UNAPPROVED AND SUBJECT TO CHANGE
CALIFORNIA FAIR POLITICAL PRACTICES COMMISSION
MINUTES OF THE MEETING, Public Session

October 11, 2001

Call to order: Chairman Karen Getman called the monthly meeting of the Fair Political Practices Commission (FPPC) to order at 9:55 a.m., at 428 J Street, Eighth Floor, Sacramento, California. In addition to Chairman Getman, Commissioners Sheridan Downey, Thomas Knox and Gordana Swanson were present.

Item #1. Approval of the Minutes of the September 10, 2001 Commission Meeting.

The minutes of the September 10, 2001 Commission meeting were distributed to the Commission and made available to the public. Commissioner Swanson moved that the minutes be approved. Commissioner Knox seconded the motion. There being no objection, the motion carried.

Item #2. Public Comment.

Chairman Getman introduced Scott Burritt, an Executive Fellow assigned to the Commission for a year by the Executive Fellows Program, and Amanda Stolmack, a new attorney with the Commission's Enforcement Division.

Chairman Getman announced that Investigator Bill Motmans of the Enforcement Division was leaving the staff. She listed his accomplishments with the Commission and expressed deep regret that he would be going to another state agency. She noted that the Commission is currently unable to pay investigators and accounting specialists what they deserve to be paid, and they receive less than investigators and accounting specialists in other state agencies because of a fluke in the civil service pay system. She noted that staff is trying to alleviate that problem, but that the Commission continues to lose qualified staff in the meantime.

Caren Daniels-Meade, from the Secretary of State's Office, gave a brief overview of the October 10 filings. She explained that there were 811 campaign related filings during the month of October, 2001. On Wednesday, October 10, there were 404 filings, 320 of which were the Form 460. There were 608 Form 460s filed during October.

Item #3. Proposition 34 Regulations: Pre-notice Discussion of Regulatory Action Regarding Section 85200 ("One-Bank Account" Rule) and Section 85317 (Carry Over of Contributions); Proposed Regulations 18520, 18521, 18523, 18523.1, and 18537.1.

Assistant General Counsel John Wallace explained that the Commission was being presented two major decision points. Section 85317 permits contributions to be carried over without limits and without attribution to specific contributors. Proposition 34 allows transfer of contributions among a candidate's own controlled committees, but attribution to specific contributors is required in most cases. The Commission was being asked to determine under what circumstances carryover of funds should be allowed without attribution to specific contributors.

Staff provided the Commission with three options for consideration. The first option recognized that § 85317 allows the carryover of contributions only to a subsequent election for the same elective state office. Under option "A", 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. This would be consistent with the proposed interpretation of the "one-bank" account rule. An election and reelection to the same seat would be treated as separate elections to a separate office and would not fall within the scope of option "A". Staff favored the narrow construction of option "A" because it fit better with the overall goals of Proposition 34 to limit campaign contributions on a per-election basis.

Mr. Wallace explained that option "B" would treat each reelection to the same seat as an election to which funds can be carried over without attribution. This option was a viable interpretation of the statute and was favored by interested persons, but staff felt it weakened the Proposition 34 limits. They did not favor this option.

Chairman Getman opined that option "A" contains the correct statutory interpretation of Proposition 34 because § 85306 discusses transfers between controlled committees while § 85317 was silent on the issue. The Commission was considering requiring different committees for different elections. She noted that if § 85317 was allowed to mean carryover from one controlled committee to another it would only benefit incumbents. If the statute were interpreted to allow carryover from the primary to the general elections only, it would benefit incumbents and challengers in the same way.

Commissioner Knox disagreed, noting that § 85317 does not favor only incumbents because a novice would, under the broader interpretation, be permitted to carryover money from the primary to the general election. Also, if it had been the intention to limit carrying over funds from a primary election to the immediately following general election, that limitation would have been expressed in § 85317. Commissioner Knox believed that a fair reading of that statute would include carryover in reelections to the same elective state office.

Chairman Getman noted that the statute reads "A subsequent election for the same elective state office," and that regulation 18520 defines "same elective state office" as meaning the same term of office.

Mr. Wallace agreed, noting that it is consistent with Commission advice. He knew of no other provision in the PRA that would treat a reelection to the same seat as the same "election" as the initial race for that seat. He explained that a senate incumbent could be challenged by an assembly member, and that the assembly member would be subject to the transfer and attribution rules while the senate incumbent would not.

Chairman Getman questioned whether the term "same elective state office" will have to be clarified to indicate that it does not affect other provisions of the regulations if the treatment of it is different in this regulation than in other regulations.

