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To: Chair Miadich, Commissioners Baker, Cardenas, Wilson, Wood

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Subject: Advice provided regarding AB 571: Aggregation of Contributions Received Prior to January 1, 2021 for Elections Held on or After January 1, 2021

Date: March 8, 2021

BACKGROUND

In 2019, the Governor signed Assembly Bill 571 ("AB 571") into law with a delayed effective date of January 1, 2021. AB 571 imposes a contribution limit on elective city and county offices in jurisdictions that do not enact an ordinance imposing contribution limits. (See Government Code section 85301[1].) AB 571 effectively applied existing contribution limits for state elected officers to local elected officers in jurisdictions that do not have contribution limits. Contribution limits apply per election, regardless of when the contribution is received. (Section 85301.)

The Legal Division has received questions regarding the application of AB 571 to contributions made prior to the bill's January 1, 2021 effective date for an election after the effective date. The legislation does not directly address this issue. The Legal Division has conservatively advised in these circumstances that contributions made prior to January 1, 2021 are not subject to the contribution limit but a contribution made prior to January 1, 2021 for an election after that date, should be aggregated with any contribution made after that date from the same contributor to the same recipient for the same election. For example, if a single contributor made a $10,000 contribution in December 2020 for a candidate whose election is held on or after January 1, 2021 that contribution is permissible, but the contributor would be prevented from contributing additional funds to the same candidate's election because any additional contribution would exceed the contribution limit of $4,900 put in place by AB 571.

The California Political Attorneys' Association (CPAA) argues this interpretation is a retroactive application of the law and that it does not align with the position taken when the contribution limit was imposed on elective state offices under Proposition 34, which went into effect January 1, 2001. As detailed below, staff addresses the reasoning for the previously provided advice.

[1] All statutory references are to the California Government Code unless otherwise indicated.

ANALYSIS

Limitations on Staff Advice

Section 83114(b) tasks Commission staff with providing advice under the provision of the Act to a person who requests advice related to the person's duties under the Act. For the requesting party, formal advice involving a specific question serves as a complete defense in an enforcement proceeding initiated by the Commission and evidence of good faith conduct in any other civil or criminal proceeding. (*Ibid*.) However, staff advice is limited to the requesting party and specific question. Staff advice does not have precedential value for any other party. Accordingly, staff advice helps to ensure that the requesting party does not inadvertently run afoul of the Act. To achieve this goal, staff typically limits advice in general and novel circumstances to conservative assistance intended to protect the requestor from violating the Act. Absent further interpretation by the Commission through a formal opinion or regulatory proceeding, the courts are ultimately the final decision maker regarding the construction of a statute, and staff advise merely serves to protect the requestor when there are questions regarding the requestor's duties.

Retroactive Application

"It is an established canon of interpretation that statutes are not to be given a retrospective operation unless it is clearly made to appear that such was the legislative intent." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388 at 393.) A statute that operates to increase a party's liability for past conduct is retroactive. (*Myers v. Phillip Morris Companies, Inc.*, (2002) 28 Cal. 4th 828 at 839.) But a statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment. (*Burks v. Poppy Construction Co.*, (1962) 57 Cal.2d 463, 474.) A statute operates retroactively when it changes the legal consequences of an act completed before the effective date of the statute. (*Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 502.)

The Legal Division's advice at issue here is in line with those cases where the court has said application of a law was not retroactive because it concerns events occurring before application of the law, but it does not impact liability for those events. For example, in *Kizer v. Hanna* (1989) 48 Cal. 3d 1, the State Supreme Court considered the application of a statute which permitted the Department of Health Services ("Department") to obtain reimbursement of medical costs from the estates of Medi-Cal patients after the patient's death. The estate of a deceased Medi-Cal patient argued the statute could not be applied to medical costs incurred prior to the statute going into effect. The deceased patient's estate argued that reimbursements from the decedent's estate for Medi-Cal benefits received prior to the effective date resulted in retroactive application of the law. The Court concluded application of the statute to debts incurred before the statute went into effect was not retroactive, since it affected only estates arising after its effective date; nor was its effect retroactive, since it did not substantially change the legal effect of any past transactions, but only affected how the property of a recipient's estate would be distributed. (*Id*. at 12.)

