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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners, Baker, 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: August 7, 2023

Executive Summary

Staff presents 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 85317 and 85318 of the Political Reform Act (Act)¹ address scenarios for the return and transfer 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 withdraw from the primary election the same as defeat in the primary election.

Similarly, Regulation 18537.1 interpreting Section 85317 concerns the “carry over” of campaign funds from a candidate-controlled committee to that candidate’s committee for a subsequent election to the same office. Section 85317 does not require attribution to specific contributors for the carry over of contributions after a general election. However, that section presumes the candidate ran in the election so it does 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. 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 presents these proposed regulations for pre-notice discussion, with adoption proposed for the October 2023 Commission meeting.

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.

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 that 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 during the primary election for the same office. Upon the defeat of the candidate, Section 85318 requires the candidate to return the funds to contributors for the general election on a pro rata basis. 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

Commission staff has offered prior advice concerning the disposition of campaign funds raised for the general election upon the withdrawal of a candidate from the primary election. In the *Kaufman* Advice Letter, A-06-106, staff advised that a candidate for state treasurer could not transfer with attribution, contributions he raised for the 2006 general election to his campaign committee established for a 2010 election for the same office. 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* and 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 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 on the basis 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. Proposed Regulation 18531.1 would codify the conclusion of the *Kaufman* Advice Letter and clarify that the return of contribution requirements in Section 85318 apply to a candidate's withdrawal from the primary election.

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.

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 office without attribution as required by Section 85306(a).

However, the laws concerning return of contributions, transfer of contributions, and carrying over of contributions do not address the circumstance where a candidate is elected to office by receiving a majority of votes in the primary election, without requiring advancement to the general election. For certain offices, a candidate that receives a majority of the votes in a primary election wins the office and no general election is held. For State offices, only 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.³ In addition, many local jurisdictions have enacted ordinances specifying that any candidate who receives a majority of the votes cast for an office at the primary election shall be elected to the office.⁴ In this circumstance, 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 return of the general election funds to contributors pursuant to Section 85318.

³ See SOS website, Primary election in California” <https://www.sos.ca.gov/elections/primary-elections-california>

⁴ 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.”

Proposed Regulatory Options

Issue 1: Refunding Contributions After Withdrawal from Primary Election

Staff proposes amendments adding additional 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 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. This is a departure from the approach employed in other circumstances where a candidate raises funds for an election but does not ultimately run in the election. In those instances, under Section 85318, the candidate returns the remaining funds.

Specifically, 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 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 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.

Specifically, 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 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 transferred to a committee for a subsequent election to the same office 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 get to keep the left-over money when a candidate does not run or withdraws from a general election, regardless of why the candidate did not run in the general election. Under Section 89510(b), contributions are deemed to be held in trust for expenses associated with the election of the candidate. 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.

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 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 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, require return by 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.

Conclusion

The three options for proposed amendments would clarify the rules for refunding contributions after withdrawal from primary election and the disposition of general election funds when a candidate wins office in a primary election by addressing the refunding of contributions when a candidate chooses to withdraw from the primary election, and the carry over, or return, of 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.

Attachments:

Proposed Option 1: Carry Over without Attribution

Proposed Option 2: Transfer with Attribution

Proposed Option 3: Return of Contributions