



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3000 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

To: Chair Miadich and Commissioners Baker, Gómez, Wilson, and Wood

From: Dave Bainbridge, General Counsel
Kevin Cornwall, Commission Counsel

Subject: **Opinion Requested Regarding Application of Amendments to Section 84308**

Date: November 3, 2022

Executive Summary

On January 1, 2023, Senate Bill 1439 goes into effect, broadening the scope of Section 84308 of the Political Reform Act to prohibit local elected officials from taking part in licensing, permitting, and other use entitlement proceedings involving a party or participant who has contributed more than \$250 to the official within the 12 months prior to the proceeding. The amendments also extend the period in which an official is prohibited from receiving a contribution exceeding \$250 from a party or participant in the proceeding from three to 12 months after the final decision. The FPPC has received multiple questions and requests for advice regarding how Section 84308, as amended, applies with respect to contributions and proceedings that occurred in 2022, before the amendments were in effect. Accordingly, Legal Division staff proposes the Commission issue an Opinion advising that Section 84308, as amended, looks back to contributions received and proceedings conducted throughout 2022 and such application does not constitute an impermissible “retroactive” application of a law. Legal Division staff is also prepared to draft regulatory amendments further clarifying Section 84308, as amended.

Reason for Proposal

Currently, Section 84308 of the Political Reform Act prohibits an officer of an agency from accepting, soliciting, or directing a contribution of more than \$250 from any party, participant, or agent thereof while a proceeding involving a license, permit, or other entitlement for use is pending before the agency and for three months following the date a final decision is rendered in the proceeding if the official knows or has reason to know that the participant has a financial interest, as further specified in the Act. An official is also prohibited from taking part in such a decision if they have received a contribution exceeding \$250 within the preceding 12 months. The term “agency,” as used in Section 84308, does not include local governmental agencies whose members are directly elected by voters.

On January 1, 2023, SB 1439 goes into effect, amending Section 84308 in two key ways. First, the bill extends the period in which such a contribution is prohibited after a final decision is rendered from three months to 12 months. Second, the application of Section 84308 will extend

to local government agencies whose members are directly elected by voters (e.g. city council members).

The FPPC has received several requests for clarification on how Section 84308, as amended, will apply on January 1, 2023. More specifically, will local elected officials be prohibited from taking part in decisions involving parties and participants from whom they received contributions of \$250 or more during the preceding 12 months, before the amended statute was in effect? Likewise, are officials who took part in license and permit proceedings that concluded in 2022 prohibited from receiving contributions from parties or participants in the proceedings for 12 months thereafter? Alternatively, should Section 84308, as amended, be applied in such a way that officials' conduct in 2022 would not potentially disqualify them from taking part in any subsequent governmental decisions or receiving contributions based on that conduct?

Most recently, the League of California Cities (Cal Cities) has formalized some of these questions with a request for an FPPC Opinion on behalf of El Cajon City Councilmember Gary P. Kendrick. In response, Legal Division staff recommends the Commission move forward with an opinion pursuant to Section 83114, addressing these questions. Below, Legal Division staff analyzes Section 84308 with respect to the above questions and advises the Commission issue an Opinion providing that under Section 84308, as amended, contributions and proceedings that occurred during 2022 may disqualify officials from subsequently taking part in proceedings or receiving certain contributions exceeding \$250.

Background

In 1982, the California Legislature passed the Levine Act, adding Section 84308 to the Political Reform Act, following reports in the *Los Angeles Times* that several coastal commissioners had solicited and received large campaign contributions from persons who had applications pending before them. One of the purposes of the Levine Act was to assure that appointed members of boards and commissions were not influenced by the receipt of campaign contributions from the individuals and parties appearing before them, and that officials were not able to use their positions of authority to unduly influence applicants to make contributions to their campaigns.

