund,

[8] The introductory paragraph and questions 23-27 of the revised fact sheet were essentially unchanged from the March 2003 fact sheet.

[9] See Attachment B, July 28, 2003 staff memorandum supporting adoption of Recall Election Fact Sheet.

officeholder account, recall committee, or ballot measure committee). This limit applies on a per election basis and includes, in the aggregate, contributions made from the candidate's or officeholder's personal funds and from campaign funds. (Section 85305; Regulation 18535.)

Regulation 18531.5. Recall Elections (operative August 14, 2003):

This regulation implements Section 85315.[10] The primary aspects of the regulation are as follows:

1. The contribution limits of the Act do not apply to contributions accepted by the target elected officer into a committee established to oppose the recall. Similarly, the expenditure limits do not apply to expenditures made by the target to oppose the recall. (Regulation 18531.5(b)(1).)

2. Committees primarily formed to support or oppose a recall are ballot measure committees not subject to the Act's contribution limits. (Regulation 18531.5(b)(3).)

Denham Recall Advice (April 11, 2008):

In another instance when control of the Senate majority was in play, the Democratic Senate President Pro Tem Don Perata initiated a recall against Republican legislator Jeff Denham, for failing to vote for the budget.[11] The recall attempt failed, but if it had succeeded it would have given the Pro Tem a two-thirds majority in the State Senate. Legislators wanted to make contributions in excess of the Section 85305 inter-candidate transfer limit to the Friends of Jeff Denham Against the Recall committee controlled by Senator Denham.

In the *Johnson* Advice Letter, No. A-08-032,[12] the question was posed whether a candidate for elective state office, or a committee controlled by such a candidate, may contribute unlimited sums to a committee controlled by a different candidate for elective state office that was established exclusively to oppose the qualification of a recall petition and any subsequent recall election against that candidate.

Staff concluded that Section 85315 permits the target of a recall to accept contributions "without regard to the campaign contributions limitations" of Chapter 5, but Section 85305 is not one of the "contributions limitations" referenced by Section 85315. Section 85305 is a limit on inter-candidate transfers which is not affected in any way by Section 85315.

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[10] See Attachment C, June 25, 2003 staff memorandum supporting adoption of Regulation 18531.5.

[11] See http://ballotpedia.org/Jeff_Denham_recall,_California_(2008).

[12] The letter can be accessed using the following URL:
http://www.fppc.ca.gov/search.html?q=johnson+advice+letter+No.+A-08-032+&currentTab=1

Section 85315(a) and Regulation 18531.5(b)(1) provide that a candidate for elective state office,[13] once he or she becomes the target of a recall, may accept unlimited contribution amounts. However, Section 85305 specifically limits contributions that a candidate may *make* to another candidate in the amount permitted by Section 85301(a). The reasoning was that the Legislature intended for Section 85305 to act as a specific use limitation, standing separate and apart from the more general contribution limits enumerated in Chapter 5 of the Act.

In sum, staff concluded that unlimited contributions may be "received" by a state candidate's recall committee pursuant to Section 85315, but that Section 85305 prohibits a committee controlled by another state candidate from "making" a contribution in excess of the limits established by Section 85301(a) to a state candidate's recall committee.

FPPC'S INTERPRETATION OF THE INTER-CANDIDATE TRANSFER RESTRICTIONS

The question at issue is whether Section 85305's restrictions on transfers of funds between state candidates applies to contributions made by state legislators to another legislator's committee to oppose a recall. This is a narrow legal question that obviously has important political ramifications. This question involves the interplay between two provisions enacted by Proposition 34: the restrictions on state elected officials transferring funds to other candidates for state office (Section 85305), and the provisions permitting a state officer who is the target of a recall to defend against the recall by raising funds not subject to contribution limits (Section 85315).

The Commission has interpreted both Section 85305's inter-candidate transfer provision and Section 85315's recall provision to clarify and amplify the plain meaning and effect of those statutes through the consideration and adoption of Regulations 18535 and 18531.5. The Commission considered the plain meaning of the statutes and the legislative intent as expressed in the ballot pamphlet, when it adopted those regulations.

The Commission has interpreted both these statutes and the application of Section 85305 as it applies in the recall situation to give full and logical effect to both the inter-candidate transfer restrictions and the recall defense provisions. The Legislative Counsel's analysis, in contrast, focuses on the recall provision, but does not consider the plain meaning, legislative history, or regulations implementing the inter-candidate transfer restrictions of Section 85305. The Legislative Counsel's interpretation, summarized below, would severely weaken the restrictions on legislative leaders transfers to other state candidates, as they could give unlimited sums to partisan recalls and other legislators' legal defense funds.

The plain meaning of Section 85305 is clear: "A candidate for elective state office or committee controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301 [$4,400]."

[13] "Candidate for elective state office" is defined in Sections 82007 and 82024.

The legislative history of Proposition 34 confirms that this provision was designed to restrict the ability of legislative leaders from contributing large sums to determine the outcome of close races. The ballot pamphlet for the adoption of Proposition 34, which provides the legislative intent for a ballot measure, highlights the effect of Section 85305. The summary of Proposition 34 by the Legislative Analyst contained in the ballot pamphlet stated 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.

Further, the "Argument in Favor" of Proposition 34 in the ballot pamphlet stated:

> 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.

Regulation 18535 provides that the limit on inter-candidate transfers applies to contributions from any committees controlled by a state candidate to any committees controlled by another state candidate. This regulation implements the restrictions on transfers by legislative leaders that were enacted by Proposition 34. Under the language of this regulation, the FPPC has consistently advised that the $4,400 limit on transfers from one legislator to another applies to their election committees ($4,400 per election), legal defense fund committees, recall committees, and candidate controlled ballot measure committees.

The current agency interpretation that the restrictions on transfers between state candidates apply to contributions by legislative leaders to a legislator's recall committee is in accord with Regulation 18535. An alternate interpretation would require amendment of that regulation.

Policy considerations also favor the agency's interpretation of the inter-candidate transfer restrictions. As stated above, the legislative history of Proposition 34 shows that Section 85305 was intended to rein in legislative leaders providing the major funding and determining the outcome of key races. Proposition 34's Section 85315 allows the target of a recall to mount a defense unconstrained by the usual campaign contribution limits. The officer facing a recall is free to raise unlimited contributions from individuals and other entities. The officer can receive unlimited amounts from a political party. However, the long-standing interpretation is that legislative leaders cannot be the source of unlimited funds to support or oppose a state candidate-controlled recall committee.

According to Ballotpedia, there have been only seven California state legislative recalls since the state adopted recall in 1911, five of which succeeded. Three of those recalls in the last 25

years have switched party control in the state senate.[14] Given that the legislative history of Proposition 34 shows that the electorate voted for a measure that would restrict legislative leaders determining the outcome of key races, for policy reasons the inter-candidate transfer restrictions should not be weakened in the recall situation, as recalls have a history of being used in partisan political fights.

The FPPC's interpretation is that Section 85305 is a stand-alone limit on inter-candidate transfers that is not affected in any way by Section 85315. That is, Section 85315 does not waive the transfer limits imposed by Section 85305. Section 85305 is not one of the "campaign contributions limits" referenced by Section 85315. The evident intent of Section 85305 would be defeated if Section 85315 were construed to suspend the statute (as one of the "campaign contributions limits set forth in this chapter") to permit the transfer of funds by a state candidate to assist when another state candidate is threatened by a recall election.

The fact that Section 85305 applies to contributions made by one candidate to another distinguishes the statute from Section 85301. If Section 85305 were categorized as limiting "campaign contributions" comparable to Section 85301, it would have no function beyond duplicating certain portions of Section 85301, while the distinctive language of Section 85305, focused on a particular *use* of funds by a candidate, would be overlooked. The contribution limits of Chapter 5, such as Section 85301, are couched in language like Section 85315, which addresses the amounts that may be "accepted" by the recipient candidate. Section 85305 contains no such language.

Section 85305 only limits the *making* of contributions by state candidates to other state candidates. Section 85315 allows an elected state officer to *accept* campaign contributions without regard to the campaign contribution limits set forth in Chapter 5 of the Act. Section 85305 does not prohibit a recall committee from accepting such contributions, and it generally prohibits other candidates for elective state office from making contributions to the committee in excess of $4,400. Thus, the plain language of these two provisions is entirely consistent.

Furthermore, the Commission's interpretation of Section 85305 has been consistent with the legislative intent underlying the Act's contribution limits. The Legislature specifically intended for Section 85305 to provide 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, Section 85305 is a specific candidate *use* limitation, standing separate and apart from the more general contribution limitations elsewhere set forth in Chapter 5.

The Commission has consistently treated Section 85305 as a limit to the movement of campaign funds between state candidates since it was approved by the voters and added into Chapter 5 of the Act by Proposition 34. Thus, the Commission has upheld the intent of the statute since its inception.

