Fair Political Practices Commission
MEMORANDUM

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

FROM: C. Scott Tocher, Counsel, Legal Division
Luisa Menchaca, General Counsel

DATE: May 24, 2004

SUBJECT: Adoption Discussion: Amended Regulation 18531.5 (Recall Elections); Regulation 18530.9 (Contributions to Candidate Controlled Ballot Measure Committees); Regulation 18531.10 (Communications Identifying State Candidates).

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EXECUTIVE SUMMARY

Since last fall, the Commission has grappled with issues surrounding the regulation of ballot measure committees – both candidate and non-candidate controlled, as well as the circumstances under which issue advertisements which feature candidates may be regulated. This year the Commission twice explored this year the many issues and regulatory approaches to solving problems in this area. At its April meeting, the Commission considered a package of three regulations (two new, one amended) that presented options to the Commission to apply contribution limits to candidate controlled ballot measure committees and to define the circumstances under which issue advertisements under section 85310 would be governed. The Commission directed staff to continue to develop these regulations and to bring them back for adoption in June. This memorandum presents each regulation and discusses the consequences of their application.

Because the Commission already has engaged in in-depth discussion on several recent occasions of the policy ramifications and legal authorities that tend to support or discourage the respective options facing the Commission, that discussion will not be repeated here. Instead, this memorandum focuses, with one exception, on presenting the Commission with the options requested and describe hypothetical scenarios to illustrate the differences between various options. Because regulation 18530.9 contains language not reviewed at prior meetings, a more lengthy discussion in this memorandum of that regulation is provided.

Options and Recommendations:

The staff has not made recommendations on every option the Commission faces in considering the proposed regulations. The Commission's determination to adopt or reject one of the regulations does not preclude consideration of the other. Thus, the Commission can choose to adopt Regulation 18531.10 interpreting Section 85310 and can separately consider Regulation 18530.9, extending contribution limits to candidate controlled ballot measure committees.

However, as discussed in the paragraphs below, there is some overlap between the two regulations that would require the Commission to make choices depending on the course of action taken.

If the Commission chooses to adopt Regulation 18530.9, extending contribution limits to candidate controlled ballot measure committees, staff recommends the Commission make following choices in that proposed regulation: 1) choose the "higher" limit text in subdivision (e); and 2) adopt the text in brackets in subdivision (d). Further, if the Commission chooses to adopt Regulation 18530.9, that decision would render the bracketed language in proposed regulation 18530.10, subdivision (a)(3) irrelevant. The bracketed language includes the option to clarify that 85310(c) extends to candidate controlled ballot measure committees. If the contribution limits are determined to apply to candidate controlled ballot measure committees, then extending 85310 to such committees becomes unnecessary because they would already be subject to contribution limits. Therefore, staff would recommend deletion of the bracketed language.

If the Commission postpones action on or rejects regulation 18530.9, staff recommends that the Commission consider the optional language in 18531.10(a)(3) and choose Option A. Option A defines "at the behest of" to include any expenditure by a candidate controlled ballot measure committee.

With regard to the options presented in Regulation 18531.10, subdivision (d), staff recommends that the Commission choose either Option A or Option C, with Option B being the option least favored by staff.

Regulation 18531.5 must be amended to make any necessary conforming changes.

I. COMMISSION DECISIONS IN APRIL

The Commission determined in April to retain the panoply of options on the table before it and to develop further regulatory language in certain areas so that an adoption discussion could materialize in June. The significant decisions made by the Commission in April are summarized here:

- Continue to consider a regulation (18530.9) which applies the contribution limits of sections 85301 and 85302 to all *candidate controlled* ballot measure committees, independent of any requirements under section 85310.
- Regarding regulation 85310.10, the Commission agreed that a candidate is "clearly identified" in a communication when the candidate appears in the communication. The Commission asked staff to draft language addressing the term in the context of radio communications.
- Bring back the same options for defining "at the behest" with respect to candidates who appear in communications funded by their own ballot measure committees.