Today, Section 84308 provides, in relevant part, that an officer is prohibited from taking part in a license, permit, or other entitlement use proceeding if the officer has received a contribution in excess of \$250 within the preceding 12 months. An officer is also prohibited from accepting a contribution in excess of \$250 during the proceeding and for three months following the date a final decision is rendered in the proceeding. However, these requirements do not apply to local elected officials when taking part in a decision by the board or body to which they were directly elected. Once SB 1439 takes effect on January 1, however, Section 84308 will apply to local elected officials even when taking part in a decision by the board or body to which they were directly elected. Additionally, the period in which contributions in excess of \$250 are prohibited following a final decision will be extended from three months to 12 months.

According to SB 1439's author:

This bill seeks to apply the same prohibitions that exist for state and local agencies to local elected agencies. Current state law counter-intuitively permits local elected officials running for re-election to solicit and accept sizable contributions from those who are seeking permits or licenses before them but prohibits identical contributions to an appointed official running for office who is acting in exactly the same capacity. If a local elected official, such as a county supervisor, is appointed to a license-granting board, the official would be barred under current law from accepting contributions from those seeking the official's approval. However, a city councilmember running against the supervisor would be able to seek and receive contributions from the same permit-seekers. Beyond counter-intuition, the problem of special interests seeking to influence local decision-making is longstanding, well-documented, and real. SB 1439 ensures the same pay-to-play prohibitions that apply to state agency appointees or appointed local officials when approving a license, permit, or entitlement for use also apply to local elected officials when acting in an identical capacity.

(Sen. Comm. on Elections & Constitutional Amendments, Analysis of Sen. Bill No. 1439 (2021-2022 Reg. Sess.) Mar. 3, 2022.)

Law

A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal. 3d 1188, 1207-1208 [246 Cal. Rptr. 629, 753 P.2d 585]; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal. 2d 388, 393 [182 P.2d 159].) A statute has retrospective effect when it substantially changes the legal consequences of past events. (*Kizer v. Hanna* (1989) 48 Cal. 3d 1, 7 [255 Cal. Rptr. 412, 767 P.2d 679].) A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. (*Ibid.*) Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us.

(*In re Marriage of Bouquet* (1976) 16 Cal. 3d 583, 587, 592.)

Although some earlier courts, in considering the retroactivity of a statute, focused their analysis on whether the statute was categorized as “substantive” or “procedural,” “California has rejected this type of classification” (*Western Security Bank v. Superior Court* (1997 15 Cal.4th 232, 244 n.4.) Instead, the Supreme Court of California has explained, “[i]n truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears.” (*Id.* at p. 244 n.4 (quoting *Aetna, supra*, 30 Cal. 2d at p. 394.) Thus, the “true distinction” is not between “substantive” and “procedural” statutes, “but between those affecting past transactions and those impacting only on future events.” (*Russell v. Superior Court* (1986) 185 Cal.App.3d 810, 816.)

Section 83114 provides that “[a]ny person may request the commission to issue an opinion with respect to that person’s duties under [the Act]. The commission shall, within 14 days, either issue the opinion or advise the person who made the request whether an opinion will be issued.” (Section 83114(a).) Regulation 18320 further specifies that opinion requests may be submitted by the representative of a person whose duties under the Act are in question, as long as at least one person is identified in the opinion request. (Regulation 18320(a)(1).) After the Commission has agreed to issue an opinion, the Commission is required to hold a hearing on the request. (Regulation 18322(a).) Commission staff is required to prepare a memorandum discussing the issues and providing any staff recommendations. (Regulation 18322(b).) A draft of the opinion shall be provided to the members of the Commission, the Attorney General, the Franchise Tax Board, the Secretary of State, the person requesting the opinion, and other interested persons and shall be made available to the public. (Regulation 18322(e).) Thereafter, the opinion shall be adopted at a public meeting. (*Ibid.*)

Discussion

In recent months, the FPPC has received several questions from interested parties seeking clarification on whether Section 84308’s 12 month lookback period and ban on receipt of contributions will apply to local elected officials immediately upon going into effect on January 1, 2023. Stated differently, will Section 84308, as amended, potentially prohibit local officials from taking part in governmental decisions based on contributions received at any point in 2022, before the amended statute was in effect? Secondly, will Section 84308 prohibit officials from receiving contributions based on permit and license proceedings that were completed in 2022?