[14] See, e.g., https://ballotpedia.org/Jeff_Denham_recall,_California_(2008).

LEGISLATIVE COUNSEL'S OPINION ON RECALL ELECTIONS

As indicated, on June 28, 2017, Mr. Rios provided the Commission with an opinion by the Legislative Counsel Bureau at the behest of Senator de León concerning contribution limits in recall elections.

1. Section 85315 waives the limit on donations that a legislator defending against a recall may accept from contributors – it does not open the door to unlimited transfers between state candidates.

Legislative Counsel initially argues that Section 85315's allowance for the target of a recall to defend him or herself by accepting "campaign contributions … without regard to the campaign contribution limits" of Chapter 5 includes Section 85305's restrictions on transfers. It contends that a court would consider the seemingly contradictory language of both statutes in the context of the entire statutory scheme of which it is a part. Counsel argues that Section 85305 uses language analogous to "campaign contribution limit," the statute is in an article entitled "Contribution Limitations,"[15] and the Legislative Analyst's analysis of Proposition 34 refers to the restriction as a "campaign contribution limit."

The FPPC's regulations and materials interpret Section 85315's reference to raising campaign contributions without regard to "campaign contribution limits," as meaning the basic candidate contribution limits in Sections 85301 and 85302 on what candidates may receive from persons – the $4,400 legislative limit, $7,300 state candidate limit, or $29,000 gubernatorial limit (as enacted $3,000, $5,000 and $20,000), and the parallel small contributor committee limits of Section 85302.

The legislative history supports the FPPC's interpretation. As evident in this link, the Legislative Analysts' description of Proposition 34 in the ballot pamphlet featured these limits of Sections 85301 and 85302 as the "campaign contribution limits" of Proposition 34. Voters would most likely have understood these campaign limits as the ones to be waived by a candidate defending against a recall. The FPPC's longstanding "Contribution Limits" chart similarly features these limits of Section 85301 and 85302 as the California State Contribution Limits. In contrast, the Legislative Analysts' summary in the ballot pamphlet describes Section 85305 as "limits on… transfers from state candidates."

The Legislative Counsel opinion also contends that Sections 85305 and 85301 are not duplicative because Propositions 73 and 208 contained complete bans against inter-candidate transfers of campaign funds that were overturned by the courts, necessitating a specific provision that transfers are not completely banned. Counsel further contends that Section 85305 imposes only one limit amount regardless of the classification of actor, while Section 85301 imposes three

[15] Article 3 is entitled "Contribution Limitations" because the basic contribution limits of Sections 85301 (Candidate Limits), 85302 (Small Contributor Committee Limits) and 85303 (PAC and Party Limits) are the most significant part of that Chapter. As the Legislative Counsel opinion concedes, there are many provisions in Chapter 5 in addition to the basic campaign contribution limits.

different limits for three different groups of actors. In Counsel's opinion, this indicates that Section 85305 is distinct from Section 85301.

Section 85305 is distinct from Section 85301 and the Commission has always interpreted it as such. Section 85301 imposes limits on the amount persons can contribute to candidates for the Legislature, statewide offices, and governor. Section 85305 restricts the ability of state candidates to transfer funds to other state candidates.

2. Unlimited Making and Accepting.

Second, the Legislative Counsel opinion argues that the waiver in Section 85315 applies to both the making and the acceptance of contributions. Counsel alleges that if Section 85315 were construed only to apply to acceptance of campaign contributions, it would not waive the limits on making contributions contained in Sections 85301 and 85302, which would cause the waiver to become ineffective. Accordingly, the opinion argues that in order for the exception in Section 85315 to have meaning, it must be read to waive limits on making a contribution as well as limits on accepting a contribution.

The candidate campaign contribution limits of Sections 85301 and 85302 are drafted as double liability prohibitions affecting both the contributor and the candidate.

Section 85301 provides as follows:

> (a) A person, other than a small contributor committee or political party committee, *may not make* to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office *may not accept* from a person, any contribution totaling more than three thousand dollars ($3,000) per election.
>
> (b) Except to a candidate for Governor, a person, other than a small contributor committee or political party committee, *may not make* to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office *may not accept* from a person other than a small contributor committee or a political party committee, any contribution totaling more than five thousand dollars ($5,000) per election.
>
> (c) A person, other than a small contributor committee or political party committee, *may not make* to any candidate for Governor, and a candidate for governor *may not accept* from any person other than a small contributor committee or political party committee, any contribution totaling more than twenty thousand dollars ($20,000) per election.
>
> (d) The provisions of this section do not apply to a candidate's contributions of his or her personal funds to his or her own campaign." (Emphasis added.)

Legislative Counsel argues that Section 85315 waives the basic campaign contribution limits of Sections 85301 and 85302 in a recall defense. When Section 85315 provides these campaign contribution limits are waived, they are waived for both the contributor and the target accepting the contributions because the statute being waived is drafted to include making and accepting.

Section 85305's restriction on inter-candidate transfers is not drafted with double liability, it is a transfer restriction that prohibits an elected state candidate from transferring unlimited funds to another state candidate.

3. Section 85303(c) – Contributions to PACs or Political Parties.

Lastly, the Legislative Counsel opinion suggests that perhaps Section 85303(c) should be taken into consideration. Subsection (c) provides that "nothing in this chapter shall limit a person's contributions to a committee or a political party committee provided the contributions are used for purposes other than making contributions to candidates for elective state office." Because a recall is considered a ballot measure rather than an election for an office, the opinion argues that Section 85303(c) may prohibit the application of Section 85305 to contributions made to a candidate's committee to oppose a recall election.

Section 85303(c) has not been and should not be interpreted to apply to contributions received by a candidate-controlled recall committee. Section 85303 contains the contribution limits imposed on PACs and political parties for the purpose of making contributions to state candidates. For example, contributions that a political party committee receives for making contributions to state candidates are subject to the political party limits of Section 85303(b) – $25,000 per year as enacted, and $36,500 now. But the political party committee also receives contributions for voter registration and other activities. Under Section 85303(c), contributions for these activities are not subject to the $36,500 per year limit. For this reason, the parties maintain two accounts, one for the purpose of making contributions to state candidates, raised under limits; and another account for other activities, not subject to limits.

In addition, the opinion's characterization of a recall election on page 3 is abbreviated. A recall election is treated half as a measure and half as a candidate election under the Act. It is not purely a measure election, and cannot be analyzed solely as a measure.

As stated in the recall fact sheet:

> Recall elections are unique because they have both the characteristics of a ballot measure and a candidate election. Most recalls have two distinct parts: 1) shall the officeholder be recalled from office; and 2) if the officeholder is recalled, who shall replace the recalled official? The first part is the actual recall, and a recall falls within the definition of a "measure" under Section 82043 of the Act. As a result, state law treats recall elections as ballot measures, the "issue" being

> whether the officeholder should be recalled. In contrast, the second part on the ballot is a candidate election, the question being who shall be elected to the vacant office.

It is difficult to argue that contributions *made* to a state elected official who is defending the recall election and running to maintain his or her office, are for purposes other than a state candidate election as contemplated by Section 85303(c).

RECOMMENDATION

The FPPC's interpretation of the relevant statutes concluding that contributions by a state candidate to a recall committee controlled by another state candidate are subject to the $4,400 limit on contributions between state candidates is well-reasoned and legally sound. Indeed, the FPPC's position is based on the plain language, legislative history, and policies of the relevant statutes. More importantly, the transfer restriction has been in place and applied to every recall since 2003. And Mr. Rios provides no basis to suggest the FPPC's interpretation needs to be reversed.

Accordingly, staff recommends that the Commission deny Mr. Rios's request for an opinion.

Attachment A

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
Luisa Menchaca, General Counsel

Date: July 26, 2002

Subject: **Proposition 34 Regulations: Adoption of Emergency Regulation 18535 – Restrictions on Contributions between State Candidates**

A. Summary. Proposition 34 added to the Act section 85305 which restricts contributions between state candidates. Questions have arisen concerning the application of the limit, including (1) whether the limit amount is $3,000 across-the-board, or whether it is $3,000, $5,000 and $20,000; (2) to which committees the limit applies; (3) when section 85305 takes effect; and (4) whether the limit applies now to contributions made by legislative candidates to statewide candidates. Draft regulation 18535 seeks to clarify the interpretation of section 85305. The regulation is presented for emergency adoption because of the proximity of the November elections.

B. Section 85305. Section 85305 states as follows:

> "A candidate for elective state office or committee controlled by that candidate may not make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301."

Section 85305 of Proposition 34 was intended to limit the movement of campaign funds between state candidates. Legislative leaders in the Senate and the Assembly typically raise funds to support candidates of their party in important races. The summary of Proposition 34 by the legislative analyst contained in the ballot pamphlet stated 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."