Mr. Wallace responded that the proposed language of regulation 18520, which is consistent with current advice, would provide that "elective office" refers to "term of office." If it were construed in regulation 85317 to include the reelection to the same seat, it would result in an inconsistency that would have to be considered. He noted that § 18520 deals with the filing of a

statement of intention for election. Incumbents who desire to run for reelection to the same seat have been required to file a new statement of intention.

General Counsel Luisa Menchaca explained that staff intended to confine the interpretation of option "A" to § 85317. There could be potential problems in other sections.

Chairman Getman noted that it would be difficult to confine the interpretation to § 85317 if the term "same elective state office" is defined in the regulation.

In response to a question, Mr. Wallace stated that the term "elective office" also appears in § 85200.

Commissioner Knox stated that the term "same elective state office" is the term in question.

Chairman Getman stated that under current interpretation of § 85200, a candidate for "elective state office" would mean a candidate for a particular term of that office.

Commissioner Knox thought it was reasonable to draw a distinction between the words, "same elective state office" as used in § 85317 and any reference to the same term of a given office. He noted that § 85200 refers to filing a statement of intention for an elective state office, and that if the incumbent runs for another term another statement of intention would have to be filed. He did not believe that carrying over funds from one general election to another general election would excuse the candidate from filing a second statement of intention if the incumbent decides to run for that office again.

Chairman Getman stated that staff's interpretation would allow more consistency with the definition in §§ 85200 and 85317 if "elective state office" is a specific term of office. She agreed that it would be difficult to deal with attribution in the middle of a campaign. She noted that a candidate for reelection who transfers and attributes funds to the reelection committee may not be permitted to accept contributions if they were made by persons whose contributions to the previous election were transferred to the new campaign and if that transfer resulted in that person meeting the contribution limits for the new campaign.

Mr. Wallace responded that it is a question of interpretation of the statute. In many cases a candidate will have both an election and reelection committee at the same time, and that transfers and attribution would not be difficult in those circumstances. He noted that transfers are allowed in all cases, but that the attribution of those transferred monies keeps the transfers from being abused. He assumed that the statute intended to allow transfers without attribution from a primary to a general election because it would be too complicated to attribute transfers during the election.

In response to a question, Mr. Wallace stated that a person could be precluded from contributing to a subsequent election even though the statute gives that person the right to contribute, and that the transfer and attribution provisions meant to do that. He noted that the scope of Proposition 34 was to prohibit persons from contributing twice to the same election.

Chuck Bell, from Bell, McAndrews, Hiltachk and Davidian, commented that § 85317 provides that, "any subsequent election for the same office" should not be limited to mean primary to general elections only.

In response to a question, Mr. Bell stated that Proposition 34 intended to track the federal election scheme, and that § 85317 intended to allow transfers forward from the primary to the general elections, and again to the reelection campaign. 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.

Mr. Bell explained that purpose of Proposition 73 was different than the purpose of Proposition 34 because § 85306 allowed candidates to transfer surplus funds. He noted that Proposition 208 had very restrictive provisions.

Mr. Bell supported staff option "B."

Chairman Getman explained that, under option "B," an incumbent would be given an advantage.

Mr. Bell responded that sometimes life is not fair, and noted that the federal district court has ruled that "campaign laws don't deal with all perceived evils."

Chairman Getman stated that option "B" would give a clear incumbent advantage. Option "A" provided a middle ground, allowing that contributions did not have to be returned to the contributor, that the money could be transferred, but that those transfers would require attribution.

Mr. Bell did not disagree with the policy, but believed that it was not supported by the interpretation of the section.

Commissioner Downey suggested that the transfer and attribution rules would only apply to the transfer or carryover to the primary campaign in the reelection. Once the primary campaign is over, under option "A," the candidates who have surplus funds would not have an attribution issue. Consequently, only the primary election has the prohibition on new money coming in from the same donors.

Lance Olson, of Olson Hagel, support option "B." He commented that if candidates are required to create a new controlled candidate committee to run for reelection, then under § 85306(a), a candidate has the right to transfer funds from one committee to another with attribution. However, § 85317 provides, "notwithstanding § 85306(a)" the candidate can transfer the money without attribution. He questioned whether requiring committees to set up another new committee and transfer monies with attribution under § 85306(a) would conflict with § 85317. The plain language of the "subsequent election for the same elective office," encompasses the concept of running for reelection. He noted that the language was modeled after the federal rule which is embodied in option "B." Mr. Olson noted that it may create an advantage for the incumbents, but that Proposition 34 was not designed to "level the playing field," and that the Supreme Court had directed that the government is not in the business of "leveling the playing field."