In determining how amended Section 84308 should be applied, two questions that must be considered are: (1) what does the law permit; and (2) what is advisable as a matter of public policy? With respect to the first question, for reasons detailed below, Legal Division staff advises that Commission may legally interpret Section 84308, as amended, in a manner that considers conduct that occurred in 2022, before the amendments took effect. Regarding the second question, Legal Division staff advises that while there is merit to either approach—that is, whether or not to consider 2022 conduct when applying Section 84308—the purposes of the Act are best served by taking into account contributions received and decisions made in 2022 so as not to delay implementation of SB 1439.

(1) Whether the Law Permits Consideration of Contributions Made and Proceedings That Occurred Prior to the Section 84308 Amendments Taking Effect

After reviewing the relevant law and legislative history, Legal Division staff advises that, as drafted, Section 84308 may be applied in a manner that considers contributions received by local elected officials and proceedings conducted throughout 2022. Such an application would only be prohibited under California law if it would constitute a retroactive application of the statute. If the amendment changes the legal consequences of past conduct, application based on that past conduct would be considered retroactive and therefore prohibited in the absence of clear legislative intent. Alternatively, if the amendment would merely impact future events,

application that considers conduct that occurred in 2022 would be considered prospective, not retroactive.

Applying amendments to Section 84308 to prohibit taking part in a decision in 2023 based on contributions received in 2022, or to prohibit accepting a contribution in 2023 based on a proceeding occurring in 2022, would not constitute retroactive application. Any contrary argument would be based on the idea that at the time certain conduct occurred in 2022 (i.e., receipt of contributions or participation in proceedings), there were no legal ramifications for said conduct, but after January 1, 2023, there will be legal ramifications. However, such an effect does not amount to retroactive application of a law. The legal effect of the *past* conduct has not changed. Rather, the past conduct merely informs the legal effect of some *future* conduct. In other words, once amended Section 84308 takes effect on January 1, 2023, no official will have violated the Political Reform Act based on contributions received or proceedings participated in throughout 2022. An impermissible retroactive application occurs only if Section 84308 is interpreted to prohibit conduct occurring prior to January 1, 2023. For instance, if a local elected official who permissibly received a contribution exceeding \$250 in June 2022 permissibly took part in a permitting proceeding involving the contributor in October 2022, but was subsequently said to have violated the Act based on amended Section 84308 taking effect. (See, e.g., *Rosasco v. Comm'n on Judicial Performance* (2000) 82 Cal.App.4th 315 [holding that changes to California Constitution allowing governmental commission to investigate conduct of former judges could not, as a matter of law, be applied to any judge who retired before the effective date of the changes].)

This is not the case here, however. The legal effect of the past conduct has not changed. Whether a local elected official received a contribution exceeding \$250 merely impacts whether that official would violate the Political Reform Act if they took part in a proceeding involving the contributor *after* January 1, 2023. Likewise, an official has not violated the Political Reform Act by taking part in a licensing or permitting proceeding in 2022. Rather, such participation merely affects whether the official is permitted to receive a contribution from a party or participant during the 12 months following the final decision in the proceeding. Accordingly, such an application of amended Section 84308 is more reasonably characterized as prospective, only impacting future events. As stated, if applied beginning on January 1, 2023, and with respect to contributions received in 2022, local elected officials would not suddenly be liable for conduct that occurred in 2022. Rather, the amendment would only impact the conditions in which an official is permitted to take part in a proceeding going forward.

Case law illustrates that consideration of contributions received and proceedings participated in throughout 2022 would not constitute retroactive application of Section 84308. In *Kizer v. Hanna* (1989) 48 Cal.3d 1, the California Supreme Court considered a statute that authorizes the state to claim against the estate of a deceased Medi-Cal recipient “an amount equal to payments for health care services received,” which became effective approximately seven years after the Medi-Cal recipient at issue had begun receiving Medi-Cal health care services and two years before his death. (*Id.* at pp. 3-4.) In holding that the statute applied prospectively, rather than retroactively, the *Kizer* Court pointed to “the fact that no liability to reimburse the Department arises until the Medi-Cal recipient’s death.” (*Id.* at p. 8.) While application of the statute depended on the existence of “facts or conditions” that came into

existence prior to the statute's enactment, the statute only applied to estates arising *after* the statute's enactment. (*Id.* at p. 9.)

