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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners, Baker, Ortiz, Wilson, and Wood

From: Dave Bainbridge General Counsel, Zachary W. Norton, Senior Counsel

Subject: Refunding Contributions After Withdrawal from Primary Election and Disposition of Contributions after Election to Office in Primary Election, Proposed Amended Regulations 18531.2 and 18537.1.

Date: March 08, 2024

Executive Summary

Staff presents for adoption amendments to two regulations addressing two distinct scenarios, one amendment concerning the refunding of contributions when a candidate chooses to withdraw from the primary election, and the other concerning the disposition of general election contributions when a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election.

Sections 85306, 85317 and 85318 of the Political Reform Act (Act)¹ address the transfer, carry over, and return of campaign funds after an election. Regulation 18531.2, interpreting Section 85318, requires a candidate to refund contributions raised for a general election if the candidate is defeated in the primary election, or withdraws from the general election. However, the regulation does not currently address refunding contributions when a candidate chooses to withdraw from the primary election. Staff recommends adding a provision to the regulation explicitly treating withdrawal from the primary election the same as defeat in the primary election and withdrawal from the general election.

Secondly, Section 85306 generally permits a candidate to transfer campaign funds after an election from one controlled committee to another controlled committee but requires that the transferred funds be attributed to specific contributors. Section 85317, as interpreted in Regulation 18537.1, operates as an exception to the general rule in Section 85306 and permits the “carry over” of campaign funds from a candidate-controlled committee to that candidate’s committee for the next election to the same office. Regulation 18537.1 does not require attribution to specific contributors for the carry over of contributions after a general election. Both Section 85306 and Section 85317 presume the candidate ran in the general election, so they do not address the situation where a candidate is elected to office by receiving a majority of votes in the primary election, without advancing to the general election, nor does Section 85318 or

¹ The Political Reform Act is set forth in Government Code Sections 81000 through 91014, and all further statutory references are to this code. The Commission’s regulations are contained in Division 6, Title 2 of the California Code of Regulations, and all regulatory references are to this source.

Regulation 18531.2. Staff recommends specifying in regulation what a committee can do with funds in this situation and has identified three options for the Commission’s consideration.

Staff presented this proposal to the Commission for pre-notice discussion at its August 2023 meeting.

Reason for Proposed Regulatory Action

Although existing regulations address the return, transfer, and carry over of contributions, the Legal Division has found that the existing regulations do not address two specific, narrow scenarios relating to campaign contributions. Staff presents two issues for the Commission’s determination. Issue 1: Resolve an issue, which is currently the subject of two conflicting advice letters, concerning what a candidate must do with remaining campaign funds after withdrawal from a primary election. Issue 2: Determine which of three statutes should apply when a candidate is elected to office outright in a primary election and does not participate in a general election. The Legal Division has received advice requests on both of these two issues on previous occasions and anticipates they will come up again, so staff recommends addressing them in regulation to provide clear and consistent rules.

Background

The express purposes of the Act, set forth in Sections 81001 and 81002, include reducing the influence of large campaign contributors, abolishing laws and practices that unfairly favor incumbents, and promoting fair elections. The Act imposes contribution limits in furtherance of these purposes.

Section 82022 defines “election” as: “... any primary, general, special or recall election held in this state. The primary and general or special elections are separate elections.” The Act’s contribution limits apply on a per election basis. (Section 85301.) Accordingly, a person may contribute up to that applicable limit to a candidate for the primary, and make another contribution up to that limit for the general election.

Section 85318 permits a candidate for elective state, county, or city office to raise general election campaign funds prior to the primary election for the same office provided the candidate sets aside these contributions and uses these contributions for the general election. Upon the defeat of the candidate in the primary election, Section 85318 requires the candidate to return the funds to contributors for the general election. While strict, the requirements of Section 85318 serve the purpose of preventing candidates defeated in a primary election from circumventing the Act’s contribution limits by using general election funds raised during the primary election, which would otherwise exceed the primary election’s applicable contribution limits, for purposes unrelated to the general election.

Sections 85306 and 85317 set forth parameters within which candidates are permitted to transfer and carryover funds from one committee to another. Section 85306 permits candidates to “transfer campaign funds from one controlled committee to a controlled committee for elective state, county, or city office of the same candidate.” Moreover, Section 85306 requires candidates

to attribute transferred contributions using either a “last in, first out” or “first in, first out” accounting method. Funds may not be transferred if the funds attributed to a specific contributor exceed the contribution limits of Section 85301 or 85302 when aggregated with all other transfers attributed to, and contributions from, the same contributor.

