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To: Chair Miadich, Commissioners, Baker, Ortiz, Wilson, and Wood

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

Subject: Proposition 34 Regulations background. Regulation 18537.1 interpretation of term "subsequent" election.

Date: January 8, 2024

Executive Summary

Staff presents historical background on the Commission's current regulation defining what constitutes a subsequent election for the same elective state office under Government Code Section 85317.[1] Section 85317 provides:

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

Section 85317 is an exception to the general rule in Section 85306, which requires that contributions be attributed to specific contributors when those contributions are transferred between committees, meaning the transferred contribution counts (e.g., is "attributed") towards the relevant contribution limit for that candidate. Under Section 85317, contributions transferred to a committee formed for a "subsequent election" do not have to be attributed, meaning they do not count for purposes the contribution limits for that office, nor does the committee receiving the funds have to identify any of the original contributors. The scope of that exception was a matter of significant debate when the Commission originally adopted its regulatory definition of "subsequent election" more than twenty years ago due to concerns about the potential use of the exception in Section 85317 to circumvent contribution limits.

Current Regulation 18537.1(c) defines subsequent election for the same 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.

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[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.

This agenda item presents background on the options considered by the Commission in specifically defining "subsequent election" when this regulation was originally enacted in 2002, including arguments for and against these options, another possible option not considered at that time, and a discussion of the Commission's authority to adopt the options discussed.

Background

Proposition 34, passed by the voters at the statewide general election of November 2000, is the campaign finance measure that established limits on campaign contributions to candidates. Proposition 34 is organized entirely around a "per election" scheme.

Sections 85306 and 85317[2], originally enacted as a part of Proposition 34, 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 to specified contributors using either a "last in, first out" or "first in, first out" accounting method. The rule requiring attribution of contributions is intended to prevent circumvention of contribution limits through the transfer of campaign funds from one committee to another, in addition to providing disclosure of contributors.

Section 85317 provides: "Notwithstanding subdivision (a) of Section 85306, a candidate for state, county, or city elective 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." The record of Proposition 34 does not provide any insight into the specific legislative intent behind the exception in Section 85317. This was an issue the Commission grappled with in adopting the regulation. The Commission considered multiple options with different definitions of a subsequent election for the same office prior to enacting Regulation 18537.1 in 2002.

Regulatory Options Considered by the Commission

Two options were initially considered by the Commission in prenotice discussions. These two options took very different approaches in defining "subsequent" election; as either the general election after the primary election to that office, or as any future election to the same office. Under the first option, Option A, funds raised in a primary election could be carried over to the general election since these were elections to the "same office" as contemplated by the Act. The second version, Option B, presented a more expansive construction of the statute. It allowed the "carry over" of contributions, without attribution, from a committee established for an election to state elective office to a committee established for any future election to the same office.

[2] These provisions originally applied only to state candidates. However, Assembly Bill 571 (Stats. 2019, Ch. 556, AB 571 Mullin), effective January 1, 2021, applied a default campaign contribution limit to city and county candidates when the city or county has not already enacted a contribution limit. Since existing Sections 85306 and 85317 now apply to state, county, or city offices, changes to the regulatory definition of "subsequent election" would affect how contributions are transferred between committees at both the state and local level throughout California.

The Commission discussed these options over several meetings, and considered public comment from the regulated community as well as Common Cause. Several Commissioners expressed support for the narrow definition of subsequent election in the first option, but a majority of the Commissioners did not agree on either approach. After extensive discussion, and consideration of public comment, the Commission adopted a third approach that was not as restrictive as Option A, while not as permissive as Option B.

Option A: Narrow view of term "subsequent"

Option A took the narrow view that "subsequent election for the same elective state office" refers to the general election, after the primary. Option A recognized that Section 85317 allows the "carry over" of contributions to a "subsequent election for the same elective state office." Under this option, funds raised in a primary election may be carried over to the general election for the same office, and funds raised in a special primary election may be carried over to a special general election for the same office.

