UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

May 9, 2003

Call to order: Chairman Liane Randolph called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:34 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Randolph, Commissioners Sheridan Downey, Thomas Knox and Gordana Swanson were present.

Item #1. Approval of the Minutes of the March 7, 2003 Commission Meeting.

Chairman Randolph and Commissioner Karlan abstained from the approval of the minutes.

Commissioner Knox moved approval of the minutes.

Commissioner Swanson seconded the motion, and asked that the first paragraph of the January 17, 2003 minutes indicate that she was not present at the beginning of the meeting because her plane did not land in Sacramento.

There being no objection, the minutes were approved as amended.

Item #2. Public Comment.

There was no public comment regarding matters not on the agenda.

Item #3. Permanent Adoption of Regulation 18530.2, Section 85306, Transfer of Pre-Proposition 34 Funds.

Staff Counsel Scott Tocher presented regulation 18530.2 for permanent adoption, noting that the Commission adopted the regulation in January on an emergency basis. The regulation interpreted § 85306 of the PRA, a provision of Proposition 34, which governs generally the transfer of funds between a candidate's committees. He explained the general rule that funds transferred between committees must be attributed to specific contributors. However, he pointed out that the statute provided an exception to that general rule for funds held by the committees on the effective date of Proposition 34.

Mr. Tocher explained that there were two issues involving the exception. Those issues involved whether there was a limit to the number of times the pre-34 funds could be transferred without attribution and how subsequent expenditures should be treated. The Commission determined that there is no limit as long as the committee can show that the expenditures came from new funds.

Mr. Tocher recommended that the regulation be adopted on a permanent basis.

Commissioner Swanson moved adoption of the regulation.

Commissioner Knox seconded the motion.

Commissioner Karlan suggested that the regulation be conformed so that commas after "2001" be consistent in the published version.

Commissioners Downey, Karlan, Knox , Swanson and Chairman Randolph voted "aye." The motion carried by a unanimous vote.

Item #4. Adoption of Regulation 18329.5 – Commission Advice Procedure – Government Code Sections 87300-87306.

Staff Counsel Jill Stecher noted that both staff and Commissioner Knox prepared different versions of the proposed regulation, and copies of Commissioner Knox's Option 2 version were distributed to the Commission.

Ms. Stecher stated that staff's proposed regulation was revised based on the comments made at the Commission's pre-notice discussion in December 2002. It dealt with Commission advice procedures for Government Code §§ 87300 through 87306, pertaining to conflict of interest codes. The purpose of the regulation was to balance the Commission's role as a provider of advice and assistance with the policy of the Act that requires conflict of interest codes to be formulated at the most decentralized level possible and then be revised and approved by the code reviewing body.

Ms. Stecher explained that sometimes Commission staff are asked for advice regarding designation or disclosure categories in an agency's conflict of interest code. The proposed regulation would delineate what kind of advice or assistance may be given and to whom it may be given. She noted that § 82011 details who a code reviewing body is for various agencies. The FPPC is the code reviewing body for state agencies and local multi-county agencies. She pointed out that §§ 87300 through 87306 provide the code reviewing body the authority to revise and approve conflict of interest codes.

Ms. Stecher stated that the proposed regulation gave the Commission the option of providing formal written advice, which would provide immunity to the requestor, or informal assistance, providing no immunity to the requestor. Staff recommended that the Commission adopt option A of the proposed subdivision (a)(1), which would allow staff to render advice or assistance when the Commission is the code reviewing body. As the code reviewing body, the Commission has the ultimate authority to approve a conflict of interest code, and staff believed formal advice would be appropriate. Staff recommended option B of subdivision (a)(2), which would allow staff to provide informal assistance only when the Commission is not the code reviewing body,

because the advice would not be binding on the code reviewing body and would therefore not usurp its authority.

Ms. Stecher stated that subdivision (a)(2)(D) should be corrected to reflect that a code reviewing body may seek formal advice at any time.

Ms. Stecher explained that the Commission was also asked to consider whether to adopt the language dealing with advice to an individual when the Commission is the code reviewing body and when it is not. The proposed regulation included limiting language requiring the individual to first contact his or her agency when he or she disagreed with the agency's determination before the Commission would render advice. She pointed out that John McKibben, representing the Los Angeles Board of Supervisors, suggested that the individual should be required to first contact his or her agency as well as the code reviewing body, rather than just one of those entities.

Ms. Stecher explained that subdivision (b) of the proposed regulation reflects the current policy of the Technical Assistance Division and helps filers prepare their Form 700s properly. Subdivision (c) addresses "other public officials who manage investments" who were recently added to the list of § 87200 statutory filers. As statutory filers not subject to a conflict of interest code, their advice requests would not be subject to the proposed regulation, and advice would be given directly to them. However, if it is determined that the official is not a public official who manages public investments, it would then be up to the agency to determine whether the official should be designated in the agency's conflict of interest code. Subdivision (d) specifies what information a requestor may need to provide to the Commission staff when requesting advice. The comment discusses the statutory remedies under existing rules.

