BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of:	)	
	)	No. O-17-001
Opinion requested by	)	August 17, 2017
Richard R. Rios, Esq.	)	
	)	
	)	

BY THE COMMISSION: Richard Rios, counsel for the Senate Democratic Caucus, has requested an opinion of the Fair Political Practices Commission ("Commission") on the following question:

QUESTION

Does the contribution limit set forth in Government Code section 85305[1] apply to a contribution made by a candidate for elective state office, or a committee controlled by that candidate, to a committee controlled by an elected state officer opposing a recall measure as described in Section 85315?

CONCLUSION

No. The limitation on inter-candidate contributions of campaign funds in Section 85305 does not apply to contributions to a committee controlled by an elected state officer opposing a recall measure as described in Section 85315.

ANALYSIS

A. The Determination That State Candidates May Contribute Unlimited Funds to A Recall Committee Controlled by Another State Candidate Is Supported by Examining the Plain Meaning of the Text of the Relevant Statutes.

When the Commission interprets a statute, it follows the same canons of statutory construction employed by the courts. *Britton et al. v. Dallas Airmotive, Inc. et al.* (2007) 153 Cal.App.4th 127, 131-132 explains:

> Our primary objective in interpreting a statute is to determine and give effect to the underlying legislative intent. We begin by examining the statutory language, giving the words their usual, ordinary meanings and giving each word and phrase significance. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context, and provisions ... relating to the same subject matter must be harmonized to the extent possible. An interpretation that

[1] Unless otherwise indicated, all further statutory references are to the Government Code.

> renders related provisions nugatory must be avoided; each sentence must be read not in isolation but in the light of the statutory scheme; and if a statute is amenable to two alternative interpretations, the one that leads to the more reasonable result will be followed. If the terms of the statute are unambiguous, we presume the lawmakers meant what they said, and the plain meaning of the language governs. (Internal citations and quotation marks omitted.)

The general campaign contribution limits are contained in Chapter 5 of the Political Reform Act (the "Act").[2] Section 85305 is an inter-candidate contribution limit contained in Chapter 5 that states "[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." In turn, Section 85315 provides that "[a]n elected state officer may accept campaign contributions . . . *without regard to the campaign contributions limits* set forth *in this chapter*." (Emphasis added.) Accordingly, by its plain language, Section 85315 waives the application of "campaign contributions limits" found within Chapter 5 but it does not define the phrase "campaign contributions limits."

In order to determine whether Section 85305 is a campaign contributions limit for purposes of the waiver in Section 85315, a court would consider the statutory language in the context of the entire statute and the statutory scheme of which it is a part. (*In Re J.F.* (2011) 196 Cal.App.4th 321, 331.) And although Section 85305 does not use the exact term "campaign contributions limits," it does use analogous language. For instance, Section 85305 prohibits a candidate from making a "contribution" in excess of specified "limits." The term "limits" is defined in the dictionary as "a prescribed maximum or minimum amount, quantity, or number." (See Merriam-Webster Online Dict., https://www.merriam-webster.com.) A maximum monetary amount for a campaign contribution would likely be encompassed by the plain meaning of the phrase "campaign contributions limits." Additionally, Section 85305 is located in an article titled "Contribution Limitations," which supports a conclusion that Section 85305 is a campaign contributions limit for purposes of Section 85315.

Accordingly, the plain meaning of Sections 85305 and 85315 allows for state candidates to contribute unlimited funds to a recall committee controlled by another state candidate.

B. The Determination That State Candidates May Contribute Unlimited Funds to A Recall Committee Controlled by Another State Candidate Is Further Supported by Considering the Legislative History of Section 85305.

Apart from looking to the plain meaning of the relevant statutes, there is evidence that the voters would have understood Section 85305 to act as a campaign contributions limit. When an enactment follows voter approval, the ballot summary and arguments and analysis presented to

[2] The Political Reform Act is contained in Title Nine of the Government Code, Chapters 1-11, Sections 81000 to 91014.

the electorate in connection with a particular measure may be helpful in determining the probable meaning of uncertain language in the enactment. (*People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294, 306.)

Here, the Legislative Analyst's analysis of Proposition 34 refers to the restriction in Section 85305 as a campaign contribution limit by stating as follows:

> Campaign Contribution Limits ... This measure repeals a provision of Proposition 208 that bans transfers of funds from any state or local candidate or officeholder to another candidate, but establishes limits on such transfers from state candidates.

(Ballot Pamp., Gen Elec. (Nov. 7, 2000) pp.13-14.) The language presented to the voters in the analysis by the Legislative Analyst specifically referenced Section 85305 as a "campaign contribution limit." It thus follows that, in enacting Section 85315, the voters intended to include Section 85305 in the limits waived by that Section.

Moreover, this interpretation of Section 85305 is also supported by language from case law that describes a previous complete ban on inter-candidate transfers as a "contribution limitation" rather than an "expenditure limitation." ln *Service Employees Intern. Union v. Fair Political Practices Com'n* (9th Cir. 1992) 955 F.2d 1312, 1322, the court distinguished inter-candidate bans from intra-candidate bans on transfers of contributions between campaign funds for the same candidate. The court reasoned that "the ban on intra-candidate transfers operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent," but found that the inter-candidate ban "operates as a contribution limitation because it limits the amount one candidate may contribute to another." (*Ibid*.)

Therefore, by looking to the plain meaning of Sections 85315 and 85305, the voters' intent in enacting Proposition 34 and relevant case law, it is evident that the phrase "campaign contributions limits" in Section 85315 includes the limit described in Section 85305.

C. The Waiver in Section 85315 Applies to Both Accepting and Making Contributions.

The plain language of Section 85315 waives contribution limits for accepting campaign contributions, whereas Section 85305 prohibits candidates from making inter-candidate campaign contributions. An argument can be made that Section 85315 does not waive the application of Section 85305 because Section 85305 only applies to making, rather than accepting, contributions. Interpreting Section 85315 in this manner, however, would lead to the conclusion that waiver of the contribution limits applies only to recipients, not contributors.