Under this narrow interpretation "subsequent election for the same elective state office" refers to either the general election, which is subsequent to and connected to the primary election, or the special general election, which is subsequent to and connected to the special primary election.

Staff at the time noted that the per election limits of Proposition 34 created a closed system, meaning each election was separate for purposes of contribution limits. While Proposition 34 expressly contemplates that candidates may move funds among their own committees, the method most consistent with the purposes of Proposition 34 is by means of transfer and attribution.[3]

Additionally, Proposition 34 provides separate contribution and expenditure limits for primary and general elections. Section 85314 expressly provides that special primary elections and special general elections are separate elections; and Section 82022 provides: "'Election' means any primary, general, special or recall election held in this state. The primary and general or special elections are separate elections for purposes of this title." Yet, at the same time, consistent with prior advice, they are elections to the "same elective office."[4]

Staff asserted this approach recognizes that the specified elections are elections to the "same elective office" consistent with the proposed interpretation of the "one-bank-account" rule in Regulation 18520. Thus, funds raised in a primary election may be carried forward to the associated general election because they are both elections for the same elective state office. Similarly, funds raised in a special primary election may be carried over to a special general election for the same office for the same reason.

[3] Staff memo for March Commission Meeting, dated February 28, 2002

[4] Staff memo for December Commission Meeting, dated November 27, 2001

Staff recommended Option A**,** because it provided a narrower interpretation of the terms used in the statute and was most consistent with the overall contribution limit scheme of Proposition 34. Staff preferred this option because it best reflected the apparent intent of the voters without impacting the closed system created by the per election limits of Proposition 34.[5] While Proposition 34 expressly contemplates that candidates may move funds among their own committees, the method most consistent with the purposes of Proposition 34 is by means of transfer and attribution. Limiting the application of the carry over exception also is consistent with a central purpose of the Act, that it's laws shall not unfairly favor incumbents.[6] Consequently, staff argued Section 85317, being an exception to that preferred rule, should be construed narrowly.

Public Comment

Jim Knox, representing California Common Cause, stated that attribution must be required. He believed that monies should not be carried over, even from the primary to a general election, without attribution. Otherwise, it would just create a mechanism for donors and candidates to avoid the contribution limits. He did not agree that Section 85317 allowed carryover without attribution.[7] The Commission at the time did not express support for this position, and staff does not believe it is a viable interpretation.

Option B: Broader reading of the statute, which would allow carry over any time candidate is running for future election to same office

Option B reflected a broader reading of the statute, which would have allowed carry over in any case where a candidate is running for a future election to the same elective state office. This version was preferred by the regulated community, who argued it was more in line with the language of the statute.

Staff at the time noted that, while this construction was supported by the statutory language, it was inconsistent with the overall intent of the proposition to limit campaign contributions on a per election basis citing the ballot pamphlet statement that "Proposition 34 brings strict contribution limits to every state office." (Ballot Pamp., Gen. Elec. (November 2000) argument in favor of Prop. 34 at p. 16.) Staff also noted that Section 85317 is an exception to the general rules permitting transfers with attribution and therefore, it should be construed narrowly (*Julius Goldman's Egg City v. Air Pollution Control District of Ventura County* (1981*)* 116 Cal.App.3d 746).[8]

[5] Staff memo for March Commission Meeting, dated February 28, 2002, and March 14, 2002, Commission Meeting Minutes, p. 3

[6] Section 81002(e).

[7] August 3, 2001, Commission Meeting Minutes, p. 5

[8] Staff memo for March Commission Meeting, dated February 28, 2002

Public Comment

At the October 11, 2001 meeting, Chuck Bell, from Bell, McAndrews, Hiltachk and Davidian, and Lance Olson, from Olson Hagel, both provided public comment and expressed support for Option B.

Chuck Bell stated that Proposition 34 intended to track the federal election scheme, and that Section 85317 intended to allow transfers forward from the primary to the general elections, and again to the reelection campaign.[9] Section 85306 provides that surplus funds can be transferred to a controlled committee for another office with attribution. In that way, contribution limits for elections to a subsequent different office are protected.

