MEMORANDUM

To: Chairman Schnur, Commissioners Garrett, Hodson, Montgomery & Rotunda

From: Gary S. Winuk, Chief of Enforcement

Subject: **Response to Comment Letter from Olson, Hagel & Fishburn LLP regarding Agenda Items 4 and 5**

Date: January 26, 2011

On January 24, 2011, Deborah Caplan and Richard Rios of Olson, Hagel & Fishburn (Respondents' attorneys) sent a comment letter to the Commission asserting they are now the attorneys of record for Respondents Michelle Berman and Adrianne Lauby for the Motions to Vacate Default Decisions and Order (Motions to Vacate) that are before the Commission at the January 28, 2011 Commission hearing. Rather than file a Amended Motions to Vacate, Respondents' attorneys chose to simply provide a comment letter. Nonetheless, the Enforcement Division provides the following responses to the points raised in their comment letter:

Response 1: Superior Court Action and Staff's Position on Motion

Respondents completely mischaracterize the Enforcement Division position with regard to both the Superior Court action and the Motion to Vacate. The Enforcement Division is filing a demurrer to the Respondent's Superior Court action because it was filed under an inapplicable Government Code section and also because the Respondents had not yet exhausted their administrative remedies, i.e. not heard their Motion to Vacate before the Commission.

Respondents accuse the Enforcement Division of stating in Superior Court that remedies were still available to Respondents administratively, but then arguing to the Commission that the issue is already resolved. This is, at best, a mischaracterization of the Enforcement Division's position.

Our position to the Commission with regard to the Motions is that it is properly filed and should be given full consideration by the Commission, but the Division's **recommendation** is that no new facts have emerged to warrant the granting of the Motions.

As the Commission is aware, Respondents' improperly attempted to file the Motion to Vacate before the Commission even entered a Default Decision at the November hearing. Despite this, the Commission generously considered the points made by Respondents in making its decision about whether or not to enter into the Default. The present Motions should be considered on their merits, but it is once again the Division's recommendation that it be denied, not that the remedy is unavailable.

Response 2: Staff Did Not Respond to Mr. Wonderwheel's Settlement Offer and Mitigation

Respondents' contention that the Enforcement Division staff did not respond to Respondents' settlement offer and mitigation is completely false. The Enforcement Division made settlement offers regarding the cases. Mr. Wonderwheel, the other attorney representing the Respondents, made a counter-offer to settle the case. The Enforcement Division rejected the counter-offer presented by Respondents telephonically shortly after it was received because the offer presented was far below the settlement range identified by the Enforcement Division.

Additionally, the Enforcement Division considered the mitigation as presented by Respondents, but did not believe it to warrant a significant reduction in the proposed penalty. The violations committed by Respondents, campaign money laundering, is one of, if not the most serious violations of the Act and were done deliberately by Respondents to circumvent the purpose of the Act and deceive the public. In this case, even if it is true that Respondents cooperated with the investigation, it does not necessarily serve as a mitigating factor to this type of violation.

Response 3: Notice of Default Was Only Served on Counsel and Service Was Deficient

Respondent criticizes the Enforcement Division for only serving Respondents' attorney with the Notice of Defense and Default Notice. This criticism is inappropriate, however, as California State Bar Rules of Conduct require that if a party is represented by counsel, opposing counsel may not contact them directly, but rather must communicate through the other party's attorney. To imply we should have done otherwise suggests we should have violated State legal ethics requirements.

Respondent further criticizes the Enforcement Division by stating that the service of the Default notice was somehow deficient, citing Government Code section 11505. However, Government Code section 11505 only requires that Accusations be provided to Respondents through personal service. It makes no mention whatsoever of service of defaults. The Enforcement Division personally served the Accusation on Respondents, as was acknowledged in the Motion to Vacate prepared by Mr. Wonderwheel, who states that "The notice from the FPPC was put on a stack of papers and buried and unfortunately forgotten." To suggest now that the Notice was insufficient

is disingenuous at best, as even Respondents concede they were served with the Accusation. Further, since Respondents and their counsel were present at the default hearing in November, it can be conclusively presumed that they received notice of the proposed default.

Response 4: Refusal to Allow Respondents a Hearing Would Constitute Abuse of Discretion

Respondents contend that refusal to grant the Motions to Vacate would serve as an abuse of discretion by the Commission. However, Government Code Section 11520 specifically provides that vacating a default decision is an act that is at the discretion of the Commission, even upon a showing of good cause. This recognizes that Administrative proceedings are designed to be less formal than civil or criminal proceedings. To make the argument that the Commission has the discretion to deny a request for a new hearing, but that any use of this discretion is an abuse of it per se flies in the face of the plain meaning of the statute.

