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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
Toren Lewis, Commission Counsel

Subject: Adoption of Proposed Amendments to Regulation 18531 – Return or Attribution of Excessive Contributions

Date: May 8, 2023

Executive Summary

Staff submits draft language for adoption regarding amendments to Regulation 18531, which currently permits a committee that receives a contribution over the applicable contribution limit to return the contribution within 14 days without violating the limit, within certain parameters. Legislation in 2022 added Section 85319.5 to the Political Reform Act (the Act),¹ codifying parts of existing Regulation 18531, as well as expanding the parameters under which a committee may return an over-the-limit contribution. In addition, Section 85319.5 now permits a committee that receives an over-the-limit contribution to avoid violating an applicable contribution limit by attributing the excess amount to a different election if certain criteria are met. Staff presents proposed amendments to Regulation 18531 for adoption, which eliminate language that has now been codified in statute, directly address the return or attribution of over-the-limit non-monetary contributions, and address provisions in the new law that provide for the Commission to promulgate regulations in the context of the new attribution allowance and contributor notification requirements.

Staff presented these proposed amendments for prenotice discussion at the Commission’s March 16, 2023 meeting. Since then, staff has removed the definition of “actual knowledge,” from proposed new subdivision (f) of Regulation 18531 and made clarifying changes to proposed new subdivision (e), concerning how a committee must report a returned or attributed excess contribution.

Reason for Proposed Regulatory Action

On September 29, 2022, the Governor signed SB 794 (Glazer) into law. SB 794 codifies parts of existing Regulation 18531 and also permits a committee that receives an over-the-limit contribution to avoid violating an applicable contribution limit by attributing the excess amount to another election if certain criteria are met. In light of SB 794, current Regulation 18531 needs

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18104 through 18998 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

to be amended to remove old language that is no longer necessary, and to implement new Section 85319.5 of the Act.

Background

Existing Regulation 18531 allows a committee to return a contribution, or a portion thereof, that exceeds an applicable contribution limit to the contributor if done within 14 days of receipt, as long as the committee does not:

- (1) Deposit or allow deposit of the contribution with actual knowledge that the contribution exceeds the applicable limit.
- (2) Make use of the contribution prior to returning it.

Additionally, existing Regulation 18531 provides a definition for “makes use of”² and provides that a non-monetary contribution that is over the applicable limit may also be returned to the contributor to avoid a violation of the contribution limits, either in its original form or in a monetary equivalent. Subdivision (f) of existing Regulation 18531 requires that an over-the-limit contribution that is returned be reported in full on committee campaign reports and statements and the return be reported as an expenditure.

New Section 85319.5 enacted by SB 794 codifies Regulation 18531’s provisions related to return of an over-the-limit contribution and the definition of “makes use of.” Additionally, SB 794 now allows a committee to *attribute* the over-the-limit contribution, or a portion thereof, to another election. There are different rules provided for the return or attribution depending on whether there was actual knowledge on the part of the committee that the contribution received was over the limit and whether it was monetary or non-monetary.

Specifically, new Section 85319.5(a) provides that a committee that receives an over-the-limit contribution (this would include both monetary and non-monetary) may return or attribute it if the following conditions are met:

- (1) The amount in excess of the contribution is returned or attributed within 14 days of receiving the contribution.
- (2) The committee does not deposit or allow deposit of the contribution with actual knowledge that the contribution exceeds the applicable limit.
- (3) The committee does not make use of the contribution prior to returning or attributing it.

²Existing regulation 18531(b) provides that a committee “makes use of” a monetary contribution if, after receiving the contribution, it makes expenditures exceeding what the committee’s available cash balance would be had it not received the contribution and any other contributions that exceed the applicable contribution limit.

New Section 85319.5(b) also provides for return or attribution of an over-the-limit **monetary** contribution that was received with **actual knowledge** that it was over the limit if the following conditions are met:

- (1) The amount in excess of the contribution limit is returned or attributed within 72 hours of receipt, or is returned or attributed on or before the date of the election, whichever is sooner.
- (2) The committee does not make use of the contribution prior to returning or attributing it.
- (3) The committee does not deposit or allow deposit of the contribution with actual knowledge that the contribution is more than two times the applicable limit.