Lance Olson stated that the plain language of the "subsequent election for the same elective office," encompasses the concept of running for reelection. He also stated that the language of Proposition 34 was modeled after the federal rule, which he believed was embodied in Option B. He also stated that that transfer without attribution may create an advantage for the incumbents, but that Proposition 34 was not designed to "level the playing field."

The agenda for the December 2001 meeting included a comment letter from Senator John Burton, Assemblymember Robert Hertzberg, and Senator Ross Johnson. The legislators opposed the narrow interpretation of Regulation 18537.1, stating that there is no ambiguity in the statute, and finding it "incomprehensible to us how the Commission could find any ambiguity in the words 'one election' and 'a subsequent election' in Section 85317." They also asserted that the narrow interpretation was constitutionally flawed as it arbitrarily discriminated against contributors by limiting contributions to future elections by contributors, where portions of their prior contributions have been transferred with attribution.[10]

Staff disagreed with the comment letter's assertion that there was no ambiguity in the statute, noting that the statute may be read to allow carryover from the primary to the general elections or it may be read to allow carryover from one election to another election years later to the same seat. Staff also disagreed with the letter's assertion that Option A did not effectuate the intent of the voters, and pointed out that the ballot arguments indicated that the limits of Proposition 34 should be strictly enforced. Staff disagreed with the letter's assertion that attribution to specific contributors is unconstitutionally burdensome on the rights of contributors.[11]

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[9] Commissioners at the time recognized that the Federal rules allow carryover despite contribution limits. (August 3, 2001, Commission Meeting Minutes, p. 3.) Federal rules provide that transfers of funds may be made without limit between "affiliated" committees. See 11 CFR 102.6(a). Included within the definition of affiliated committees are all those political committees that are established, financed, maintained or controlled by the same person or group of persons. See 11 CFR 100.5(g)(2), 110.3(a)(1)(i); 2 U.S.C. 441a(a)(5).

[10] Letter from Office of Senator John Burton, dated December 4, 2001

[11] December 7, 2001, Commission Meeting Minutes, p. 2

In an effort to gain consensus on this matter, staff explored variations on the two options initially proposed in drafting the third option, Option C.

Option C: Allow carry over any time a candidate is running for the next election to same office, with certain limitations

After the Commission was unable to come to a consensus on Options A and B, staff proposed Option C which ultimately was adopted by the Commission.

Option C, the current regulation, allows a candidate committee to carry over campaign funds without attribution to a committee for the same office in the next election cycle. This was more permissive than Option A, which limited carry over to a general election following a primary election, but stricter than Option B, which allowed carry over without attribution for any future election to the same office.

Staff at the time preferred this option to Option B because they thought it better reflected the apparent intent of the voters without impacting the closed system created by the per election limits of Proposition 34. Staff at the time stated that, while Proposition 34 expressly contemplated that candidates may move funds among their own committees, the method most consistent with the purposes of Proposition 34 is by means of transfer and attribution. Section 85317, being an exception to that preferred rule, should be construed narrowly. However, if the Commission believed this approach to be too narrow, staff at the time believed that Option C would be a viable alternative and was sufficiently narrow to prevent wholesale repudiation of the per election scheme of Proposition 34.[12]

The Commission ultimately approved Option C. The Regulation defined "subsequent election for the same elective state office" as "the election to the next term of office immediately following the election/term of office for which the funds were raised." [13]

Alternate Proposal

At the August 3, 2001, Commission meeting, Scott Hallabrin, from the Assembly Ethics Committee, stated that there could be an issue with the definition of "same elective state office" in terms of legislators representing a district that had been redistricted. He expressed the same concern for legislators who start in the Assembly, move to the senate, then go back to the Assembly, and he questioned whether those situations would be considered the same office.