Commissioner Knox presented Option 2, which would replace staff's subdivision (a) and (c)(2). He noted that the difference between the two versions is that the individual who does not believe he or she should be required to file should first be required to apply to his or her agency for an interpretation of the conflict of interest code. If the individual is still not satisfied, he or she should then be required to apply to the code reviewing body for an interpretation. The individual would not be able to request advice from the FPPC until after he or she had taken these steps. Commissioner Knox noted that making the determinations is very fact-intensive, and the agency and the code reviewing body are probably better equipped to find those facts. The Commission would then serve as more of a reviewing appellate panel after the facts have been clarified.

In response to a question, Ms. Stecher stated that Commissioner Knox's version was substantively similar to staff's version. Subdivision (c)(2) of Commissioner Knox's version seemed more succinct than staff's version. She noted that (a)(2), (a)(3)(A) and (a)(3)(B) of Option 2 had bracketed language that should be considered.

Commissioner Knox proposed that the Commission accept Option 2, using the word "request" instead of "obtain." This would require the individual to apply to his or her agency, but the agency would not be able to stall the process. If the agency did not respond in a reasonable amount of time, the individual could proceed to the next level.

Commissioner Downey noted that an individual could meet the requirements of the proposal by simply sending the same letter at the same time to the agency, the code reviewing body, and the FPPC. He suggested that it might be better to use the word "obtain" to ensure that the individual does not go around the agency and code reviewing body.

Chairman Randolph noted that the language implied that the individual must take an initial step.

Commissioner Knox suggested that "request" gives the Commission more flexibility, and they could refuse to consider a request from an individual if they had not given the agency or the code reviewing body a reasonable amount of time to respond to their request for a determination.

Commissioner Downey agreed, noting that it was a practical answer.

Commissioner Swanson asked whether the determinations would be made in closed or open session.

General Counsel Luisa Menchaca stated that the agencies are required to conduct the process in a manner that assures adequate notice and a fair opportunity for members of the public to present their views.

Commissioner Swanson commented that Los Angeles County was known to conduct a lot of business behind closed doors and asked whether staff could assure her that the determinations would not be done in closed session.

Ms. Menchaca responded that § 87311 made that requirement, but that each code reviewing body can have separate procedures for providing adequate notice for public comment.

In response to a question, Commissioner Knox stated that, under Option 2, there would be a review by two bodies in the county before the issue could be brought to the Commission. He explained how the process would work in a hypothetical situation.

Commissioner Swanson pointed out that the County Board of Supervisors in Los Angeles hires the code reviewing body as their employees to make decisions on their behalf. In order to be just and fair to the individuals, she believed that the Commission should provide every opportunity for an unbiased point of view to resolve the issues. She asked that the process include checks and balances, providing a certain level of fairness.

Ms. Menchaca responded that this regulation would authorize the Commission to provide advice regarding conflict of interest code designations, which it currently cannot do. Using the word "request" in the language would allow the Commission to determine whether they need to contact the agency and the code reviewing body to determine whether anything had been done at the those levels to resolve the issue. The Commission could then give guidance to the individual if the local agency had not. Staff could decline to provide advice if the local agency was making efforts to resolve the issue.

In response to a question, Ms. Menchaca stated that informal written advice was considered guidance.

Commissioner Karlan pointed out that Option 2 provided the Commission with the flexibility to decide whether to offer formal or informal assistance.

Commissioner Knox stated that the individual would have the right to decide whether the advice would be formal or informal.

John McKibben, Deputy Executive Officer for the Los Angeles County Board of Supervisors, stated that Los Angeles County agencies hold at least one or two public meetings where an the agency's conflict of interest code is discussed. Conflict of interest code discussions for special districts or school districts must be held in public, pursuant to the Ralph M. Brown Act. County departments must provide an opportunity for public input on their conflict of interest codes. His office reviews the proposed codes, and the Board of Supervisors approves the codes. He noted that they try to make the discussions as open as possible and they attempt to get as much input as possible.

Mr. McKibben asked whether Option 2 would allow the FPPC to provide informal assistance.

Commissioner Knox responded that the requesting party could request formal advice or informal assistance.

Mr. McKibben responded that Los Angeles County believed that the PRA establishes the responsibility and the authority for review and approval of a local agency conflict of interest code. He believed that the appeal process would be for judicial review, and not for FPPC review. He explained that his staff has worked closely with FPPC staff regarding the review of conflict of interest codes and always looked for help from the FPPC when questions arose regarding whether certain persons should be included in their code or whether the disclosure level is appropriate. However, he believed the code reviewing body has final authority.

Commissioner Knox agreed that the code reviewing body has final authority on adopting a code. He believed that the Commission has the authority to interpret the code. He did not suggest that the Commission could adopt a code in place of the one adopted by the code reviewing body, but he did believe that the FPPC had the authority to interpret how the code applied. If the individual or the agency did not agree with the FPPC decision, they had the option of taking the issue to the courts.

Mr. McKibben asked whether the Commission's formal advice under Option 2 would supercede the decision made by the code reviewing body, or whether it was an element that the agency or individual could use to support their position in court.

Commissioner Knox responded that formal advice would protect the individual. If an individual was required to file under the conflict of interest code and both the agency and the code

reviewing body declined to change that, the individual could ask the Commission to reverse that determination and the Commission decision would give protection to the individual.