New Section 85319.5(c) requires a committee that receives an over-the-limit contribution to provide notice to the contributor of the over-the-limit contribution by the applicable deadline for returning or attributing the over-the-limit contribution or a portion thereof, but does not provide the format in which this must be done. Staff believes this would best be required in writing so there is a clear record. Section 85319.5(c) also provides that, in cases where a committee automatically attributes an over-the-limit contribution to a connected primary or general election as allowed by Section 85319.5(d) (discussed below), the committee must also provide notice to the contributor that their contribution was attributed and that they may request a refund. However, Section 85319.5(c) does not specify in what format this must be done, or that the same timeline applies for this notice. Staff believes this should be done on the same timeline as the over-the-limit notice and the wording of the statute implies that this notice should be given at the same time as the over-the-limit notice.³ Staff also recommends this be done in writing so that there is a clear record.

New Section 85319.5(d)(1) provides that a committee may, in accordance with any regulations adopted by the Commission, request that the contributor attribute in writing a contribution to a different election and Section (d)(2) provides that a committee may, in accordance with any regulations adopted by the Commission, automatically attribute the portion of a contribution that is in excess of the applicable limit between the primary and general elections. Staff proposes amendments to Regulation 18531 to address this direction from the Legislature as described below in the Proposed Regulatory Actions section of this memorandum.

³ Specifically Section 85319.5(c) states: “By or before the applicable deadline for returning or attributing the contribution, or excess portion thereof, in subdivision (a) or (b), a committee that receives a contribution that exceeds a contribution limit set forth in Section 85301, 85302, 85303, or 85316 shall inform the contributor that their contribution was in excess of the applicable limit. If the contribution was attributed pursuant to paragraph (2) of subdivision (d), the committee shall also inform the contributor that the contribution was attributed and that the contributor may request a refund.”

Proposed Regulatory Actions

Amend Regulation 18531 Subdivisions – Application of Government Code Section 85319.5

In response to new Government Code Section 85319.5, staff proposes amending Regulation 18531 in six substantive ways:

First, subdivisions (a) and (e) of new Section 85319.5 codify all of subdivisions (a) and (b) of existing Regulation 18531. Thus, staff proposes deletion of current subdivisions (a) and (b) of existing Regulation 18531 because they are duplicative of language now in statute. Staff recommends a similar minor update to existing subdivision (d) (proposed new subdivision (c)) to include Section 85316 in the list of applicable contribution limits as this has been included in the new statute.

Second, staff recommends adding a new subdivision (a) to Regulation 18531 addressing language provided in new Section 85319.5(d) that provides that (1) a committee may, in accordance with any regulations adopted by the Commission request that a contributor attribute in writing a contribution to a different election and (2) a committee may, in accordance with any regulations adopted by the Commission, automatically attribute the portion of a contribution that is in excess of the applicable limit between the primary and general elections without permission from the contributor. New Regulation 18531(a) addresses these requirements for monetary contributions attributed per Section 85319.5(a) and (b).

Specifically, staff proposes adding the following language as new subdivision (a) to Regulation 18531 to allow the automatic attribution provided for in Section 85319.5(d)(2) and to require the written confirmation referenced in Section 85319.5(d)(1) to be in writing and be obtained prior to the attribution:

(a) Attribution. A committee that elects to attribute a contribution, or a portion thereof, that exceeds the applicable contribution limit set forth in Section 85301, 85302, 85303, or 85316 to another election pursuant to Section 85319.5(a) or (b) must obtain written confirmation from the contributor that the contribution may be attributed to a different election except the committee may attribute a contribution, or a portion thereof, between a primary and general election for the same term of office without obtaining prior permission from the contributor.

Third, staff recommends adding a new subdivision (b) to Regulation 18531, addressing the return or attribution of over-the-limit non-monetary contributions. New Section 85319.5(a) applies to both monetary and non-monetary contributions but does not specifically provide for detailed rules tailored to non-monetary contributions as existing subdivision (c) of Regulation 18531 does for the return of non-monetary contributions. Staff proposes deleting current subdivision (c) and moving those provisions into a new subdivision (b) that addresses Section 85319.5(a)'s rules for return and attribution of over-the-limit non-monetary contributions and additionally adding that non-monetary contributions chosen to be attributed to another election pursuant to Section 85319.5(a) may be attributed either in original form or in a monetary

equivalent. This is the same rule currently applied to the return of over-the-limit non-monetary contributions in existing Regulation 18531(c).

