Fair Political Practices Commission

Memorandum

To: Chairman Randolph, Commissioners Blair, Downey, Karlan and Knox

From: John W. Wallace, Assistant General Counsel
Luisa Menchaca, General Counsel

Subject: March 2004 Work Plan Revisions

Date: March 5, 2004

A. INTRODUCTION

Each year the Commission approves a regulatory work plan for the next calendar year.[1] The plan provides for quarterly work plan revisions. Attached is the March update to the regulatory work plan for calendar year 2004 reflecting changes during the first quarter.

B. PROPOSED REVISIONS

I. Proposition 34 Retrospective – Proposed Regulatory Refinements.

- **1: Section 85310:[1] Communications Identifying State Candidates – Issue Advertisements:**

Issue: Does section 85310 operate to effect a $25,000 limit on contributions received by a candidate's own ballot measure committee for advertisements which feature the candidate?

In the first quarter of this year, the Commission adopted a fact sheet discussing the applicability of the recall election statute, section 85315, in the context of the recall election. In July, the Commission adopted regulation 18531.5, which concluded that committees formed primarily to oppose or support the recall election were *not* subject to contribution limits. (Reg. 18531.5, subd. (b)(3).) The Commission followed up this regulation by revising its Recall Fact Sheet the following month. In August, the Commission, on the basis of long-established Commission policy and the case of *Citizens Against Rent Control v. Berkeley*, (1981) 454 U.S. 290, advised that replacement candidates could control ballot measure committees formed primarily to support or oppose the recall election and that such committees were not subject to the contribution limits of the Act. During the recall election this year, Senator Johnson sued the Lieutenant Governor and argued that section 85310 prevents a candidate from receiving contributions in excess of $25,000 from a ballot measure controlled by the candidate if the communication features that candidate. The Sacramento Superior Court ultimately did not render a judgment on that issue. Staff recommended that should the Commission wish to address

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[1] See staff memorandum dated December 1, 2003, *Approval of 2004 Regulatory Priorities.*.

the issue it do so in advance of the March primary election to provide sufficient guidance to the regulated community in a timely fashion. In December 2003, the Commission decided to hold pre-notice discussion in April 2004.

CHANGE: An interested person meeting was held in February.

- **Item 3: Termination of Committees: Regulations 18404-18404.1:**

***Issues*:** Should committees be permitted to reopen after termination? What rules apply to withdrawn candidates?

Regulations 18404 and 18404.1 require candidates to terminate their committees after a certain period of time after leaving office or after defeat in an election. Generally speaking, these regulations were created, in part, as a hedge by the Commission to contain the impact of the determination that pre-34 committees were not subject to the post-election fundraising limitations of section 85316. Since the Commission made changes to regulation 18531.6, the Commission may also wish to look down the road at whether the committee termination requirements remain essential to the Political Reform Act ("Act"). Should the Commission wish to keep these regulations, the Commission nevertheless may wish to address the increasing number of inquiries addressing the issue of reopening terminated committees to accommodate unforeseen expenditures (some required by law) and receipt of payments. In addition, questions have arisen about regulation 18404.1's impact on candidates who withdraw their candidacy prior to an election. Also, regulation 18404.1 needs to be amended to clarify that it impacts committees of statewide candidates.

CHANGE: This item, originally scheduled for a pre-notice hearing in February and adoption hearing in April has been set back in order to allow for an interested persons' meeting. The interested person meeting will be held in March, with pre-notice discussion in April and adoption in June.

- **Item 4. Recall Elections:**

***Issue*:** Should candidates running in a state election be able to control ballot measure committees without limit?

Regulation 18531.5 provides that a state candidate controlling a recall committee is not subject to contribution limits. This raised many questions during the recent state recall election. One principal issue is whether this rationale applies to candidates who control ballot measure committees generally. The staff would explore this in light of constitutional implications and may recommend amendment of regulation 18531.5 or a new regulation addressing this and related issues.

CHANGE: This item, originally scheduled for a pre-notice hearing in June and adoption hearing in August has been advanced on the calendar in order to link this project with item 1,

discussion of regulatory amendments to section 85310. The pre-notice discussion will now be in April and adoption in June.

- **Item 5. Section 85307 - Extensions of Credit: Formerly Proposed Regulation 18530.7; Regulation 18530.8: Personal Loans:**

***Issues*:** Should the Commission reconsider adoption of a regulation addressing extensions of credit? Should the Commission define what "terms available to the public" means?

Section 85307 prohibits candidates from personally loaning himself or herself funds whose balance exceeds $100,000. With respect to regulation 18530.7, the Commission is asked to determine the length of time that may pass before an extension of credit becomes a contribution. This becomes important for campaigns and businesses that do business with campaigns. While the Commission determined in September of 2001 not to pursue a regulation on this issue, staff believes the Commission may wish to revisit that determination in light of the continued demand on staff for clarification of the circumstances of the statute's application. For instance, staff recently received an inquiry about whether a campaign worker who had contributed the limit to the candidate could continue paying campaign expenses for which he would be reimbursed under regulation 18526.

