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July 14, 2009

Via United States mail and facsimile

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Charles Robinson, General Counsel
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Re: Agenda Items J1 and J2, July 15, 2009: Request by President Yudof for
Amendment to Standing Order 100.4 and for Regental Declaration of Extreme
Financial Emergency

Dear Regents of the University of California and General Counsel Robinson,

This law firm represents the Council of the University of California Faculty Associations. We urge you to defer action on Items J1 and J2 on the agenda for your meeting of July 15, 2009. President Yudof proposes to implement an unprecedented furlough/salary reduction plan that would dramatically impact the ability of the University to recruit and retain its faculty, irreparably jeopardizing the University's status as a leading research institution. President Yudof unveiled the specifics of a plan to reduce faculty and staff compensation by over half a billion dollars a mere three business days before its proposed adoption. This letter does not address the wisdom of that plan. Rather, we simply write to draw your attention to the unfair and unlawful process by which President Yudof has developed and now seeks to implement the plan. Cuts of this magnitude and with dire long-term consequences should only be imposed after an open and transparent process that fully examines all alternatives. Indeed, Regents-adopted standing orders

sensibly mandate a procedure with adequate notice and opportunity for feedback before adoption of the type of changes sought by President Yudof. The notice requirement serves a critical function – it ensures that you, the Regents of the University of California, have the opportunity to exercise your fiduciary duties and engage in a meaningful review of the consequential matters before you. But the required notice has not been provided. Approval of Agenda Items J1 and J2 at the July Board meeting would violate University of California Standing Orders governing notice, and raise a cloud of illegality over already controversial actions. We urge that you not take the precipitous – and unlawful – actions requested by the President, and instead that you defer a vote of these weighty matters until a subsequent meeting so that you can fully examine the plan, its consequences, and alternatives. The exercise of your fiduciary duties requires nothing less.

To implement his plan, President Yudof is requesting at the July Board meeting (1) that the Regents grant him broad, unchecked authority to implement furloughs and salary reductions, upon a declaration of financial emergency by the Regents, and (2) that the Regents simultaneously declare a financial emergency. See July 15, 2009 Agenda, Joint Meetings: Committees on Finance and Compensation, Items J1 & J2. There is no dispute that President Yudof can only implement the furlough/salary reduction plan if the Regents take these two actions. But the Regents lack authority to approve either of these requests at the July Board meeting because the required notice has not been provided. If the Regents adopt both Items J1 and J2 at the July Board meeting, any subsequent implementation of the furlough/salary reduction plan will be *ultra vires* and subject to immediate legal challenge.

1. Item J1: The Regents Lack Authority To Adopt The Proposed Amendment To Standing Order 100.4 At The July Board Meeting

The President has requested that the Regents amend Standing Order 100.4 to grant him broad authority to implement furloughs and salary reductions upon the declaration of an extreme financial emergency by the Regents. Standing Order 130.1 prohibits the Regents from adopting the proposed amendment to grant the President emergency powers at the upcoming July meeting because the required notice has not been provided.

Standing Order 130.1 requires that, before the Regents may vote to amend any Standing Order, notice of the intent to amend and the proposed amendment must be provided at the prior Board meeting.¹ This notice requirement serves the salutary purpose of allowing meaningful

¹Standing Order 130.1 reads in full: “No Standing Order shall be adopted, repealed, or amended, except by the affirmative vote of not less than a majority of the members of the Board, and unless at a regular meeting of the Board held prior to the meeting at which a proposed Standing Order, repeal, or amendment of Standing Order is voted upon, notice of intention to

public input on critical matters of university governance. Although notice was provided at a prior Regents meeting of a potential amendment to the President's authority under Standing Order 100.4, the proposed amendment to Standing Order 100.4 now before the Board differs from the version previously presented. Indeed, the current version of the proposed amendment to Standing Order 100.4 was only made available to the public on July 10, 2009, just three business days before the requested date of adoption by the Regents – thus depriving the public of an opportunity to review and provide feedback on the amendment, and the Regents of an opportunity to study the proposal, in the exercise of their fiduciary duties. The lack of required notice is particularly egregious given the subject matter of proposed amended Standing Order 100.4, which would grant the President vast new powers and fundamentally change the University's longstanding model of shared governance. The eleventh-hour notice violates both the spirit and the letter of Standing Order 130.1.

Agenda Item J1 acknowledges that the required notice has not been provided because the President requests that the Regents waive notice. *See* Agenda Item J1 for Meeting of July 15, 2009, Recommendation Number 1 (“Service of Notice be waived.”). But the Regents have adopted, in Standing Order 130.1, a procedure that expressly governs the process for amending standing orders. That procedure requires notice but does not authorize waiver of notice. Although the Regents are free to amend Standing Order 130.1 and allow waivers of notice, there has been no proposal to do so, and indeed, one would not be proper unless and until the notice requirement of Standing Order 130.1 has been satisfied. To amend Standing Order 100.4 by “waiving” the notice required by Standing Order 130.1 would violate the Regents’ own governing procedures.

Because the required notice has not been provided, and the Regents currently lack authority to “waive” notice, the Regents are barred by Standing Order 130.1 from adopting the proposed amendment to Standing Order 100.4 at the July Board meeting.