In determining the effect of statutory language, it is a well-established rule of statutory construction that the provisions should be read "'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citations.]"

(*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) Moreover, a literal interpretation will not be followed where it would cause an absurd result. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.) Here, Sections 85301, 85302, and 85303 all include limits on making, as well as accepting, contributions. If the waiver in Section 85315 does not apply to the making of contributions, then it would not waive the limits on making contributions contained in Sections 85301 to 85303 either, thereby causing the waiver to become wholly ineffective, which is an absurd result.

Therefore, in order for the exception in Section 85315 to be effective, it must be read to waive limits on making a contribution as well as limits on accepting a contribution. And courts may read into a statute an exception that must be reasonably and necessarily implied. (See *Phillippe v. Shapell Industries* (1987) 43 Cal.3d 1247, 1265.) Thus, if Section 85315 is interpreted as waiving limits for making contributions for purposes of Sections 85301 to 85303, then it must necessarily be implied that Section 85315 also waives the limit on making contributions for purposes of Section 85305.

Accordingly, Section 85315 waives the limit imposed by Section 85305 on contributions made by a candidate to a committee controlled by an elected officer opposing a recall measure.

D. *Citizens to Save California v. FPPC* Also Lends Support to the Determination That Section 85315 Waives the Campaign Contribution Limit Imposed by Section 85305

To begin, the Political Reform Act includes a recall election within the definition of a "measure." (Section 82043.) Thus, Section 85303, subdivision (c), is relevant in determining whether the limit in Section 85305 applies to contributions made by one candidate to the committee of another candidate opposing a recall measure. Section 85303, subdivision (c), provides that "nothing in this chapter shall limit a person's contributions to a committee ... provided the contributions are used for purposes other than making contributions to candidates for elective state office." Although Section 82007 defines a "candidate" to include "any officeholder who is the subject of a recall election," there is a strong argument that making a contribution to a committee to oppose a recall measure should be viewed as having a purpose other than making a contribution to a candidate for elective office.

Consequently, because a recall is considered a ballot measure, rather than an election for an office, a court likely would find that Section 85303, subdivision (c), prohibits the application of Section 85305 to contributions made to a candidate's committee to oppose a recall election. For example, in *Citizens to Save California v. California Fair Political Practices Com'n* (2006) 145 Cal.App.4th 736, the court held that the FPPC overstepped its authority[3] in adopting former

[3] This opinion does not analyze any potential First Amendment concerns with the FPPC's historical interpretation of this issue. However, to the extent such concerns exist, they should be ameliorated by adoption of this opinion.

Regulation 18530.9, which limited contributions to candidate-controlled ballot measure committees, in part, due to the fact that it conflicted with Section 85303, subdivision (c). The court supported its conclusion by emphasizing that contributions to a candidate-controlled ballot measure committee are not required to be included in a candidate's one bank account under Section 85201, which requires all contributions to the candidate, "or to the candidate's controlled committee," to be deposited into one bank account. (*Id*. at p. 750, italics omitted.) Because the contribution was made to oppose or support a ballot measure, and was not included in the candidate's one bank account, the court did not view the contribution as being for a candidate for elective office. (*Ibid*.)

Similarly, the PRA requires contributions to committees formed to oppose a recall measure to be deposited "in a single bank account ... which is separate from any other bank account held by the officer, including any campaign bank account." (Regulation 18531.5(c)(1).) Additionally, after failure of a recall petition or after a recall election, any remaining funds from the recall committee must be disposed of as surplus funds in compliance with Section 89519. (Section 85315(b).) Thus, the reasoning of *Citizens to Save California* bolsters the conclusion that the funds contributed to a candidate's committee to oppose a recall measure are used for purposes other than making contributions to a candidate for elective state office. If so, then Section 85303, subdivision (c) precludes applying the limit in Section 85305 to such contributions.

For all of these reasons, the limitation on inter-candidate contributions of campaign funds in Section 85305 does not apply to contributions to a committee controlled by an elected state officer opposing a recall measure as described in Section 85315.

WE CONCUR:

Maria Audero, Commissioner

Brian Hatch, Commissioner

Allison Hayward, Commissioner

Chair Remke, Dissenting.

I respectfully dissent from the Opinion for several reasons. Most importantly, the Commission's long-standing interpretation is legally sound: the restriction on contributions between state candidates in Government Code section 85305 imposes a $4,400 limit on the amount a candidate for elective state office,[4] or any committee controlled by that candidate, may contribute to a committee established by an elected state officeholder to oppose the qualification of a recall measure or to oppose the recall election for his or her elected state office. The Commission undertook careful consideration of this issue shortly after the relevant statutory provisions were enacted by Proposition 34; it adopted a regulation and a recall fact sheet following public notice and comment; and its interpretation has remained consistent for almost 15 years, including during two prior recalls that qualified for the ballot - all factors supporting the soundness of the agency's long-standing interpretation.[5]

Furthermore, the interpretation is fair and reasonable. Under section 85315, both supporters and opponents of a recall can give unlimited contributions, including contributions by state candidates. The only caveat is that an unlimited contribution from a state candidate must go to a non-candidate controlled committee that supports or opposes the recall. But this limitation applies to both sides.[6] For example, while the Senate Democratic Caucus members are subject to the limits of section 85305 as to all contributions given directly to Senator Newman's candidate controlled committee to oppose the recall measure and the recall election, the Senate Republican Caucus members are also limited by this section as to any contributions they give to a replacement candidate's controlled committee to support the recall measure and his or her election. But again, state candidates from both sides can give *unlimited contributions* to a non-candidate controlled committee for purposes of the recall.

This balanced approach not only allows state candidates supporting or opposing a recall to effectively advocate their position, it also furthers the voters' intent to rein in state leaders with large bank accounts from swaying the outcome of key races by contributing huge sums to candidates. This issue is no less significant in recall elections, which have a history of being used in partisan political fights.[7]

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[4] "Candidate for elective state office" is defined in section 82007 and 82024, and will be referred to as "state candidate."

[5] *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 13.

[6] *FPPC Frequently Asked Questions: Recall Elections*, 072-6-2017 (http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/TAD/Campaign%20Documents/Recall_Elections.pdf).