Another central tenant of the Act is that public officials should perform their duties in an impartial manner, free from bias caused by their own financial interests or the financial interests of persons who have supported them. (Section 81001(b).) To that end, the Act provides that all contributions deposited into a campaign account shall be deemed to be held in trust for expenses associated with the election of the candidate or for expenses associated with holding office. (Section 89510(b)). This principle informs not only how a candidate can spend campaign funds prior to an election but also the rules on what a candidate committee can do with campaign funds after an election.

With these basic principles in mind, we consider how to address the two issues identified above regarding the disposition of campaign funds.

Issue 1: Refunding Contributions After Withdrawal from Primary Election

A candidate controlled committee may receive contributions for a general election before the primary election but those funds may not be expended for the primary election. If the candidate is defeated in the primary election, or withdraws from the general election, the candidate must return the funds received for the general election to the contributors. (Section 85316.) The law does not explicitly address the scenario where a candidate withdraws before the primary election. Commission staff has offered prior advice concerning the disposition of campaign funds raised for the general election in that scenario. In the *Kaufman* Advice Letter, A-06-106, staff advised that a candidate for state treasurer could not transfer contributions he raised for the 2006 general election to his campaign committee established for a 2010 election for the same office when the candidate withdrew before the 2006 primary election. The letter noted that, since winning the primary is a necessary prerequisite in order to be on the ballot for the general election, a candidate’s withdrawal from the primary election effectuates a withdrawal from the general election for that office as well.²

In the *Brown* Advice Letter, No. A-09-276, staff reached the opposite conclusion from *Kaufman* despite the facts being similar. In that letter, staff advised that a candidate may transfer funds raised for his attorney general committee to his committee for governor pursuant to requirements under Section 85306. The letter reasoned that it was difficult to conclude that a candidate who has not even run in the primary election, let alone won it, can “withdraw” from the

² Elections Code Section 13 subdivision (a). A person shall not be considered a legally qualified candidate for an office, for party nomination for a partisan office, or for nomination to participate in the general election for a voter-nominated office, under the laws of this state unless that person has filed a declaration of candidacy or statement of write-in candidacy with the proper official for the particular election or primary, or is entitled to have his or her name placed on a general election ballot by reason of having been nominated at a primary election, or having been selected to fill a vacancy on the general election ballot as provided in Section 8807, or having been selected as an independent candidate pursuant to Section 8304.

general election. *Brown* concluded that the rules for transferring funds when a candidate was defeated in the primary do not apply when a candidate instead withdraws from the primary. It did so based upon an unsupported assertion that allowing the transfer is more consistent with the language of Section 85318 and also more consistent with other provisions of the Act.

Section 85318 and existing regulations make no mention of a candidate choosing to withdraw from the primary election. Staff believes that the conclusion in the *Kaufman* Advice Letter was correct and more consistent with the intent behind contribution limits and existing law requiring the return of contributions upon *defeat* in the primary or *withdrawal* from the general election since, in each of these instances, the candidate did not ultimately run in the general election. Proposed Regulation 18531.1 would codify the conclusion of the *Kaufman* Advice Letter and clarify that the requirements for return of general election contributions in Section 85318 likewise apply to a candidate's withdrawal from the primary election.

Issue 2: Disposition of General Election Funds when a Candidate Wins Office in a Primary Election

When a candidate shifts money from one campaign committee to another, the general rule, as contained in Section 85306 and Regulation 18536, is that the candidate must attribute the funds transferred to specific contributors, and the amount attributed to a contributor may not exceed the applicable contribution limit. A specific provision in the Act, found in Section 85317, however, makes an exception to the attribution requirement when the candidate is shifting funds to a committee set up in connection with a subsequent election to the same office. Under these circumstances, no attribution is required, and limits do not apply.

The Commission has adopted Regulation 18537.1 to describe the circumstances and procedure of the "carry over" provisions of Section 85317. For purposes of Government Code Section 85317, "carry over" refers to the movement of campaign funds to the candidate's controlled committee established for a subsequent election to the same elective state office³ without attribution as required by Section 85306(a).

