

November 14, 2022

Richard C. Miadich, Chair
Commissioners Catharine Baker (Vice Chair),
E. Dotson Wilson, Dr. José A. Gómez, Ph.D., and Abby Wood
Fair Political Practices Commission
1102 Q Street, Suite 3800
Sacramento, CA 95811

VIA .PDF

Re: Comments re: November 2022 Meeting Agenda Item No. 10 (In Re Kendrick Opinion)

Dear Chair Miadich and Commissioners:

We are writing both in support of comments the Commission has already received from the California Contract Cities Association and others, and to ensure the Commission is aware of the authorities previously provided in our own request for formal advice, submitted to the FPPC by letter dated October 17, 2022.

We, like other commentors, urge the Commission to find that SB 1439 does not apply to contributions made prior to the law's January 1, 2023 effective date. We recognize that the Commission has elected to respond to the Opinion request submitted by the League of California Cities rather than the advice requests submitted by our firm and others. We note, however, that the FPPC Staff Memorandum for this agenda item does not include in its analysis certain authorities that we believe are highly relevant to the Commission's determination as to how to appropriately implement SB 1439.

Our advice request summarizes these authorities in detail and is attached for the Commission's reference. In particular, we wish to draw the Commission's attention to the fact that, after the Levine Act was passed in 1983, the Commission acted quickly to adopt a regulation specifying that "[t]he prohibitions and requirements of Government Code Section 84308 do not apply to contributions made or received prior to January 1, 1983." (See attached at p. 2 & Ex. A.) There is nothing in the legislative history of either the Levine Act or SB 1439 to suggest a different result was intended here, and we disagree with the staff's conclusory determination to the contrary. There is simply no basis for concluding that

retroactive application was intended with respect to SB 1439. (*Digenova v. State Bd. of Educ.* (1962) 57 Cal.2d 167, 174 [extensive case law establishes that statutes will not be given “retroactive effect” unless the Legislature has expressly stated such an intention].) We hope that the Commission will adopt a similar clarifying regulation with respect to SB 1439, and in the meantime, use the In Re Kendrick Opinion request as an opportunity to provide immediate clarification that SB 1439 does not apply to contributions made prior to January 1, 2023. This “bright line” approach will provide both contributors and public officials with much needed certainty that contributions made in 2022 that were legal and non-disqualifying when made will continue to be treated as such after SB 1439 takes effect.

We appreciate the Commission’s consideration of this information.

Sincerely,

A handwritten signature in blue ink, appearing to be "JD 2" with a flourish at the end.

Jason D. Kaune
Hilary J. Gibson
David J. Lazarus
Katherine Mirassou

October 17, 2022

Mr. David Bainbridge
General Counsel
Fair Political Practices Commission
1102 Q Street, Suite 3000
Sacramento, CA 95811
Email: DBainbridge@fppc.ca.gov

Re: Request for Formal Advice, Regulatory Amendment or Other Clarification

Dear Mr. Bainbridge:

Pursuant to Government Code section 83114 and Section 18329 of the Fair Political Practices Commission’s (“FPPC”) regulations, we write to request formal advice regarding the prospective or retroactive effect of Senate Bill 1439 (“SB 1439,” statutes 2022, ch. 848), which was recently enacted by the Legislature. Alternatively, or in addition to providing this advice, we ask that the FPPC immediately exercise its powers under Government Code section 83112 to amend its regulations to carry out the purposes and provisions of the new law and consider issuing other written clarification to contributors, officials, members of this firm and the wider regulated community.

SB 1439 amends Government Code section 84308 in two key respects. It expands the scope of the law by removing the exception for local government agencies whose members are directly elected by the voters, thereby subjecting local elected government agency officers to the existing prohibitions and disclosure requirements in Government Code section 84308. It also extends the prohibition on contributions from 3 to 12 months following the date a final decision is rendered in a proceeding. SB 1439 has an effective date of January 1, 2023.

The expansion of the scope of Section 84308 is significant. It means that, for the first time, elected city council members and members of county boards of supervisors, among other local officials, will be disqualified from participating in or voting in a proceeding involving a license, permit, or other entitlement if they received a contribution of more than \$250 within the preceding 12 months from a party or participant in the proceeding or their agent.