Ms. Menchaca stated that adopting this regulation would shift the burden from the individual to the FPPC. Once formal advice is issued to an individual, the individual could go to the agency with the FPPC interpretation, or they could simply fail to file in accordance with the FPPC advice, and the code reviewing body could assert that the FPPC did not have the authority to make that determination. Should that happen, the Commission might have to defend its advice in court. Staff understood that the Commission did not want individuals to be burdened with seeking administrative remedies and the costs of seeking judicial review. She believed that staff would be guarded and weigh all of the factors before rendering advice, but she also believed that the statute would allow it.

In response to a question, Ms. Menchaca clarified that she agreed with Commissioner Knox that the FPPC could overturn the code reviewing body's decision, because the individual could take the formal advice letter to the code reviewing body as evidence that they did not have to file. She believed that the agencies may then come to the FPPC in order to deal with the individual.

Commissioner Karlan questioned whether the code reviewing body or agency could then go after the individual for failing to file, and whether the individual could then use the formal advice letter as justification for not filing.

Commissioner Downey noted that the Commission usually hears from the agencies when there is a failure to file and that an enforcement action is initiated by the FPPC. In this situation, the enforcement would not be pursued by the FPPC because the formal advice letter would protect the individual. However, the local district attorney could pursue an enforcement proceeding. In that case, the individual could still use the formal advice letter as a defense.

Commissioner Swanson summarized that this regulation would allow the Commission to make the final determination instead of forcing the individual to go to court for a remedy.

Chairman Randolph stated that there could be a situation where the local code reviewing body disagrees with the FPPC's determination and pursues the individual. If the individual then uses the formal advice letter as a defense, the district attorney could argue that the FPPC did not have the authority to issue the formal advice because the code reviewing body has the final authority.

Ms. Menchaca stated that § 87308 provides that judicial review of any action by the code reviewing body may also be sought by the Commission too.

Commissioner Karlan asked whether individuals could be prosecuted in one superior court while the FPPC files an action against the code reviewing body in another superior court.

Ms. Menchaca responded that it could happen.

In response to a question, Mr. McKibben stated that the Commission should not be an intermediary before the individual goes to court to challenge the code reviewing body's determination. He believed that §§ 87307 and 87308 provide a statutory scheme for appealing decisions of a code reviewing body. He did not believe that the issue would necessarily arise, because his office works very closely with FPPC staff to ensure that any questions are thoroughly reviewed. Ultimately, however, the appeal process is set forth in the statute and formal challenges of a code reviewing body's decision must use that process.

Commissioner Knox agreed that most matters would be resolved, but noted that § 83114(b) granted the Commission the authority for the regulation because of its language, "Any person may request the Commission to provide written advice with regard to the person's duties under this title." He noted that it was a broad grant of power that applies to this regulation, although it should be used judiciously.

Mr. McKibben responded that if an individual had a formal advice letter from the FPPC that conflicted with the code reviewing body's decision, he did not know which would take precedent.

Commissioner Knox responded that another government code section provides that, once the FPPC has rendered formal written advice, it provides immunity to the individual who relies upon that advice. He agreed that the agency has the right to take the FPPC to court if it believed that the FPPC is incorrect, but the individual could rely on the letter in the interim.

Commissioner Swanson noted that this was similar to the LA City Ethics Commission's charge that their regulations supercede FPPC regulations. It was decided that the local jurisdiction had every right to make their own regulations for their own local candidates, but that the final word is vested in the FPPC.

Ms. Menchaca generally agreed, but pointed out that this case involves the interaction of more statutes that articulate the Commission's broad authority in this area.

Commissioner Downey stated that there seemed to be a consensus that the primary purpose of this regulation was to deal with situations where an individual has exhausted remedies at the lower levels. He did not believe that issues would arise from this regulation very often, and was satisfied with Option 2.

Chairman Randolph agreed, noting that she preferred the "request" language.

Mr. McKibben commented that, given the two choices, he recommended adopting staff's version because it discusses a process that already occurs. An individual would be allowed to seek informal assistance from the Commission, having discussed it with the agency and the code reviewing body. This would answer any question that comes up and avoids conflicts between the FPPC and the code reviewing body, resulting in possible court actions.

Chairman Randolph did not see a substantive difference between the two versions. Option 2 still anticipates administrative remedies, requiring that the individual try to resolve the issue with the agency and/or the code reviewing body before approaching the FPPC for advice.

Mr. McKibben responded that the only difference is that a person or agency can request informal assistance from the FPPC prior to the code reviewing body making its decision on the code.

Commissioner Knox pointed out that the agency can bring the issue to the FPPC under Option 2.

Commissioner Karlan observed that, under Option 2, both formal and informal assistance are available in every case, while the staff's version only provided informal assistance to individuals who request advice when the FPPC is not the code reviewing body.

Chairman Randolph agreed.

Commissioner Downey moved that the regulation be adopted using Option 2 with the use of the word "request" on lines 16, 21 and 25.

Commissioner Knox seconded the motion.

Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted "aye." The motion carried by a unanimous vote.

Item #5. Adoption of Regulation 18702.5. Public Identification of a Conflict of Interest for Section 87200 Filers: Amendment of Regulations 18702 and 18702.1.

Staff Counsel Galena West explained that the proposed regulation provided guidance for § 87105, which became part of the PRA through AB 1797 (Harman). She explained that the Commission opposed the bill, but it was passed and became law on January 1, 2003.