[12] Staff memo for March Commission Meeting, dated February 28, 2002,

[13] We also note that in March 2006, the Commission amended Regulation 18537.1 to clarify that the carryover provision allows contributions to be carried over from the primary to the general election for the same office. Although not explicitly stated, this Regulation had always been interpreted to allow funds raised in a primary election to be carried over without attribution to the general election of the same term for an elective state office, but the lack of specificity had caused some confusion among interested parties. Language specifically stating that "subsequent election for the same elective state office" also refers to the general election, which is subsequent to and for the same term of office as the primary election for which the funds were raised, and 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, Regulation 18537.1 (c) (2) and (3), was added at this time.

Regulation 18537.1(c) could be amended to define "subsequent election" for the same office as the election to any term of office following the election/term of office for which the funds were raised, so long as the district boundaries for the office remain unchanged.

Commission's Regulatory Authority

The Commission, at its August meeting, questioned the extent of its authority to adopt regulations in circumstances where the Commission is being asked to address scenarios not specifically provided for in the statute. Further, on August 30th the Commission received a public comment letter from Thomas Montgomery of Political Communications, Inc. that questioned whether current Regulation 18537.1 is invalid. As discussed below, the current regulation is valid and the options discussed above would similarly be permissible for the Commission to adopt.

The FPPC is authorized by statute to adopt rules and regulations to carry out the purposes and provisions of the Act, and the Act is to be "liberally construed to accomplish its purposes." (Sections 83112 and 81003.)

Courts on multiple occasions have upheld Commission regulations in circumstances similar to this one. In *Californians for Political Reform Found. v. Fair Political Practices Com*, (1998) 61 Cal. App. 4th 472, the court upheld an amendment the Commission adopted to Regulation 18215 that excluded payments by a sponsoring organization for administrative expenses from the definition of "contribution." The court reasoned that "an administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate," and the "absence of any specific statutory provisions regarding the regulation of an issue does not mean that such a regulation exceeds statutory authority," because the agency is "authorized to 'fill up the details' of the statutory scheme.[Citations]" (*Id*., at 484.)

The court also noted that "because of the agency's expertise, its view of a statute or regulation it enforces is entitled to great weight unless clearly erroneous or unauthorized… The Commission is one of those agencies whose expertise is entitled to deference from the courts… Moreover, where the regulation at issue is one deemed necessary to effectuate the purposes of the statute, we apply a more deferential standard of review, requiring only that the regulation be reasonable." (*Id*. at 484.) The court went on to state that "[t]his is particularly true where, as here, the quasi-legislative decisions of the Commission involve controversial issues that would entangle the courts in a 'political thicket.'

Similarly, in *Watson v. Fair Political Practices Commission* (1990) 217 Cal.App.3d 1059, the court considered the Commission's authority to promulgate regulations interpreting Government Code Section 89001, a broad prohibition on sending "mass mailings" at public expense, enacted in June 1988 by Proposition 73. The statute consisted of just twelve words: "No newsletter or other mass mailing shall be sent at public expense." Under the definition of "mass mailing" already contained in Section 82041.5, it soon became evident that the new statute (read too literally) would bar the state from sending out a variety of documents, such as tax forms, legal notices, announcements of official agency events and other public meetings, telephone directories, ballot pamphlets, and college catalogs; effectively eliminating the ability of government to communicate with its citizens through the mail. The Commission therefore adopted an emergency

regulation, Regulation 18901, two months later, listing a comprehensive list of "exceptions" to Section 89001 - exceptions that did not exist either explicitly or implicitly in the plain language of the statute.[14]

In *Watson,* plaintiffs took the position that the FPPC, in promulgating Regulation 18901, had impermissibly rewritten Section 89001 by creating numerous exceptions and exclusions not authorized by the clear wording of the statute. Nonetheless, the *Watson* court concluded:

> We agree with the FPPC that the effect of regulation 18901 is to permit the free flow of necessary government information while reducing the political benefit realized by incumbent elected officials from the sending of newsletters and other such mass mailings. This is totally consistent with the FPPC's duty to implement the *intent* and not the *literal language* of the statute. *(ld.* at p. 1076, emphasis in original.)