Questions have arisen as to whether the 12-month look-back period in Section 84308(c) will apply to require recusals of elected local officials who have received or will receive contributions of more than \$250 in 2022 from donors who are seeking licenses, permits, or other entitlements that will come before their agencies in 2023.

As an initial matter, we believe the FPPC has an opportunity to immediately, and consistent with past action, clarify the lookback provisions of the law by regulatory action. A prospective interpretation of SB 1439—meaning an interpretation that does not subject contributions made

prior to the statute's effective date to the prohibitions and disclosure requirements in Section 84308—aligns with the FPPC's past interpretation of Government Code Section 84308, so that the statute will not unfairly apply to contributions given before the donor or recipient knew or could know of the significant consequences arising from the contribution. The original “pay-to-play” provisions of the Political Reform Act, intended to apply to appointed boards and commissions, were adopted in September 1982, with an effective date of January 1, 1983 (the Levine Act, statutes 1982, ch. 1049). Shortly thereafter, the Commission interpreted the Levine Act to exclude contributions given prior to the statute's effective date. Section 18438 of the Commission's regulations, issued on January 29, 1983 (Reg. 83, No. 5) provided that “[t]he prohibitions and requirements of Government Code Section 84308 **do not apply to contributions made or received prior to January 1, 1983.**”¹ There is no reason for the Commission to depart from the approach it has historically applied to Government Code Section 84308.

For the several additional reasons stated below, the lookback period for contributions to local elected agencies newly subject to Section 84308 should not apply to contributions made before the January 1, 2023 effective date of the statute. An alternative approach would be inconsistent with the plain text and legislative history of SB 1439, the presumption against retroactivity, the FPPC's prior history of interpreting similar provisions, and notions of due process and advance notice which are particularly significant where a restriction will significantly affect the exercise of core political speech. (See *Woodland Hills Residents Assn. v. City Council* (1980) 26 Cal.3d 938, 946 [“To disqualify a city council member from acting on a development proposal because the developer had made a campaign contribution to that member would threaten constitutionally protected political speech and associational freedoms.”].)

First, extensive case law establishes that statutes will not be given “retroactive effect” unless the Legislature has expressly stated such an intention. (*Digenova v. State Bd. of Educ.* (1962) 57 Cal.2d 167, 174.) This is consistent with the general principle of statutory interpretation that the intent of the Legislature is to be ascertained by reviewing the legislative text, along with relevant extrinsic sources, and that elements should not be added to effectively supply text that the Legislature has chosen to omit. (See generally *People v. White* (1954) 122 Cal.App.2d 551, 553-554.) This presumption is rooted in constitutional principles that recognize the fundamental unfairness of assessing the legal effect of conduct based on law enacted after the conduct took place. (*Landraf v. USI Film Products* (1994) 511 U.S. 244, 256.)

Applying the presumption here, it is clear that SB 1439 should not be applied retroactively to subject pre-effective date contributions to the prohibitions and disclosure requirements in Section 84308. The text of SB 1439 does not contain any language indicating that the Legislature intended the statute to require recusals in 2023 based on contributions given in 2022. Further, the seven committee and floor analyses posted on the California Legislature's website do not say

¹ A copy of the FPPC's 1983 regulation is attached to this Request as Exhibit A.

anything about the bill having a retroactive effect or being intended to resolve concerns related to contributions made prior to the effective date.²

Second, a prospective interpretation of SB 1439 is consistent with the FPPC’s recent approach to retroactivity questions. In 2021, the FPPC determined that Assembly Bill 571 (“AB 571”) would have a retroactive effect if the local campaign contribution limits it imposed required the aggregation of contributions given prior to the statute’s effective date with contributions given after the statute’s effective date (January 1, 2022). (*In re Sanders* (Op. 21-001).) Based on the presumption against retroactivity, the silence of AB 571 on the issues of aggregation or retroactivity, and the potential constitutional harms of restricting political speech without advance notice, the FPPC properly interpreted AB 571 to not require the aggregation of contributions made prior to the effective date with post-effective date contributions. (*Id.*) Likewise, the FPPC should determine SB 1439 would have a retroactive effect if the disqualification and disclosure rules were to reach contributions to local elected officials made prior to January 1, 2023 and it should apply the presumption against retroactivity to conclude that pre-effective date contributions to local elected officials and candidates covered by SB 1439 do not trigger the disqualification and disclosure rules in Section 84308.