In *Burks v. Poppy Construction Co.* (1962) 57 Cal.2d 463, 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. (*Id.* at p. 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.*)

Finally, in *United States v. Jacobs* (1939) 306 U.S. 363, the Supreme Court of the United States 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.)

In each of the three case law examples, the key consideration in determining whether a statute has a retroactive effect is whether the statute changes the legal consequences of past conduct or merely impacts future events. In each of the three cases, no liability applied to the subject until a future, triggering event occurred. Here, too, officials who come within the scope of amended Section 84308 would not face any change in liability based solely on past conduct. Rather, although amended Section 84308's application would consider facts or conditions existing before its enactment, it will only impact those officials after some triggering event in the future. Accordingly, once the amendments to Section 84308 take effect on January 1, 2023, the statute may prospectively prohibit a local elected official's participation in proceedings involving parties and participants who have contributed more than \$250 to the official within the past 12 months and may also prospectively prohibit the receipt of contributions in excess of \$250 from parties and participants to proceedings an official took part in within the preceding 12 months.

(2) *Whether Section 84308, as a Matter of Public Policy, Should Apply Prospectively in a Manner That Looks Back at Contributions Received and Proceedings Participated in Throughout 2022*

In Cal Cities' request for an FPPC Opinion, the organization noted concerns regarding fairness if Section 84308, as amended, is applied in a manner that looks back at conduct that occurred in 2022, before the amendments took effect. Cal Cities wrote:

If the "look back" provision is applied retroactively, it could disqualify a city councilmember who lawfully accepted campaign donations in 2022 from participating in important decisions affecting the community in 2023. These contributions may have been received from either a party or *participant*, such as a

member of the public who owns property within 1,000 feet of a proposed project and later speaks at a public hearing. This outcome could be perceived as unfair not only to the officials, but to donors who made lawful campaign contributions to candidates of their choice in 2022. The official would, moreover, have no opportunity to cure the disqualification by returning the donation if the 30-day period for cure has passed.

As discussed above, Legal Division staff advises that a “look back” period extending into 2022 would not constitute “retroactive” application of Section 84308 as the statement above suggests. Cal Cities’ concern regarding an official’s inability to cure disqualification are valid in some instances. Under amended subdivision (d)(1) (current subdivision (c)), “[i]f an officer receives a contribution which would otherwise require disqualification under [Section 84308], and returns the contribution within 30 days from the time the officer knows, or should have known, about the contribution and the proceeding involving a license, permit, or other entitlement for use, the officer shall be permitted to participate in the proceeding.” Regulation 18438.7 clarifies that an official knows or has reason to know about a person’s financial interest in a proceeding or contribution if the person is a party to the proceeding or discloses facts in written or oral support or opposition that make the financial interest apparent. Likewise, an official knows or should know about a prior contribution if the official has actual knowledge of the contribution or the contribution has been disclosed on the record of the proceeding as required under Section 84308.

Cal Cities’ concern is to a large degree mitigated by the fact that Section 84308 only applies in the instances in which an official accepted a contribution and has reason to know of the proceeding involving the contributor. In many, if not most, instances the official will have no reason to know of the proceeding at the time of the contributions. Accordingly, an official will have 30 days from the date on which the official has reason to know of the proceeding to return a contribution regardless of when the contribution was made. Accordingly, for any proceeding first initiated after January 1st, 2023, the official will be able to determine whether to return a contribution so that the official may be able to take part in the decisions.

