FAIR POLITICAL PRACTICES COMMISSION
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October 25, 2002

Ms. Diane M. Fishburn
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Sacramento, CA 95814-4602

Re: Your Request for Advice
Our File No. A-02-271

Dear Ms. Fishburn:

This letter is in response to your request for advice on behalf of the Honorable Philip Angelides regarding the provisions of the Political Reform Act (the "Act").[1]

FACTS

Your client is the Treasurer of the State of California. His campaign committee, "Friends of Phil Angelides," was formed for the purpose of supporting his re-election in 2002 ("2002 Committee"). After the November 5, 2002, election, your client may form a committee to run for a different statewide office in 2006 ("2006 Committee").

APPLICABLE LAW

Proposition 34 was passed in November of 2000 and became effective January 1, 2001. The measure provided, however, that the contribution limits for statewide candidates would not go into effect until after the November 5, 2002, elections. Section 83 provides as follows:

> "This act shall become operative on January 1, 2001. However, Article 3 (commencing with Section 85300), except subdivisions (a) and (c) of Section 85309, Section 85319, Article 4 (commencing with Section 85400), and Article 6 (commencing with Section 85600), of Chapter 5 of Title 9 of the Government Code shall apply to candidates for statewide elective office beginning on and after November 6, 2002." (Section 83, an

[1] Government Code sections 81000 – 91014. Commission regulations appear at Title 2, sections 18109-18997, of the California Code of Regulations.

uncodified section of Proposition 34, as amended by Stats. 2001, Ch. 241, effective September 4, 2001.)

Pursuant to section 83, the $5,000 per election ($20,000 for Governor) contribution limits are effective for statewide candidates on and after November 6, 2002. These limits apply to fundraising by statewide candidates for the 2006 elections. The $100,000 limit on loans from a state candidate to his or her campaign is also in effect for the 2006 elections. (Section 85307(b).)

In addition to the delayed effective date of contribution limits for statewide candidates, Proposition 34 contains a transition provision addressing the use of campaign funds possessed by statewide candidates on the date the limits take effect.

Section 85306 generally permits a candidate for elective state office to transfer contributions from one of his or her controlled committees to another, subject to the applicable contribution limits, by requiring attribution of the funds to specific contributors. Sections 85306(b) and (c), however, contain grandfather provisions permitting legislative and statewide candidates to use funds they possessed prior to the effective dates of Proposition 34's contribution limits without attribution. These exceptions to the attribution requirement are transition rules designed to permit the proximate use of funds on hand on the date the contribution limits of the Act take effect.

Section 85306 provides:

> "(a) A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state office[2] of the same candidate. Contributions transferred shall be attributed to specific contributors using a 'last in, first out' or 'first in, first out' accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor may not exceed the limits set forth in Section 85301 or 85302.
> (b) Notwithstanding subdivision (a), a candidate for elective state office, other than a candidate for statewide elective office, who possesses campaign funds on January 1, 2001, may use those funds to seek elective office without attributing the funds to specific contributors.
> (c) Notwithstanding subdivision (a), a candidate for statewide elective office[3] who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors." [Footnotes added.]

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[2] "'Elective state office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of Equalization." (Section 82024.)

[3] "'Statewide elective office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction and member of the State Board of Equalization." (Section 82053.)

Regulation 18536 describes how to attribute funds to past contributors when making transfers pursuant to section 85306.

The contribution limits of Proposition 34, the one bank account rule of section 85201, and the committee termination requirements also impact responses to questions about funds that are raised for an election. Under the one bank account rule of section 85201, an individual who has filed a statement of intention to be a candidate is required to establish one campaign contribution account and all contributions or loans made to the candidate or the candidate's controlled committee must be deposited in that account. Pursuant to regulations 18520 and 18521, a candidate who is required to file a statement of organization for a controlled committee must establish a separate controlled committee and campaign bank account for each office (and term of office) identified by the candidate in his or her statement of intention. Further, under regulation 18523.1, when a state candidate or the candidate's controlled committee makes a written solicitation for contributions, the solicitation must identify the controlled committee that is soliciting the contribution and the office for which the contributions are being solicited.

However, the case of *Service Employees International Union v. FPPC* (9th Cir. 1992) 955 F.2d 1312, 1322, affirmed that in the absence of valid contribution limits, a candidate may freely transfer funds between his or her own committees. Consistent with the decision in *SEIU*, sections 85306 and 85317, set forth parameters within which candidates are permitted to transfer and carryover funds from one committee to another.