The Commission may also want to revisit whether the $100,000 limit applies to commercial loans to a candidate. In October, 2003, gubernatorial candidate Arnold Schwarzenegger borrowed $4.5 million from the City National Bank, and loaned $4 million of the proceeds to his campaign. In *Camp v. Schwarzenegger*, Sacramento Superior Court, Case No. 03AS05478, Judge McMaster found that the loan fell within the scope of the exception in § 85307(a) because it was made upon terms available to members of the general public, despite the fact that only a small percentage of the public could actually take advantage of those terms due to their personal financial status. The Court further held that § 85307(b) prohibits a candidate from personally loaning his or her campaign account more than $100,000, regardless of the fact that the original source of the funds used by the candidate to fund the loan to his or her campaign is a commercial loan to the candidate that meets the requirements of § 85307(a). This latter conclusion conflicts with Commission regulation 18530.8, which provides "The proceeds of a loan made to a candidate by a commercial lending institution for which the candidate is personally liable, pursuant to the terms of subdivision (a) of Government Code section 85307, which the candidate then lends to his or her campaign do not count toward the $ 100,000 loan limit of subdivision (b) of Government Code section 85307."

CHANGE: An interested persons' meeting has been added in June. While the court in *Camp* agreed with the Commission's interpretation of section 85307(a), it interpreted section 85307(b) in a manner inconsistent with the Commission's regulation. Thus, the Commission may wish to advance this item to an earlier date on the calendar.

II. Other Campaign Projects

NO CHANGE

III. Conflict Of Interest and Lobbying

- **Item 1: General Plan Cluster.** Some agencies are viewing general plan amendments as coming within the purview of "zoning or rezoning" decisions under subdivisions (a)(1) and (a)(6) of regulation 18704.2. Because general plans cover the entire jurisdiction, officials of these agencies believe they cannot participate in such decisions unless the "public generally" or "legally required participation" exceptions apply. This results in substantial difficulties, in that all of the members of a governing board of an agency may be unable to participate in some of the most fundamental decisions affecting the entire jurisdiction. This project now includes the following subprojects:

- **Subproject (d): Standard of Care:** What is the "standard of care" required of a public official deciding whether he or she has a conflict of interest? To what extent, if any, should making that reasonable effort (or complying with that standard of care) shield the public official from after-the-fact second-guessing or prosecution?

CHANGE: This item, originally scheduled for an interested persons' meeting in January, pre-notice hearing in March and adoption hearing in May has been set back in order to allow more time for research and public comment. The interested person meeting will be held in March, with pre-notice discussion in May and adoption in August.

- **Subproject (e): Conforming Changes to 18700:** Including adding segmentation, specifically addressing burden of proof/production issues, and related changes resulting from other substantive amendments made to the regulations.

CHANGE: This item, originally scheduled for an interested persons' meeting in January, pre-notice hearing in March and adoption hearing in May has been set back in order to allow completion of the more substantive subprojects. The interested person meeting will be held in August with pre-notice discussion in October and adoption in December.

- **Government Code section 1090 Merger Project.** The Commission previously decided to solicit public participation in a study of the possible merger of conflict-of- interest laws that are not currently in the Act into the framework of the Act. The rationale for this proposal is that by moving the provisions into the Act, the Commission could further clarify and implement the sections through its administrative rulemaking process and provide advice to officials attempting to comply. Under consideration for merger are sections 1090 et seq, Public Contracts Code sections 10410 et seq., and the common law doctrine against conflicts of interests. This project was started in 2003 and will continue into 2004.

CHANGE: This item was the subject of a memorandum at the February Commission meeting where the Commission voted to rescind the old schedule and approved a new schedule. The new schedule is as follows: Interested persons' meeting in January and status report in February (both completed), topical interested persons meetings in April, June, and August; policy discussion in October and a decision on draft language in December.

- **Regulation 18616:** The lobbying disclosure provisions of the Political Reform Act require reporting of "payments to influence legislative or administrative action," which are defined in § 82045 to include payments for or in connection soliciting or urging other persons to enter into direct communication with an elective state official, legislative official, or agency official. This type of activity is commonly referred to as "grassroots lobbying." Regulation 18616(g)(5) provides an exemption to the Act's lobbying disclosure rules for payments to influence certain proceedings before the Public Utilities Commission. The proposed amendment will clarify that payments for or in connection with soliciting or urging others to engage in direct communication with the Public Utilities Commission are not included in the exemption.

CHANGE: This item was initially set for one hearing, an adoption hearing in February. Due the complexity of the item, the February meeting became a pre-notice hearing and adoption will occur in April.

IV. Administrative, Enforcement, And Other Issues

NO CHANGE

V. Other Miscellaneous Items

NO CHANGE

ATTACHMENT`