Cal Cities also raises general considerations of “fairness” with respect to prior contributions and participation in proceedings. SB 1439 was not introduced until mid-February 2022 and was not signed into law by the Governor until late September 2022. Thus, for a significant portion of the year, public officials affected by the amendments either could not have known or could not reasonably have been expected to know about the changes the amendments would bring. As explained above, officials have a 30-day period to return a contribution once they have reason to know about the proceeding and otherwise disqualifying contribution, but Section 84308 does not contain a similar provision with respect to proceedings an official has already taken part in, as there is obviously no way of “taking back” an official’s influence on a proceeding they have taken part in. It is conceivable that in some instances, officials may have elected to recuse themselves from certain proceedings if they had known they would subsequently be prohibited from receiving contributions exceeding \$250 from key donors.

Concerns regarding “fairness” with respect to public officials’ anticipated ability to take part in future proceedings or receive contributions are outweighed, however, by the Legislative

intent of SB 1439 and Section 84308 generally. As noted above, the very purpose of the Levine Act was reducing the prevalence of “pay-to-play” politics. Per SB 1439’s author, the most recent amendments to Section 84308 were aimed at combatting the “longstanding, well-documented, and real” problem of special interests seeking to influence local decision-making through pay-to-play practices.

As an example of the prevalence and severity of the type of conduct SB 1439 is aimed at preventing, in a story by KCET—an LA-based PBS television station—reporters found that the City of Huntington Park “doled out more than \$11 million combined from 2018 to 2020” to companies “that donated gifts and campaign contributions to council members during that time . . .” (Erick Cabrera and Julie Patel, Hefty Contracts for Campaign Contributors in Huntington Park, KCET, July 26, 2021, <https://www.kcet.org/news-community/hefty-contracts-for-campaign-contributors-in-huntington-park>.) The report continued:

In all, \$38,000, or over 30 percent of the roughly \$125,000 in campaign contributions to current city of Huntington Park council members, came from eight companies and their executives that were identified as city contractors at some point during that time, according to an analysis of the city’s campaign finance records.

(*Ibid.*) Similarly, in 2015, a *Los Angeles Times* article reported, “[t]he development company that is on a fast track to build a professional football stadium in Inglewood has poured more than \$100,000 into campaign contributions to elected city officials, according to campaign finance reports.” (Angel Jennings and Tim Logan, Stadium developer has donated \$100,000 to Inglewood officials’ campaigns, *Los Angeles Times*, February 15, 2015, <https://www.latimes.com/sports/la-me-0216-nfl-stadium-money-20150216-story.html>.)

Having established that consideration of proceedings and contributions that occurred in 2022 does not constitute retroactive application of Section 84308, there is no apparent reason why concerns for public officials’ ability to anticipate the Section 84308 amendments should override or delay the Legislature’s goal of reducing pay-to-play practices. Based on a review of the legislative history and a lack of any indication that the statute’s prospective application would *not* consider conduct that occurred in 2022, it appears the Legislature seemingly did not anticipate a “grace period” before the amended provisions of Section 84308 were enforced. Taking the above into consideration, Legal Division staff advises that the Commission issue an Opinion stating that Section 84308’s lookback period applies to contributions and proceedings that occurred in 2022, before SB 1439’s amendments took effect.

Conclusion

Because SB 1439’s amendment of Section 84308 would not change the legal effect of past conduct, but merely consider certain past conduct when the statute is applied in the future, Legal Division staff advises that the statute has a prospective, rather than retroactive effect. Accordingly, and given the Legislature’s intent to combat “pay-to-play” politics, Section 84308 should be applied in such a way that local elected officials who have received a contribution exceeding \$250 are prohibited from taking part in a license, permit, or other use entitlement proceeding involving the contributor for 12 months after receipt of the contribution, even if receipt occurred before the statutory amendments took effect. This interpretation ensures the

most imminent application of the new provisions and serves to protect the public interest by immediately addressing what the Legislature determined was a “longstanding, well-documented, and real” problem of pay-to-play political practices. Consequently, Legal Division staff advises the Commission authorize Legal Division staff to draft an Opinion to that effect, as well as proposed regulatory amendments, to be considered and approved at a subsequent Commission meeting.