QUESTIONS AND CONCLUSIONS

1. May the 2002 Committee transfer funds held by the Committee on November 6, 2002, to the 2006 Committee after November 6, 2002? If the answer is yes, are the transferred funds subject to attribution to specific contributors for purposes of the contribution limits?

Section 85306(c) states that "a candidate for statewide elective office who possesses campaign funds on November 6, 2002, may use those funds to seek elective office without attributing the funds to specific contributors."

The transition provision of section 85306(c) does not specify or restrict the time period when a candidate for statewide elective office who possesses campaign funds raised prior to the effective date of limits must transfer those funds. Accordingly, the 2002 Committee may transfer funds held by the Committee on November 6, 2002, to the 2006 Committee after November 6, 2002. Under section 85306(c), if Mr. Angelides is a candidate for statewide office who possesses funds on November 6, 2002, he may use the transferred funds which he possesses on November 6, 2002, to seek elective office in 2006 without attributing the funds to specific contributors.

The amount of funds that may be transferred from the 2002 Committee after November 6, 2002, however, would necessarily be decreased by any amounts spent by

the 2002 Committee after that date. In addition, to be used for the candidate's future election, such funds must be transferred before they become surplus under section 89519.

2. Before November 5, 2002, the 2002 Committee may have assets including valuable artwork donated to the 2002 Committee which the Committee may sell to raise funds. We have two questions:

a. May the 2002 Committee transfer its assets, including any remaining artwork, to the 2006 Committee after November 6, 2002? If the answer is yes, are the transferred assets subject to attribution to specific contributors for purposes of the contribution limits?

With respect to the donation of art, in-kind contributions are subject to the Act's contribution limits. However, Proposition 34's contribution limits do not apply to statewide candidates until after the November 5, 2002 elections. Accordingly, the 2002 Committee may receive an in-kind contribution of valuable art, prior to the effective date of the contribution limits. This transaction is analogous to the 2002 Committee receiving a large monetary contribution prior to the effective date of the statewide limits, which is not prohibited under section 83.[4]

You next ask whether the 2002 Committee may transfer its assets, including valuable artwork to the 2006 Committee after November 6, 2002, and if so, whether the transferred assets are subject to attribution. As we discussed by telephone, the committee's assets other than art amount to standard campaign property, including office equipment, computers, furniture, fax machines, telephones, and lists, which are located at three campaign offices.

With respect to transferring the assets, section 85306(a) states that a "candidate may transfer *campaign funds* from one controlled committee to a controlled committee for elective state office of the same candidate" subject to attribution. Section 85306(c) states that notwithstanding the attribution requirements, "a candidate for statewide elective office who possesses *campaign funds* on November 6, 2002, may use those *funds* to seek elective office without attributing the *funds* to specific contributors."

The term "campaign funds" used in section 85306 is not specifically defined for purposes of the entire Act or for purposes of Chapter 5 - Limitations on Contributions (§§ 85100 - 85802). However, it is used elsewhere in the Act (section 89511(b)(1) for purposes of Chapter 9.5 - Ethics (§§ 89500 - 89522)) to include "assets received or possessed by a committee as defined by subdivision (a) of Section 82013."

In addition, in-kind contributions of artwork and stock are donations to a campaign committee that are easily convertible into cash and are thereby similar to monetary contributions. As such, they fit within the meaning of the term "campaign

[4] Although this transaction may be forward looking, Proposition 34 clearly sets forth the effective date of the statewide contribution limits and contains a broad grandfather provision providing for the use of contributions possessed by statewide candidates prior to the effective date.

funds" as used in section 85306. Accordingly, under section 85306(c), the 2002 Committee may transfer the artwork and campaign office assets held by the committee on November 6, 2002, to the 2006 Committee after November 6, 2002, without attribution.[5]

b. If the assets are transferred to the 2006 Committee, may the 2006 Committee sell such assets to raise funds for the 2006 Committee? If an asset is sold by the 2006 Committee, has the Committee received a contribution in the amount of the entire sales price or, consistent with past Commission advice, is the amount of the contribution only the amount paid which is over the established fair market value of the asset?

You are not specifically inquiring about the 2006 Committee selling other assets except the donated art. Past advice concerning the reporting and accounting for an in-kind contribution of donated art is as follows. We have advised that the individual who donates the art has made an in-kind contribution (reportable on schedule C) in the amount of the fair market value of the art at the time of the donation. When the committee sells the art, the purchaser is only considered to have made a contribution if the purchase price exceeds the fair market value of the painting. (*Miller* Advice Letter, No. A-01-263; *Moniz* Advice Letter, No. A-88-028; *Sepulveda* Advice Letter, No. I-89-428.) If the purchaser pays fair market value for the art, then the purchaser is not considered to have made a contribution, and the payment received from the purchaser would be reported on schedule I as a "miscellaneous increase to cash."

