



August 30, 2023

Fair Political Practices Commission

Attn: Commissioners: Miadich (Chair), Baker, Wilson & Wood

1102 Q St., Suite 3000

Sacramento, CA 95811

Dear Chair Miadich & Commissioners Baker, Wilson & Wood,

I write to ask the Commission to address what I, as a professional campaign treasurer, see as a problem with its carry-over and attribution rules in Regulation 18537.1. This problem was not raised in the staff memo or Commissioners' pre-notice discussion of amendments to Regulation 18537.1 presented at the August 17, 2023 meeting. For reasons explained here, I hope the Commission will address this problem while already reviewing the carry-over and attribution regulations in October.

The problem is the regulation specifying when carry-over of campaign funds is allowed without attribution differs from what the statute and the FPPC's own public materials indicate is allowed. This difference exposes candidates and treasurers to inadvertent and unfair violations.

1. The FPPC's carry-over regulation differs from the statute passed by the Legislature and California voters.

Proposition 34 was placed on the ballot by the Legislature and passed by voters in 2000. Under Prop. 34, when a candidate loses a race and has funds remaining in their campaign account, the candidate can move those funds into a new committee for a future election. If the new committee is for a different office (for example, from an Assembly committee to an Attorney General committee), the new committee filing must attribute the funds to specific contributors to the original committee using either the last-in-first-out or the first-in-first-out accounting method. This process is referred to as a transfer of funds "with attribution." If the new committee is for the same office in a future election (for example, from a Senate committee to a future Senate committee), no attribution is required and the funds can be carried over to the new committee. This process is called "carry-over."

This is what the statute says regarding when carry-over without attribution is allowed:

Government Code § 85317. Carry Over of Contributions. (a) Notwithstanding subdivision (a) of Section 85306, a candidate for elective state, county, or city office may carry over contributions raised in connection with one election for elective state, county, or city office to pay campaign expenditures incurred in connection with **a subsequent election for the same elective state, county,**

or city office. This section does not apply in a jurisdiction in which the county or city imposes a limit on contributions pursuant to Section 85702.5. (Bold added to text here.)

In other words, the statute says that as long as the new committee is for the same office in a subsequent election cycle, the candidate can carry over leftover funds to that committee without attribution. Note here the statute says the committee must be for “a” subsequent election, not “the” subsequent election or any more specific election cycle.

In 2002, the Commission added a restriction to the circumstances under which a candidate with leftover funds can carry over those funds without attribution to new committee for the same office. The Commission adopted Regulation 18537.1(c), which says:

For the purposes of Government Code section 85317, "**subsequent election for the same elective state office**" refers to: **(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. (Bold added to text here.)

In short, the statute and the regulation are different. The statute allows a candidate to carry over funds to a new committee for the same office in *a* subsequent election cycle, without further prohibition or requirement on which election cycle is chosen, but the regulation allows carry-over to a committee for the same office only if the committee is for the very next immediate election cycle.

In practice, when candidates have leftover funds, they typically open a new committee for the same office with plans for a rematch in the next election, or they open a new committee for a different office to “park” the funds for future use. But there are also reasons a candidate might want to move funds to a committee for the same office in a non-sequential election cycle, including: to run when the seat is next expected to be open or the incumbent termed out, or to run after redistricting determines new seat boundaries and new incumbents and election year assignment (in the case of State Senate seats, for example).

At the August 17, 2023 Commission meeting, Commissioners asked for more legislative and regulatory history on carry-over and attribution rules. I encourage Commissioners and staff to review the minutes and staff memos from the adoption of 18537.1 and the input provided by Prop. 34’s authors. You will see the difficult time the Commissioners and staff had reconciling staff proposals for regulations on carry-over with the language of Prop. 34. The staff proposed more restrictive options for interpreting carry-over and attribution, while the authors of Prop. 34 indicated the statute was intended to apply more broadly than staff proposed. Then-Commissioner Knox expressed concern that the proposal the staff recommended and the Commission finally adopted – which is now Regulation 18537.1(c) – created a restriction that was not imposed by Prop. 34.

When adopting this regulation, neither Commission staff nor Commissioners discussed the scenario where a candidate might want to transfer leftover funds into a committee for the same office in a non-sequential election cycle. Their discussions were focused on other scenarios related to primary and general election transfers. The staff did tell the Commission “[t]he rationale for the carry-over rule is that the funds raised for an election (win or lose) have not been expended. These funds may be used in a future election.” That rationale for carry-over applies equally to a non-sequential election as to a sequential one.

2. The regulation can cause unfair “gotcha” violations.

The FPPC’s training materials and other public summaries of Regulation 18537.1 should clearly state that carry-over without attribution can only apply to the same office in *the very next election cycle*. They do not. This can lead to “gotcha” violations.