Ms. West explained that the new statute requires § 87200 filers with a financial interest in a decision to, immediately prior to the making of the decision, publicly identify the financial interest, recuse himself or herself and leave the room. She described who those filers are. Existing regulations provide that public officials who do not act because of a financial interest are not required to identify the financial interest. Since the existing rules and the new statute conflicted, staff proposed the new regulation to resolve the conflicts and to clarify other gaps in the regulation.

Ms. West explained that the Commission considered the regulation at its March 7, 2003 Commission meeting, and directed staff to clarify subdivisions (c), (d)(1) and (d)(3), pertaining to the exceptions for closed session, consent calendars and speaking as a member of the public. She presented decision point 1, which addressed the Commission's concern over whether the official should publicly disclose the financial interest for a closed session item when it could lead to breaches in confidentiality. The proposed regulation created more limited options for closed session. Option A would limit the public disclosure to a statement that the public official has a

conflict of interest, with no further details about the financial interest. This option would harmonize the statute and the necessary confidentiality of closed sessions. Option B would impose no disclosure requirements for closed session settings. She explained that the statute did not detail whether closed sessions were to be included in the statute, and noted that option A appeared to best harmonize the statute and confidentiality laws. Staff recommended adoption of option A.

In response to a question, Ms. West explained that § 87200 filers included a long list of people, as outlined on page 4 of the staff memo, and she read from the memo.

In response to a question, Ms. West stated that the statute made express exceptions, but did not include closed sessions as one of those exceptions.

Commissioner Downey stated that the statute seemed solely concerned with public hearings.

Chairman Randolph agreed that the statute refers to "meetings" and that closed sessions were meetings. She noted that, under the Brown Act, a local official must go into open session before going into closed session. She supported both option A and including the proposed comment in the regulation. She stated that a lot of closed sessions identify the issues being discussed. She was concerned about those closed session items that are not publicly identified (such as pending litigation), and pointed out that public disclosure of an official's economic interest may result in public disclosure of the confidential identity of the matter under consideration. She believed that the comment would protect the official from breaching that confidentiality. She did not believe that the Commission had the authority to adopt a blanket disclosure exception for closed sessions, noting that a decision may not even be impacted by a disclosure.

Commissioner Karlan questioned whether a public official would be required to recuse himself or herself when the official has a financial interest in one matter but not another on the closed session agenda. She asked how subdivision (d)(2) would interact with that scenario.

Ms. West responded that the absence provision was meant to be applied when the public official was not present for any portion of the closed session meeting. She explained that the disclosure for a closed session item could simply refer to the agenda item number, thereby protecting the confidentiality of the item.

Commissioner Karlan questioned whether the public would then believe that the person is absent, when, in fact, the person is present for much of the closed session meeting.

Ms. West explained that there needed to be a balance between keeping the confidentiality and providing public disclosure. She explained that the regulations did not specify that the agenda item needs to be identified, but the proposal did not seem to be in conflict with the "immediately prior to the consideration…" language of the statute.

Assistant General Counsel John Wallace observed that the absence provision was intended to address situations whereby the official is truly absent from the meeting, and was not intended to cover situations whereby the official leaves the room because of his or her conflict.

Commissioner Karlan questioned how an official would present disclosure of a conflict for one closed session item but not from other items under consideration at the same closed session meeting.

Ms. West responded that it would be a very general disclosure stating that they had a conflict of interest but did not necessarily specify that they would not be participating in all or part of the meeting.

Chairman Randolph observed that sometimes the mere fact that a public official has a conflict can reveal too much information, but other times it would not. She presented a hypothetical situation involving an eminent domain issue, noting that when a public official with only one real property interest recuses himself or herself, then the public will know the subject matter of that item. Conversely, once the eminent domain action is filed, the agenda will identify the subject matter, and it would no longer be a waiver of confidentiality for the public official to recuse himself or herself. She believed that the disclosure would be somewhat fact dependent.

Commissioner Karlan pointed out that a public official who recuses himself or herself from the closed session meeting without identifying that the recusal is for only part of the meeting leaves the public with the impression that the official will not be participating in any of the closed session meeting.

Chairman Randolph observed that, if there was only one item on the agenda created a conflict for the official, then the official could indicate that the recusal would be for “one item” without identifying the item.

Commissioner Karlan stated that the official could say that the recusal would be for some but not all items on the closed session agenda, otherwise the disclosure would be inaccurate.

Commissioner Downey stated that the drafters did not consider closed sessions and thought the Commission was inventing issues. The statute deals with public identification and specific identification of the nature of the potential conflict, all of which would be inconsistent with the required confidentiality of closed session. He believed that, if it is necessary to do anything, option B was the better choice. He suggested that the regulation could state that the statute does not apply to conflicts of interest arising in closed session.

Commissioner Knox asked Chairman Randolph whether, in instances where the individual could declare the nature of their conflict of interest without compromising the confidentiality of the closed session, the individual should be required to do so. He believed that would not be a bad idea, but did not agree that the proposed regulation would accomplish that.

Chairman Randolph observed that option A required basic disclosure and not a detailed disclosure.

Commissioner Knox responded that option A would not require disclosure of the nature of the conflict in closed session for those instances where the confidentiality of the session would not be compromised.

