BEFORE THE FAIR POLITICAL PRACTICES COMMISSION

In the Matter of: Opinion requested by: Robert H. Nida, Associate Counsel, Automobile Club of Southern California	No. 75-075-A January 7, 1976

BY THE COMMISSION: We have been asked the following questions by Robert H. Nida, Automobile Club of Southern California:

(1) The Automobile Club of Southern California is the employer of a lobbyist. Automobile insurance premiums charged by the Automobile Club vary depending on the vehicle insured, the age of the operators of the vehicle, the rating territory in which the vehicle is principally located, the principal use to which the vehicle is put, the commute mileage to and from work, and the amount and types of coverage purchased. Premiums are not individually negotiated, but they are identical for insureds in identical circumstances in the context of the rating factors.

Is the collection of an insurance premium by the company from an insured who is a specified person a reportable exchange under the Act?

(2) The company pays approximately 24,000 claims each month, many of which exceed $1,000. Some claims are paid to insureds, pursuant to an insurance contract on a first-party basis, such as medical expenses or physical damage to an owned automobile; other claims are paid to insureds on a first-party basis for the liability of an uninsured motorist to the insured; and other claims are paid to third-party claimants under insurance policies covering liability of insureds. The reasonableness and amounts claimed in each of the foregoing cases are sometimes in dispute and subject to negotiation.

Are claims payments of $1,000 or more to specified persons reportable exchanges under the Act in each of the above cases?

(3) The Automobile Club investigates reported hazardous traffic locations and reports to the Department of Transporation. On occasion, in addition to describing the investigation results, the Club staff will recommend corrective action to the Department, including signing, signalization, lane striping or reconstruction.

Does this constitute an attempt to influence administrative action and is it, therefore, reportable under the Act?

(4) The Automobile Club provides vehicle registration facilities and services for its members in cooperation with the Department of Motor Vehicles. Registration procedures which are prescribed by departmental regulations of the DMV are followed. The Club staff occasionally is asked by the DMV to comment on proposed or existing registration procedures or regulations of the DMV, or the Club staff sometimes will initiate such comment.

Does this constitute an attempt to influence administrative action and is it, therefore, reportable under the Act?

(5) Automobile Club employees may discuss member problems related to enforcement policies adopted by the California Highway Patrol with CHP management at the field office, zone office or headquarters level.

Does this constitute an attempt to influence administrative action and is it, therefore, reportable under the Act?

(6) The Automobile Club staff includes specialists in automotive engineering, traffic engineering, public safety and so forth. State agencies, in connection with developing state programs, frequently request comments from the Automobile Club staff on draft proposals. Some of these proposals and others ultimately may be considered under the Administrative Procedure Act, and others may be submitted to the Legislature.

Assuming "administrative action" is at issue, when comments on a proposal are solicited by a state agency because of an individual's expertise in an area, does the response constitute an "attempt to influence" which is reportable under Section 86109(g)?

(7) Assuming "administrative action" is at issue, and a state agency requests data or factual materials relating to a proposal because of the availability of the data or materials at the Automobile Club, does the response by the Club constitute

an "attempt to influence" which is reportable under Section 86109(g)?

(8) Does the term "agency official" include field management staff of the Department of Motor Vehicles and the California Highway Patrol?

CONCLUSION

(1) Under the circumstances described, collection of an insurance premium is not a reportable exchange under the Act.

(2) The payments of claims may be reportable exchanges when made to specified persons in amounts of $1,000 or more.

(3) Reporting hazardous traffic locations and recommending corrective action does not constitute an attempt to influence administrative action under the Act.

(4) Commenting on proposed regulations constitutes an attempt to influence administrative action under the Act.

(5) Discussion of enforcement policies with CHP personnel may constitute an attempt to influence administrative action under the Act.

(6) A comment on proposed regulations constitutes an attempt to influence administrative action under the Act regardless of whether the comment is made in response to a request by the agency.