Third, as discussed at length by the Commission in its *In re Sanders* opinion, determining whether to apply SB 1439 retroactively “involve[s] the potential to infringe on the constitutional rights of contributors.” (Op. at 5.) As explained by the FPPC, “political contributions are a form of political speech” and laws restricting campaign contributions “implicate fundamental First Amendment interests.” (*Id.*, quoting *Randall v. Sorrell* (2006) 548 U.S. 230, 241.) As in that opinion, important policy considerations weigh in favor of avoiding an interpretation that subjects lawful contributions made prior to SB 1439’s effective date to consequences that could not have been predicted or known at the time of contribution. (*Woodland Hills*, *supra*, 26 Cal.3d at pp. 946-951.) Further, commencing the application of SB 1439 to contributions made on or after January 1, 2023 would best protect the rule of law and the fundamental due process principle that conduct must be governed by rules publicly fixed in advance. (*Landgraf*, *supra*, 511 U.S. at pp. 266-267 & fn. 18.)

Fourth, a prospective interpretation of SB 1439 would align the FPPC with other jurisdictions that have adopted pay-to-play regulations. For instances, the Securities and Exchange Commission’s (“SEC”) pay-to-play rule specified that its disqualification requirement would not apply to contributions that were made prior to the effective date of the new regulations. (Securities and Exchange Commission, Rule 206(4)-5, Release No. IA-3043, at 122-123.) As with the SEC’s approach, a prospective interpretation will ensure that the regulated community has “sufficient time to implement policies and procedures regarding contributions to avoid violations of the rule.” (*Id.* at 123.)

² https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB1439.

Fifth, an alternative approach would raise practical implementation questions that pose a likelihood of uncertainty and confusion. For instance, if SB 1439 were to be interpreted to extend to contributions given prior to January 1, 2023, it is not clear when the 30-day return period in Section 84308(d) would apply. Would it require officers to return contributions within 30 days of the date SB 1439 was approved by the Governor and chaptered by the Secretary of State (September 29, 2022), within 30 days of the effective date of SB 1439 (January 1, 2023), or within some other time period? Even if the FPPC were to decide that the lookback period should apply to pre-effective date contributions, it will be imperative that the FPPC clarify these provisions.

We ask that the FPPC provide this advice, or amend its regulations, as soon as possible and before the effective date of the law. We understand others in the regulated community have also requested guidance clarifying that lawful contributions made in 2022 will not result in future disqualification. Our clients and many others making contributions in connection with the 2022 general election must now make contributions under the uncertainty of their future impact on matters before local government agencies. Our law firm is not immune to this concern. Partners and other personnel who are employed by our firm have made and are considering making contributions of more than \$250 to local elected officials and to candidates for local offices that will be subject to the prohibitions and disclosure requirements in Section 84308, pursuant to SB 1439. Our law firm provides various services to a wide range of local agencies that will be subject to Section 84308 starting on January 1, 2023, and our firm will almost certainly be involved in pursuing new and extended contracts with local agencies and will appear before local agencies on a variety of matters in 2023. As a result, it is important that our law firm, like so many other businesses, developers, consultants, accountants and others providing services to local governments ascertain whether any contributions made in 2022 by principals and affiliates will result in the disqualification of an elected city or county official in a 2023 proceeding involving a contract for services or another proceeding in which individuals might appear on behalf of a client.

Finally, in the event the Commission does issue an opinion and/or promulgate regulations, we would recommend that the Commission clarify that the disclosure requirement in subsection (e)(1) of the new law applies only to contributions to “any officer of the agency.” Due to an apparent drafting error that occurred when the legislation was amended to strike references to contributions from spouses, SB 1439 left intact the requirement that officers disclose contributions of \$250 to them within the preceding 12 months of a proceeding, leaving open ended which contributions a party to a proceeding must disclose. Nothing in the statute or the legislative history indicates that the Legislature intended to vastly expand the scope of the disclosure rules in Section 84308. To avoid any confusion over whether SB 1439 vastly expands the disclosure rules to require donors to provide a complete list of all contributions made, regardless of whether they have any connection to the agency or the proceeding, we ask the FPPC to clarify that the scope of disclosure has not changed.