Response 5: November Meeting Was Legally Inadequate

Respondents contend that the November hearing on the default items were legally inadequate and that Respondents were "unaware of the nature of the proceeding" and that "nothing in the notice for that meeting would have alerted them to the possibility that they were to be prepared to submit any and all mitigating or exculpatory evidence."

This statement demonstrates a lack of review of the Administrative Procedures Act on the part of Respondents. Government Code Section 11520, which deals specifically with defaults, states that the agency may take action, if the respondent fails to file a notice of defense, based upon the respondent's express admissions or upon other evidence, or upon written affidavit. This gives the Commission discretion to consider any "other evidence" it wishes to make a default determination.

A reading of the default statute in the Administrative Procedures Act in preparation for the November hearing, or for the comments to the Motion to Vacate contained in the letter at issue here would plainly inform Respondents and their counsel that a default item considered by the Commission allows for the receipt of "other evidence," if permitted by the Commission.

At the November hearing, the Commission very generously allowed Respondents the ability to make any statements they wished and present any documents they wished in support of their arguments. Respondents' attorney brought numerous documents to the hearing, which were received by the Commission, completely contradicting their argument that they did not know the nature of the hearing and were unprepared to make their presentations. Additionally, Respondents had well over a year to provide the FPPC any exculpatory information in their

possession, but failed to do so. Since the Respondents make the point in their letter that their "full cooperation" should be considered as a mitigating factor, the fact that they allegedly have further information in their possession indicates that this statement may be less than genuine and should not be considered a fact in mitigation.

Response 6: Petitioners Were Not Afforded the Act's Procedural Protections

The contention that the Respondents were not afforded the Act's procedural protections is false. They were afforded all the protections of the Act but did not avail themselves of it. They did not request a probable cause hearing, and did not timely file a Notice of Defense but were presented with properly served notices for each. Further, they did not provide any exculpatory or mitigating evidence at the November hearing, which was conducted fully in accordance with the Administrative Procedures Act, despite being personally present and given an open microphone to make any points about the case they wished.

Administrative law is designed to provide Respondents the ability to have access to a fair, but expedited and less formal resolution process. Respondents received full access to this process. However, they have provided no facts, either in writing or orally, either in person or through the now three different attorneys who have served as their counsel, as to any exculpatory or mitigating facts that would warrant a hearing before an administrative law judge at this stage.

Ultimately, an administrative hearing would only provide a recommendation to the Commission which the Commission could then accept or reject or accept new evidence to consider a change in recommendation. Respondents continue to provide only assertions that they have exculpatory or mitigating evidence while continuously not providing it to the Commission despite many opportunities to do so.

Response 7: Fines Are Disproportionately High

Respondent contends that the fines imposed on Respondents were disproportionately high. They cite two recent examples to allegedly demonstrate this contention. However, their use of these examples is grossly misleading.

In FPPC Case No. 08/074 (Serco Management Services) the Commission did indeed accept a stipulated agreement for $3,000 per count for violations of Section 84301. What Respondents fail to mention, however, is that in that case Serco Management Services self reported the violations, without which the FPPC would likely never have become aware of them, and took action against their own employee who had committed the violations without their knowledge. This is very different from the circumstances at issue here, where Respondents intentionally violated the Act and did not voluntarily report their violations.

Respondents also use FPPC Case No. 99/783 (Flaherty) as another example because of the $2,000 penalty imposed by the Commission in 2003 for a default violation of Section 84301. We completely agree that this case is a good example to help guide the Commission's actions in this case as the Respondents' attorneys fail to mention that in that case, due to the date of the offense, the maximum fine the FPPC was authorized to impose was $2,000 a count. Thus, in that case, as here with respect to Respondent Berman, the Commission recognized that because this is the most serious type of violation of the Act, a maximum fine should be imposed. Respondent Lauby, in fact, received a less than maximum fine of $4,500.

More appropriate are recent examples such as FPPC Case No. 09/694 (Anderson), which imposed a **stipulated** fine of $4,000 per count for money laundering violations, and FPPC Case No. 07/467 (Copeland) which imposed a **default** penalty of $5000 for a money laundering violation. Both of these case have been approved by the Commission within the past 18 months.

Conclusion

The Respondents attorneys have made a number of misleading, false and unconvincing assertions in their letter that should be rejected out of hand. The Enforcement Division continues to recommend denial of the Motions to Vacate.