In the section on transfers after an election, the FPPC’s Manual 1 for state candidates says:

A candidate or officeholder may transfer leftover campaign funds to another committee **for a future election to the same office** or to a different office long as the funds are not considered “surplus funds” and the committee does not have “net debts outstanding.” (Bold added to text here.)

The manual does not specify that carry-over without attribution is limited to a new committee for the very next election cycle. The FPPC’s live training sessions and training slides also do not specify carry-over is limited to only the very next election cycle.

The staff memo for the August 17, 2023 pre-notice discussion of proposed carry-over and attribution regulations also was incomplete in its summary of 18537.1. The staff memo summarized 18537.1 as follows:

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). (Bold added to text here.)

The memo does not mention the additional restriction that carry-over can apply only to a committee for the same office *in the very next election cycle*.

As a result, a candidate or treasurer can (1) read the statute, which says “a subsequent election” without further restriction on which election cycle; (2) read the FPPC’s Manual 1, which says “a future election” with no restriction as to the election cycle; (3) attend an FPPC training and hear that carry-over applies to “a future election” or “a subsequent election” with no restriction on which election cycle; and (4) read the staff memo for the August 17, 2023 pre-notice summarizing regulation 18537.1, which also says carry-over applies to “a subsequent election” with no restriction as to the election cycle, and that candidate or treasurer would have multiple

authoritative reasons to believe they can carry over funds to a committee for the same office in a non-sequential election without attribution. They would not have fair notice that buried in subsection (c) of 18537.1, but not mentioned in the FPPC's public materials, is an additional restriction that carry-over applies only to a committee for same office in the very next election cycle.

Violations of this regulation that result from carry-over to a committee for the same office in a non-sequential election might be rare. Even so, a gotcha violation like this does not further justice and undermines the respect and credibility of the Act and the Commission.

3. The regulation might be invalid under court opinions issued after its adoption.

At the August 17, 2023 Commission meeting, Commissioners directed staff to review any court opinions that might be relevant to the proposed new carry-over and attribution regulations presented in pre-notice.

One appeals court opinion that came after the FPPC adopted regulation 18537.1(c) is *Citizens to Save California v. FPPC*, (2006) 145 Cal.App.4th 736. In that case, the court invalidated an FPPC regulation that added a contribution limit to candidate-controlled ballot committees where the statute was silent on requiring a contribution limit. The court decided the FPPC exceeded its authority in making a regulation that was more restrictive than what the statute's plain language allowed.

I am not a lawyer, but the situation here is similar to the one in this court opinion. Here the statute does not require a specific election year limitation on carry-over that the regulation imposes. Commissioners and staff should consider whether 18537.1(c) presents the same problem as in that court case. Perhaps the regulation here is not inconsistent with the statute, but it is more restrictive than the statute – exactly what the court said the FPPC did wrong in this court case.

There are also court opinions addressing the effect of a legislature (which voters are acting as when they pass initiatives like Prop. 34) using “a” instead of “the” in a statute. Here, the statute says carry-over is allowed to a committee for the same office in “a” subsequent election. Commissioners and staff should consider if the California Legislature or Prop. 34 authors would have used the definitive article “the” rather than the indeterminate article “a” if they intended to limit carry-over only to the next immediate election cycle. (*Pineda v. Bank of America, N.A.* (2010) 50 Cal.4th 1389, 1396–1397 [“Use of the indefinite articles ‘a’ or ‘an’ signals a general reference, while use of the definite article ‘the’ (or ‘these’ in the instance of plural nouns) refers to a specific person, place, or thing.”] citing Garner, *The Redbook: A Manual on Legal Style* (2d ed. 2002) § 10.38, p. 173.).

Staff might be able to provide other court opinions and FPPC materials that support the current regulation. The Commission still should perform its due diligence and ask itself whether the FPPC's own public-facing materials are as clear as possible on the more restricted circumstance in which the regulation allows carry-over.

4. The Commission can easily fix the problem.

There are two straightforward fixes to the problem raised here. One fix is to repeal the definition of "a subsequent election" in 18573.1(c). If the Commission concludes the regulation is unjustified or invalid under relevant court opinions and the legislative history, repeal is the cleanest option.

The other option is to amend all public-facing FPPC materials to mimic the definition of "a subsequent election" that appears in 18537.1(c). If FPPC fails to change its materials to match the statute more clearly, the FPPC would be open to court challenge from a candidate or treasurer who might inadvertently violate the regulation. Incorporating the definition of "a subsequent election" into FPPC public materials would give candidates, treasurers, and political attorneys much better notice of the additional limitation on carry-over the FPPC regulation imposes.

I do not have a recommendation here for either option, but ask the Commission to address this issue so there is more clarity and fair notice on when carry-over without attribution is allowed.

Thank you for your work and your consideration.

Sincerely,

Thomas Montgomery
Political Communications, Inc
tom@politicalcommunicationsinc.com
415 250-4036