Chairman Randolph stated that the more general disclosure requirement of option A would apply. However, she pointed out that an official who has such a limited number of economic interests that a general disclosure of any economic interest would make obvious the identity of the matter under discussion. She believed that staff's language recognized that there is no closed session exemption in the statute, but also recognized that closed session is different from public session and should be treated differently. A general disclosure may be sufficient in those cases. She supported option A.

Commissioner Downey stated that option B was ideal because it would not require any disclosure for closed sessions. This would also make the city attorney's job easier. He preferred that the regulation state that the statute does not apply to closed sessions. Barring that, he supported option B.

Commissioner Knox did not believe that the language of the statute would allow closed sessions to be exempted. He noted that the statute is seriously flawed, but believed that option A was preferable.

Chairman Randolph noted that the proposed changes in (d)(3) removed any requirement that the public official must speak if he or she chooses to remain in the room and listen to the public discussion (under the exception allowing for representation of the official's own interests).

Ms. West agreed, noting that the change was made because of public comments and comments from the Commission at the March 2003 meeting.

Commissioner Karlan asked whether the language of (d)(3) inferred that the moment the public official determines not to speak he or she must leave the room.

Mr. Wallace explained that staff tried to be a little vague in the regulation language because the statute used the term "speak." Staff tried to make it more reasonable. He noted that Mr. Martello, from the city of Mountain View, pointed out that sometimes people listen in order to ascertain whether they will speak.

Commissioner Karlan stated that Mr. Martello pointed out that the word "speak" may be more broadly defined, in First Amendment terms, to mean the official's presence indicating their support of a position.

Mr. Wallace stated that staff could add clarity to the language specifying that the official did not have to leave the room, noting that they did not intend to make the official leave the room once the decision had been made not to speak.

Chairman Randolph questioned whether the language, "He or she is not required to actually speak," could be added to the regulation, and asked whether it would conflict with the language of the statute.

Mr. Wallace suggested that page 3, line 17 could read, "interest and need not leave the room." The regulation could also state that the official did not need to leave the room, but it might conflict with the statute.

Chairman Randolph suggested the line 17 language read, "interest and need not leave the room during discussion of the item," to clarify that the official could stay for the whole discussion.

Commissioner Downey suggested that the statute requires that the official leave the room once he or she determines that they will not speak.

Chairman Randolph did not agree that the official would need to leave. She agreed with staff's argument that the statute should be read in harmony with the existing exception for speaking on behalf of your own interests.

Ms. West suggested that the sentence on lines 15, 16 and 17 could be shortened to read, "He or she may listen to the public discussion of the matter with the members of the public."

Commissioner Karlan favored shortening the sentence.

There was no objection to shortening the sentence as suggested by Ms. West.

Commissioner Knox stated that the reference to 18702.5 on line 13 of proposed regulation 18702 seemed out of harmony with the rest of the sentence. The other sections cited relate to determining when a conflict occurs, while 18702.5 explains what the official must do when a conflict of interest occurs.

Ms. West agreed that it would be appropriate to remove that reference because the whole paragraph deals with making a determination.

Commissioner Karlan stated that, if the reference to 18702.5 is left in the regulation, then under (d)(3), an official who sits in the audience would not be considered to be participating in making a decision.

Ms. West noted that the same logic would apply to the consent calendar exception as well.

Commissioner Karlan agreed, noting that, because the exceptions are listed in regulation 18702.5, the exceptions need to be listed in 18702. This would indicate that, if an official falls

into one of the exceptions and applies the statute, the official is not making or attempting to use his or her official position.

Commissioner Knox agreed.

In response to a question, Commissioner Knox stated that the reference to 18702.5 should be left in the regulation.

Commissioner Knox moved adoption of regulation 18702.5 including option A and the deletion of the language, "to determine if he or she needs to speak on his or her personal interest" on page 3 lines 16 and 17; and adoption of amended regulations 18702 and 18702.1.

Commissioner Swanson seconded the motion.

Commissioners Karlan, Swanson, Knox and Chairman Randolph voted "aye." Commissioner Downey voted "no." The motion carried by a vote of 4-1.

Item #6. Pre-notice Discussion of Amendments to Regulation 18225(b)(2).

Staff Counsel Larry Woodlock explained that the Commission directed staff to propose amendments to Regulation 18225(b)(2) following recent appellate court decisions construing the Act's definition of "express advocacy" in § 82031 and regulation 18225(b)(2). Staff did an internal study and conducted an "Interested Persons" meeting in April 2003, and concluded that the *Schroeder* and *Davis* opinions might justify an amendment clarifying the meaning of "context" as the word is used in § 82031.

Mr. Woodlock presented two options for the clarifying amendment. Option A would limit the term "context" to an internal context, consisting of all words and symbols appearing within the communication. Option B would permit consideration of the proximity to an upcoming election. If option B is chosen, the Commission would also have to decide whether to limit the contextual consideration to communications published within a specified time before an election or whether to permit consideration of timing in all communications. A third option, recommended by staff, was to defer amendment since case law is rapidly evolving and currently provides a relatively uncertain guide. He pointed out that neither *Schroeder* nor *Davis* nor the Ninth Circuit require the Commission to amend its regulation.