[7] July 17, 2017 Commission Staff Memorandum, *Contribution Limits on Transfers from State Candidates to a State Candidate (or Candidate-controlled Committee) to Oppose a Recall Election*, pp. 10-11.

Additionally, " 'lawmakers are presumed to be aware of long-standing administrative practice, and, thus, the reenactment of a provision, or the failure to substantially modify a provision, is a strong indication [that] the administrative practice was consistent with underlying legislative intent.' " [8] If members of the Legislature disagreed with the Commission's interpretation there have been various avenues to address it over the past 15 years, including a straightforward statutory amendment.[9] But lawmakers chose not to act, subjecting prior recall candidates to adhere to an interpretation that only now is considered erroneous by some.

It is also worth noting that at an opinion provides no finality to the issue as "[t]he ultimate interpretation of a statute is an exercise of the judicial power" of the courts.[10] And if this issue were to be litigated, "[w]hen an agency' s construction flatly contradicts its original interpretation, it is not entitled to significant deference. Put more bluntly, a vacillating position is entitled to no deference."[11] Under the circumstances, it is questionable whether any perceived benefit of issuing an opinion outweighs the optics of intervening amid a partisan political fight.

Without a modification to the relevant statutory provisions, a court decision or even a factual basis showing unjust consequences from the Commission's sound interpretation and corresponding regulation, the request for an opinion should be denied.

Jodi Remke, Chair
September 15, 2017

[8] *Yamaha Corp. of America v. State Board of Equalization, supra,* 19 Cal.4th at p. 22 (conc. opn. of Mosk, J.), citing *Rizzo v. Board of Trustees* (1994) 27 Cal.App.4th 853, 862.

[9] But see *Foundation for Taxpayer & Consumer Rights v. Garamendi* (2005) 132 Cal.App.4th 1354, 1370 (to be valid, an amendment "must not only further [the] purposes [of Proposition 34] in general, but [it] cannot do violence to specific provisions of [the initiative]").

[10] *Yamaha Corp. of America v. State Board of Equalization, supra,* 19 Cal.4th at p. 7.

[11] *State Bldg. and Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, (quotations and citations omitted), citing *Yamaha Corp. of America v. State Board of Equalization, supra,*19 Cal.4th at p. 13.

Commissioner Audero, amending the Opinion to respond to the Dissent

It is not a pleasant task to take issue with the Dissent and seek to amend this previously-issued Opinion[12], particularly when doing so changes neither its conclusion nor its effectiveness. Nonetheless, [the Majority feels/I feel/Commissioners _____ and Audero feel] compelled to do so because [we/I] disagree with the Dissent's statements of fact and law.

[We/I] take each of the Dissent's arguments and, respectfully, respond in turn.

Dissent argues: The Commission's long-standing interpretation is legally sound under *Yamaha*. The Dissent's reliance on *Yamaha*,[13] to support the "soundness" of the challenged 2008 *Johnson* Advice Letter, its precursors since 2002, and its successors (collectively, the "2002 Interpretation"), is misplaced. As a threshold matter, *Yamaha* does not provide the standard for examining the "soundness" of an agency's interpretation, and cannot be relied upon for such.[14] Instead, *Yamaha* examined only the degree of deference a reviewing court should accord such an interpretation.[15] And, contrary to the Dissent's implications, "deference" is not the end of the "soundness" inquiry. The interpretation itself, constrained by the court's deference, ultimately is only one input of many to the determination of soundness.[16] Either way, the 2002 Interpretation survives neither the *Yamaha* deference test nor a soundness examination.

To begin with, the Dissent fails in its efforts to bring the 2002 Interpretation within any meaningful level of *Yamaha* deference. *Brown v. FPPC*[17] is instructive here. In *Brown*, the court was called upon to decide the validity of one of our own Commission opinions.[18] The court first applied the *Yamaha* factors to determine how much deference to accord the opinion and then analyzed it in light of that deference and considering other merits factors.[19] The court explained that the level of deference it would accord the opinion turned on whether it found (a) that the Commission had an interpretive advantage over the court, and (b) that the opinion was likely to be correct.[20] The factors that informed the court as to the "correctness" of the

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[12] *In re Rios Opinion* (O-17-001).

[13] *Yamaha Corp. of America v. State Bd. of Equalization,* 19 Cal. 4th 1 (1998).

[14] *See Mercury Ins. Group v. Superior Court,* 19 Cal. 4th 332, 348 (1998) (a decision is not authority for what it does not consider).

[15] *See Yamaha,* 19 Cal. 4th at 6.

[16] *See id.* at 2 ("Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court.")

[17] 84 Cal. App. 4th 137 (2000).

[18] *See id.* at 139 (FPPC Opinion O-99-314, involving the application of the FPPC's conflict of interest code to then-Mayor Jerry Brown's participation in a redevelopment project, withdrawn on 11/3/00 in accordance with the writ of mandate by the First District Court of Appeal).

[19] *See id.* at 150-51.

[20] *See id.*

opinion were "an indication of careful consideration by senior officials, particularly a collective decision reached after public notice and comment; evidence that the agency has consistently maintained the interpretation; and indications that the interpretation is contemporaneous with the enactment of the statute or regulation being interpreted."[21] The court concluded that the Commission had no discernible comparative interpretive advantage because the question was one of first impression and, rather than involving obscure technical issues, it presented "matters of legal interpretation in which courts are well versed and for which they are finally responsible."[22] In addition, the court noted that the opinion's failure to apply a critical term of the agency's own regulation weighed against deference.[23] Ultimately, the court concluded that the opinion lacked merit and commanded its withdrawal.[24]