In addition, the 'Argument in Favor' of Proposition 34 in the ballot pamphlet stated:

> – "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 these political sneak attacks."

The idea of restricting contributions or transfers[1] between candidates is not new. The Act has contained several bans on contributions between candidates in the past. Proposition 73, passed in 1989, contained a strict provision in former section 85304 prohibiting transfers between a candidate's own controlled committees and prohibiting any transfers of contributions between candidates for elective office. In the litigation challenging Proposition 73, a federal appellate court held that the contribution limits of Proposition 73 calculated on a fiscal year basis were unconstitutional. (*Service Employees International Union v. Fair Political Practices Commission* (9th Cir. 1992) 955 F.2d 1312, 1321, *cert. den.* 505 U.S. 1230.) The court invalidated the ban on transfers between a candidate's own committees and affirmed that the prohibition on transfers between candidates did not prevent circumvention of contribution limits where no valid contribution limits were in effect. (*Id.* at 1322-23.)

Proposition 208, enacted in 1996, contained its own prohibition on the transfer of campaign funds between candidates in then-section 85306. Section 85306 was repealed by Proposition 34 and replaced by its restriction on contributions between state candidates in section 85305. Several questions involving the interpretation of section 85305 are discussed below.

1. Is the dollar amount of the limit on contributions between state candidates $3,000 across-the-board, or is it $3,000, $5,000 and $20,000, depending on the office?

Under section 85305, a state candidate may not make a contribution to another state candidate "*in excess of the limits set forth in subdivision (a) of Section 85301.*" Section 85301 sets forth Proposition 34's general limits on contributions from persons to candidates. Although phrased indirectly, section 85301 provides in subdivision (a) that the limit on contributions from persons to legislative candidates is $3,000; in subdivision (b) that the limit on contributions from persons to statewide candidates (other than Governor) is $5,000; and in subdivision (c) that the limit on contributions from persons to candidates for Governor is $20,000. Section 85301 states:

"(a) A person, other than a small contributor committee or political party committee, may not make to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office

[1] Contributions between candidates are sometimes called "inter-candidate transfers." The movement of funds between several of a candidate's own committees is sometimes called an "intra-candidate transfer." Because the distinction between inter-candidate and intra-candidate transfers becomes confusing, we do not use the term "transfer" here and in the proposed regulation, but adhere to Proposition 34's statutory language of "contributions between candidates."

may not accept from a person, any contribution totaling more than three thousand dollars ($3,000) per election.

(b) Except to a candidate for Governor, a person, other than a small contributor committee or political party committee, may not make to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office may not accept from a person other than a small contributor committee or a political party committee, any contribution totaling more than five thousand dollars ($5,000) per election.

(c) A person, other than a small contributor committee or political party committee, may not make to any candidate for Governor, and a candidate for governor may not accept from any person other than a small contributor committee or political party committee, any contribution totaling more than twenty thousand dollars ($20,000) per election."

The amount "set forth in subdivision (a) of Section 85301" that one state candidate may contribute to another under section 85305 is $3,000 per election. Where the plain meaning of a statute is clear, that meaning must be enforced. (*United States National Bank of Oregon v. Independent Insurance Agents of America, Inc.* (1993) 508 U.S. 439, 113 S. Ct. 2173.) Under the plain language of section 85305, the limit on contributions made by one state candidate to another is $3,000 per election. Further, under the plain meaning of section 85305, the $3,000 limit applies to all "candidates for elective state office.[2]" This means the $3,000 limit applies to contributions made by a legislative candidate to a candidate for Governor and to contributions made by a candidate for Governor to a legislative candidate, absent the section 83 concerns discussed below.

Ms. Jan Wasson, treasurer to a legislative officeholder, and Mr. Tony Miller, her attorney, have raised questions concerning section 85305 in the requests for advice attached in Appendix 2.[3] Mr. Miller interprets section 85305 to mean that the limit on contributions between state candidates is $3,000, $5,000, or $20,000, depending on the recipient of the contribution.

In effect, this interpretation reads section 85305 out of the Act. If section 85305 did not exist, candidates would be limited to the general contribution limits of section 85301 in making contributions to other state candidates. Mr. Miller's interpretation

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[2] "'Elective state office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of Equalization." (Section 82024.) In this memorandum, candidates for "elective state office" are also referred to as state candidates.

[3] Mr. Miller subsequently asked that the Executive Director grant his request for a Commission opinion interpreting section 85305. Because the interpretation of the restriction on contributions between candidates is a question of general applicability and because the request for an opinion may have raised some past conduct issues, the Executive Director denied the request, concluding that the interpretation of section 85305 should instead be resolved through a regulation.

would also be correct if section 85305 stated that contributions made by state candidates to other state candidates were limited to the contribution limits set forth in subdivisions (a), (b), and (c) of section 85301. But section 85305 states that the contributions between state candidates may not exceed the limits set forth in *subdivision (a) of section 85301*, which amount is $3,000. Section 85305's limit on contributions between state candidates incorporates the $3,000 monetary limit of section 85301(a), and includes no other limit.

Mr. Miller counters that if section 85305 meant $3,000, the drafters could have just inserted that number. However, by incorporating the limit of section 85301(a), section 85305 takes advantage of the cost-of-living adjustment applied to the contribution limits every other year as specified in section 83124. In this way, the limit on contributions between state candidates will always remain consistent with the legislative contribution limit.

Mr. Miller also argues that it makes more sense for the limits on what a candidate may give to another candidate, and what that candidate may accept, to be the same. But section 85305 speaks only in terms of prohibiting a state candidate from *making* a contribution to another state candidate in excess of $3,000. Section 85305 does not limit the contributions a committee may receive.

Paragraphs (a) and (b) of proposed regulation 18535 clarify that the limit on contributions between state candidates under section 85305 is $3,000, as adjusted for inflation, and applies to all state candidates.

2. To which committees do the restrictions on contributions between state candidates apply?

Section 85305 states that "[a] candidate for elective state office *or committee controlled by that candidate* may not make any contribution to any other candidate for elective state office in excess of the limits set forth in subdivision (a) of Section 85301 [$3,000]." Under the plain meaning of section 85305, the limit on contributions between state candidates applies to contributions made from the personal funds of a state candidate and contributions made by all committees controlled by that candidate. Subdivision (c) of proposed regulation 18535 codifies advice given in the *Dichiara* Advice Letter, No. I-02-040, that the section 85305 limit is $3,000, rather than $3,000 from the candidate and $3,000 from his or her committee, for a total of $6,000. The Act and regulations define "controlled committee" in section 82016 and regulation 18217, and those definitions are applicable here, as stated in subdivision (c) of the proposed regulation.

3. When does section 85305 take effect for statewide candidates?

Portions of Proposition 34 do not become applicable to candidates for statewide elective office[4] until after the November 6, 2002 election. Under section 83, the

contribution limitations of Article 3 (except the $1,000 and $5,000 online reports required by section 85309(a) and (c) and section 85319 concerning returning contributions) do not apply to candidates for "statewide elective office" until November 6, 2002.[5] Pursuant to section 83, section 85305 applies now to contributions made by legislative candidates to other candidates for elective state office. It applies starting November 6, 2002, to contributions made by statewide candidates to other candidates for elective state office.

In other words, section 85305 applies now to restrict a legislative candidate from making a contribution in excess of $3,000 to any candidate for elective state office, including a candidate for the Legislature, a candidate for statewide office, or a candidate for Governor. Pursuant to section 83, however, section 85305 does not apply to statewide candidates until November 6, 2002. Thus, to use Mr. Miller's example, the State Treasurer is *not* presently prohibited from contributing in excess of $3,000 to the Governor for the November 2002 election. After November 6, 2002, however, the State Treasurer would be limited to contributing $3,000 per election to the Governor or any other candidate for elective state office.

Paragraph (e) of draft regulation 18535 states the delayed effective date for statewide candidates. This is the most straightforward application of the Section 83 effective date.[6]

4. May a legislative candidate and his or her controlled committee (pre- or post-Proposition 34) make a contribution to a statewide candidate in excess of $3,000 now?

In the *Wasson* Advice Letter, attached in Appendix 2, we answered that section 85305 prohibits a legislative candidate and his controlled committees, whether pre-2001 or post-2001, from making a contribution today to a statewide candidate in excess of $3,000. Consistent with the discussion above, we answered that the restriction on contributions between state candidates is in effect now for legislative candidates, it

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[4] "'Statewide Elective Office' means the office of the Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction and member of the State Board of Equalization." (Section 82053.) In this memorandum, candidates for "statewide elective office" are also referred to as statewide candidates.

[5] Section 83, an uncodified section of Proposition 34, as amended by Stats. 2001, Ch. 241, effective September 4, 2001, provides as follows: "This act shall become operative on January 1, 2001. However, Article 3 (commencing with Section 85300), except subdivisions (a) and (c) of Section 85309, Section 85319, Article 4.(commencing with Section 85400), and Article 6 (commencing with Section 85600), of Chapter 5 of Title 9 of the Government Code shall apply to candidates for statewide elective office beginning on and after November 6, 2002."