Mr. Woodlock reported that a special 3-judge panel in Washington DC issued a 1,600 page decision on May 2, 2003, on the Bipartisan Campaign Reform Act (BCRA). The panel did not consider a definition of "express advocacy." However, two of the three judges agreed that express advocacy is not the only permissible basis for regulation of campaign communications. Two of the three judges also agreed that the constitution permitted the use of context in identifying communications which are subject to regulation. These two points support staff's option B. He pointed out that the 3 judges wrote 4 opinions, illustrating that they did not agree with each other on many of the issues. The judges approved a definition of "electioneering communication," which some observers see as a worse definition than the one they struck down,

underscoring staff's concern that the Commission should be cautious in approving a regulation. He noted that the Commission's current regulation is 28 years old and no court has required that it be amended.

Mr. Woodlock reported that staff received the Ninth Circuit's decision in *California ProLife Council v. Getman, et al.* on May 8, 2003, affirming the Commission's argument on the Act's committee disclosure requirements. The federal court responded to the *Davis* critique of *Furgatch*, making it clear that it stands by its views in *Furgatch*, indicating that the U.S. constitution permits the use of context in reviewing language to determine whether it has express advocacy. The court deferred to *Davis* for its interpretation of state law.

Lastly, Mr. Woodlock reported that staff presented a hypothetical situation in its memo illustrating how it can be difficult to tell what the words of a communication mean with reference to context. In the hypothetical situation, the proximity of the next election would help determine whether the communication was express advocacy or issue advocacy. Shortly after distributing the memo, staff received copies of communications that clearly illustrated the issue. The communications presented a scenario whereby a sitting district attorney was proposing to fund an expensive lawsuit against a timber company that was very involved in local political issues. The timber company started a recall effort against the district attorney, and staff had to determine when the series of advertisements changed from issue advocacy to express advocacy. This could not be done without the background information about the recall election.

Chairman Randolph stated that the Commission needed to determine whether the regulation should be amended at this time. She believed that it would be a good idea to do something. Currently, the FPPC is interpreting the statute and regulation in light of the *Davis* opinion, and she believed that it would be appropriate to write that into the regulation.

Commissioner Downey agreed with the staff recommendation. The Commission could continue to interpret the current version of the regulation, while assuring that it does not conflict with the *Davis* decision. However, he expected the BCRA decision would be made by the Supreme Court during the current term, and he suggested that the Commission not take any action at this time.

Commissioner Knox agreed. He believed that *Davis* was rightly decided, and that the Commission was now bound to adopt a more narrow approach to express advocacy than the Commission previously pursued and he opposed the amendments proposed by staff. He believed that, if the courts decide in favor of *Davis*, the Commission would need to remove "taken as a whole" from the definition of express advocacy. He noted that he did not agree with staff that the proximity of the election was an important factor in the *Davis* court's interpretation. The court believed that there should be a bright line test that would let people know when they were exercising their first amendment rights and when those rights involved filing requirements. Commissioner Knox believed that the regulation should not be changed at this time.

Mr. Woodlock stated that the last clause of the regulation has caused suspicion in the past. He pointed out that Judge Leon, in the BCRA case, discussed striking the last clause of the

alternative standard of the electioneering communications statute, which was very similar to the clause, "taken as a whole." However, he noted that the language is in the statute, and if the BCRA courts find the language unconstitutional, there may need to be a legislative change next year.

Chuck Bell, from Bell, McAndrews, Hiltachk and Davidian, agreed that it would be prudent to wait to see the effect of the BCRA decision. He believed the Ninth Circuit decision supported the *Davis* view of *Furgatch*, and deferred to the California courts the interpretation of state law, even though that interpretation was based on the possible unconstitutionality of the state statute and regulation. The Ninth Circuit decision says that words must be looked at without considering external contexts. He agreed that the regulation will probably need to be amended, and the statute reviewed, in light of the *Davis* decision. Complicating the issue, the BCRA decision and § 85310 deal with issue advocacy, while *Davis* interprets the meaning of the term "independent expenditure." Mr. Bell questioned whether the Supreme Court would provide a clear resolution of the issues. He suggested that the Ninth Circuit decision raised some question regarding whether the disclosure requirements for issue advocacy communications under § 85310 are constitutional. He cautioned against relying on the district court's *McConnell* decision because observers believe it cannot be rationally construed to have any defining meaning and will be subject to Supreme Court Review. He urged the Commission to wait to change the regulations, and to apply *Davis* in the interim.

There was no objection from the Commission to taking on regulatory action at this time.

Item #7. 2003 Campaign Manual Addendum. Staff: Technical Assistance Division Chief Carla Wardlow.

Technical Assistance Division Chief Carla Wardlow presented the 2003 Campaign Manual Addendum for the Commission's approval. She explained that it highlighted changes to the Act and the regulations since the last full campaign disclosure manuals were published. She noted that the Commission directed staff to prepare new campaign disclosure manuals in 2003, and reported that the project is almost ready for Legal Division review.

Commissioner Swanson moved approval of the Campaign Manual Addendum as presented.

Commissioner Knox seconded the motion.

Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted "aye." The motion carried unanimously.

Items #8, #9, #10, #11, #12, #13, #14, #15, #16, #17, #18, #19, #20, #21, #22, #23, #24.

Commissioner Downey moved that the following enforcement items be approved on the consent calendar:

Item #8. In the Matter of D. Barton Doyle, FPPC No. 00/045. (1 count.)