- Construe the 45-day rule in section 85310 to mean that the statute applies only to communications which clearly identify candidates who are on a ballot within 45 days of the communication.
- Continue the discussion of how the contribution limits of section 85310, subdivision (c), apply to ballot measure committees.

II. STATUTES SUBJECT TO INTERPRETATION

This regulatory project encompasses the application of three primary statutes: sections 85310, 85301 and 85302. Section 85310 requires, among other things, reporting of certain payments made for communications which identify, but do not expressly advocate for, a state candidate.

The relevant portions of section 85310 are as follows:

> "**§ 85310. Communications Identifying State Candidates.**
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> "(a) Any person who makes a payment or a promise of payment totaling fifty thousand dollars ($50,000) or more for a communication that clearly identifies a candidate for elective state office, but does not expressly advocate the election or defeat of the candidate, and that is disseminated, broadcast, or otherwise published within 45 days of an election, shall file online or electronically with the Secretary of State a report disclosing the name of the person, address, occupation, and employer, and amount of the payment. The report shall be filed within 48 hours of making the payment or the promise to make the payment.
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> …
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> "(c) Any payment received by a person who makes a communication described in subdivision (a) is subject to the limits specified in subdivision (b) of Section 85303 if the communication is made at the behest of the clearly identified candidate."

In 2002, the Commission adopted regulation 18539.2 to describe the method and substance of those reports. In the first quarter of 2003, 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.

The other two statutes implicated in this proceeding are sections 85301 and 85302. As section 85302 is virtually identical to section 85301, except that it applies only to small contributor committee contributions, only section 85301 is set forth below. The operative language of sections 85301 and 85302 applies contribution limits "to any candidate for elective state office…." To date, that language has been understood to apply to a candidate's committee for elective state office, as opposed to other committees controlled by the candidate. One could construe that language, however, to apply also in the context of other controlled committees by regarding contributions to such committees as contributions "to" the candidate who holds or seeks elective state office. For instance, contributions to an Assembly candidate's controlled ballot measure committee would be governed by the provisions of subdivisions (a) of sections 85301 and 85302, $3,200 for contributions by persons and $6,400 for contributions by small contributor committees, respectively.

> **"§ 85301. Limits on Contributions from Persons.**
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> "(a) A person, other than a small contributor committee or political party committee, may not make to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office may not accept from a person, any contribution totaling more than three thousand dollars ($3,000) per election.
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> "(b) Except to a candidate for Governor, a person, other than a small contributor committee or political party committee, may not make to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office may not accept from a person other than a small contributor committee or a political party committee, any contribution totaling more than five thousand dollars ($5,000) per election.
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> "(c) A person, other than a small contributor committee or political party committee, may not make to any candidate for Governor, and a candidate for governor may not accept from any person other than a small contributor committee or political party committee, any contribution totaling more than twenty thousand dollars ($20,000) per election.
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> "(d) The provisions of this section do not apply to a candidate's contributions of his or her personal funds to his or her own campaign."

III. REGULATION 18531.10

This proposed regulation is the primary interpretation of section 85310. The elements of subdivisions (a) and (c) of the statute are reduced to their elements, below. Those that are bolded are elements staff has sought to clarify in the regulation:

(a) 1. A person
2. Who makes a **payment of $50,000**+
3. That "**clearly identifies**" a candidate for elective state office
4. but does not **expressly advocate** defeat/election of the candidate
5. **w/in 45 days of an election** must report….

(c) 1. **A payment** received by a person ((a)(1) above)
2. Who makes a communication described above
3. **Is subject to $25,000 limit** of 85303(b)
4. If the communication is **made at the clearly identified candidate's behest.**

As discussed earlier, the Commission already is well aware of the arguments on both sides of the issues facing interpretation of section 85310, and so that discussion will not be repeated. The Commission directed staff in April to bring back the language of draft regulation 18531.10 with slight modifications for consideration for adoption in June. Regardless of the action taken with respect to regulation 18530.9 (applying the limits of sections 85301 and 85302), section 85310 presents issues independent of those which also may be implicated by regulation 18530.9. Therefore, decisions face the Commission in section 85310 with or without regulation 18530.9. The following is a brief discussion of the components of regulation 18530.10 and, where helpful, examples to illustrate its application.