[6] In regulations 18531.6 and 18536, the section 83 effective date for statewide candidates is also restricted to elections occurring on and after November 6, 2002, because sections 85316 and 85306 concerning fundraising for outstanding debt and a candidate's transferring contributions between his or her own committees involve maintaining the limits on contributions a committee may receive for a particular election. In contrast, section 85305 restricts the current actions of a contributor – a state candidate – in funding another state candidate.

covers current conduct, and it applies to all of a candidate's controlled committees. The plain meaning of section 85305 leads to this conclusion.

Mr. Miller argues that the outstanding debt rules of regulation 18531.6(a) limit how section 85305 may be interpreted. Regulation 18531.6 interprets section 85316 of Proposition 34 concerning post-election fundraising. Section 85316 provides that a state candidate may only accept a contribution after the date of an election to the extent that the contribution does not exceed net debts outstanding from the election, and that the contribution does not exceed the applicable contribution limit for the election. In essence, it restricts post-election fundraising, and ensures that the contribution limits of an election are not exceeded.

So as not to retroactively impose Proposition 34's contribution limits on elections that took place before Proposition 34 was in effect, regulation 18531.6(a) states:

> "(a) Pre-2001 Elections. Government Code section 85316 does not apply to a candidate for elective state office in an election held prior to January 1, 2001.
> (1) There are no contribution limits in effect for elections held prior to January 1, 2001 for contributions made on or after January 1, 2001.
> (2) Contributions for an election held prior to January 1, 2001 may be accepted in an amount that exceeds net debts outstanding."

The discussion at the adoption of that regulation concerned fundraising for outstanding debts, application of the contribution limits of sections 85301 and 85302 to past elections, and permitting termed-out incumbent officeholders to raise funds into committees maintained for officeholder purposes. There was no discussion of the interpretation of section 85305 in the memorandum or during the commission meetings relating to the outstanding debt rules. Regulation 18531.6 was not intended to interpret, nor does it interpret, the limit on contributions between state candidates in section 85305.

Mr. Miller is asking whether a legislative leader may make a contribution to a statewide candidate in excess of $3,000. We respectfully submit that section 85305 could not be more clearly applicable to contributions made by legislative leaders to other candidates if the code section were titled "Restrictions on Transfers by Legislative Leaders." The restriction on contributions between state candidates is a prohibition that is distinct from and in addition to the rules applicable to debts outstanding after an election contained in section 85316 and regulation 18531.6. To argue that a regulation interpreting section 85316 concerning outstanding debt renders section 85305 inapplicable, is to ignore the statute.

In essence, section 85305 is designed to reduce the power of legislative leaders to influence election outcomes by transferring money to candidates in tight races. The effect of the interpretation advanced by Mr. Miller is to stave off the application of section 85305 and keep the money moving around a little longer, albeit in old committees and to statewide candidates.

The proposed regulation in subdivision (d) interprets section 85305 to apply to current contributions made by a state candidate and all of his or her controlled committees, regardless of whether a committee is pre-2001or post-2001. As interpreted in the proposed regulation, section 85305 applies to the current conduct of a contributor and to all of the contributor's controlled committees, which committees are expressly included in the language of section 85305. Unlike regulation 18531.6 which seeks to avoid applying contribution limits to past elections that were not conducted under such limits, staff believes there is no persuasive policy argument to exempt from section 85305 the current activity of a state candidate in contributing to another state candidate, even if the contribution is made from or to an old committee.

Mr. Miller raised the additional question of whether the $3,000 restriction of section 85305 would apply to contributions made by state candidates to a committee of another state officeholder maintained for officeholder purposes. Under paragraph (d) of the proposed regulation, the $3,000 limit would apply.

C. Recommendation. Under the interpretation of section 85305 in the proposed regulation, the limit on contributions between state candidates is $3,000 per election and it applies to current contributions made by the candidate and all of his or her controlled committees. The proposed interpretation of section 85305 contained in the draft regulation expresses the plain meaning of the statute, and results in a clear and easy-to-apply rule. Staff recommends that the Commission approve regulation 18535 for emergency adoption.

Attachments

Appendix 1 – Proposed regulation 18535
Appendix 2 – Wasson request for Advice, dated February 14, 2002
Wasson Advice Letter, No. I-02-048
Miller request for reconsideration, dated May 24, 2002.

Attachment B

FAIR POLITICAL PRACTICES COMMISSION

MEMORANDUM

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

From: C. Scott Tocher, Commission Counsel
Luisa Menchaca, General Counsel

Re: Adoption of Recall Election Fact Sheet

Date: July 28, 2003

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In March of 2003 the Commission approved a fact sheet, titled "Recall Elections," which updated a 1999 version on the same subject. The revised fact sheet included statutory changes made to the Act by Proposition 34. The fact sheet covered the disclosure obligations and limits applicable to candidates and committees involved in a state recall election.

In July, the Commission adopted regulation 18531.5, implementing section 85315, addressing the subject of recall elections. The primary aspects of the regulation are as follows:

1. The contribution limits of the Act do not apply to contributions accepted by the target elected officer into a committee established to oppose the recall. Similarly, the expenditure limits do not apply to expenditures made by the target to oppose the recall. (Reg. 18531.5, subd. (b)(1).)

2. The contribution limits apply to replacement candidates who are seeking elective state office. (Reg. 18531.5, subd. (b)(2).)

3. Committees primarily formed to support or oppose a recall are ballot measure committees not subject to the Act's contribution limits. (Reg. 18531.5, subd. (b)(3).)

When the Commission adopted regulation 18531.5, the Commission directed staff to revise the Recall Elections fact sheet to address additional issues surrounding recall elections. The Commission also asked for input from the community to assist in the revision of the fact sheet. An updated fact sheet is presented to the Commission for consideration and approval. The fact sheet seeks to address many of the issues that were discussed at the Commission's July meeting and anticipates other issues that may arise in the recall process. This memorandum discusses several major issues that were discussed at the Commission's July meeting and addressed in the revised fact sheet.[1]

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[1] The attached revised fact sheet merges the fact sheet adopted in March, 2003, with new questions and issues concerning regulation 18531.5 and the current recall drive. The introductory paragraph and questions 23-27 of the draft revised fact sheet are essentially unchanged from the March, 2003 fact sheet. The remaining text is either new or heavily revised.

I. TARGET OFFICERS – THE MEANING OF "OPPOSING" A RECALL ELECTION

Proposition 34 expressly provides that the Act's contribution limits do not apply to a committee established by an elected state officer to *oppose* a recall. Section 85315 states:

> "(a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election."

Thus, regulation 18531.5, consistent with previous staff advice on the question, states that the target of a recall is not subject to contribution limits in his or her effort to oppose the recall. (E.g., *Roberti* Advice Letter, No. A-89-358.) During the July meeting, various scenarios were posed seeking to illuminate the boundaries of activities that constitute "opposing" a recall. For instance, most observers agreed that section 85315 and regulation 18531.5 permit the target of the recall to raise unlimited contributions and make expenditures directly addressing the first question of a recall: Should the elected official be recalled? Most often, these expenditures would be related to communications advising the public to "vote no," for instance, on the recall or tout the accomplishments of the target official. Debate centered, however, on whether the target officer could raise and use unlimited funds for communications that either were a hybrid, addressing both the first and second (shall Jane Doe be elected to the office to replace the recalled official?) recall ballot questions or that entirely addressed only the second. In this regard, it was discussed whether the communications explicitly addressing only the second question could really be said to "oppose" the recall if the communications only were directed to opposing a given replacement candidate. Regarding hybrid expenditures that address both questions, such as "I deserve to be kept in office and Jane Doe is unqualified," the question arose whether candidates would be forced to apportion the expenditure in some manner between a committee that raises unlimited funds and a separate committee created to oppose replacement candidates.[2]

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[2] In the staff memorandum on the recall issue for the July, 2003 Commission meeting, staff stated that amendments to the state Constitution and recent amendments to other laws consolidated the two recall questions onto the same ballot. In fact, the appearance of both questions on the same ballot, whether to recall and with whom to replace the recalled official, can be traced to the original constitutional recall provision adopted by the voters in 1911, in then-section 24 of the state Constitution. In November of 1974, that provision was renumbered in the Constitution by the voters in adopting a revised recall proposition, Proposition 9 (not to be confused with Proposition 9 on the June ballot in 1974 that created the Political Reform Act and the Fair Political Practices Commission). In 1994, Proposition 183 added a 180-day option for holding a recall election under certain circumstances but did not affect the issue of consolidation.