However, the laws concerning the return of contributions, transfer of contributions, and carrying over of contributions do not address what a candidate may do with general election funds when the candidate is elected to office by receiving a majority of votes in the primary election, without requiring advancement to the general election.⁴

³ Regulation 18537.1(c) defines "subsequent election for the same elective office" as (1) The election to the next term of office immediately following the election/term of office for which the funds were raised; (2) The general election, which is subsequent to and for the same term of office as the primary election for which the funds were raised; or (3) The special general election, which is subsequent to and for the same term of office as the special primary election for which the funds were raised.

⁴ Proposition 34 created contribution limits, and most of the discussion in the Voter Information Guide for the 2000 General Election focused on contribution limits, disclosure requirements, and penalties for violations. There is a mention of prohibitions on campaign fund transfers, but nothing that provides insight into any express intent as to the matters currently before the Commission.

Numerous offices within the state can be won at a primary election, particularly at the local level. Under Elections Code Section 8140, “[a]ny candidate for a nonpartisan office who at a primary election receives votes on a majority of all the ballots cast for candidates for that office shall be elected to that office.” This provision of the Elections Code does not apply to charter cities and counties however, some of these jurisdictions have enacted similar ordinances.⁵ Several others have implemented ranked-choice, or “instant runoff,” voting for specified local offices. This eliminates the need for separate runoff elections, and results in a single general election held for these offices, as opposed to separate primary and general elections.

For State offices, candidates running for State Superintendent of Public Instruction or candidates for voter-nominated offices in special elections can win outright by getting a majority of the vote in the primary election.⁶

Existing statutes and regulations do not explicitly indicate what a winning candidate can do with funds raised for the general election in which the candidate will not need to run. Staff has identified three possible options for interpreting existing law in the circumstance where a general election is not required: (1) permit carry over of general election funds pursuant to Section 85317; (2) permit transfer of general election funds with attribution to contributors and subject to contribution limits pursuant to Section 85306; or (3) require the return of the general election funds to contributors pursuant to Section 85318.

Proposed Regulatory Options

Issue 1: Refunding Contributions After Withdrawal from Primary Election

Staff proposes amendments adding language to existing subdivision (a) of Regulation 18531.2, so that a candidate would be required to refund general election contributions when the candidate does not run or withdraws from a primary election. Under existing law, a candidate must refund left-over money when a candidate does not run or withdraws from a general election. This proposed change is consistent with the idea that a withdrawal from the primary election also effectuates a withdrawal from the general election for that office. It would also achieve a consistent result as to the refund of contributions upon withdrawal from a primary election. This approach is consistent with the advice given in the *Kaufman* letter mentioned above.

While there are three options presented for amending Regulation 18531.2, the options do not differ in their approach to addressing Issue 1. The three options only differ as to Issue 2

⁵ For example, Section 108(a) of the City of Los Angeles Elections Code provides that “[i]n the event that any candidate receives a majority of the votes cast for an office at the Primary Nominating Election, that candidate shall be elected to the office.”

⁶ See SOS website, Primary election in California: <https://www.sos.ca.gov/elections/primary-elections-california> Proposition 14, passed in 2020 to create the “Top-Two Open Primary Act” added Cal. Const. art. II, § 5 also specifically amended Cal. Const. art. II, § 6 to add the Superintendent, so that the provision now reads “[a]ll judicial, school, county, and city offices, *including the Superintendent of Public Instruction*, shall be nonpartisan.” (Emphasis added.)

discussed below. The proposed amendments related to a candidate who withdraws prior to a primary election are the same in each option.

Issue 2: Disposition of General Election Funds when a Candidate Wins Office in a Primary Election

Staff also proposes adding a new subdivision (d) to Regulation 18537.1, addressing the transfer of campaign funds when a candidate is elected to office at the primary election without advancing to the general election. The issue for the Commission’s consideration is whether this amendment would allow the carry over of these contributions without attribution, the transfer with attribution, or the return of the contributions. The three regulatory options are as follows:

Option 1: Carry Over without Attribution

Under this option, when a candidate is elected to the office without advancing to the general election, funds raised for the general election may be transferred, without attribution, to a committee for subsequent election to the same office. This would include these funds with the attribution exception of Section 85317, and permit a candidate elected at the primary election to “carry over” contributions for the general election as if the candidate had run in, and won, the general election. By treating an outright win in a primary as the equivalent of winning in a general election, this approach permits a candidate to carry over funds without attribution and, therefore, without regard for contribution limits. Under these circumstances, the candidate would still shift funds to a committee set up in connection with a subsequent election to the same office, and the exception found in Section 85317 would apply.