Mr. Olson stated that option "A" would impose an expenditure limitation on a candidate and that Proposition 34 does not impose any expenditure limitation other than the voluntary expenditure limits.

Mr. Wallace responded that Proposition 34 does interpret the primary and general elections as separate elections. He noted that § 85400 provides separate expenditure limits for those

elections. He did not agree that it ignored § 85317 to apply the provision only to the primary and general elections because it considers the purpose of Proposition 34. He believed that option "A" was consistent with what the voters adopted and intended to adopt when they passed Proposition 34.

Commissioner Swanson commented that she favored option "A" because the voters intended to put controls on contribution limits. She did not favor giving an advantage to an incumbent in option "B." She believed that option "A" was much cleaner, leaving no room for guessing the interpretation.

Commissioner Downey responded that the argument in favor of option "A" is that it brings in the specific term for the "elective state office." It would provide a narrow construction that the Commission might wish to give to any statute that would undermine attribution and the ability to identify the source of funds given to a candidate. He pointed out that the structure of the PRA separates primary and general elections. He agreed that the plain language of, "a subsequent election for the same elective office," created a problem, but preferred the idea of identifying separate elections and keeping them separate, as well as identifying contributors and supporting contribution limits. He did not agree that the incumbent would gain a very big advantage under option "B."

Commissioner Swanson stated that lawyers and laypersons look at things differently. Lawyers look at what is written down, but laypersons, like her, look at the common sense of an election being a real event and contributions being influence peddling opportunities. She believed that option "A" was a better option.

Chairman Getman pointed out that Commissioner Swanson's common sense interpretation was totally backed by the law. She noted that Proposition 34 did not take away the purposes and intents of the PRA, and that § 81002(e) provided that laws and practices unfairly favoring incumbents should be abolished in order that elections be conducted more fairly. She favored option "A."

Commissioner Knox agreed that the purposes and intentions of the PRA should be consulted, but he did not think that it allowed the Commission to ignore the plain meaning of the words. In this instance, he did not think that the language was sufficiently in doubt to require that the statement of purposes and intentions be considered.

Commissioner Downey stated that § 85317 could be interpreted to mean that the only possible subsequent election is the reelection campaign. A candidate would think that surplus funds from the general election could be carried over by reading § 85317.

Mr. Wallace explained that the funds could be carried over under option "A," but that they would require attribution. Staff interpretation was guided by the fact that it was for the same elective state office, and by the concept behind expenditure limits that each primary and general election is a separate election. He found it troubling to consider that funds could be carried over four years later without attribution.

Mr. Wallace explained that option "C" is very similar to option "B," using a broader approach allowing funds to be transferred from general election to reelection campaigns without attribution. Staff believed that if the Commission chose to interpret the statute to allow that carryover there should be some limitations. Option "C" contained optional decision points

placing limitations reflected in other statutes in Proposition 34, so that the interpretation could not be considered to override those other statutes. As an example, carryover would not be allowed until net debt was paid, in accordance with a statute and a regulation that provides that funds raised after an election must be used for net debt.

Chairman Getman disagreed with that approach, pointing out that there already was a specific statutory prohibition against raising money after an election except to pay off net debts. She found no basis in the statute for decision point 1 in option "C" and considered decision points 2 and 3 superfluous because they repeated other statutes that apply regardless of what is in the regulation. She did not believe that there could be a middle ground on this issue.

In response to a question, Mr. Wallace stated that staff could probably tailor the language to limit it specifically to the section, but that it would be a different interpretation of the concept than is used in the "one-bank" account rule.

Chairman Getman noted that it would not make any sense to require a new committee if carryover without attribution was allowed.

Commissioner Downey stated that he was persuaded that option "A" was the best interpretation.

Chairman Getman and Commissioner Swanson agreed.

Commissioner Knox supported option "B."

Chairman Getman suggested that the wording on lines 11 and 12 of the proposed § 18537.1 option "A" be changed from, "…without attribution as provided by…" to "…without the attribution required by…".

Mr. Wallace agreed that it was an appropriate change.

Chairman Getman moved that the Commission adopt option "A" with the change she suggested.

Ms. Menchanca noted that this vote was just for prenotice purposes.

Commissioner Downey seconded the motion.

Chairman Getman, Commissioners Downey and Swanson voted "aye." Commissioner Knox voted "nay." The motion carried by a vote of 3-1.

Mr. Wallace explained that regulations 18520, 18521, 18523, and 18523.1 had been modified to set up a "one bank account" system in which candidates will have to set up a new campaign bank account and new campaign committee for reelection to the same office. This concept will be contrary to staff advice initiated when Proposition 73 was in place.