The fact sheet answers these questions by stating that an elected state officer who is subject to a recall may make expenditures to oppose the recall and expenditures to oppose replacement candidates from his or her committee. (Fact Sheet, Q. 8.) This conclusion is based on section 85315's broad language allowing the target to "oppose the recall election" without hindrance from contribution limits. Expenditures opposing a replacement candidate may be an integral part of a target candidate's strategy to succeed ultimately in opposing the recall and can have virtually the same effect as an expenditure to "vote no on the recall." By opposing a replacement candidate, the target implies that a successful recall will bring negative consequences in the form of the replacement candidate. Thus, the worse alternative counsels to stay the course. The viability of a replacement candidate and its effect on the possible outcome of the vote on the recall election itself was acknowledged in press accounts of a strategy memorandum prepared by a consultant for a pro-recall group. (Margaret Talev, *Memo's a Recipe for Recall*, Sacto. Bee, July 18, 2003; Marc Sandalow, *Issa Forces Told How to 'Trash' Governor - Recall Troops Urged by GOP Consultant to 'Kill Davis Softly'*, S.F. Chronicle, July 18, 2003.) A recall committee may also make expenditures that call for a recall and support a replacement candidate. Therefore, a target candidate should be able to fully address the opponents.

Moreover, this approach eliminates the need to assess all expenditures of the target to determine which may have a dual purpose and whether and how the relative costs should be apportioned and by what standards the expenditures are to be assessed. While one can conceive of a target candidate who, sensing defeat, throws in the towel and makes expenditures supporting a given replacement candidate over another, such an event seems first, unlikely, and second, problematic.

II. MAY CANDIDATES CONTROL BALLOT MEASURE COMMITTEES?

The question of whether a replacement candidate may also control a ballot measure committee is a critical one. Because ballot measure committees generally are not subject to contribution limits under *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, and because the Commission already has determined that replacement candidate committees remain subject to contribution limits, different rules will apply in the event a replacement candidate is able to control both a ballot measure committee as well as his or her own candidate committee. The fact sheet states that a replacement candidate may control a ballot measure committee formed to support a recall and addresses several scenarios to help answer common questions. (Fact Sheet, Q. 9.)

Section 82043 of the Act includes recalls within the definition of "measure," and therefore the FPPC's interpretation has proceeded under that framework. Accordingly, the FPPC has consistently advised that the contribution limits of the Act do not apply to proponents or opponents of a recall measure. Also, it is long-standing advice that a candidate may control a ballot measure committee. (*Kopp* Advice Letters, Nos. A-97-390 and A-97-390a; *Olson* Advice

Letter, No. A-89-363; *Leidigh* Advice Letter, No. A-89-170.)[3] In *Kopp*, staff issued advice to a state senator concluding that a ballot measure committee which was controlled by the senator was subject to Proposition 208's statute, stating the contribution limits applied "to any candidate." The proposition's contribution limits applied to "any candidate or the candidate's controlled committee." (Former § 85301.) Although in the singular, the letter noted that "controlled committee" had been interpreted elsewhere in the Act to be plural and cited Government Code section 13, an interpretive statute for the code, that states "the singular number includes the plural, and the plural the singular." Staff also observed that there was no indication in Proposition 208 that voters intended to change the definition of a candidate-controlled committee to exclude ballot measure committees. Nevertheless, the Commission voted in October of 1997 to rescind that advice, Senator Kopp consequently was advised that the contribution limits did not apply to candidate-controlled ballot measure committees. As a result, previous Commission positions support the conclusion that a replacement candidate in a recall election may also control a ballot measure committee formed to support the recall election.[4]

A contrary conclusion implicates issues surrounding the First Amendment right of free speech, as well. Also, practical problems can arise if a person who is not a candidate controls a ballot measure committee supporting the recall and then later becomes a candidate. Moreover, there is nothing in the Act prohibiting candidates from controlling ballot measure committees.

By stating that replacement candidates may also control a ballot measure committee formed to support the recall, the Commission avoids unnecessary constitutional and practical problems and follows historic Commission determinations in similar contexts.

III. APPORTIONMENT OF JOINT EXPENDITURES BY A REPLACEMENT CANDIDATE

In light of the determination that a replacement candidate may also control a ballot measure committee formed to support the recall, questions arise regarding "hybrid" expenditures that implicate both the question of whether to recall the target officeholder and the question of who shall replace the target if the recall succeeds. These issues are addressed in questions twelve through fifteen of the fact sheet. The essential test for whether and how "hybrid" expenditures may be apportioned is whether the expenditure can clearly be shown to relate solely to the ballot measure question. (Fact Sheet, Q. 14.)

The analysis begins with observance of the cardinal one-bank-account rule of sections 85200 and 85201. According to this rule, any campaign expenditures of a candidate for election to a specific office must be made from the candidate's committee created for that office. As a result, a ballot measure committee also controlled by the candidate may not make expenditures that promote the candidate's candidacy. While it may be true that an expenditure by a ballot

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[3] The *Olson* letter allowed the candidate to control the ballot measure of a candidate running for office even though the contributions to the ballot measure also might indirectly benefit the controlling candidate.

[4] The question of when a candidate "controls" a committee is addressed in "Question 10" of the fact sheet.

measure committee that relates solely to the ballot measure question (and thus not subject to contribution limits) may indirectly benefit the candidate's election campaign insofar as it increases the likelihood that the second question in the election will be reached, it does so without reference to the candidate him/herself and arguably will have just as much impact on other replacement candidates as well. Thus, expenditures from a ballot measure committee controlled by a replacement candidate may only address the first question on the ballot – whether to recall the elected official. (Fact Sheet, Q's. 12, 15.)

As to the replacement candidate's election committee, nothing in the law requires a replacement candidate to create a separate ballot measure committee to support the recall. The only incentive for doing so is, of course, the absence of contribution limits to such a committee. Nevertheless, it is conceivable, if not likely, that expenditures by a replacement candidate may implicate both ballot questions separately and the Fact Sheet allows apportionment where a candidate can clearly show that a part of an expenditure relates solely to the ballot measure issue. The cost that may be borne by the ballot measure committee correlates its proportion of the overall expenditure. Where a candidate cannot make the showing described, the expenditure must be paid for by the candidate's election committee. In this way, the candidate is responsible for bearing the burden of any ambiguity created by his or her expenditures.

IV. MISCELLANEOUS CASE LAW

At the July meeting, two cases of uncertain relevance were brought to the attention of the Commission. Each is addressed below.

A. The *Wax* Case.

The case of *Wax v. FPPC* in 1990 in the United States District Court, Eastern District of California, was part of a fusillade of legal challenges stemming from the voters' adoption of Proposition 73 in 1988. Among the many provisions of Proposition 73 were limits on contributions among candidates and the ability for candidates to transfer funds to and among other candidates. At issue in the case were two regulations propounded by the Commission which described situations in which a communication by a ballot measure committee would be treated as a contribution to a candidate featured in the communication. In granting a preliminary injunction barring the Commission from enforcing the regulations in the relevant context of the case, the court enjoined the Commission from taking any action:

> "...that treats an expenditure by a ballot measure or candidate committee as a 'contribution' to an individual running for office, *when the expenditure is made to publicize an endorsement by that individual*, unless the endorsement message being publicized includes express advocacy of the election or nomination of the endorsing individual." (Order of Judge Karlton, 10/10/90; italics added.)

As can be seen from the language of the order, the challenge made and the relief granted relate to the very narrow circumstances italicized in the quoted text above. Since the case involved language of a statutory and regulatory scheme no longer in place in a very limited factual context, staff does not believe that the *Wax* case is determinative of the issues addressed in regulation 18531.5 and the Recall Elections fact sheet.

B. *Citizens for Clean Government v. City of San Diego.*

On July 7, 2003, a federal district court in southern California issued an order denying an application for a preliminary injunction barring enforcement of a local ordinance that had the effect of subjecting a recall committee to local contribution limits. The court concluded that "the recall process cannot be likened to a ballot measure, and should instead be treated as a candidate campaign… ." (*Citizens for Clean Government v. City of San Diego* (2003) (S.D. Cal.) Civ. No. 03-1215 J.)

In *Citizens*, the plaintiff was a committee seeking to recall a San Diego city councilman. The plaintiff wished to hire paid signature gatherers to qualify the recall. A city ordinance, however, limited the amount of money that could be contributed to such a campaign, which covered recall campaigns as well as traditional candidate elections. The suit alleged First Amendment free speech violations. The plaintiff alleged that the recall could be divided into three discrete segments: the signature gathering for the recall petition, the vote on the petition, and if the recall was voted onto the ballot, the resulting election of a replacement candidate. The suit requested the court lift the contribution limitation only for the signature gathering portion of the process, alleging that since a recall petition was not the same as a candidate campaign, the contribution limits in the recall were unconstitutional.