Similarly, in *Burks v. Poppy Construction Co*., the State Supreme Court held that the Hawkins Act, which prohibited discrimination in connection with the rental or sale of publicly assisted housing, applied even though a housing development received public assistance prior to the Hawkins Act's enactment. (57 Cal.2d at 474.) This was the case because sanctions were imposed only for violations occurring after the statute's effective date. Even though the defendant's housing development would not be subject to the Hawkins Act had he not received public assistance, the application of the Hawkins Act was not retroactive because "[a] statute does not operate retroactively merely because some of the facts or conditions upon which its application depends came into existence prior to its enactment." (*Ibid*.)

The U.S. Supreme Court in *United States v. Jacobs* (1939) 306 U.S. 363, upheld the application of a tax law adopted in 1924 to property obtained in 1909 because the event that triggered the taxation was the transfer of the property via joint tenancy to the decedent's wife, which occurred after the law went into effect, not the purchase of the property in 1909. The Court reasoned "(h)ad the tenancy not been created, this survivorship and change of ownership would not have taken place, but the tax does not operate retroactively merely because some of the facts or conditions upon which its application depends came into being prior to the enactment of the tax." (*Id* at 367.)

Aggregating contributions made prior to January 1, 2021 with contributions made after January 1, 2021 does not impose liability or change the legal effect of acts occurring before AB 571 went into effect. While contributions made prior to January 1, 2021 are relevant in determining if contribution limits have been met or exceeded, a violation for a contribution over the limit would only occur as the result of a contribution made after January 1, 2021. In *Burks*, the defendant was still subject to the housing discrimination law put in place by the Hawkins Act as a result of receiving public funds for the housing development, even though the funds were received prior to adoption of the Hawkins Act, because the prohibited discrimination occurred after the law went into place. In *Kizer* the decedent's estate could be made to reimburse Medi-Cal costs incurred prior to the statute going into effect because the statute was in place at the time of decedent's death, the event triggering the reimbursement requirement. Likewise, in *Jacobs*, a new tax law could be applied to property acquired and held in joint tenancy before the law went into effect because the event triggering the tax occurred after the statute went into effect. The facts in each of these cases are analogous to the question at issue here and therefore staff's advice does not result in an impermissible retroactive application of the provisions of AB 571.

<u>Statutory Construction of Section 85306</u>

Section 85306 governs the transfer of funds between a candidate's committees and the expenditure of funds raised prior to implementation of a contribution limit. The section was part of Proposition 34 in 2000, which established the current contribution limit law for state officers. Section 85306, as amended by AB 571, reads as follows:

> (a) A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state, county, or city office of the same candidate. Contributions transferred shall be attributed to specific contributors

using a "last in, first out" or "first in, first out" accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor shall not exceed the limits set forth in Section 85301 or 85302.

(b) Notwithstanding subdivision (a), a candidate for elective state office, other than a candidate for statewide elective office, who possesses campaign funds on January 1, 2001, may use those funds to seek elective office without attributing the funds to specific contributors.

(c) Notwithstanding subdivision (a), a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors.

(d) This section does not apply in a jurisdiction in which the county or city imposes a limit on contributions pursuant to Section 85702.5.

(e) This section shall become operative on January 1, 2021.

The amendments by AB 571 to Section 85306 consisted of adding "county or city" to subdivision (a) and adding subdivisions (d) and (e). The bill did not amend subdivision (b) and (c). Subdivisions (b) and (c) provided that committees of state officers with funds on hand at the time Prop 34 went into place did not have to account for the sources of those funds. This resulted in contributions received prior to implementation of Prop 34, even if earmarked for future elections, not being counting toward the contribution limits put in place by Prop 34.

AB 571 did not amend subdivision (b) or (c) to apply to the contribution limits put in place for local offices. The Legislature could have mirrored the language of subdivisions (b) and (c) when they amended Section 85306(a) to include city and county offices, but they chose not to. This indicates the Legislature did not intend to "wipe the slate clean" as Prop 34 had done. Accordingly, staff has interpreted this construction of Section 85306 to mean the Legislature made clear which part of Section 85306 it wanted to apply to elective city and county offices and which part it did not. Given the lack of amendments to subdivisions (b) and (c), and the fact that contribution limits are on a per election basis, staff believed it best to advise that under AB 571 contributions for an election should be counted for purposes of contribution limits regardless of when the contribution is received but a contribution in excess of the contribution limit made before January 1, 2021 would not violate the contribution limit put in place by AB 571because that would be a retroactive application of the statute, as discussed above.