Here, tellingly, the Dissent ignores altogether the *Yamaha* "comparative advantage" factor. Still, even the Dissent's assertion of the *Yamaha* "correctness" factors does not save the 2002 Interpretation because it suffers from the same maladies as the Commission opinion in *Brown.* First, as in *Brown*, it is unlikely that the Commission would be found to have discernible comparative interpretive advantage over a court on this issue. As the impassioned debate at the July and August meetings unmistakably make clear, the issue before the Commission is a novel question. Repeatedly, the Commission heard that the validity of the 2002 Interpretation depends upon the creation of a "new," categorical distinction between candidate-controlled recall committees and non-candidate-controlled recall committees, a question that, as admitted at the July meeting, is a matter of first impression for which there exists no authority.[25] Second, as in *Brown*, the 2002 Interpretation is at odds with one of the agency's own rules. As discussed during public comment, and as already found by the California Court of Appeal in 2006, "treating contributions to a candidate-controlled recall committee as contributions to a candidate for elective office conflicts with the 'one bank account rule' set forth in Section 85210 of the Political Reform Act."[26] Because of these shortcomings, it is unlikely that a court would accord the 2002 Interpretation much, if any, deference.[27]

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[21] *See id.*

[22] *See id.*

[23] *See id.*

[24] *See id.*

[25] Brian Hildreth, Esq. testimony at FPPC July 2017 meeting; YouTube (July 27, 2017) https://www.youtube.com/watch?v=4W5mZQTsgA0 at 40:24-41:38: acknowledging that the question of whether a candidate-controlled recall committee should be treated the same as a candidate election committee rather than as a recall committee is "an issue of somewhat first impression," and that there is no specific authority for this premise.

[26] *Citizens to Save California v. California FPPC*, 145 Cal. App. 4th 735, 750 (2006).

[27] Indeed, the court in *Citizens to Save California* struck down a similar FPPC regulation limiting contributions to ballot measure committees controlled by candidates because, among other reasons, the regulation violated the one-bank-account rule. *See id.*, at 754 ("because regulation 18530.9 is inconsistent with the PRA, it is an invalid regulation.")

Even assuming some *modicum* of deference, the Dissent conspicuously disregards the fatal imperative that such deference is overcome where an interpretation is "clearly erroneous."[28] For the many reasons already articulated by the Majority in this Opinion, *supra*, the 2002 Interpretation is nothing short of erroneous and, as in *Brown*, would be overruled upon challenge.

Dissent argues: The 2002 Interpretation is fair and reasonable because there exists another avenue for supporters/opponents of a recall, including state candidates, to make unlimited contributions, and, in any event, this rule applies equally to both sides. This precept -- that affirmative misinterpretation of a law is permitted as long as there exists another, albeit lesser, means to achieve a similar end -- not only lacks legal support, but is want of logic. A consumer who orders a six-speaker surround-sound system but receives a two-speaker system is not consoled by the explanation "you can still hear the music." Nor should a state candidate to whom Proposition 34 gave two ways to make unlimited contributions in a recall election - to a non-candidate-controlled committee as well as to a candidate-controlled committee – but has one such option interpreted away, be consoled by the explanation "you can still contribute."[29]

Logic aside, the Dissent's argument also is contrary to sound principles of statutory interpretation. To begin with, the Dissent incorrectly, and citing to no authority, directs us to "fairness" and "reasonableness" as the benchmarks for the validity of the 2002 Interpretation. In so doing, the Dissent ignores the long-standing tenets that it is the lawmaker's purpose that drives the analysis and that a declaration of such purpose leaves "no room to conceive of any other purpose."[30] In extraordinary disregard of these foundational principles, the Dissent sidesteps the declared purpose of Proposition 34 – to allow unlimited contributions to a committee established by a state officer to oppose a recall measure and recall election[31] – and impermissibly replaces it with her own, after-the-fact, strained incantation – to *dis*allow unlimited contributions to a recall committee controlled by a candidate, *supra*. It is well-

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[28] *Bodinson Mfg. Co. v. California Empl. Com.,* 17 Cal.2d 321, 326 (1941) (it is the duty of the court to state the true meaning of the statute, even where such requires the overthrow of an erroneous administrative interpretation).

[29] Chairwoman Jodi Remke colloquy with Richard Rios, Esq. and Brian Hildreth, Esq. during public comment at FPPC July 2017 meeting; YouTube (July 27, 2017) https://www.youtube.com/watch?v=4W5mZQTsgA0, at 15:06-15:57, 43:16-43:37: inquiring whether a committee can be formed to oppose a recall that is not a candidate controlled committee to which persons could give unlimited funds; *see also* Dissent, *supra.*

[30] *Wheeling Steel Corp. v. Glander*, 337 U.S. 562, 569-70 (1949) (interpreting a tax statute by the Tax Commissioner, the court limits review to the statute's stated purpose, finding it inappropriate to decide the question based on an unstated and different purpose).

[31] California 1999-2000 Senate 1223 – Bill Analysis, at page 2, http://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml (Exhibit A – only those documents not already a part of the record are included as exhibits here): "Impose campaign contribution limits, per election, including special elections, except as specified: . . . (i) To a committee established by a state officer to oppose a recall measure and recall election: no limits on contributions." (emphasis added)

established that where the lawmaker's purpose is as explicitly set forth as it is here, it cannot be disturbed by *post hoc* legal machinations.[32]

In addition, the Dissent's suggestion that the 2002 Interpretation is stripped of its fallacy merely because it does not favor one side over the other is an answer to the wrong question. The issue before the Commission is whether the 2002 Interpretation is correct in the absolute regardless of who it favors at any given time, not whether its results are equitable. Indeed, the irony should not escape that those arguing in favor of the 2002 Interpretation today opposed it in 2008.[33]

Dissent argues: That lawmakers -- presumed to be aware of the Commission's long-standing administrative practice -- have not acted against the 2002 Interpretation is a strong indication that the administrative practice is consistent with underlying legislative intent. The Dissent misstates, and therefore misapplies, this principle. Accurately stated, it is the absence of legislative change to a practice that exists at the time legislation is enacted, not after, that is a strong indicator of legislative approval of that practice.[34] Here, Proposition 34 was enacted first, and, as the Dissent concedes, the 2002 Interpretation followed – a sequence that bars application of this principle.