The court agreed with the city, concluding that gathering signatures to support a recall petition "cannot be likened to a ballot measure." (*Id.*) The ordinance "specifically contemplates that a successful recall petition results in a recall proposal on the ballot which names an alternate candidate." (*Id.*) The court concluded, therefore, that the "recall petition circulation process is therefore similar to a reverse election rather than a drive to create a ballot measure" and should be treated as a candidate campaign as provided in the local ordinance. (*Id.*)

Several important points must be made with respect to the case's relevance here. First, procedurally the case is at a very nascent stage. While a ruling on an application involves a preliminary assessment of the likelihood of success, it is not the final adjudication on the matter and usually occurs within days of the commencement of the suit. Second, as discussed above, section 82043 of the Act defines "measure" to include a recall. The court in *Citizens* did not construe this provision for the scheme before it was a local one with different definitions. Moreover, the court's conclusion does not conflict with section 81013 of the Act which permits local jurisdictions to impose additional requirements on persons so long as they do not prevent compliance with the Act. Therefore, section 81013 has been construed to mean stricter local rules are acceptable because they do not prevent compliance with the Act. (*Graves* Advice

Letter, No. A-97-416.) In anticipation of this issue, regulation 18531.5 addresses this issue in the "Comment" to the regulation. Finally, the case does not present controlling authority for the Commission because the ruling comes from a district court. As a result, while informative the case does not provide guidance to the Commission in its interpretation of the Act.

V. RECOMMENDATION

Staff recommends the Commission approve the revised Recall Elections Fact Sheet.

Attachment:

Exhibit 1: Recall Elections Fact Sheet

Recall Elections

The power of the voters to remove an elective officer by recall is set forth in the California Constitution Article II, §§ 13-19, and the California Elections Code §§ 11000 et seq. The Political Reform Act regulates campaign activity in a recall election. All candidates and committees that raise and spend funds in connection with a recall election have full reporting and disclosure obligations under the Act. In addition, Proposition 34 has added new provisions applicable to state officials and candidates involved in a recall effort.

Application of Contribution Limits to State Recall Elections

1. How is a recall election different from a typical election of a candidate for public office? Recall elections are unique because they have both the characteristics of a ballot measure *and* a candidate election. Most recalls have two distinct parts - 1) Shall the officeholder be recalled from office?; and 2) If the officeholder is recalled, who shall replace the recalled official? The first part is the actual recall, and a recall falls within the definition of a "measure" under section 82043 of the Act. As a result, state law treats recall elections as ballot measures, the "issue" being whether the officeholder should be recalled. In contrast, the second part on the ballot is actually a candidate election, the question being who shall be elected to the vacant office. Because different rules sometimes apply between the two types of elections, the answers to questions about conduct related to "the recall" depend on which part of the election is involved.

2. Is the elected state officer who is the target of a state recall subject to contribution limits? No. Proposition 34 expressly states that an elected state officer who is the target of a recall may accept contributions into a committee established to oppose the qualification of the recall or the recall election without regard to the contribution limits. (Section 85315; Regulation 18531.5.) The target candidate is not subject to expenditure limits. (Regulation 18531.5.)

3. Are replacement candidates running in a state recall election subject to contribution limits? Yes. Replacement candidates are subject to the contribution limits of the Act put in place by Proposition 34. For example, in 2003 the contribution limit for candidates for Governor is $21,200 per contributor. (Section 85301; Regulations 18531.5 and 18545.) Expenditure limit provisions apply to replacement candidates.

4. Why are the replacement candidates running in the gubernatorial recall subject to the contribution limits if the target elected officer is not? Proposition 34, the campaign contribution limit law passed by the voters in November of 2000, enacted contribution limits that apply to all candidates seeking elective state office. The replacement candidates are seeking the office of governor in the recall election and therefore the $21,200 per contributor limit applies to them. Proposition 34 contained a specific statutory provision, section 85315, which exempts the target of a recall from the contribution limits when raising funds to defend against a recall. Proposition 34

does not contain any parallel provision excepting replacement candidates in a recall from the contribution limits that apply as a matter of law to candidates seeking state office.

5. Are there any restrictions on the amount of funds a candidate may expend on his or her own campaign? No. Under the Act, there is no limit on the amount of personal funds a candidate may contribute or spend on his or her own campaign. (Section 85301(d).) However, this may cause an opponent's voluntary expenditure limits to be lifted. (Section 85402.)

6. May a local jurisdiction impose contribution limits on the subject of a recall election and replacement candidates? Nothing in the Act prohibits a local jurisdiction from imposing contribution limits on the subject of a recall election or a replacement candidate, so long as the local ordinances do not prevent anyone from complying with the Political Reform Act. (Section 81013; *Angus* Advice Letter, No. A-97-173.)

Donors

7. How do donors know whether the committee to whom they contribute is governed by limits or not? As shown above, contributions to a ballot measure committee are not subject to limits, whereas contributions to candidate committees are limited. Committees controlled by candidates already must identify the committee by name in solicitations. Also, candidates for elective state office must identify the specific name of the committee and the office sought. (Regulation 18523.1.) The Commission strongly recommends that committees make clear in solicitations whether or not the committee is subject to limits. A donor should contact the committee before making a donation if the donor is uncertain about the type of committee to which they wish to contribute.

Elected Officer Subject to Recall

8. May an elected state officer who is subject to a recall make expenditures to oppose the recall and expenditures to oppose replacement candidates from his or her committee? Yes, the target officer may make expenditures from a committee established to oppose the recall to oppose the qualification of a recall against him or her and to oppose the recall election. Expenditures by the target officer from such a committee may include expenditures to oppose the recall and to oppose the election of replacement candidates.

Replacement Candidates

9. May a replacement candidate control a ballot measure committee established to support a recall? Yes. The Commission has previously advised that a candidate may control a ballot measure committee. (*Kopp* Advice Letters, Nos. A-97-390 and A-97-390a; *Olson* Advice Letter, No. A-89-363; *Leidigh* Advice Letter, No. A-89-170.) Extending this advice to recalls, a replacement candidate may control a ballot measure committee supporting a recall.

10. What does it mean when a candidate "controls" a committee? A candidate "controls" a committee when he or she has a significant influence on the actions or decisions of the committee. (Section 82016.) To determine whether a candidate controls a committee, the FPPC looks at the degree of the candidate's involvement in the committee's activities. The involvement of a candidate includes the involvement of his or her campaign committee and his or her agents. (*Roberti* Advice Letter, No. I-90-339; *Madden* Advice Letter, No. A-85-197.) Although certain activities are not sufficient by themselves to constitute control, each is a factor to be considered in determining whether the candidate controls the committee. For example, soliciting funds on behalf of a committee by itself would not indicate control of the committee. However, such activity is relevant to whether the committee is controlled by the candidate. (*Woodruff* Advice Letter, No. I-89-180.) On the other hand, a candidate or an elected officer who is a voting member of a committee's board of directors is presumed to be a "controlling candidate." (*Ferguson* Advice Letter, No. A-86-044.)

11. Why aren't contributions to a ballot measure committee controlled by a replacement candidate subject to limits? Contributions to ballot measure committees are generally not subject to limits, based on the Supreme Court case *Citizens Against Rent Control v. Berkeley*. A ballot measure committee controlled by a replacement candidate may accept contributions to support a recall that are not subject to limits (except contributions from other candidates, which are subject to limits). (See Question 19.)

12. May a ballot measure committee controlled by a replacement candidate make expenditures to support the recall and expenditures to promote the replacement candidate's candidacy from funds not subject to limits? No. Expenditures to promote a replacement candidate's candidacy, including payments for communications that expressly advocate the election of the replacement candidate, must be made from the replacement candidate's committee for office which is subject to the Act's limits, not from the ballot measure committee. (Sections 85200-85201; Regulation 18521; *Mathys* Advice Letter, No. I-00-068; *Weems* Advice Letter, No. A-91-448.) According to this rule, any campaign expenditures of a candidate for election to a specific office must be made from the candidate's committee created for that office. As a result, a ballot measure committee also controlled by the candidate may not make expenditures that promote the candidate's candidacy. While it may be true that an expenditure by a ballot measure committee that relates solely to the ballot measure question (and thus not subject to contribution limits) may indirectly benefit the candidate's election campaign, it does so without reference to the candidate himself or herself. Thus, expenditures from a ballot measure committee controlled by a replacement candidate may only address the first question on the ballot – whether to recall the elected official.

13. Conversely, may a replacement candidate make expenditures to promote his or her candidacy and to support a recall from his or her committee for office? Yes. All expenditures made by the replacement candidate that promote his or her candidacy must be made from his or her committee for office which is subject to contribution limits. For example, payments for communications that expressly advocate the election of a replacement candidate, and expenditures for a consultant and a poll furthering the replacement candidate's election must be made from the replacement candidate's committee for office. In addition, the replacement candidate may make expenditures specifically supporting the recall from his or her candidate committee.