A. Subdivision (a): This subdivision of the regulation defines three important terms used in the statute and therefore is divided into three subparts.

1. Subdivision (a)(1): This subdivision defines when a candidate is "clearly identified," as that term is used in subdivisions (a) and (c) of the statute. The primary source of this language is from existing regulation 18225. The regulation adds to that definition, however, to address circumstances unique to this statute.

Issue: Does the use of a candidate's photograph or voice make the candidate "clearly identified" and thus subject to section 85310?

The first sentence that is bracketed under subdivision (a)(1) states a communication is subject to section 85310 if the communication contains a visual depiction or uses the voice of the candidate. The Commission requested staff provide language addressing the context of radio communications and staff believes the term "voice" in the regulation suffices in that regard.

Issue: Does legally required identification subject the communication to regulation?

The second bracketed sentence addresses whether legally required identification, such as the disclosure of the name of the committee at the end of a television commercial that contains the candidate's name, is exempted or included when determining if the candidate is "clearly identified." The second clause of the sentence (also in brackets) would exempt the legally required disclosure only under circumstances where the disclosure is made only minimally as required by law. This language seeks to address Commission concern that the exemption might become a loophole which candidates would exploit by repeating the candidate's name under the guise of legally required disclosure.

2. Subdivision (a)(3):[1] This subdivision defines when a communication is "made at the behest of" a candidate for purposes of section 85310, subdivision (c). The regulation refers to the preexisting definition found in regulation 18225.7, but applies a different rule for purposes of section 85310 with respect to a candidate's own committee.[2]

Issue: Are expenditures made by a candidate controlled ballot measure committee in the context of section 85310 made "at the behest" of the controlling candidate?

Option A answers the question above in the affirmative. As a result, every candidate controlled ballot measure committee would be subject to the provisions of section 85310 and the contribution limit of subdivision (c) of that statute, *assuming all the other elements of the statute are met*.

Option B answers the question above in the negative. As a result, a candidate controlled ballot measure committee may make expenditures which feature the candidate and would never be subject to the reporting or contribution limit provisions of section 85310. The committee already would be subject to the reporting provisions of Chapter 4 of the Act pursuant to other provisions of the Act.

While applying the term "at the behest of" in these circumstances is unprecedented beyond the usual circumstance of two different parties acting together, and while the notion of the candidate and his or her committee as two separate entities does not always hold true under the Act, staff believes that failing to adopt this language would create a loophole which would allow candidate-controlled ballot measure committees to become a conduit to avoid the limitations of section 85310. Given the relatively low threshold that defines a "controlled"

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[1] A discussion of subdivision (a)(2) is omitted from this discussion. That subdivision defines the term "expressly advocate," referring to an existing regulation defining that term. The term is not controversial in this statute and nothing need be added to the discussion of the term beyond that which already has occurred at prior Commission meetings.

[2] Under regulation 18225.7, if a candidate "behested" his or her own committee payments, a candidate would end up making a contribution to his or her own committee, which leads to an absurd result.

committee, the language of "Option B" would encourage committees to share "control" of the committee with the candidate who wishes to be featured in the communication and thereby escape section 85310's limitations. Staff believes such a construction would not further the purposes of the Act.

NOTE: If the Commission adopts regulation 18530.9 and applies the contribution limits of sections 85301 and 85302, then the optional language provided in subdivision (a)(3) is not necessary and will be deleted.

B. Subdivision (d).

Subdivision (d) of the regulation addresses application of the $25,000 contribution limit of subdivision (c) of the statute to ballot measure committees.

Issue: Once the statute is triggered, does the contribution limit of section 85310, subdivision (c), apply retrospectively or prospectively to contributions received by the ballot measure committee?