Item #9. In the Matter of Andres Lujan, Jr., FPPC No. 02/185. (4 counts.)

Item #10. In the Matter of Roger Kirwan; FPPC No. 02/708. (1 count.)

Item #11. In the Matter of The Doctors' Company Political Action Committee and James Cathcart, FPPC No. 99/727. (1 count.)

Item #12. In the Matter of Orrin Cocks, FPPC No. 01/183. (3 counts.)

Item #13. In the Matter of Margaret Sabovich, FPPC No. 01/0432. (1 count.)

Item #14. In the Matter of Daniel Sanchez, FPPC No. 02 / 402. (1 count.)

Item #15. In the Matter of Donald Ray Wesson, FPPC No. 01/550. (1 count.)

Item #16. In the Matter of Gordon McGinnis, Friends of Gordon McGinnis, and Dena McGinnis, FPPC No. 00/619. (1 count.)

Item #17. In the Matter of Glen Dahlbacka, FPPC No. 01/412. (1 count.)

Item #18. In the Matter of Elizabeth Pidgeon-Ontis, FPPC No. 02 / 441. (1 count.)

Item #19. In the Matter of Signature Properties, Inc.; FPPC No. 02/806. (1 count.)

Item #20. In the Matter of David Graves, FPPC No. 01 / 414. (1 count.)

Item #21. In the Matter of Jaroth, Inc.; FPPC No. 02/1055. (1 count.)

Item #22. In the Matter of Thomas P. Allen, Jr., FPPC No. 99/836. (2 counts.)

Item #23. Failure to Timely File Late Contribution Reports – Proactive Program.

a. In the Matter of King's County Truck Lines, FPPC No. 2003-0042. (1 count.)

b. In the Matter of Milk Producers Council, FPPC No. 2003-0005. (1 count.)

c. In the Matter of SEIU Local 998 PAC, FPPC No. 2003-0009. (3 counts.)

d. In the Matter of Gemini Advisors, FPPC No. 2002-1029. (1 count.)

Item #24. Fair Political Practices Commission v. Democratic Congressional Campaign Committee and Janica Kyriacopoulos; FPPC No. 02/422.

Commissioner Swanson seconded the motion.

Commissioners Downey, Karlan, Knox, Swanson and Chairman Randolph voted "aye." The motion carried unanimously.

Item #25. Legislative Report.

AB 190 (Parra) and SB 1072 (Burton)

Executive Director Mark Krausse explained that both of these bills addressed the scenario that allowed the 21st Century Insurance Company to move contributions through political parties in a manner that did not disclose the true source of the contributions until many months after the election. These bills would require that political parties file late contribution reports. He stated that the drafted language did not work, and that Technical Assistance Division staff was working with the authors'staff from both bills. He noted that the staff memo included a suggestion that, instead of approaching this as a late contribution, a Proposition 34 electronic reporting approach should be used. This would require 24-hour reporting of contributions of $1,000 or more within 90 days for political parties. However, the Attorney General's office persuaded staff that it would not be necessary to require that much reporting. Staff was currently exploring requiring the political parties to file pre-election reports for any elections in which they received $1,000 or more in contributions, or any elections to which they made contributions of $500 or more. He distributed draft language, and asked the Commission for a "support if amended" position to resolve staff concerns.

There was no objection from the Commission.

AB 1501 (Levine)

Mr. Krausse reported that Proposition 34 requires that, when candidates file to form a committee and begin collecting money, the candidates declare whether they will accept voluntary expenditure limits. Many candidates expressed concern that they must make that decision well before the election and before they had any idea who their opponents would be. This bill would allow candidates to change their choice at any time prior to filing their nomination papers (88 days prior to the primary). Staff was concerned that the bill did not limit the number of times the candidate could make that change. Staff recommended that the Commission support the bill if it is amended to permit only one change to that decision.

In response to a question, Caren Daniels-Meade, from the Secretary of State's office, stated that her office could handle multiple changes to the candidate's decisions.

Chairman Randolph did not see any problem with the candidate's changing their choice multiple times, and recommended that the Commission support the bill as written.

There was no objection from the Commission to supporting AB 1501 as written.

SB 467 (Johnson)

Mr. Krausse explained that this was one of the more important bills of the session, but it died in the Senate Elections Committee. It would have prohibited some campaign contributions in excess of Proposition 34 limits that resulted from Commission interpretation of the law. He stated that officeholders serving their last term may not currently collect a contribution after the election unless the officeholder has debt, under Proposition 34. This bill would have allowed the officeholder to collect money, subject to Proposition 34 limits, but use of the contribution was not limited to officeholder expenses. If the bill is revived, he asked that the Commission take a position to support the bill if amended to provide that those monies can only be used for officeholder expenses.

There was no objection to Mr. Krausse's suggestion.

AB 419 (PERS Committee)

Mr. Krausse explained that the PRA already covers this issue for the Public Employees Retirement System (PERS), placing campaign reform on PERS candidates and the Board members. There are problems with this because it provides that the conflict provisions of the Act apply to them but are not enforceable against them. Staff will seek to remedy the PERS issue through Legislation in the future, but the State Teachers Retirement System (STRS) is attempting to copy the PERS model in this bill. Staff believed that the Commission should oppose the bill unless, at a minimum, the enforcement exemption is removed. Staff preferred that it be drafted outside the PRA, and STRS has said it would be willing to work with the FPPC.