While we defer to the Commission as to the mechanism by which it clarifies that SB 1439 does not apply to contributions given prior to the effective date of January 1, 2023, the Commission may wish to consider issuing some type of immediate clarification statement or timely response to

Fair Political Practices Commission
October 17, 2022

this request letter, to be followed by an amendment to the Commission's regulations. That approach would align with the way the Commission clarified the proper scope of the Levine Act.

Thank you for your consideration of this request.

Regards,

A handwritten signature in blue ink, appearing to be "JDK", is centered on the page.

Jason D. Kaune
Hilary J. Gibson
David J. Lazarus
Katherine Mirassou

Exhibit A

NOTICE: Week ending January 29, 1983, is covered by Register 83, No. 5 and Register 83, No. 5-Z.

(Register 83, No. 5—1-29-83)

State of California
California Administrative Code Supplement
Register 83, No. 5
(January 29, 1983)

Amendments and Additions to Rules and Regulations of

- Title 2.** Fair Political Practices Commission
- Title 3.** Food and Agriculture
- Title 14.** Department of Boating and Waterways
- Title 16.** State Board of Registration for Geologists and Geophysicists
- Title 22.** Social Security
Division 3. Health Care Services
- Title 25.** California Housing Finance Agency



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REVISION RECORD FOR REGISTER 83, No. 5
(January 29, 1983)

TITLE 2. ADMINISTRATION

DIVISION 6. FAIR POLITICAL PRACTICES COMMISSION

This part of Register 83, No. 5, contains all the additions, amendments, and repeals affecting the above-entitled portion of the California Administrative Code which were filed with the Secretary of State from 1-22-83, to and including 1-29-83. The latest prior register containing regulations of the above agency is Register 83, No. 3 (1-15-83).

It is suggested that the section numbers listed below as well as the page numbers be checked when inserting this material in the code and removing the superseded material. In case of doubt rely upon the section numbers rather than the page numbers since the section numbers must run consecutively. It is further suggested that superseded material be retained with this revision record sheet so that the prior wording of any section can be easily ascertained.

SECTION CHANGES

Unless otherwise noted, the sections listed below are amended herein.

18438 Added
18438.1-18438.8 Added
18728
18730
18901

PLEASE NOTE

A new, simple style for the California Administrative Code is being implemented to cut both printing time and expense. We hope you are pleased with the new format which you will notice in the attached amendments.

PAGE CHANGES

Remove Old Pages	Insert Attached Pages
301-302	301-302
311-312	311-312
312.1-312.2	312.1-312.6
334.1-334.2	334.1-334.2
334.2.1-334.2.4	334.2.1-334.2.4
351-352	351-352

DIVISION 6. FAIR POLITICAL PRACTICES COMMISSION

(Originally printed 1-11-75)

- CHAPTER 1. GENERAL
- CHAPTER 2. DEFINITIONS
- CHAPTER 3. FAIR POLITICAL PRACTICES COMMISSION
- CHAPTER 4. CAMPAIGN DISCLOSURE
- CHAPTER 5. LIMITATIONS ON EXPENDITURES
- CHAPTER 6. LOBBYISTS
- CHAPTER 7. CONFLICTS OF INTEREST
- CHAPTER 9. INCUMBENCY
- CHAPTER 10. AUDITING

DETAILED ANALYSIS

CHAPTER 1. GENERAL

Section

- 18110. Duties of Filing Officers
- 18115. Duties of Filing Officers and Filing Officials—Statements of Economic Interests
- 18116. Reports and Statements; Filing Dates