(7) The furnishing of data or factual materials will be reportable under certain circumstances.

(8) Field management staff of the California Highway Patrol and the Department of Motor Vehicles may be agency officials.

ANALYSIS

(1) The Political Reform Act requires that an employer of a lobbyist report any exchange with a specified person 1/ of

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1/ Specified persons include elected state officers, legislative officials, agency officials, state candidates, and the members of the immediate families of such individuals. Government Code Section 86107(d).

money, goods, services or anything of value "if the fair market value of either side of the exchange exceeded one thousand dollars." Government Code Section 86109(d).[2] However, the Commission, in interpreting this reporting requirement, has concluded that reportable exchanges do not include transactions with a specified person resulting from offers of goods or services made by a lobbyist employer "if such offers are made on identical terms to the public at large." 2 Cal. Adm. Code Section 18650(b)(1).

Insurance premiums are not the same for each insured, and the insurance offered by the Automobile Club, therefore, is not, strictly speaking, offered to specified persons and to the public at large on identical terms. The premiums are, however, "identical" for individuals in identical circumstances and, presumably, the rating factors which determine the amount of the premiums are uniformly applied. Assuming this is the case, and that there are no discretionary factors used in determining premiums which could be employed to afford favored treatment to a specified person, the insurance is available "on identical terms," as that phrase is used in 2 Cal. Adm. Code Section 18650(b)(1), and the exchange involved in the sale of insurance, therefore, is not a reportable exchange under the Act.

(2) The comment to FPPC Regulation 2 Cal. Adm. Code Section 18650 states:

> Sections 86109(d) and (e) are intended to open to public view transactions between employers of lobbyists (and others who spend substantial amounts to influence legislation) and high-level public officials, to assure that favorable terms are not provided to such officials in anticipation of favorable governmental decisions....

Routine transactions in which a business provides goods or services to specified persons and to the public at large on identical terms are not susceptible to being used to improperly influence the specified persons and therefore these transactions do not have to be reported pursuant to Section 86109(d). 2 Cal. Adm. Code Section 18650(b)(1). The payment of an insurance claim, however, is not a routine transaction. The existence of liability and, assuming liability is conceded or established, the amount ultimately paid to settle a claim is subject to negotiation. Moreover, each negotiation is affected by the facts, circumstances and individuals involved in it. Accordingly, this is precisely the type of transaction, when it involves a specified person, which Section 86109(d) is designed to open to public scrutiny through disclosure.

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[2] All statutory references are to the Government Code unless otherwise noted.

Of course, we recognize that the payment of a claim pursuant to a jury verdict or a court-approved settlement of a minor's claim does not lend itself to according favored treatment to a specified person to the same extent that an out-of-court negotiation does. However, it cannot be gainsaid that these payments are not the result of an offer which is extended to specified persons and to the public at large on identical terms. Moreover, even in the context of a claim ultimately determined by a jury or a judge it is possible to treat the claimant differently, and who the claimant is may be determinative of the type of treatment afforded. Finally, the reporting obligations established by Sections 86109(d) and (e) do not distinguish between those situations where a third party has some role relative to the exchange, such as in the case of a jury verdict, and those situations where the filer alone determines whether to engage in the exchange. We conclude, therefore, that any payment of a claim by the Automobile Club to a specified person must be reported as an exchange pursuant to Section 86109(d) if the payment is $1,000 or more.

We note, however, that the Automobile Club will not know in every instance whether the recipient of a payment is a specified person. Pursuant to 2 Cal. Adm. Code Section 18650(e), a filer is:

> ... required to report only otherwise reportable exchanges with persons or business entities <u>actually known</u> to be specified persons or specified business entities on the basis of information in the possession of filers at the time of the filing. There is no requirement to make specific inquiry of persons or business entities unless such inquiry would be made in [the] ordinary course of business.
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> (Emphasis added).