Further, although the legislature certainly can act to overturn an existing practice, it is a *non sequitur* that legislative inaction imports approval to such practice. As the U.S. Supreme Court has cautioned, no good comes from such a flawed leap in logic: "To explain the cause of non-action by Congress when Congress itself sheds no light is to venture into speculative unrealities . . . [W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle."[35] The California Supreme Court concurs,

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[32] *McGinnis v. Royster*, 410 U.S. 263, 277 (1973) (refusing "to discard a clear and legitimate purpose because the court below perceived another …").

[33] *See* February 29, 2008 letter from Jimmie E. Johnson of Bell, McAndrews & Hiltachk, LLP to Scott Hallibrin, FPPC General Counsel, at pages 2-3 (Exhibit B): characterizing the Commission's statement -- that a candidate for elective state office, or a committee controlled by such a candidate, may not contribute unlimited sums to a committee controlled by a different elective state officer that was established exclusively to oppose the qualification of a recall petition, and any subsequent recall election, against that elective state officer -- as an "unusual, and apparently unlawful, conclusion," and arguing instead, contrary to its 2017 position, that "Government Code § 85315 … exempts contributions to recall committees from any limits set in Title 9, Chapter 5 of the Government Code." (highlighting added).

[34] *See Cal. Auto. Assigned Risk Plan v. Garamendi*, 234 Cal. App. 3d 1486, 1495 (1991) (in that the electorate is presumed to be aware of a long-standing administrative practice and is deemed to be aware of existing laws and judicial constructions in effect at the time legislation is enacted by initiative, failure to enact change is indicative of an intent to leave the practice as it stood.) (emphasis added) (citations omitted).

[35] *Helvering v. Hallock*, 309 U.S. 106, 119-21 (1940). *See also Scripps-Howard Radio v. FCC*, 316 U.S. 4, 11 (1942) "[t]he search for significance in the silence of Congress is too often the pursuit of a mirage. We must be wary against interpolating our notions of policy in the interstices of legislative provisions."); *Jones v. Liberty Glass Co.*, 332 U.S. 524, 534 (1947) ("We do not expect Congress to make an affirmative move every time a lower court indulges in an erroneous interpretation.").

characterizing legislative inaction as a "weak reed upon which to lean,"[36] and holding for decades that "something more than mere legislative silence should be required before that acquiescence is elevated into a species of implied legislation."[37] In any event, to charge the legislature with even marginal approval, it first must be shown that it was aware of the interpretation at issue. Again, the U.S. Supreme Court has spoken: in the absence of evidence that the legislative body actually is aware of an existing interpretation, "any argument based on congressional silence is stronger in favor of <u>not</u> construing [the law at issue] as incorporating [such interpretation]".[38] The California Supreme Court holds likewise: "The presumption that the Legislature is aware of an administrative construction of a statute should be applied only on a showing that the construction or practice of the agency had been made known to the Legislature."[39] And, even with such awareness, the U.S. Supreme Court has admonished that subsequent legislative inactivity cannot ratify a clearly erroneous agency interpretation: "failure of Congress to overturn the Commission's interpretation falls far short of providing a basis to support a construction of [the law] so clearly at odds with its plain meaning and legislative history."[40]

Here, in light of the complete absence of facts from which to minimally infer, let alone prove, the legislature's awareness of the 2002 Interpretation, the Dissent's invocation of legislative inaction is at best doctrinally suspect, and at worst capricious. Still, even if such facts were to exist, the clearly erroneous nature of the 2002 Interpretation, *supra,* would render ratification unobtainable.

<u>Dissent argues: In that a Commission opinion provides no finality to the issue, it is questionable whether any perceived benefit of issuing the opinion outweighs the optics of intervening amid a partisan political fight</u>. In making the "opinions provide no finality" argument, the Dissent disingenuously ignores that the matter came to the Commission as a

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[36] *See People v. Escobar*, 3 Cal. 4th 740, 751 (1992).

[37] *See Cianci v. Superior Court*, 40 Cal. 3d 903, 923 (1985) (internal quotations omitted).

[38] *See Toussie v. United States*, 397 U.S. 112, 120 (1971) (emphasis added). *See also Lukhard v. Reed*, 481 U.S. 368, 380 (1987) (conclusion that regulation was unlawful was improper in the absence of evidence that the Congress that passed the statute had an understanding of an earlier contrary interpretation); *Rowan Cos. v. United States*, 452 U.S. 247, 260, 260, n. 15 (1981) (congressional endorsement of a Treasury regulation based on an appellate ruling improper in the absence of evidence that the appellate decision was brought to the Congress' attention); *Zuber v. Allen*, 396 U.S. 168, 193 (1969) (finding absent the "props that serve to support a disputable administrative construction" where there was no evidence to suggest that Congress acted with the particular administrative construction before it).

[39] *Robinson v. Fair Employment & Housing Com.*, 2 Cal. 4th 226, 235, fn. 7 (1992). *See also Environmental Protection Information Center v. Dept. of Forestry & Fire Protection*, 43 Cal. App. 4th 1011, 1027 (1996) ("[where] there has been no showing … that the Legislature has in fact been aware of [the rule in question] … we decline to equate legislative inaction with legislative approval.")

[40] *Aaron v. SEC*, 446 U.S. 680, 694 n. 11 (1980).

request for "a determination on a question of law,"[41] and that it was the Commission's Executive Director who unilaterally characterized it as a "request for Commission opinion."[42] It just as easily could have come, or been interpreted, as a request for a revision to the regulation – in fact, such a request was made[43] and the Commission rejected it in favor of a more immediate first-step to the ultimate long-term solution. To now claim that the request sought something less than finality rings hollow.

Moreover, the Dissent seems to forget the lengthy procedural colloquy at the June, July, and August meetings that issuing the Opinion was simply the most expedient way to correct the Commission's practice of enforcing a flawed interpretation and that such would be followed by further conforming acts. In fact, the Dissent well knew, at least as early as June 28, 2017, that if the Commission issued a new Opinion, it would move "as expeditiously as possible" to amend the related regulation.[44] In addition, the Dissent knew as of the August 17, 2017 meeting, pre-dating the writing of the dissenting opinion, that the Commission would notice and consider at the October 2017 Commission meeting a draft amendment to the related regulation.[45]

As significant, the Dissent's "optics of intervention" argument cannot be made with a straight face given that the issuance of the 2008 *Johnson* Advice Letter was precisely the type of intervention the Dissent now decries. Not only did the Commission issue the advice letter amid a recall election, but, tellingly, it did so in less than 45 days, presumably to avoid prejudice to those involved in the recall, as requested.[46] In any event, the Commission is here to serve the public and it takes its issues as and when the public presents them – unlike a restaurant, it does not reserve the right to refuse service.