Mr. Krausse explained the Proposition 34 placed the contribution and voluntary expenditure limits on PERS candidates, and this bill would place those limits on STRS candidates. The limits were not contemplated to apply to retirement board candidates, and it does not seem to work.

Mr. Krausse asked for a position of oppose unless amended to (a) fix the enforcement problem, and (b) either remove the legislation from the PRA or draft it in a separate area of the Act so that it is discreet and treating them like elective state candidates does not create problems for other purposes.

There was no objection from the Commission to Mr. Krausse's recommendation.

AB 1678 (Negrete McLeod)

Mr. Krausse explained that public officials at the state level who are negotiating future employment are prohibited from taking part in governmental decisions that would affect that future employer. AB 1678 would extend that prohibition to all local public officials as well. Staff was concerned that it could add to the advice and enforcement workloads, and proposed that the Commission ask that the bill be amended to provide a $250,000 appropriation for the FPPC to fund staff for that additional workload. If the request is not approved, staff could then request additional monies from the Department of Finance. The Commission must make that

request in the bill in order to stand a better chance of receiving additional funding from DOF later.

Commissioner Swanson noted that this might discourage people from running for political office.

Mr. Krausse did not believe that it would have that effect because the bill would only affect those officials who are negotiating future employment. He explained that a city manager who is involved in land use decisions and is considering employment with an entity involved in an action before the city would simply not be able to participate in that decision-making process. Currently, this applies to state employees, and the authors believe that it should apply to local officials as well.

In response to a question, Mr. Krausse stated that the prohibition would apply to all local officials, including the elected officials.

Scott Hallabrin, from the Assembly Ethics Committee and drafter of the bill, explained that the PRA currently provides that a public official who is negotiating employment with someone is prohibited from participating in government decisions that have an impact on a prospective employer only if that official is a state official. The bill expands that prohibition to the local level. He did not necessarily agree that the FPPC would need three positions to enforce the regulation.

Mr. Hallabrin explained that the bill arose from a local issue, when a local county supervisor negotiated future employment while participating in decisions that would impact the potential employer.

Mr. Krausse explained that the public official would not be precluded from going to work in the new job, but would not be able to participate in any decisions affecting the future employer while serving as a public official.

Mr. Krausse recommended that the Commission support the bill if amended.

There was no objection to Mr. Krausse's recommendation.

SB 641 (Brulte)

Mr. Krausse explained that telephone advocacy disclosure was addressed last year in SB 3. The bill resulted from a Los Angeles mayoral election wherein some telephone banking by third parties used a name very close to "Gloria Molina," a county supervisor, giving a false impression that Supervisor Molina was discouraging voters from voting for Tony Villaraigosa. These bills would require disclosure of the committees paying for that telephone call. In a separate section, the bill also lists the types of articles that would be included in the definition of "mass mailing." He noted that Enforcement Division was concerned about the enforceability of the first provision because someone getting a phone call would not necessarily know who it was from.

Enforcement Chief Steve Russo stated that he expected that there would be a great many complaints regarding the telephone calls. He noted that individuals who get the calls may not give the caller a chance to get their message out. He expected that most of the calls Enforcement Division would get would not be actionable. However, even in those instances where there appeared to be a violation, it would be difficult to build a case based on what was or was not said over the telephone. He was concerned that staff would be subject to criticism for failing to pursue violations when those violations will be difficult to prove.

Mr. Krausse explained that the Legislative subcommittee supported this kind of disclosure. He suggested that, if the Commission chose to support the measure, it do so on the condition that it be amended to require that disclosure be made at the beginning of the call so that the recipient does not call the FPPC to complain that there was no disclosure when, in fact, the recipient disconnected the call before the caller could make the disclosure. He also proposed that the bill be amended to require that the committee keep on file a copy of the text of the content of the call and copies of the recordings of all electronic calls, and that those copies be kept for the same amount of time that financial records are required to be kept.

In response to a question, Mr. Russo stated that Mr. Krausse's proposed amendments would not eliminate his concerns, but would help.

There was no objection to the Mr. Krausse's recommendation.

Item #26. Executive Director's Report.

The report was accepted as submitted.

Commissioner Swanson asked if the Spanish translation efforts involved paying a company to do the translations.

Mr. Krausse stated that a company did draft the forms, but that some of the Spanish-speaking members of the FPPC staff were checking to ensure that the word choices used by the translators fit in the context of the law.

Chairman Randolph congratulated Media Director Sigrid Bathen for receiving the "Lifetime Achievement Award" from the State Information Officers Council.

Item #27. Litigation Report

Commissioner Karlan pointed out that item 1 on the Litigation Report was changed.

Chairman Randolph agreed, noting that the decision was no longer pending.

Ms. Menchaca stated that staff received an opinion affirming the Superior Court's decision in the *Gamel* matter, in favor of the FPPC.

The Commission adjourned to closed session at 11:25 a.m.

The public session was adjourned at 1:40 p.m.

Dated: June 5, 2003.

Respectfully submitted,

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Sandra A. Johnson
Executive Secretary

Approved by:

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Chairman Randolph