CHAPTER 2. DEFINITIONS

Section

- 18202. Quasi-Legislative Administrative Action (82002)
- 18215. Contribution
- 18225. Expenditure
- 18227. Filing Officer
- 18233. Leasehold Interest (82033 and 87206)
- 18234. Reporting Interests in Trusts (82029, 82030, 82033 and 82034)
- 18235. Reporting Interests in a Blind Trust (82030, 82033 and 82034)
- 18239. "Lobbyist": Definition of Terms Used in Government Code Section 82039
- 18249. State Agency (82049)

CHAPTER 3. FAIR POLITICAL PRACTICES COMMISSION

Section

- 18306. Compensation and Reimbursement for Members of the Fair Political Practices Commission
- 18307. Honoraria for Members of the Fair Political Practices Commission
- 18310. Meetings
- 18319. Delegation of Authority
- 18320. Requests for Opinions
- 18321. Review of Requests Denied by the Executive Director
- 18322. Procedures for Hearings on Opinion Requests
- 18324. Opinions
- 18326. Petition for Rehearing
- 18327. Voting Requirements for Formal Action by the Commission
- 18329. Advice
- 18351. Conflict of Interest Code of the Fair Political Practices Commission
- 18360. Complaints
- 18361. Enforcement Proceedings
- 18362. Confidentiality

CHAPTER 4. CAMPAIGN DISCLOSURE

Section	
18401.	Required Recordkeeping for Chapter 4
18404.	Termination of Candidate's and Committees' Filing Requirements
18419.	Organizations Sponsoring Political Action Committees
18420.	Reporting of Campaign Contributions and Expenditures of State or Local Government Agencies
18423.	Payments for Personal Services as Contributions and Expenditures
18426.	Semi-Annual and Post Election Statement Early Filing
18427.	Duties of Treasurers and Candidates with Respect to Campaign Statements
18428.	Reporting by Committees and Affiliated Entities
18435.	Definition of Mass Mailing and Sender
18438.	Contributions to Members of Quasi-Judicial Boards and Commissions
18438.1.	Bodies Covered by Government Code Section 84308
18438.2.	Proceedings Covered by Government Code Section 84308
18438.3.	Applicants and Agents
18438.4.	Persons Who Actively Support or Oppose
18438.5.	Contributions
18438.6.	Solicitation, Direction, and Receipt of Contributions
18438.7.	Prohibitions and Disqualification
18438.8.	Disclosure

CHAPTER 5. LIMITATIONS ON EXPENDITURES

CHAPTER 6. LOBBYISTS

Section	
18600.	Duties and Prohibitions of Lobbyists and Lobbyist Employers (86100-86300)
18601.	Withdrawal of Lobbyist Registration
18615.	Lobbyist Accounting
18616.	Lobbyist Reporting (86107)
18618.	Persons Required to File Statements Pursuant to Section 86108 (86108)
18619.	Business Entities Retained to Influence Legislative or Administrative Actions: Definitions
18620.	Reports by Lobbyist Employers and Persons Spending \$250 or More to Influence Legislative or Administrative Action (86108, 86109(c))
18621.	Reporting Pursuant to Section 86108(b) (86108(b))
18622.	Consolidated Reporting by Lobbyists and Their Employers (86107, 86109)
18623.	Gifts from Lobbyists; Honoraria
18630.	Home Hospitality (86203)

CHAPTER 7. CONFLICTS OF INTEREST

Article 1. Conflicts of Interest; General Prohibition

Section	
18700.	Public Official Making, Participating in Making, or Using His Official Position to Influence a Governmental Decision (87100)
18701.	Legally Required Participation
18702.	Material Financial Effect
18703.	Effect on the Public Generally
18704.	Source of Income (87103(c))
18705.	Academic Decisions

(b) For purposes of this section, an "affiliated entity" shall be a person or group of persons whose campaign contributions or expenditures are directed or controlled by another. A "parent" is the person who exercises direction or control over the affiliated entity in the making of campaign contributions or expenditures. An affiliated entity may include, but is not limited to, a subsidiary, branch, division, department or local unit.

(c) The parent and affiliated entities shall file one campaign statement reflecting their combined activities. The campaign statement shall be filed in the name of the parent with an indication that the campaign statement includes the activity of the affiliated entity. In addition to the information required by Government Code Section 84211, the campaign statement shall include an attachment listing the following information clarifying the expenditures and contributions listed on the campaign statement:

(1) The name and address of the parent, if the parent has made contributions or expenditures, and the names and addresses of the affiliated entities.