Specifically, for this option, staff offers the following language as new subdivision (d) to Regulation 18537.1, to address the transfer of remaining primary election funds where a candidate is elected to office in the primary election without advancing to the general election:

If a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, the remaining campaign funds may be transferred to a committee for a subsequent election to the same office without attributing funds to specific contributors.

Option 2: Transfer with Attribution

Under this option, when a candidate is elected to the office without advancing to the general election, funds raised for the general election may be transferred to a committee for subsequent election to the same office. However, these contributions would not be exempt from attribution under the exception created in Section 85317 and the attribution requirements of Section 85306(a) would apply. This approach ensures that contributions will be attributed to a specific contributor, and thus the applicable contribution limits for the subsequent election will not be exceeded. Requiring the attribution of transferred funds is also consistent with Section 85306 and Regulation 18536, and contribution limits specified in Section 85301.

For this option, staff proposes adding the following language as new subdivision (d) to Regulation 18537.1 to address the transfer of both the remaining primary election funds, and general election contributions where a candidate is elected to the office in the primary election without advancing to the general election:

If a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, the remaining campaign funds raised for the primary election may be transferred to a committee for a subsequent election to the same office without attributing funds to specific contributors. Funds raised for the general election may be transferred to a committee for a subsequent election to the same office but shall be attributed to specific contributors as provided in Section 85306 and Regulation 18536.

Option 3: Return of Contributions

Under this option, when a candidate is elected to the office without advancing to the general election, funds raised for the general election must be refunded under Section 85318, consistent with other instances where a committee raises funds for a general election but does not ultimately run in the election.

Under existing law, a candidate does not get to keep general election funds when the candidate does not run or withdraws from a general election, regardless of why the candidate did not run in the general election. Requiring the return of contributions received for use in a general election in which a candidate did not participate, as the result of having been elected to office in the primary election, is consistent with 85318(a); which provides a narrow exception to the Act's contribution limits that allows a candidate to receive contributions for a general election before the primary election for the same elective office but only "if the candidate sets aside these contributions and *uses these contributions for the general election...*" (Emphasis added.)

For this option, staff proposes adding the following language as new subdivision (d) to Regulation 18537.1 to address the transfer of both the remaining primary election funds, and the return of general election contributions where a candidate is elected to office in the primary election without advancing to the general election:

If a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, the remaining campaign funds raised for the primary election may be transferred to a committee for a subsequent election to the same office without attribution, while funds raised for the general election must be refunded under Section 85318 and Regulation 18531.2.

In addition to the proposed language addressing the return of general election contributions when the candidate does not run or withdraws from a primary election, for Option 3, staff also proposes adding additional language to existing subdivision (a) of Regulation 18531.2,

that requires a candidate who receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, to return the general election contribution.

Staff recommends Option 3 because it is consistent with the rules governing other instances where a candidate does not run in a general election, Section 85318's narrow exception permitting receipt of general election funds before a primary, and Prop 34's contribution limits.

Public Comment

Staff received public comment from the California Political Attorneys Association on the draft regulations shortly before they were presented for pre-notice discussion at the August Commission meeting. These comments expressed a preference for the regulatory option allowing candidates who win outright in the primary election to carry over funds raised for the general election without attribution.

Staff also received a comment letter from Senator Monique Limon and Assembly Member Rick Chavez Zbur which made three arguments concerning Issue 1; limitations on intra-candidate transfers have uniformly been invalidated by courts as impermissible, the Commission should not change the law before an election cycle, and that the law is so clear that the proposed amendments exceed the extent of the Commission's regulatory authority.

Impermissible Limit on Intra-candidate Transfers Argument

The argument presented is based on the Ninth Circuit's holding in *Service Employees International Union v. Fair Political Practices Commission* (9th Cir. 1992) 955 F.2d 1312, cert. den. 505 U.S. 1230, which invalidated a ban on transfers contained in Proposition 73 to the extent that it prohibited transfers between a candidate's own committees where no valid contribution limits were in effect.

Proposition 73, a campaign finance reform measure on the June 1988 statewide primary ballot established general election contribution limits based on a fiscal year cycle and special election contribution limits based on an election cycle, and added Section 85305, which stated:

No candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective office. Transfers of funds between candidates or their controlled committees are prohibited.