2. Item J2: The Regents Lack Authority To Issue A Declaration Of Extreme Financial Emergency At The July Board Meeting

Even assuming the Regents could lawfully adopt the proposed amendment to Standing Order 100.4 – which for the reasons stated above they cannot – the Regents lack authority to issue the requested declaration of financial emergency at the July Board meeting.

(continued)

propose such Standing Order, or repeal, or amendment, including a draft thereof, shall have been given and the proposal for amendment first shall have been referred to an appropriate Committee of the Board in accordance with Bylaw 10.1(a).”

Proposed amended Standing Order 100.4 would grant the President broad authority to implement furloughs and/or salary reductions upon a “Declaration of Extreme Financial Emergency” by the Regents. If adopted, proposed amended Standing Order 100.4 would set forth a clear process for obtaining such a declaration, including that the President first submit a written request to Regents. *See* Proposed Amended Standing Order 100.4(qq)(3). Before submitting that written request, the President would be required by proposed amended Standing Order 100.4 to engage in mandatory “consultation with campus Chancellors, representatives of the systemwide Academic Senate and the appropriate representatives of systemwide staff and academics concerning the matters to be included in the request for approval of a Declaration of Extreme Financial Emergency.” *See* Proposed Amended Standing Order 100.4(qq)(4).

The President requests in Agenda Item J2 that the Regents adopt at the July Board meeting a declaration of emergency. But the President has not yet satisfied the mandatory consultation required pursuant to proposed amended Standing Order 100.4(qq)(4). To be sure, the President purported to engage in some consultation with the Academic Senates in June. However, such “consultations” cannot have been meaningful because at the time they occurred, the President had no lawfully delegated emergency powers to implement salary reductions and/or furloughs. The “consultation” that occurred in June involved *simultaneous* input on how such powers should be designed, and how and whether they should be implemented. While broad sectors of the University community submitted highly constructive comments in good faith, the purported consultation process was a sham because it presupposed authority that did not exist. The consultation over the proposed salary reduction/furlough plan (J1) that occurred in June could have been valid as consultation within the meaning of the proposed Amended Standing Order 100.4 (J2) if, and only if, Standing Order 100.4 had already been validly enacted. Once validity enacted, the President must then submit a written request for emergency powers, and a Regental vote cannot occur until after broad consultation on that request. These provisions in proposed Amended Standing Order 100.4 are more than formalities – they are necessary safeguards against making bad, and irreversible, decisions all at once. The imposition of cuts of the magnitude at issue here requires real, not illusory, consultation.

Consultation pursuant to amended Standing Order 100.4(qq)(4) must occur anew. The harm resulting from the improper and unlawful consultation is underscored by the fact that the documents previously circulated to the University community provided only an outline of three potential plans and raised far more questions than they answered. The details of the actual plan and the President’s request for an emergency declaration were only released to the public on July 10, 2009, just three business days before the President now requests approval of these items. The President seems to recognize that any salary reduction/furlough plan must be “viewed to be the product of a full and fair process,” an “objective [that] is particularly important given the scale and scope of the proposed actions, believed to be unprecedented in the history of the University.” *See* Agenda Item J2 for Meeting of July 15, 2009, page 3. But three days simply do not allow for a “full and fair process.” The Regents owe a fiduciary duty to the institution to ensure that the

plan actually implemented is in the University's best interests. By providing only three business days' notice, the President has interfered with the Regents' exercise of that fiduciary duty, by depriving the Regents of their ability to engage in any meaningful review of or solicitation of public feedback about the plan, its consequences, and alternatives.

Only upon the Regents' adoption of the proposed amendment to Standing Order 100.4 would the President be conferred the requested emergency powers. At that point, if he wishes to exercise those powers, he must follow the prerequisites set forth in proposed amended Standing Order 100.4. No such compliance has yet occurred. The Regents are barred even under proposed amended Standing Order 100.4 from adopting the declaration of financial emergency at the July Board meeting.

For the foregoing reasons, the Regents must defer consideration of Items J1 until the September Board meeting. Even if Item J1 could lawfully be adopted at the July meeting, Item J2 cannot be adopted until the September meeting to allow for proper consultation regarding the specifics of the intended salary reduction/furlough plan. The simultaneous debate on J1 and J2 has conflated and precluded intelligent and orderly analysis of the distinct questions of whether to grant the President emergency powers at all, and how and whether any such powers should be implemented under present circumstances. Further, the short notice provided has interfered with the Regents' exercise of their fiduciary duties to the University by making it impossible for them to engage in a responsible evaluation of the unprecedented proposed cuts. Moreover, adoption of both of these items at the July Board meeting would violate the University's own governing policies and procedures. Any subsequent salary reduction/furlough plan implemented pursuant thereto would be challengeable as *ultra vires*.

Given the urgency of this matter, we request that the General Counsel ensure that this letter is transmitted to each Regent before Items J1 and J2 are taken up on the July 15, 2009 agenda.

Respectfully submitted,

By: 
Linda Lye

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Attorneys for Council of the
University of California Faculty Associations