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[41] June 12, 2017 letter from Richard Rios, Esq. of Olson Hagel & Fishburn LLP to FPPC Commissioners: "I write … to request that the Commission make a determination on a question of law at its upcoming meeting on June 29, 2017."

[42] June 14, 2017 letter from Erin Peth, FPPC Executive Director, to Richard Rios, Esq.: "Procedurally, I am treating your [June 12, 2017] letter as a request for a Commission opinion …"

[43] June 28, 2017 letter from Richard Rios, Esq. to FPPC Commissioners: "Prompt resolution is necessary . . . Therefore, in addition to the opinion, we would appreciate the Commission's consideration of an amendment to 2 CCR § 18531.5(b)(1) . . . We would propose that the regulation be considered at the next Commission hearing . . ."

[44] June 28, 2017 letter from Jack Woodside, Esq. to Richard Rios, Esq. (Exhibit C): "Should it be necessary to amend Regulation 18531.5, we will ensure that is done as expeditiously as possible." (highlighting added)

[45] Motion of Commissioner Brian Hatch at July 2017 meeting that "a draft commission regulation amending Section 18535 to be prepared and properly noticed for consideration by the Commission at the regular October meeting which draft regulation shall be in harmony with the analysis and conclusion of this Commission Opinion No. O-17-001," passing 3 to 1 votes; YouTube (August 17, 2017) https://www.youtube.com/watch?v=IhLWVw0A66E at 1:30:50-1:31:46.

[46] *See* Exhibit B - February 29, 2008 letter from Jimmie E. Johnson of Bell, McAndrews & Hiltachk, LLP to Scott Hallibrin, FPPC General Counsel, at pg. 3: "Expedited response is requested, in light of the pending recall. Campaign activity already has begun on the recall question, and our candidate clients – both potential donors and the recipient elective state officer recall committee – will be damaged by any delay in addressing this question." (highlighting added)

Submitted by Commissioner Maria Audero, October ___, 2017.

[Joined by Commissioner[s] _____].

EXHIBIT A

BILL ANALYSIS

PROPOSED CONFERENCE REPORT NO. 1 - June 29, 2000
SB 1223 (Burton)
As Amended July 13, 1999
Majority vote

SENATE:	(August 31, 1999)	ASSEMBLY:	(August 26, 1999)
(vote not relevant)		(vote not relevant)	

SENATE CONFERENCE VOTE : 3-0 ASSEMBLY CONFERENCE VOTE :2-1

Ayes:	Burton, Murray, Johnson	Ayes:	Hertzberg, Shelley
		Nays:	Ackerman

Original Committee Reference: E.R. & C.A.

SUMMARY : Enacts campaign finance reform by amending the Political Reform Act of 1974 (PRA). Limits campaign contributions to candidates for state office, provides for voluntary spending limits, requires additional campaign disclosure, modifies enforcement provisions, changes disposition of surplus funds, repeals conflicting provisions of prior propositions, and calls a special election to be consolidated with the 2000 statewide general election. Specifically, the conference committee amendments :

1) Define, for purposes of campaign contribution limitations:

   a) "Small contributor committee" as a committee that has been in existence at least six months, receives contributions from 100 or more persons to a maximum of $200 per person per calendar year, and contributes to five or more candidates;

   b) "Political party committee" as the state central committee or county central committee of a political party recognized under the Elections Code, and remove a political party committee from the definition of a controlled committee;

   c) "Statewide elective office" as including the office of Member of the State Board of Equalization, as well as the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, and Superintendent of Public Instruction; and,

   d) Apply the existing definition of a "person" under the PRA, which includes an individual, firm, partnership, company, corporation, and other organization or group acting in concert.

2) Impose campaign contribution limits, per election, including special elections, except as specified:

   a) To a candidate, other than Governor, by a person: statewide, $5,000; legislative, $3,000;

   b) To a candidate, other than Governor, by a small contributor committee: statewide, $10,000; legislative, $6,000;

   c) To a candidate for Governor, by a person or small contributor committee: $20,000;

   d) To a committee by a person, for the purpose of making contributions to candidates for state office: $5,000 per

calendar year;

e) To a political party committee, for the purpose of making contributions for the support or defeat of candidates for state office: $25,000 per calendar year;

f) To a political party committee by a person for purposes other than making contributions to candidates for state

office: no limits on contributions;

g) Personal loans by a candidate for state office to his or her campaign: up to $100,000. The candidate may not charge interest on any personal loan to his or her campaign;

h) Personal funds contributed by a candidate to his or her own campaign: no limits on contributions;

i) To a committee established by a state officer to oppose a recall measure and recall election: no limits on contributions;

j) To a candidate's or officeholder's legal compliance account for the purpose of defraying legal costs in an administrative, civil, or criminal proceeding arising from an election campaign, the electoral process, or the performance of governmental duties: no limits on contributions;

aa) To a state officer or candidate for state office from a lobbyist registered to lobby the governmental agency: no contribution allowed;

bb) A candidate may accept a contribution for a state election after the date of the election only to the extent it does not exceed net debts outstanding from the election and does not otherwise exceed the applicable contribution limit for that election; and,

cc) Applicable contribution limits shall be adjusted in January of every odd-numbered year to reflect changes in the consumer price index.