3. If a loan is made by Mr. Angelides or by another person or entity to the 2002 Committee prior to November 5, 2002, we have the following questions:

a. May the 2002 Committee continue to raise funds after November 5, 2002, in order to repay the loan? If the answer is yes, would the Committee be subject to contribution limits on the funds raised after November 5, 2002? Would there be any other restrictions on the repayment of a loan made to the 2002 Committee?

In the *Fishburn* Advice Letter, No. A-02-257, we advised that a candidate for Insurance Commissioner could continue to raise contributions outside the limits of sections 85301 and 85302 to pay back loans that had been made to his 2002 committee for that election. (Section 83.) In addition, we said that loans made by individuals to that committee for the 2002 election could be forgiven, resulting in a contribution in excess of the limits in sections 85301 and 85302. The letter, however, stated that the question of whether a statewide candidate's 2002 committee could continue to raise unlimited contributions (in excess of debt the committee had from the 2002 elections) for officeholder expenditures or other purposes on or after November 6, 2002, would need to be considered by the Commission.

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[5] In future elections when section 85306(c) does not apply, a state candidate who wishes to transfer artwork or stock, which were in-kind contributions to the candidate, from one committee to another, would be required to attribute such transferred funds to prior contributors under section 85306(a).

Similarly, here, if the 2002 Committee incurs debt to pay for expenses of the 2002 election, it may continue to raise funds in excess of the limits of sections 85301 and 85302 for the purpose of repaying that debt.

b. If the funds held by the 2002 Committee on November 6, 2002, include proceeds from a loan, does that affect all or any part of the answer to question 1, above? In other words, may all or any part of the loan proceeds which are held by the 2002 Committee on November 6, 2002, be transferred to the 2006 Committee after November 6, 2002? If the funds transferred to the 2006 Committee include any loan proceeds, does that affect all or any part of the answer to question 3a?

If the proceeds of a loan made to the 2002 Committee are transferred to the 2006 Committee, the answer to questions 1 and 3a may be affected. Posed as a hypothetical question and without facts that may impact the conclusion, it is not possible to answer your question definitively, however.

In the hypothetical transaction you have described, a loan would be made by the candidate or another person to the 2002 Committee prior to November 5, 2002. You state that some or all of the loan proceeds would then be transferred to the 2006 Committee. The campaign might then solicit and accept amounts in excess of the limits from contributors after November 6, 2002, to repay the loan to the 2002 Committee. This first requires us to assume loan proceeds exist in connection with the November 5, 2002, election. Second, you do not state whether the loan proceeds in that committee would be used first to pay for campaign debt of the 2002 Committee. If a candidate chose to use loan proceeds (or any asset of a committee), for a 2006 election, instead of paying for 2002 debt, in context, it would appear that the intent is to transfer the campaign funds merely to avoid the contribution limits in effect for 2006 election. Under those facts, a question is posed that presents significant policy considerations which are not addressed by regulation and have not yet been considered by the Commission.

As you are aware, the limits of Proposition 34 are in effect for statewide candidates in the 2006 elections. For the 2006 elections, a person (other than a small contributor committee or a political party committee) may not make to a statewide candidate and a statewide candidate may not receive contributions in excess of $5,000 per election for statewide office other than Governor, and $20,000 per election for Governor. (Sections 83 and 85301.) In addition, for the 2006 elections, loans by a state candidate to his or her campaign are limited to $100,000 (section 85307(b)) and loans by other persons (besides a commercial lending institution) to the campaign are limited to the amount of the contribution limits. The described loan transaction could be viewed as fundraising in excess of the contribution limits for the 2006 election and in possible

violation of the loan limits.[6] Therefore, without further action by the Commission, we advise you that loans whose proceeds are to be transferred for the 2006 election should be made directly to a 2006 Committee and contributions to repay that debt accepted under the contribution limits.

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

Hyla P. Wagner

By: Hyla P. Wagner
Senior Counsel, Legal Division

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[6] Also, as discussed above, section 85201 requires that all contributions or loans made to a candidate, or to the candidate's controlled committee, must be held by a single campaign bank account and controlled committee. Regulation 18525(b) further provides that incumbent elected officers may not make expenditures from any campaign bank account for expenses *other than those associated with his or her election to the specific office for which the account was established and expenses associated with holding that office.* In other words, under the campaign bank account rules a candidate is prohibited from raising funds for a 2006 election, through a committee and campaign bank account established for a 2002 election.