(2) For the parent and every affiliated entity that has made expenditures, a listing of:

(A) The name of the recipient and the amount of each expenditure of \$100 or more, made during the period covered by the campaign statement;

(B) The total amount of expenditures made during the period covered by the campaign statement; and

(C) If the filer receives contributions, the total amount of contributions received during the period covered by the campaign statement.

(d) When an affiliated entity makes an expenditure that is a contribution, it shall advise the recipient of its name and address and the name and address of the parent and of the requirement that the recipient list both the parent and affiliated entity on the recipient's campaign statement. Upon receiving notice, the recipient shall report the contribution as received from the parent and shall also indicate the name and address of the affiliated entity.

Comment to Section 18428: This regulation will apply most typically to a corporation and one or more of its wholly owned subsidiaries since there is very often coordination, direction or approval by the parent corporation in the subsidiaries' decisions to make contributions or expenditures.

NOTE: Authority cited: Section 83112, Government Code. Reference: Section 84211, Government Code.

HISTORY:

1. New section filed 6-1-79; effective thirtieth day thereafter (Register 79, No. 22).
2. Amendment of section title and subsections (a) and (c) filed 1-9-81; effective thirtieth day thereafter (Register 81, No. 2).
3. Amendment of section heading filed 2-17-82; effective thirtieth day thereafter (Register 82, No. 8).

18429. Providing a Procedure to Obtain an Exemption from Reporting and Disclosure Requirements (84102, 84210(g), 84210(h), 84210(j), 84210(k), 84214).

NOTE: Authority cited: Section 83112, Government Code. Reference: Sections 84102, 84210(g), 84210(h), 84210(j), 84210(k), 84214, and 84300, Government Code.

HISTORY:

1. New section filed 5-10-76; effective thirtieth day thereafter (Register 76, No. 20).
2. Editorial Correction in Section 18429 (Register 76, No. 34).
3. Amendment of subsection (a) filed 1-21-77 as an emergency; effective upon filing (Register 77, No. 4).
4. Reinstatement of subsection (a) as it appeared prior to the filing of 1-21-77 by operation of Section 11422.1(b), Government Code (Register 77, No. 51).
5. Repealer filed 6-22-78; effective thirtieth day thereafter (Register 78, No. 25).

18435. Definition of Mass Mailing and Sender.

(a) A "mass mailing" has been made when 200 or more identical, or nearly identical, pieces of mail have been sent within a calendar month.

(b) The sender, as used in Government Code Section 84305, is the person who incurs the largest portion of expenditures attributable to the designing, printing, and posting of the mailing which are reportable under Government Code Sections 84200-84217.

NOTE: Authority cited: Section 83112, Government Code. Reference: Sections 82041.5 and 84305, Government Code.

HISTORY:

1. New section filed 6-17-76; effective thirtieth day thereafter (Register 76, No. 25).
2. Amendment filed 2-17-82; effective thirtieth day thereafter (Register 82, No. 8).

18438. Contributions to Members of Quasi-Judicial Boards and Commissions.

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

(b) Terms used in Government Code Section 84308 are defined in Sections 18438.1 through 18438.8.

NOTE: Authority cited: Section 83112, Government Code. Reference: Section 84308, Government Code.

HISTORY:

1. New section filed 1-26-83; effective thirtieth day thereafter (Register 83, No. 5).

18438.1. Bodies Covered by Government Code Section 84308.

(a) A "legislative body" while acting as a body or committee thereof is excluded by Government Code Section 84308(d) from the coverage of Government Code Sections 84308(a), (b), and (c) if its entire membership consists of elected officers directly elected by the voters to serve on that body. As used herein, the term "voters" has the same meaning as in Elections Code Section 18.

(b) A legislative body is "acting as a body or a committee thereof" when:

- (1) It acts in its entirety as itself or as the ex officio governing body of any district or other entity; or
- (2) Any subgroup of the legislative body composed solely of members of the body sits by designation of the body.