3) Specify the following regulations on transfers of funds:

a) To a legislative candidate from another legislative candidate: up to $3,000;

b) To a candidate's own controlled committee from another controlled committee of the same candidate, using a "last in, first out" or "first in, first out" accounting method: aggregate and attribute to a specific contributor up to the applicable contribution limits;

c) To a political party committee by a state candidate for purposes other than making contributions to candidates for state office, such as voter registration, get-out-the-vote activities, and slate mailers: no limits on transfers of excess funds;

d) To a state officer or candidate for state office from an entity whose contributions are directed and controlled by any individual: all contributions made by that individual and any other entity whose contributions are controlled by that individual are aggregated;

e) Communications to members, employees, shareholders, or their families to support or oppose a candidate or ballot

measure: payments are not treated as contributions or independent expenditures if the payments are not for general public advertisements; and,

f) Independent expenditures by a candidate's controlled committee or transfers to another committee for the purpose of making independent expenditures: none allowed.

4) Provide voluntary expenditure limits at a primary or special primary election (P), or at a general or special runoff election (G). A state candidate must file a statement of acceptance or rejection at the time he or she files a statement of intention to run for office:

a) Assembly: $400,000 (P); $700,000 (G);

b) Senate: $600,000 (P); $900,000 (G);

c) Board of Equalization: $1 million (P); $1.5 million (G);

d) Statewide: $4 million (P); $6 millioin (G); and,

e) Governor: $6 million (P); $10 million (G).

5) Provide incentives for acceptance of voluntary expenditure ceilings and penalties for violations, as follows:

a) A candidate who accepts voluntary expenditure limits will be so designated in the state ballot pamphlet, and may pay for a 250-word statement to be included therein;

b) A candidate may file an acceptance for the general election even though he or she declined the voluntary spending limits for the primary election if his or her primary election expenditures did not exceed the voluntary limits;

c) A candidate is not bound by the voluntary spending limits if an opponent contributes personal funds to his or her own campaign in excess of the voluntary spending limits;

d) Political party campaign expenditures on behalf of a candidate do not count toward the candidate's voluntary spending limits;

e) Restriction on the future elective office for which campaign funds held on the effective date of this measure may be used: no restriction;

f) Applicable voluntary spending limits shall be adjusted in January of every odd-numbered year to reflect changes in the consumer price index; and,

g) A candidate who exceeds the voluntary spending limits after accepting them is subject to administrative fines and other penalties under the PRA.

6) Make the following changes, among others, to enforcement

provisions of the PRA:

a) Provides that the Fair Political Practices Commission may impose administrative fines up to $5,000 per violation of the PRA;

b) Requires a candidate or committee that receives a "laundered" contribution to pay it over to the state

General Fund;

c) Reauthorizes administrative penalties on persons who aid and abet a violation of the PRA if they have filing obligations or are compensated for planning, organizing, or directing any activity regulated under the PRA; and,

d) Clarifies the authority of the public prosecutor to prosecute misdemeanor violations of the PRA.

7) Require additional campaign disclosures, as follows:

a) A candidate or ballot measure committee shall file within 24 hours an online or electronic report disclosing receipt of a contribution of $1,000 or more within 90 days of an election;

b) A person shall file within 48 hours an online or electronic report disclosing payment or promise of payment totaling $50,000 or more for an ad that clearly identifies a candidate for state office, but does not expressly advocate election or defeat of the candidate, disseminated, broadcast, or otherwise published within 45 days of an election;

c) A committee shall file within 24 hours a report online or electronically disclosing an independent expenditure of $1,000 or more within 90 days of an election in connection with a candidate for state office. Also, a committee's independent expenditure report must disclose the reportable contributions received and expenditures made by that committee since it filed its last statement;

d) An advertisement must disclose a payment of $5,000 or more to a spokesperson who appears in the ad supporting or opposing qualification, passage, or defeat of a ballot measure; and,

e) A slate mailer that recommends a support or oppose position that is different than the official position of the political party the slate mailer appears to represent must contain a specified disclaimer statement.

8) Require a candidate, upon leaving office or at the end of the reporting period following the defeat of the candidate, to manage surplus funds as follows:

a) Report surplus funds on campaign finance reports; and,

b) Use the surplus funds only to pay outstanding campaign debts; repay contributions; make donations to bona fide tax-exempt nonprofit organizations; contribute to a political party committee for purposes other than support or opposition of candiates, such as voter registration, get-out-the-vote activities, and slate mailers; contribute to federal candidates or any ballot measure; and pay for professional services required by the committee to assist in the performance of its administrative functions.

9) Repeal provisions of prior ballot measures (including provisions of Proposition 73 of 1988 and Proposition 208 of 1996 invalidated by the courts) that conflict with this measure's provisions, and makes other conforming changes to the PRA.

10) Require that this measure be submitted to the voters at a special statewide election held on the same date as, and consolidated with, the November 7, 2000, statewide general election.

11) Provide this bill takes effect immediately as an act calling an election pursuant to the California Constitution.

AS PASSED BY THE SENATE , this bill made nonsubstantive grammatical changes to a provision of the PRA that prohibits the use of public moneys for campaign purposes.

The Assembly amendments deleted the Senate version of this bill and instead declared legislative intent to require a specified notice to be printed on any slate mailer that recommends a support or oppose position that is different from that of the political party the slate mailer appears to represent.

FISCAL EFFECT : Unknown

COMMENTS : Proposition 208, the campaign finance reform initiative adopted at the November 1996 statewide general election, is currently enjoined from operation by order of the Sacramento federal district court issued January 6, 1998. The federal district court ruled that Proposition 208's contribution limits were too restrictive to permit effective communication with the voters, and thereby violated a candidate's First Amendment political speech rights. Individual contributions to legislative candidates were limited to $250 per election, or $500 per election if a candidate accepted the voluntary expenditure limits in Proposition 208.

The federal district court issued an injunction to permit appeal of the ruling. However, the Ninth Circuit Court of Appeals remanded the case to the federal district court with directions to make final determinations on the validity of the myriad provisions of Proposition 208. The trial is scheduled to reconvene in Sacramento on July 11, 2000.

This bill, if approved by the voters at the November 6, 2000, statewide general election, will impose contribution limits and voluntary expenditure ceilings. Individual contributions to legislative candidates will be capped at $3,000 per election. It will apply to legislative candidates on January 1, 2001, and will apply to candidates for statewide office, including Governor, on and after November 6, 2002.