Accordingly, when the Automobile Club does not know the payment is being made to a specified person, and in the ordinary course of business would not obtain this information, it does not have to report such a payment under Section 86109.3/

3/ We have been informed by Mr. Robert Nida, an attorney for the Automobile Club, that although an insured's occupation appears in an insurance application form, this information generally is not reviewed by the Club employee in charge of negotiating and paying a first-party claim to a member of the Club. Telephone conversation with Robert Nida, November 21, 1975. We do not think that, pursuant to 2 Cal.Adm. Code Section 18650(c), the employment of the member of the Club on his application form creates knowledge on the part of the Club of the status of the payee if this information is not obtained in the normal course of paying the claimant-member. We note, however, that if a list of specified persons is published by the Commission, this will create an obligation to report exchanges of $1,000 or more under the foregoing circumstances (assuming, of course, the claimant-member appears on the list). See 2 Cal.Adm. Code Section 18650(d).

(3) An employer of a lobbyist is required to provide in its report a "specific description of legislative or administrative action" which it has "attempted to influence." Section 86109(g). Administrative action is defined in the Act as:

> ... the proposal, drafting, development, consideration, amendment, enactment or defeat by any state agency of any rule, regulation or other action in any rate-making proceeding or any quasi-legislative proceeding which shall include any proceeding governed by Chapter 4.5 of Division 3 of Title 2 of the Government Code (beginning with Section 11371).
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> Section 82002.

We conclude that, under most circumstances, recommendations and reports made to the Department of Transportation by the Automobile Club concerning signing, signalization or lane striping would not constitute attempts to influence administrative action because the response by the Department to the recommendations would not involve "administrative action" within the meaning of the Act. Decisions to post signs, install signals or put down lane stripes do not result from action taken in a rate-making proceeding or in a quasi-legislative proceeding. See FPPC Regulations, 2 Cal.Adm. Code Section 18202, interpreting "quasi-legislative proceeding."

We observe, however, that our conclusion on this question does not mean that the types of recommendations and reports described above never could involve an attempt to influence administrative action. If these materials were provided in connection with an effort to influence departmental action with respect to a rule or regulation, this would involve an attempt to influence administrative action and would activate the reporting requirements of Section 86109(g).

(4) Comments concerning proposed or existing regulations of the Department of Motor Vehicles can constitute an attempt to influence administrative action and, therefore, may be reportable pursuant to Section 86109(g). Influencing legislative or administrative action constists of:

> ... promoting, supporting, influencing, modifying, opposing or delaying any legislative or administrative action by any means, including but not limited to the provision or use of information, statistics, studies or analyses.
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> Section 82032.

Comment by the Automobile Club may well "influence" some administrative action by the DMV since it may result in the development, amendment, enactment or defeat of a regulation. See p. 8, supra, for the definition of what constitutes

administrative action. Indeed, it is difficult to understand what other purpose a comment on a proposed or existing regulation would or could have. Accordingly, the action of the DMV which is influenced will be reportable.4/

Moreover, this conclusion is not altered by the fact that in some instances, the comment is requested by the state agency. The Political Reform Act, in establishing reporting requirements relative to attempts to influence administrative action, does not condition the reporting obligation on how the attempt was generated. Regardless of whether the state agency requests comments or such comments are initiated by a lobbyist employer, an attempt to influence administrative action must be reported.

(5) The determination of whether discussions between Automobile Club employees and management personnel from the California Highway Patrol about enforcement policies adopted by the CHP constitute attempts to influence administrative action depends on whether the discussions related to a quasi-legislative proceeding. We conclude that they do not if, by the question asked, the Automobile Club is referring to specific enforcement decisions made by CHP personnel. If, on the other hand, the Club is referring to the adoption of an enforcement policy by the CHP, discussions designed to influence what that policy ought to be would relate to a quasi-legislative proceeding and, therefore, could constitute attempts to influence administrative action.