14. If an expenditure by a replacement candidate both promotes his or her candidacy and supports the recall, may the expenditure be apportioned between the candidate's ballot measure committee and his or her candidate committee for office? Yes. If a candidate can clearly show that a part of an expenditure relates solely to the ballot measure issue, the ballot measure committee may pay for that cost. Where such a showing cannot be made, the expenditure must be paid for by the candidate's committee for office. (Sections 85200-85201.)

15. May I make a joint expenditure out of the ballot measure committee and be reimbursed by the committee for office? No. Any expenditures by a candidate that promote his or her candidacy must be made from the candidate committee. (Sections 85200-85201; See Question 12.) A candidate committee may, however, be reimbursed by the ballot measure committee if the costs of the expenditure may be apportioned as indicated above.

Other Committees

16. May a single campaign committee be formed to oppose the recall of two or more officeholders in a recall election? Yes. This committee would be primarily formed and would be subject to any applicable limits. If the committee is controlled by a candidate or officeholder, the committee would also be a controlled committee.

17. May a general purpose committee use its funds to support or oppose a recall effort? Yes.

18. Non-Controlled Committees primarily formed to support or oppose a replacement candidate are subject to the $5,000 per contributor limit if they make contributions to state candidates. (Section 85303.) If such committees do not make contributions to state candidates, but only make independent expenditures for or against replacement candidates, they are not subject to contribution limits. (*Buckley v. Valeo.*)

19. Are contributions by other elected officials to a candidate's controlled ballot measure committee subject to limits? Yes. Contributions from candidates (and officeholders) for elective state office (and their controlled committees) may not make contributions to *any* committees controlled by other candidates in excess of $3,200, including a ballot measure committee. (Section 85305; Regulation 18535.)

Other Provisions of the Act

20. How do other contribution rules and the prohibition on independent expenditures by controlled committees (section 85501) apply to a state recall? Under section 85501, a candidate controlled committee may not make independent expenditures. However, a candidate's expenditures against his or her opponents are not considered "independent expenditures" subject to the prohibition of section 85501. Accordingly, expenditures made by the target officer to oppose replacement candidates are not independent expenditures prohibited by section 85501. Likewise, expenditures made by replacement candidates to oppose the target officer and other replacement

candidates are not independent expenditures prohibited by section 85501. The target officer would, however, be prohibited under section 85501 from making independent expenditures expressly advocating the election of a replacement candidate from any controlled committee of his or hers. Also, a candidate controlled ballot measure committee may not make contributions to support or oppose candidates, including the candidate who controls the ballot measure committee. (*Mathys* Advice Letter, No. I-00-068; *Weems* Advice Letter, No. A-91-448.)

21. How do the advertising disclosure provisions (sections 84501-84511) apply to a state recall? State and local ballot measures advertisements are required to contain disclosures naming major contributors. The name of a ballot measure committee (to support or oppose the recall) must meet certain identification requirements that identify interests of the major donors. Also, independent expenditures to support or oppose a candidate or ballot measure must identify the committee making the expenditure and its major contributors.

22. How do the issue advocacy disclosure provisions (section 85310) apply to a state recall? Section 85310 requires disclosure of communications identifying a state candidate made within 90 days of an election. This provision is designed to provide disclosure of large payments (over $50,000) for communications used for issue advocacy campaigning. Payments for such election-related communications identifying a state candidate might otherwise go undisclosed because they do not expressly advocate the election or defeat of a state candidate, and are therefore not required to be reported as independent expenditures. The disclosure requirements of section 85310 do apply in a state recall election to certain payments for communications identifying state candidates that are not otherwise disclosed. (If a payment for a communication identifying a state candidate is otherwise reported as an independent expenditure, the payment need not be reported under section 85310.)

Filing Obligations

23. What are a Proponent's Filing Obligations? An important consequence of the fact that recalls are treated as ballot measures, is that a person or group of persons who raises or spends more than $1,000 for a potential recall attempt will not be a "committee" pursuant to section 82013 until the target of the recall is served with a notice of intention to circulate a recall petition and the notice is filed and published, or posted pursuant to Elections Code sections 11006 and 11021. However, once this notice is given, the committee must report on its first campaign statement all contributions received and expenditures made for the purpose of influencing the electorate to sign a recall petition or to vote for or against a recall election regardless of when the contributions or expenditures were made.

24. What Are Officeholders' and Replacement Candidates' Filing Obligations? An officeholder who is the subject of a recall must disclose all contributions received and expenditures made in anticipation of a recall election, even if the officeholder has not been served with notice of intention to circulate a recall petition.

A replacement candidate must also disclose all contributions received and expenditures made pursuing election even if the subject of the recall has not been served with notice of intention to circulate a recall petition.

A committee's filing obligations during a recall election are as follows: generally speaking, proponents of a recall, the subject of the recall, and replacement candidates must file two pre-election campaign statements. In addition, all committees must make the usual semi-annual filings, and ballot measure committees must make the required quarterly filings.

The officeholder or replacement candidate has several options regarding what campaign account to use so long as they are consistent with the one bank account rule and other fundraising restrictions of Proposition 34 or local law. He or she may use his or her existing bank account (if any), an account formed for a future election (if any), or establish a separate ballot measure committee to oppose the recall. Section 85315 specifically provides that a state officer who is the target of a recall may open a new campaign committee and account to oppose the recall. All of these committees would be candidate controlled, and forms 410 (statement of organization) and 501 (candidate intention) must be on file.

25. How does a committee determine its filing schedule? The Commission's manuals for candidates and committees explain how to compute the filing schedule for election dates *other* than the normal election dates. Also, because the date of the election can vary, the filing schedule may be awkward depending on a candidate's or committee's existing filing obligations, if any. Because of this possibility, a candidate or committee may ask the FPPC's technical assistance division for a filing schedule and may ask the Commission for written permission to combine reports and statements if certain reports or statements overlap.

After the Recall Election

26. What may a candidate controlled committee do with remaining funds after the recall effort is finished? The funds of a candidate controlled committee become surplus funds under section 89519 after a recall. Section 85315(b) provides that after a recall petition or election is finished, the target state officer's recall committee must wind down its activities. Its remaining funds are treated as surplus under section 89519(b) and must be spent within 30 days.

27. What may a ballot measure committee (formed primarily to support or oppose a recall effort) do with funds remaining after the recall effort is finished? Generally speaking, the committee may spend its funds on anything that is reasonably related to a political, legislative, or governmental purpose, if there is no personal benefit to an officer of the committee. Also, if the committee would like to remain in operation, it may do so. However, the statement of organization may have to be amended to reflect the new purpose of the committee.

Attachment C

Fair Political Practices Commission

MEMORANDUM

To: Chairman Randolph, Commissioners Downey, Karlan, Knox and Swanson

From: Hyla P. Wagner, Senior Counsel
Luisa Menchaca, General Counsel

Date: June 25, 2003

Subject: Adoption of Regulation 18531.5 – Recall Elections

A. Summary. At its March 7, 2003, meeting, the Commission approved a revised fact sheet about recall elections. The revision updated the 1999 version to include statutory changes made to the Act by Proposition 34. At the March meeting, Chairman Getman requested that staff codify in a regulation pertinent advice contained in the recall fact sheet.

Regulation 18531.5 has two primary objectives:

(1) To clarify how the contribution and expenditure limits added by Proposition 34 apply to state candidates in a recall, following section 85315.

(2) To codify current FPPC advice as to reporting requirements for candidates and committees in recalls at the state and local level.

The impetus for updating the fact sheet and codifying advice concerning recalls was the pending effort to recall the Governor. This regulation, however, concerns rules that are broadly applicable to recalls. It is contemplated that specific questions which are unique to candidates and committees involved in the current gubernatorial recall attempt can be handled in the advice letter context rather than addressed in this regulation.

B. Recalls. Recall is the power of the voters to remove a sitting elected officer. (California Constitution Article 2, sections 13-19, and Elections Code sections 11000 et seq.) Recall elections are unique because they have characteristics of both a ballot measure and a candidate election. In a recall election, there are two separate questions being presented to the voters. The first is "should the elected official be removed from office?" Thus, the recall measure qualifies for the ballot through a signature gathering process like an initiative measure, and is defined as a "measure" under the Act. If the recall succeeds, the second question is selecting a replacement candidate in what is akin to a special election to fill a vacancy.

Amendments to Article 2 of the State Constitution in 1994 changed how recalls work in California. Prior to 1994, the vote on whether to remove an elected official from office, and if the recall

succeeded, the subsequent election to choose a successor candidate, were held separately. Amendments to Article 2 and the Elections Code consolidated recall elections and the choice of a replacement candidate to the same ballot and permitted recalls to be consolidated with an upcoming regularly scheduled election.[1] These changes were intended to save the expense of holding two separate elections and to prevent a period of vacancy in the office if a recall succeeds.[2]

Under the Act, a somewhat different set of rules applies to ballot measure elections than to candidate elections. Because recall elections are a hybrid between a ballot measure and a candidate election, recalls have given rise to numerous questions of interpretation for the FPPC in the past. In addition, Proposition 34 added section 85315, a provision specifically addressing recalls.