One instance where an appellate court has deemed a Commission regulation impermissible was the case of *Citizens to Save Cal. v. Cal. Fair Political Practices Com.* (2006) 145 Cal. App. 4th 736. In that case, the court considered the validity of a regulation that extended the limits on contributions to candidates for state elective office enacted under Proposition 34, and applied contribution limits to candidate-controlled ballot measure committees. The court invalidated the regulation on the grounds that it "conflicts with multiple provisions of the Political Reform Act… and thereby exceeds the FPPC's authority." (*Citizens to Save Cal., supra,* at p..739.) The court found that the regulation ran directly contrary to Section 85303(c), which provides: "Except as provided in Section 85310, nothing in this chapter shall limit a person's contributions to a committee or political party committee provided the contributions are used for purposes other than making contributions to candidates for elective office." As funds in ballot measure committees necessarily must be used for purposes other than making contributions to candidates for elective office, placing limits on contributions to candidate-controlled ballot measure committees was in direct contravention of the statute.

The court differentiated the case before it from the *Californians for Political Reform* case discussed above, noting:

> "[W]here the regulation at issue is one deemed necessary to effectuate the purposes of the statute, we apply a more deferential standard of review, requiring only that the regulation be reasonable." (*Ibid*.) However, we do not defer to an agency's view when deciding whether a regulation lies within the scope of the authority delegated by the Legislature. "The court, not the agency, has 'final responsibility for the interpretation of the law' under which the regulation was issued." (*Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, 11, fn. 4.)" (*Citizens to Save California*, at p. 747.)

As *Californians for Political Reform* provides, the Commission is "authorized to 'fill up the details' of the statutory scheme." Moreover, as reiterated in *Watson*, the Commission has

[14] In adopting Regulation 18901, the Commission interpreted a twelve-word statute with a 1,556-word regulation. In 2017, Senate Bill 45 codified the FPPC's mass mailing restrictions into Sections 89002 and 89003, and Regulation 18901 was subsequently repealed.

broad authority under the Act to adopt rules and regulations to carry out its purposes and provisions, authority which has generally been upheld by the courts, which apply a deferential standard, and where the regulation in question effectuated the intent, even if not the literal language, of the statute.

There is some ambiguity in Section 85317 as to the definition of "subsequent election for the same elective office," as it is unclear whether this language was intended as a reference only to the general or special general election following a primary or special primary election, the election for the same office immediately following the last election, or any future election for the same office regardless of the amount of time between the elections. To resolve this ambiguity any of the options discussed below would be consistent with the statutory language and a reasonable interpretation of the language provided. Accordingly, these regulatory proposals are analogous to the action taken in *Watson* and *Californians for Political Reform*. The proposed definitions of "subsequent election" considered by the Commission neither exceed the scope of the underlying statute nor contradict other provisions of the Act, but are necessary to implement the *intent, if not the* literal language, of the restrictions created through Proposition 34.

Conclusion

Over the course of several meeting, the Commission considered different approaches in defining "subsequent" election; a very narrow definition as either the general election after the primary election to that office, a very broad definition, as any future election to the same office, and after extensive discussion and consideration of public input, adopted the existing compromise approach. The current regulation has existed for over 20 years without legal challenge or difficulty in interpretation or application. Staff does not recommend changing the existing rule.

Attachments:

Memo, July 9, 2001

Meeting Minutes; July 9, 2001

Memo, August 3, 2001, meeting

Meeting Minutes; August 3, 2001

Memo, October 11, 2001, meeting

Meeting Minutes; October 11, 2001

Comment Letter from Chuck Bell

Memo, December 7, 2001, Meeting

Meeting Minutes; December 7, 2001

Comment Letter from John Burton

Memo, March 14, 2002, Meeting

Meeting Minutes; March 14, 2002

Comment letter from Thomas Montgomery, August 30, 2023