The language in **Option A** is unchanged from the last draft seen by the Commission. This language applies the contribution limit in a retrospective fashion – regarding the contribution limit of subdivision (c) as a prerequisite to activity of a given committee. Thus, if a committee had ever received a contribution in excess of the limit, it could not engage in the communications described in the statute (communications within 45 days of an election made at the behest of a candidate who is clearly identified in the communication but that does not expressly advocate for the election or defeat of that candidate).

The language in **Option B** applies the contribution limit prospectively to every contribution received by the committee after the triggering event. Thus, regardless of the contribution history of a committee, a committee can accept unlimited contributions prior to making a communication described in the statute. From that point forward, every contribution received by the committee would be subject to the contribution limit. Under this option, mere consultation activities between the featured candidate and the committee conducted *prior* to the making of the communication would not trigger the contribution limit.

The language of **Option C** also applies the contribution limits in a prospective manner. The primary difference between this option and Option B, however, is the requirement that a committee create a separate account from which payments for section 85310 communications must be made. In this manner, and unlike Option B, a ballot measure committee could continue to accept contributions in excess of $25,000 after the statute is triggered. If the ballot measure committee wishes to make expenditures for 85310 communications, it must first create a separate account and transfer with attribution, funds to make the communication.

IV. REGULATION 18530.9 – APPLICATION OF CONTRIBUTION LIMITS TO CANDIDATE CONTROLLED BALLOT MEASURE COMMITTEES

In April, the Commission determined to move forward with a regulation which would apply the contribution limits of sections 85301 and 85302 to candidate controlled ballot measure committees. This approach would be independent of regulation 18531.10, which interprets section 85310. As the draft regulation in April was conceptual in nature, the Commission asked staff to bring the regulation back for adoption with language tailored to address issues inherent in its application.[3]

Threshold Issue: Do the contribution limits of sections 85301 and 85302 apply to effect a contribution limit on candidate controlled ballot measure committees?

The operative language of sections 85301 and 85302 applies contribution limits "to any candidate for elective state office…." To date, that language has been understood to apply to a candidate's committee for elective state office, as opposed to other committees controlled by the candidate. One could construe that language, however, to apply also in the context of other controlled committees by regarding contributions to such committees as contributions "to" the candidate who holds or seeks elective state office. Assuming the Commission determines sections 85301 and 85302 in fact apply to candidate controlled ballot measure committees, staff proposes adoption of the language drafted in regulation 18530.9. Each subdivision is explained below.

1. Subdivision (a): Subdivision (a) of the draft regulation describes the parameters of the regulation, indicating that ballot measure committees *not* controlled by a candidate are *not* subject to the regulations. This subdivision also states that preexisting ballot measure committees become subject to the regulation once controlled by a candidate but cease to be subject to the regulation once no longer controlled by a candidate. Thus, if a candidate creates a ballot measure committee but leaves office at some point in the future and is no longer a candidate for office, the committee no longer will be subject to the contribution limits of sections 85301 and 85302.

2. Subdivision (b): Sections 85310 and 85303 contain certain provisions that arguably apply, in a broad construction, to candidate controlled ballot measure committees. For instance, subdivision (c) of section 85310 applies a $25,000 contribution limit to communications featuring a candidate which are made at the candidate's behest but which do not expressly advocate the candidate's election. Subdivision (b) of this regulation clarifies that the provisions of sections 85301 and 85302 are controlling with respect to the application of contribution limits to candidate controlled ballot measure committees.

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[3] It may be noted that the Commission has taken a "support" position with respect to Assembly Bill 1980 (Wolk), which would impose a $21,200 contribution limit on all candidate controlled ballot measure committees.

The second sentence contains optional language to address the situation of how the limits apply in the event the ballot measure committee is a general purpose committee. Since a general purpose ballot measure committee may potentially exist in perpetuity over many elections, the contribution limits which apply to the controlling candidate could change from time to time. This subdivision states that the contribution limit remains fixed at the point in time when the candidate created the ballot measure committee or came to control an existing committee.