Analysis Prepared by : Romulo I. Lopez / E., R. & C. A. / (916) 319-2094

FN: 0005568

EXHIBIT B

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February 29, 2008

BY FACSIMILE AND EMAIL DELIVERY

Mr. Scott Hallibrin
General Counsel
California Fair Political Practices Commission
428 J Street, Suite 620
Sacramento, CA 95814

Re: Request for Advice

Dear Mr. Hallibrin:

This letter requests advice pursuant to the California Political Reform Act ("Act") under California Government Code section 83114.

QUESTION

May a candidate for elective state office, or a committee controlled by such a candidate, contribute unlimited sums to a committee controlled by a different elective state officer that was established exclusively to oppose the qualification of a recall petition, and any subsequent recall election, against that elective state officer?

FACTUAL BACKGROUND

This law firm represents several "candidates for elective state office" under Government Code § 82024. These candidates each wish to make contributions in excess of $3,600 between the date of this letter and the June 3, 2008 statewide election to the Friends of Jeff Denham Against the Recall committee – ID # 1300419 (hereinafter "the recall committee"). Denham is the elective state officer. Government Code 85315(a). The recall committee is also a client who asks us to make this request. The source of the contributions from each candidate for elective state office would be their controlled committees.

The recall committee controlled by State Senator Jeff Denham, the "target officer" (2 C.C.R. § 18531.5(a)(1)), is separate from all other committees controlled by State Senator Denham, and was

established exclusively to oppose the qualification of a recall petition against him, and any related recall election should the petition qualify for the ballot.

Pursuant to Government Code § 85301 and applicable cost-of-Living-adjustments, the current contribution limit to state legislative candidates is $3,600 per donor, per election. Pursuant to Government Code § 85305(a), this contribution limit equally applies to contributions made by a candidate or a committee controlled by a candidate. Both Government Code § 85301 and § 85305 are found within Title 9, Chapter 5 of the Government Code.

Notwithstanding Government Code §§ 85301 and 85305, Government Code § 85315, subdivision (a) provides:

> 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 [Title 9, Chapter 5].*** The voluntary expenditure limits do not apply to expenditures made to oppose the qualification of a recall measure or to oppose the recall election.

(Emphasis added.)

In interpreting Government Code § 85315, the Commission enacted 2 C.C.R. § 18531.5, subdivision (b)(1). This regulation states:

> Target Officer. Pursuant to Government Code section 85315, ***the contribution limits of Chapter 5 of the Act do not apply to contributions accepted by an elected state officer who is the target of a recall into a separate recall committee established to oppose the qualification of the recall measure or the recall election.*** Pursuant to Government Code section 85315, the voluntary expenditure limits of the Act do not apply to expenditures made by an elected state officer who is the target of a recall to oppose the qualification of the recall measure or the recall election.

(Emphasis added.)

On February 29, 2008, I was advised orally by Commission staff that the answer to the question I ask now in writing is "no." The apparent basis for this unusual, and apparently unlawful, conclusion, was that the statutes in question allow the recipient elective state officer recall committee to "accept" unlimited contributions, but do not govern whether a candidate for elective state office may "make" such contributions.

ANALYSIS

Government Code § 85315 (which constrains this Commission barring an initiative measure amending said section) equally exempts contributions to recall committees from any limits set in Title 9, Chapter 5 of the Government 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."

Although the answer to this question appears very clear from the statutes and regulations the Commission is authorized to interpret (see Government Code § 83112; *Citizens to Save California v. Fair Political Practices Commission*, 145 Cal.App. 4th 736, 746-747 (3rd DCA, 2006)), the February 29, 2008 telephone advice was premised upon a purported "rethinking" of the Commission's position that the contribution limits set by Government Code §§ 85301 and 85305 do not apply to contributions to recall campaign committees controlled by the elected state officer. Again, Government Code § 85305 states, "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." In the recall context, and in the language of the recall statute -- Section 85315 governs contributions to the ballot measure committee controlled by the *elected state officer* subject to the recall. (Government Code § 85305 in contrast has properly been interpreted by the Commission to apply to candidates in the recall replacement election. 2 C.C.R. § 18531.5, subdivision(b)(2).) Moreover, Section 85315 itself expressly supersedes "the campaign contribution limits set forth in this chapter." "This chapter" is chapter 5. Chapter 5 limits, including sections 85305 and 85301, subdivision(a), which 85305 incorporates, are superseded.[1]

The 3rd District Court of Appeal in *Citizens, supra*, made clear the Commission is without authority to interpret the Political Reform Act in a way that is plainly contrary to the express language of the Act. (*Id.*) Moreover, such an administrative interpretation would render portions of Section 85315 surplusage, something the courts are wont to do. (See *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1397.)

Expedited response is requested, in light of the pending recall. Campaign activity already has begun on the recall question, and our candidate clients – both potential donors and the recipient elective state officer recall committee – will be damaged by any delay in addressing this question.

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[1] "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 [Title 9, Chapter 5]."

Thank you for your assistance in this important matter. Please feel free to contact me should you require additional information.

Very truly yours,

Jimmie E. Johnson

EXHIBIT C

FAIR POLITICAL PRACTICES COMMISSION
428 J Street • Suite 620 • Sacramento, CA 95814-2329
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June 28, 2017

Mr. Richard Rios
Olson, Hagel & Fishburn, LLP
555 Capitol Mall, Suite 1425
Sacramento, CA 95814

Via Email: rrios@Olsonhagel.com

RE: Request for Commission Opinion and Regulation regarding staff interpretation of Cal. Gov. Code §§85315 and 85305

Dear Mr. Rios:

I am responding to your letter dated June 28, 2017 to Chair Remke and Executive Director Peth. Per your request under Regulation 18321, the August 2017 Commission agenda will include your appeal of Executive Director Peth's denial of your opinion request. Should the Commission grant your request, we intend to proceed as expeditiously as possible to have an Opinion issued by the Commission which would be effective upon adoption. Should it be necessary to amend Regulation 18531.5 to conform with the Opinion, we will ensure that is done as expeditiously as possible as well.

Sincerely,

Jack Woodside
General Counsel

JW:jgl