Prior Advice

Commission staff gave similar advice in 2015 in the context of a multipurpose organization qualifying as a committee under Section 84222. (*Mintzer* Advice Letter, No. I-15-242.) Jonathan Mintzer of the Sutton Law Firm inquired whether expenditures made prior to adoption of Section 84222 would count toward the thresholds contained in Section 84222,

subdivision (c)(5), or if such application would result in retroactive application of the statute. In the *Mintzer* advice letter, staff provided, in relevant part, the following:

> The effective date of the Legislation was July 1, 2014. The statute does not expressly set a later effective date for compliance. Thus, the plain language requires compliance as of July 1, 2014 and requires contributions and expenditures made prior to July 1, 2014 to be considered in determining whether the multipurpose organization qualifies as a committee under Section 84222(c). However, donors who gave to the organization prior to July 1, 2014, would not have to be disclosed as specified in Section 84222(e)(4).
>
> You asked whether this might be considered a retroactive application of the statute. A statute is not applied retroactive merely because some of the facts upon which its application depends came into existence before its enactment. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7.) In other words, a statute operates retroactively when it changes the legal consequences of an act completed before the effective date of the statute. (*Florence Western Medical Clinic v. Bonta* (2000) 77 Cal.App.4th 493, 502.)
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> Moreover, a construction of the statute that clears the slate and restarts day one of the "look-back" period on the effective date would result in delayed implementation of the new statute for possibly four years. This result would be contrary to the purposes of the statute and the general purposes of the Act. Had it been intended that the look-back did not apply to activity before July 1, 2014, that would have been stated explicitly in the statute as Section 84222(e)(4) explicitly stated for disclosure of donor information.

As described herein, staff has previously researched whether considering prior contributions is a retroactive application of law and has remained consistent in its analysis. As a result, staff has advised that existing funds held by a candidate prior to January 1, 2021 should be attributed to a specific contributor for the same election held on or after January 1, 2021.

Legislative Intent of AB 571

In addition to the decision by the Legislature to construct Section 85360 in the way that it did, as analyzed above, the author's statement in the Assembly Floor's Analysis of AB 571 also provides insight into the intent of the Legislature when drafting AB 571, which reads as follows:

> Currently, there is no limit on contributions to candidates for local office in 78% of cities and 72% of counties. In these jurisdictions, contributors can give unlimited amounts to candidates for local office. A single donor may give tens to hundreds of thousands of dollars to a candidate for city council or county board – far exceeding the amount that even state legislators can legally accept…"
>
> AB 571 would set default local campaign contribution limits for local city and county elections, setting a new standard for these local elections. This bill respects

> local control in the sense that it would not prevent local jurisdictions from adopt[ing] a higher or lower limit threshold. AB 571 takes an important step in establishing a more widespread application of campaign contribution limit to prevent undue influence in local elections.

This statement details the goal and intent of AB 571 and that was to limit contributions made to elective city and county candidates by either imposing the contribution limit of the Act, or have the local jurisdiction impose its own contribution limit.

Consequently, staff's conservative advice is that AB 571 requires consideration of contributions received prior to AB 571 taking effect for purposes of determining whether the AB 571 limit has been met or exceeded as of January 1, 2021. Staff considers this advice consistent with the goal of AB 571. Any alternative interpretation would result in allowing candidates to receive up to $4,900 after January 1, 2021 in addition to unlimited contributions received from the same source prior to January 1, 2021, which would be counter to the intent of the legislation.

CONCLUSION

For the reasons stated above, Legal Division staff believes it was appropriate to advise that Section 85306, as amended by AB 571, requires existing funds held by a candidate prior to January 1, 2021 be attributed to a specific contributor for the same election held on or after January 1, 2021, and contributions received before January 1, 2021 should be aggregated with contributions made by the same contributor on or after January 1, 2021 to the same candidate for the same election for purposes of determining if a contribution made after January 1, 2021 exceeds the contribution limit.