Specifically, staff proposes the following language be added as new subdivision (b):

(b) Non-monetary contributions. A committee that receives a non-monetary contribution whose fair market value, or a portion thereof, exceeds a contribution limit set forth in Section 85301, 85302, 85303, or 85316, may return the non-monetary contribution, or a portion thereof, either in its original form or in a monetary equivalent, or attribute the portion of the non-monetary contribution whose fair market value exceeds the limit to another election by attributing the excess amount to another election or attributing the monetary equivalent of the contribution to another committee established for another election. The return or attribution of a non-monetary contribution pursuant to Section 85319.5 must occur within 14 days of receiving a contribution and the committee may not make use of the non-monetary contribution prior to its return or attribution.

Fourth, staff proposes changes to existing subdivision (e) (which would become subdivision (d)) of existing Regulation 18531 to clarify the timeframe for depositing a contribution that is earmarked for purposes other than making contributions directly to candidates for elective office into a separate account in order to avoid being deemed in excess of limits. Specifically, the proposed amendments are in ~~strikeout~~ and underline as follows:

(d) Contributions not for Candidates. Notwithstanding subdivisions (a) through (c), contributions Contributions to a committee, other than a candidate-controlled committee, which are earmarked for purposes other than making contributions directly to candidates for elective office, shall not be deemed in excess of limits and need not be returned, provided the contributions are deposited to a separate account within the deadline prescribed in subdivision (a). the applicable time period as prescribed by either Section 85319.5(a) or (b), depending on whether the committee has actual knowledge that the contribution exceeds the applicable limit.

Fifth, staff proposes adding language to existing subdivision (f) (which would become subdivision (e)) of existing Regulation 18531 to apply the reporting requirements for *returned* contributions to *attributed* contributions under Section 85319.5 as well. In addition, the proposed amendments spell out in greater detail the reporting requirements for both the committee attributing the contribution and the committee receiving the attributed contribution. Specifically, the proposed amendments are in ~~strikeout~~ and underline as:

(e) Reporting. A contribution returned or attributed, in whole or in part, under this regulation Section 89519.5, must be reported as a contribution in its entirety pursuant to Chapters 4 and 5 of the Act if the contribution is deposited in the committee's bank account. the committee deposits the contribution in its bank account. The amount returned or attributed must also be reported.

(1) A committee that elects to automatically attribute a contribution, or a portion thereof, that is in excess of the applicable limit between the primary and general

elections as prescribed by Section 85319.5(d)(2) must disclose the cumulative totals of contributions received for both the primary and the general elections, respectively, in accordance with Regulation 18421.4.

(2) An amount attributed to another committee must be reported by the attributing committee as an expenditure.

(3) An amount attributed to another committee must be reported by the receiving committee as a contribution from the original contributor and identify the attributing committee as an intermediary pursuant to Section 84302.

The version of Regulation 18531 proposed in March added a new subdivision (f) to Regulation 18531, defining what constitutes “actual knowledge” for purposes of attributing a portion of a contribution that exceeds the contribution limit to another election under subdivision (b) of Section 85319.5. However, as instructed by the Commission at the March meeting, staff did additional research on the term “actual knowledge,” and concluded that its commonly understood plain meaning is sufficiently clear without further definition.⁴ Moreover, relying on the plain meaning of “actual knowledge,” rather than more narrowly defining it, would capture the factual scenarios the Commission has raised with respect to electronic payments and deposits of a check that on its face exceeds the applicable contribution limit. For this reason, staff has deleted this proposed language and renumbered the following subdivision accordingly.

Finally, staff recommends adding a new subdivision (f) to Regulation 18531 that provides clarification of Section 85319.5(c)’s requirement that by or before the applicable deadline for returning or attributing the contribution, or excess portion thereof, a committee that receives a contribution that exceeds a contribution limit must notify the contributor that their contribution was in excess of the applicable limit. If the contribution was automatically attributed pursuant to Section 85319.5(d)(2), the committee must also inform the contributor that the contribution was attributed and that the contributor may request a refund. Staff recommends this notice be in writing and that both notices are sent on the same timeline. Specially staff recommends the following language for new subdivision (f):

(f) Notification. For purposes of Section 85319.5(c), a committee shall be deemed to have “informed” a contributor that their contribution was in excess of the applicable contribution limit if the committee sends written notification to the contributor noting that their contribution exceeded the applicable limit by the applicable deadline for returning or attributing the contribution or excess portion thereof. A committee required to send notification to a contributor that their contribution, or a portion thereof, was automatically attributed under Section 85319.5(d)(2) and that they may request a refund as required by Section 85319(c)

⁴ As explained by the U.S. Supreme Court, “to have ‘actual knowledge’ of a piece of information, one must in fact be aware of it.” (*Intel Corp. Investment Policy Committee v. Sulyma* (589 US __ (2020))). By contrast, the Court notes that “constructive knowledge” is knowledge imputed to a person who fails to learn something that a reasonably diligent person would have learned. (*Id.*) This same linguistic distinction between actual knowledge (“knowingly,” “willfully or knowingly”) and constructive knowledge (“knew or should have known”) appears throughout the Act.

must send such notification in writing and at the same time as informing the contributor that their contribution exceeded the applicable limit.