In the *SEIU* case, the Court invalidated the contribution limits enacted by Proposition 73 (except those applicable to special elections) because the limits were based on a fiscal year rather than an election cycle, and the Court found this would unconstitutionally discriminate against challengers. (*Id.* at 1316-1321.) As such, the Court held that the transfer prohibition between candidates does not prevent circumvention of contribution limits if no valid contribution limits are in effect. (*Id.* at 1322.)

The Act's current restrictions on transfers are not as broad as the total ban struck down in *SEIU*, which only invalidated a ban on transfers in the absence of valid contribution limits. The letter indicates in a footnote "Section 85318's requirement that general election funds be returned if a candidate is defeated in the primary election or withdraws from general election would be vulnerable to the same legal arguments that apply to the Commission's proposed regulations." But that assertion is not supported by legal authority indicating Section 85318 is unconstitutional when considered in conjunction with the Act's current contribution limits. Moreover, the proposed regulation to codify the advice in *Kaufman* merely clarifies that Section 85318 applies to a candidate's withdrawal from the primary election because the withdrawal from a primary election also requires withdrawing from the general election. To the extent the Section 85318 requires the candidate to return contributions following a withdraw from the general election, this requirement has been in place for nearly 24 years and in this time has never been invalidated.⁷

Change Prior to Election

The Comment letter also suggests the Commission should not amend campaign related regulations before an election. However, staff believes that the rules for refunding contributions after withdrawal from the primary election warrant action by the Commission. The proposed regulatory language formally codifies prior advice and does not present a new or novel interpretation. Further, adding language into the regulation provides needed clarity by including within the regulation clarifying language previously found in an advice letter. While the letter also suggests that adopting the approach from *Kaufman* would confuse voters by making it difficult to determine which office a candidate actually intends to run for, and the potential for misleading practices by candidates, staff believes that requiring return of general election contributions upon a candidate's withdrawal from the primary election would actually discourage this activity.

Rulemaking Authority

The comment letter asserts that the proposed regulatory language would be invalid because the plain language of the statute itself is unambiguous. However, as noted above, Section 85318 makes no mention of a candidate choosing to *withdraw* from the primary election. Indeed, it is this very ambiguity itself that necessitated the proposal before the Commission, providing a regulation which formally resolves an issue where opposite conclusions had been reached by the *Kaufman* and *Brown* advice letters. Further, it is a well-established rule of statutory construction that the provisions should be read "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." [Citations.] (*People v. Skiles* (2011) 51 Cal.4th 1178, 1185.) Moreover, a literal interpretation will not be followed where it would cause an absurd result. (*Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.) When a candidate is *defeated* in the primary election, or *withdraws* from the general election, the candidate must return the funds received for the general election. Allowing a candidate to retain these general election funds when a candidate instead *withdraws* from

⁷ Section 3.5 of Article III of the California Constitution prohibits any administrative agency, including the Commission, from declaring a statute unconstitutional. It also prohibits administrative agencies from declaring a statute unenforceable or refusing to enforce a statute on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.

the primary election would also seem to be an absurd result, as it would undermine the regulatory scheme behind contribution limits.

Education/Outreach Efforts

Staff will distribute the amended regulations to interested parties via the Newly Adopted, Amended or Repealed Regulations email list, update the “Newly Adopted, Amended or Repealed Regulations” page on the Commission’s website, and make necessary updates to training and educational materials resulting from the regulatory changes. Staff also intends to add a disclaimer on the *Brown* Advice letter indicating it has been superseded by regulation. Further, staff will reach out to city and county elections officials to ensure they are aware of the new and amended regulations.

Conclusion

The proposed amendments would clarify the rules for refunding contributions after withdrawal from the primary election and the disposition of general election funds when a candidate wins office in a primary election. For Issue 1, staff proposes following the advice given in the *Kaufman* letter for the reasons discussed above. For Issue 2, staff recommends Option 3; however, any of the 3 options would be beneficial in providing a clear, definitive rule in instances where a candidate wins office in a primary election.

Attachments:

Proposed Option 1: Carry Over without Attribution

Proposed Option 2: Transfer with Attribution

Proposed Option 3: Return of Contributions

Comment letter from Senator Monique Limon and Assembly Member Rick Chavez Zbur, dated October 20, 2023