3. Subdivision (c): Another issue which arises when applying contribution limits pegged to controlling candidates is the question of which limit applies when a committee is controlled by more than one candidate, each subject to a different contribution limit due to their different offices. This subdivision provides **optional language** that identifies the appropriate limit – **either the highest or lowest contribution limit applicable to a controlling candidate**.

4. Subdivision (d): This subdivision addresses several issues. First, the question arises whether contribution limits should be applied only to primarily formed ballot measure committees or whether limits should apply to general purpose ballot measure committees, as well. While not apparent on its face, such a distinction has great practical effect given the differences in how primarily formed and general purpose committees operate.[4]

Primarily formed ballot measure committees[5] are most analogous to a candidate's campaign committee. For instance, the primarily formed committee exists for the purpose of supporting or defeating a given ballot measure, which will be determined at a given election. After the election, the ballot measure no longer exists (either defeated or adopted). Similarly, a candidate's election committee exists for the purpose of election to a given office. After that election, that committee no longer exists for the purpose of electing the candidate to a future office. Thus, when the issue of whether to apply the post-election net debt fundraising restrictions of section 85316 to primarily formed ballot measure committees arises, it can be done with relative ease.

General purpose ballot measure committees,[6] on the other hand, are more challenging. Because general purpose committees, for example, exist not to support or oppose a single measure but exist over the course of an unlimited number of elections addressing a potentially

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[4] Historically, Commission staff has advised that a candidate may not control a generic general purpose committee – i.e., one which makes payments for both ballot measures *and* candidates. With respect to general purpose *ballot measure committees*, however, candidates are not prohibited from them because they do not make payments to support or oppose candidates.

[5] A "primarily formed" ballot measure committee is a "committee" (defined as a person or group of persons who have received contributions totaling at least $1,000 in a calendar year) which is formed or exists primarily to support or oppose a single measure or two or more measures being voted upon by the same city, county, multicounty or state election. (§ 82047.5.)

[6] A "general purpose" ballot measure committee is a committee which is formed or exists primarily to support or oppose more than one ballot measure, except as provided above.

unlimited number of measures, the question of applying post-election restrictions becomes more difficult – the committee does not exist for the results of any one election. Thus, if one seeks to apply net debt post election fund-raising restrictions, it will be necessary to determine what election triggers the application of the statute.

The options facing the Commission in this subdivision are as follows:

a. Omit the bracketed language, in which case all candidate controlled ballot measure committees would be subject to post-election contribution limitations.

b. Include the bracketed language. If it is determined that section 85316 does *not* apply to general purpose ballot measure committees, then it is possible that candidates will find them more attractive as a tool to avoid the restrictions which would be applicable to primarily formed committees. As a practical matter, however, the consequence of such strategies may not in fact be that great considering that under subdivision (a) of the regulation the general purpose ballot measure committee would remain subject to contribution limits as long as it is controlled by a candidate.

5. Subdivision (e): When a sitting legislator also is a candidate for governor, the candidate could have two committees open – one for the legislative office and the other for the governor's office. Since different contribution limits apply to those offices it is uncertain what limit applies to the ballot measure committee controlled by that candidate. This subdivision provides **optional language which would apply either the lowest (the legislative committee) limit or the highest (the governor's office committee) to the ballot measure committee.**

6. Subdivision (f): This subdivision provides that the consumer price index adjustments of section 83124 apply.

V. AMENDED REGULATION 18531.5.

If the Commission adopts either or both of the proposed regulations above, conforming changes will have to be made to existing regulation 18531.5, which governs recall election ballot measure committees. The amendments to subdivision (b)(3) of that regulation will ensure agreement among the regulations. Staff also has made a technical amendment to subdivision (c)(1), unrelated to the subject matter at hand.

Attachments:
1. Regulation 18530.9
2. Regulation 18531.10
3. Regulation 18531.5