C. Application of State Contribution Limits to State Recall Elections. The proposed regulation in subdivision (b) states whether the various parties to a state recall – the target officer, the replacement candidates, and proponent and opponent committees, are subject to the contribution and voluntary expenditure limits.

1. Target of Recall. As to the target of a state recall, the regulation follows section 85315 and states that the contribution limits of the Act do not apply to contributions accepted by the target elected officer into a committee established to oppose the recall. Similarly, it states that the expenditure limits do not apply to expenditures made by the target to oppose the recall.

Section 85315 expressly provides that the Act's contribution limits do not apply to a committee established by an elected state officer to oppose a recall:

> "(a) Notwithstanding any other provision of this chapter, an elected state officer may establish a committee to oppose the qualification of a recall measure, and the recall election. This committee may be established when the elected state officer receives a notice of intent to recall pursuant to Section 11021 of the Elections Code. An elected state officer may accept campaign contributions to oppose the qualification of a recall measure, and if qualification is successful, the recall election, without regard to the campaign contributions limits set forth in this chapter. The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election."

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[1] Cal. Const. Art. 2, § 15, amended by Stats. 1994 Res. ch. 59 (S.C.A. 38 (Prop. 183) approved November 8, 1994); Elections Code §§ 11381-11386.

[2] 1994 ballot arguments and legislative analyst's estimate of fiscal impact concerning Proposition 183, a constitutional amendment on recall elections put on the ballot by the Legislature.

The statute and regulation are consistent with past FPPC advice stating that the target of a recall is not subject to contribution limits in his or her efforts to oppose the recall. (E.g., *Pringle* Advice Letter, No. A-89-155; *Roberti* Advice Letter, No. A-89-358; *Roberts* Advice Letter, No. I-89-570.)

2. Replacement Candidates. As to replacement candidates, the regulation in subdivision (b)(2) states that because these individuals are "candidates" who are seeking elective state office, the contribution limits of Chapter 5 of the Act do apply. Section 82007 of the Act defines a "candidate" as follows:

> "'Candidate' means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office, or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. 'Candidate' also includes any officeholder who is the subject of a recall election. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. 'Candidate' does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971."

The Act's definition of "candidate" is broad and includes both the replacement candidates and the elected officer who is the subject of the recall.

Proposition 34 enacted contribution limits applicable to candidates for elective state office. Among the limits in Chapter 5 of the Act, section 85301 restricts contributions from persons to state candidates as follows:

- $ 21,200 per election to "any candidate for Governor" (§ 85301(c));
- $ 5,300 per election to "any candidate for statewide elective office" except a candidate for Governor (§ 85301(b));
- $ 3,200 per election to "any candidate for elective state office" other than a statewide candidate (§ 85301(a)).[3]

[3] The amount of the contribution limit is adjusted every two years based on changes in the Consumer Price Index. These adjusted limits apply for elections occurring between January 1, 2003, and December 31, 2004.

The replacement candidates in a state recall election are "candidates" within the meaning of section 82007, who are seeking election to state office. Under a plain meaning interpretation of the Act, the contribution limits of Chapter 5 apply to replacement candidates in a state recall election.

Unlike the contribution limit schemes preceding it (Propositions 73 and 208), Proposition 34 contains a specific provision concerning recalls. As discussed above, section 85315 expressly provides that an elected state officer who is the target of a recall effort may accept contributions to oppose the recall without regard to the contribution limits of Chapter 5. Neither section 85315, nor any other section of the Act, however, exempts the individuals who are seeking state office as replacement candidates from the contribution limits. The fact that Proposition 34 specifically exempts the target of a recall from the contribution limits, but is silent as to the replacement candidates, argues that the Act's contribution limits do apply to replacement candidates. The Commission ratified this interpretation at its March 8 meeting, when adopting the fact sheet, and to date we have not received any negative comments about this interpretation.

3. Committees Primarily Formed to Support or Oppose a Recall. For committees formed to support or oppose a recall, the regulation in subdivision (b)(3) states that because a recall falls within the Act's definition of "measure," the contribution and voluntary expenditure limits of Chapter 5 do not apply. Section 82043 defines a "measure" as follows:

> "'Measure' means any constitutional amendment or other proposition which is submitted to a popular vote at an election by action of a legislative body, or which is submitted or is intended to be submitted to a popular vote at an election by initiative, referendum or recall procedure whether or not it qualifies for the ballot."

Accordingly, the FPPC has usually analyzed recall elections following the rules applicable to ballot measures, rather than those applicable to candidate elections. The Supreme Court case *Citizens Against Rent Control v. Berkeley* (1981) 454 U.S. 290, stands for the proposition that contribution limits do not apply in ballot measure elections. In that case, the Court struck down a Berkeley ordinance placing a $250 limit on contributions to support or oppose ballot measures as violating First Amendment rights of association and expression. The Court reasoned that the usual justification for contribution limits – preventing corruption or the appearance of corruption of a candidate or an elected official – was not present in the ballot measure situation, and that ballot measure elections involve issue discussion. (*Id.* at 297-298.) It is important to observe, however, that *Citizens Against Rent Control v. Berkeley, supra,* did not discuss recall elections or classify recall elections as ballot measures. The case only analyzed "non-candidate" controlled ballot measure committees, and emphasized the differences between "issues" that appear on the ballot and candidate elections.

Because recalls fall somewhere in-between a ballot measure and a candidate election, a statutory scheme could reasonably classify them either way. Section 82043 of the Act, however, includes recalls within the definition of "measure," and therefore the FPPC's interpretation has proceeded under that framework. Accordingly, the FPPC has consistently advised that the contribution limits of the Act do not apply to proponents or opponents of a recall measure.

D. Campaign Report Filing Obligations of Candidates and Committees Involved in a Recall. Having clarified how the Act's contribution limits apply to candidates and incumbents involved in state recalls, the second objective of the regulation is to give guidance to the parties involved in recalls about their campaign report filing obligations. In subdivision (c), the regulation emphasizes that all candidates and committees that are raising and spending funds in connection with a recall election have full reporting and disclosure obligations under the Act.

For a state or local elected official who is the target of a recall, the regulation provides that he or she may use a committee for the office held to oppose a recall, or may establish a separate committee to oppose a recall upon receiving a notice of intent to recall the officer. (§ 85315; *Hong* Advice Letter, No. A-89-133; *Roberts* Advice Letter, No. I-89-570). However, if a state officeholder who is the target of a recall accepts contributions to oppose the recall in any committee, other than a separate recall committee created pursuant to section 85315 or a committee otherwise not subject to Proposition 34 limits, the applicable contribution limits and post-election fundraising restrictions of Proposition 34 will be in effect. If the target officer establishes a separate recall committee, the regulation requires that the word "recall" be included in the name, consistent with section 84107 and the instructions to the Form 410 – Statement of Organization. Because a target officer opposing a recall is not seeking a new elective office, the regulation provides that the officer is not required to file a new candidate intention statement (Form 501) under section 85200.

The regulation states that a replacement candidate may form a committee to seek elective office in a recall at any time, and unlike the target officer, is required to file a candidate intention statement (Form 501) under section 85200. The regulation further provides that the disclosure obligations of committees primarily formed to support or oppose a recall are triggered when the proponent serves the target of the recall with the notice of intention to circulate a recall petition pursuant to Elections Code section 11021.

The comment to the regulation provides additional specifics as to the campaign reports required by committees active in a recall (codifying filing advice in the *Higdon* Advice Letter, No. I-94-189). The second paragraph of the comment recognizes local ordinances such as San Diego's municipal code which classifies recalls as candidate elections and imposes local contribution limits on all committees participating in a recall. State campaign finance law provides some deference to local governments to enact additional campaign finance regulation applicable in that jurisdiction. Under section 81013, a local jurisdiction is not prevented from imposing additional requirements on any person if the requirements do

not prevent the person from complying with the Act. In addition, section 81009.5 provides that local jurisdictions may not impose additional or different filing requirements from those in Chapter 4 of the Act, unless the additional or different requirements apply only to candidates or committees active only in that jurisdiction. Further, the additional or different reporting requirements may not be inconsistent with the provisions of the Act. The *Angus* Advice Letter, No. A-97-173, concluded that state law did not preempt the City of San Diego's local ordinance in its application of contribution limits to all participants in a recall.

E. Recommendation. Staff recommends that the Commission adopt regulation 18531.5 which interprets section 85315 and codifies advice about reporting by candidates and committees involved in recalls.

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