Mr. Wallace noted that the Commission has already dealt with the redesignation rule twice, and that the Commission favored rejection of the redesignation rule. Option "A" would provide that redesignation would not be permitted. Option "B" would allow redesignation under limited circumstances. It would include all of the regulations in option "A" except regulation 18521 would be replaced with the option "B" version.

Mr. Wallace noted that one comment letter had been received from Mr. Bell, requesting that the redesignation rule be retained. Staff recommended that the redesignation rule be eliminated because it is better for the public and for the agency's enforcement ability to have separate committees and bank accounts for each election. Staff interpreted "election" as "each term of office."

In response to a question, Mr. Wallace explained that Franchise Tax Board had not taken a position on this issue.

Mr. Wallace stated that under Proposition 73, most limits were lost by court action, so redesignation was allowed. Now, however, limits are back in place, and it will be easier to implement them without redesignation.

In response to a question, Mr. Wallace responded that transferred contributions would have to be tracked through a bookkeeping process, and that it would raise issues related to debts since there are limits on raising funds for debt.

Enforcement Chief Steve Russo stated that, if redesignation is allowed, the only way to track the flow of money will be by auditing the committee's books. There will be no way for the public to know what is going on with the transfer of funds because it may not be publicly disclosed and the Commission will not know until there is an audit. Audits can be several years after-the-fact. Additionally, if the committee does not keep accurate records an investigation will be limited. A record keeping violation could be charged in those cases, but there may be a more serious violation that will not be discovered. If redesignation is not allowed, a paper trail will exist immediately in the bank records, and it will be a clearer record.

In response to a question, Mr. Russo stated that he did not anticipate an increase in the number of inadvertent mistakes because this will make a much simpler system. He believed that redesignation would cause more mistakes and more violations because there are now limits. If redesignation is allowed, staff would have to be vigilant in prosecuting record-keeping violations in order to ensure that mistakes are not made so that the more serious violations can be tracked.

Technical Assistance Division Chief Carla Wardlow stated that there will be some errors, but that for purposes of tracking the limits and giving the information to the public separate accounts and committees would be a better idea.

Mr. Bell stated that he was withdrawing his objection to redesignation because the Commission had decided to accept option "A" of the carryover issue. He noted that the only way the regulated community will be able to track those attributions would be to have a new committee and a new account or there would be no way to avoid inadvertent mistakes.

Chairman Getman moved that new committees and new bank accounts be required for each election cycle.

Commissioner Swanson seconded the motion.

There being no objection, the motion carried.

Mr. Wallace explained that staff received some public comments regarding changes to the text and language issues that require clarification. Those changes will be incorporated prior to noticing the regulations.

Mr. Wallace added that some non-substantive grammatical changes requested by the Chairman also would be made.

Mr. Olson questioned whether, under proposed regulation 18523.1(b)(3) candidates are prohibited from soliciting contributions for both the primary and general elections at the same time. He suggested that the regulation include language making it clear that candidates may solicit contributions for both the primary and general elections.

Mr. Wallace stated that he would work with Mr. Olson on clarifying language.

Mr. Olson noted his concern that candidates may instruct contributors pursuant to proposed regulation 18523.1(c), but contributors may not follow the instructions. If that should happen, candidates should be allowed to attribute the contribution pursuant to whatever the solicitation indicated.

Commissioner Knox asked what would happen if the Commission revised subparagraph (b)(3) so that the same solicitation applies to the primary and general elections and the candidate gets a contribution that fails to designate which election the contribution was for.

Mr. Olson responded that, if the candidate wanted to apply part of a contribution to the primary election and the remainder to the general election it should be permitted. He suggested that, if a candidate receives a contribution for the primary election in excess of the contribution limits, the excess could be put towards the general election.

Chairman Getman noted that the Commission had already decided that candidates would not be told what they had to do with such contributions.

Mr. Wallace stated that staff would consider Mr. Olson's comments and develop more acceptable language addressing his concerns.

Item #4. Proposition 34 Regulations: Termination of Committees - Second Pre-Notice Discussion of Proposed Regulation 18404.1 and Emergency Adoption of Regulation 18404.2.

Staff Counsel Holly Armstrong presented to the Commission and made available to the public additional changes to the emergency regulation and proposed regulation 18404.1 prompted by comments received from members of the public. She noted that staff would be working from the new versions.

Ms. Armstrong stated the emergency regulation provisions relate to the pre-January 1, 2001 committees controlled by candidates who never held or no longer hold the office for which the committee was formed. The regulation must be adopted as an emergency regulation because of the amount of work required to enable staff to locate and give notice to the committees prior to the termination date.