The Commission, by regulation, has clarified the meaning of quasi-legislative proceeding by identifying certain proceedings which are not quasi-legislative. 2 Cal.Adm. Code Section 18202. Included among those proceedings which are not quasi-legislative is "a proceeding to enforce compliance with existing law." 2 Cal. Adm. Code Section 18202(a)(3). Accordingly, to the extent the discussions referred to by the Automobile Club's question involve an enforcement proceeding, they would not relate to a quasi-legislative proceeding and, therefore, would not involve attempts to influence administrative action. See Section 82002.

4/ We note that the fact that the Automobile Club provides vehicle registration services and facilities for its members pursuant to procedures prescribed by departmental regulations of the DMV does not create any additional reporting obligations for the Club as the employer of a lobbyist. Moreover, the Commission has not reviewed the DMV Manual of Registration Procedures or the DMV Manual of Accounting Procedures, and we express no view on whether comments on these particular procedures constitute attempts to influence administrative action. Specific questions relative to these procedures can be submitted by the Club in a subsequent opinion request.

If, however, the discussions involve the adoption of enforcement policies promulgated by the CHP, they could constitute attempts to influence administrative action. The adoption of an enforcement policy may be analogous to the adoption of rules or regulations and, therefore, may involve a quasi-legislative proceeding.5/ Section 82002. Accordingly, discussions designed to promote, support, influence, modify, oppose or delay the adoption of an enforcement policy would constitute attempts to influence administrative action and would be reportable.

(6) Our discussion in response to question No. (4) is dispositive here. Whether an attempt to influence administrative action is initiated by the Automobile Club or is the result of a request from a state agency is irrelevant to the reporting obligations imposed by Sections 86108 and 86109.

The Political Reform Act was not passed for the purpose of inhibiting the flow of information and ideas between state agencies and individuals who are knowledgeable about matters considered by such agencies. The Act does, however, require the disclosure of information about such transactions in order to make the information available to the public, and thereby inhibit the potential for exercising improper influence as a result of the transactions. The need for disclosure is not mitigated by the fact that an exchange commences by reason of a request for information or ideas from a state agency.

(7) We have not been given detailed information about the context in which the data or materials encompassed by the Automobile Club's question will be provided. We observe, however, that the definition of influencing administrative action includes "the provision or use of information, statistics, studies or analyses." Section 82032. Accordingly, if the data or material is provided in order to promote, support, influence, modify, oppose or delay any administrative action, it will constitute an attempt to influence which is reportable under the Act. Moreover, as indicated by our discussions of questions (4) and (6), the fact that the data or material is supplied in response to a request from a state agency will not alter this conclusion. See pps. 10; 12, supra.

(8) The term "agency official" includes "any member, officer, employee or consultant of any state agency who as part of his official responsibilities participates in any administrative action in other than a purely clerical, secretarial or ministerial capacity." Section 82004. See also opinion requested by L. T. Wallace, 1 FPPC Opinions 118 (No. 75-087, September 4, 1975). Field management staff certainly are employees

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5/ The Club's question relative to discussions about enforcement policies with officials of the CHP is couched in general terms. Specific questions concerning whether or not a particular activity related to enforcement involves quasi-legislative action can be submitted by the Club in subsequent opinion requests.

of the DMV or CHP, and, to the extent that the term management involves control or direction, it would seem that when they participate in administrative action, it would be in other than a purely clerical, secretarial or ministerial capacity. See p. 8, supra, for the definition of administrative action. Accordingly, they would be included in the definition of agency official. If, however, the duties of field management staff of the DMV or CHP do not involve them in the proposing, drafting, developing, considering, amending, enacting or defeating of rules, regulations or other quasi-legislative actions of their respective agencies, they will not be participating in administrative action in other than a purely clerical, secretarial or ministerial capacity and, therefore, will not be agency officials.

Approved by the Commission on January 7, 1976. Concurring: Brosnahan, Carpenter, Lowenstein, Miller and Waters.

Daniel H. Lowenstein
Chairman