Summary of Public Comment & Responses

The proposed amendments to Regulation 18531 were presented to the Commission for prenotice discussion at the March 16, 2023 Commission meeting, as well as the April 6, 2023 Law and Policy Committee meeting, which also served as an Interested Persons meeting.

After the March Commission meeting, Shirley L. Grindle, author of Orange County's Campaign Reform Ordinance, sent an email on March 31, 2023, expressing numerous concerns about the proposed amendments to Regulation 18531. Ms. Grindle notes that Orange County's local campaign ordinance "requires excess contributions to be returned within 7 days of being notified they are over the limit AND requires written notification showing the donor's name, the amount returned, and the date of return, to be provided to the filing officer within 72 hours after the return." In addition, she states "Our ordinance does not allow attribution to a future election." Ms. Grindle asks whether the proposed amendments to Regulation 18531 are intended to apply to local ordinances such as Orange County's.

As a general rule, local jurisdictions are permitted to impose requirements in addition to those in the Act, provided those requirements do not prevent a person from complying with the Act. (Section 81013; *In re Miller* (1976) 2 FPPC Ops. 91.) In addition, we have advised that, where the provisions of local law do not conflict with the Act, the requirements of the Act will not supersede local law. (*Riddle* Advice Letter, No. A-88-409.) That said, we express no opinion as to Orange County's interpretation of its local ordinance in this case because it is outside of the Commission's jurisdiction.

Ms. Grindle in her letter also expresses concern about three specific provisions of Regulation 18531, as amended. First, she recommends adding a requirement to Regulation 18531 that would require a committee that returns an over-the-limit contribution, or attributes a portion thereof to another election, to notify its filing officer of the return or attribution "within a reasonable time period," so that the public knows that the excess contribution was corrected in a timely manner. Ms. Grindle states that without such a notification, there would be no public record of the correction until as long as six months later, when the committee filed its next Form 460 Semi-Annual campaign statement. However, this ignores Pre-Election campaign statements and Form 497 24-hour/10-day Contribution Reports,⁵ which are public documents and could potentially also capture this information. Regardless, Section 85319.5, which the proposed changes to Regulation 18531 seek to effectuate, does not contain any public disclosure/filing officer notification requirement.

Second, Ms. Grindle, recommends deleting proposed Regulation 18531(f) in its entirety because it would, in her view, delay a committee in refunding or attributing an over-the-limit

⁵ Commonly referred to as late contribution reports, or "LCRs," Form 497 24-hour/10-day Contribution Reports are required when a committee receives contributions of \$1,000 during the 90 days before an election, or on the date of an election. (Sections 82036 and 84203).

contribution and “there is no way for the public to know if paragraph [sic] f was complied with.” Proposed subdivision (f) implements new Section 85319.5(c) of the Act, which requires a committee that receives an over-the-limit contribution to inform the contributor that their contribution was over the limit or, in cases where a committee attributes a portion of an excess contribution, that the contribution was attributed and that the contributor may request a refund. This requirement is found in statute, and thus can only be overridden by the Legislature or voters.

Finally, Ms. Grindle recommends deleting the provisions of Regulation 18531 that permit a committee to attribute an excess contribution or portion thereof to another election. Again, this rule stems from Section 85319.5(a-b). The Commission does not have the authority to override statute.

Education/Outreach Efforts

Commission staff has shared the proposed regulatory amendments with the California Political Attorneys Association, who worked with the FPPC on previous amendments to this regulation in 2020. Staff will also distribute the amended regulation 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.

Conclusion

The proposed amendments to Regulation 18531 will help eliminate language now codified in statute, clarify new provisions enacted by SB 794, and provide needed guidance to the regulated community. Staff recommends that the Commission adopt the proposed amendments.

Attachment

- Proposed Regulation 18531 for Amendment