STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Cardenas, Hatch, Hayward, and Wilson

From: Dave Bainbridge, General Counsel
Katelyn Greene, Commission Counsel

Subject: Pre-Notice Discussion of Proposed Amendment to Regulation 18531, Return of Excessive Contributions

Date: February 10, 2020

Requested Action and Summary of Proposal

Staff presents amendments to Regulation 18531 for prenotice discussion. The proposed amendments allow for campaign contributions received by a committee that are over the applicable contribution limit ("excessive contributions") to be returned after a committee has deposited the contribution into its campaign bank account but maintains the current 14-day rule. Currently, in order to avoid a violation of the Act's contribution limits, excessive contributions are allowed to be returned within 14 days of receipt and only prior to deposit by a committee.

Staff's proposed amendments to Regulation 18531 are provided in response to comments received by the Commission from the California Political Attorneys Association ("CPAA") at its December 2019 meeting. CPAA expressed concerns that Regulation 18531 does not currently provide a mechanism to remedy excess contributions received by candidates and committees after the contributions have been deposited. CPAA explained that more and more donors are choosing to contribute to candidates via reoccurring credit contributions that are automatically deposited into the committee's bank account, resulting in inadvertent excessive contributions being received. According to CPAA, these excessive contributions are the result of inadvertent error, rather than the result of bad actors intentionally contributing over the legal contribution limit.

Staff requests approval from the Commission to notice the proposed regulatory changes, which would allow for return of a contribution after deposit but still within 14 days, for future adoption. Staff anticipates the consideration of the proposed language for adoption at the Commission's April 2020 meeting.

Background

Currently, Regulation 18531 allows for a return of an excessive contribution "prior to deposit or negotiation" within 14 days of receipt. Staff proposes to amend this regulation to allow for a committee to avoid a violation of the Act by refunding excessive contributions after they have been deposited but still within 14 days of receipt. Specifically, an issue has come to staff's attention with regard to contributions received via auto-deposit. A committee that receives contributions via auto-deposit may be unaware of an excessive contribution until it has already been deposited by a third-party vendor and at that point, the committee would have no recourse under the current language of Regulation 18531. For example, the excessive contribution may not become noticed until the accounting is complete when the statements and reports are being prepared for filing. Accordingly, allowing for the return of an excessive contribution within a certain amount of time *after deposit* gives a committee an opportunity to look for and notice an excessive contribution and the ability to comply with the Act.

Proposed Amendments

Staff proposes keeping Regulation 18531's current 14-day deadline for the return of excess contributions for purposes of consistency. This would, in effect, allow a committee that receives and deposits an excessive contribution to return the excessive contribution, or a portion thereof, within 14 days, even after deposit.

Though staff recommends keeping Regulation 18531's current 14-day deadline, staff provides research below on contribution return rules in other jurisdictions should the Commission wish to consider a different standard. If the Commission wishes to adopt a longer time period for the return of an excessive contribution, staff recommends considering additional safeguards to prevent the expansion of this regulation being misused.

Excessive Contribution Rules in Other Jurisdictions

- **San Diego**: A committee has a 10-calendar day grace period from the date of deposit, or before the filing deadline for the relevant reporting period, whichever occurs first.

- **Oakland**: Follows Regulation 18531 and deals with excessive contributions on a case by case basis – if the overage is self-reporting or caught early on, the candidate can return excessive contributions. If the City determines that it is a violation the candidate is required to forfeit the excessive contribution to the City immediately.

- **San Francisco**: No grace period. The excessive contribution amount is forfeited to the City if deposited.[1]

- **Los Angeles**: A committee has 75 days following the filing deadline for the statement in which the contribution must be reported.[2]

[1] This standard is sometimes lenient if: (1) receipt of the unlawful contribution was not willful, and (2) the committee initiated the refund prior to first contact by the commission (or prior to learning that a complaint had been filed against them.) This practice is part of San Francisco's enforcement divisions discretion to waive or reduce forfeiture.

[2] https://ethics.lacity.org/wp-content/uploads/Excess-Contribution-Policy.pdf

- **Federal**: A committee may remedy the receipt of an excessive contributions by refunding the excessive amount or by seeking a re-designation or re-attribution of it within 60 days.[3]

- **Colorado**: A committee must return the excessive contribution within 10 days of receipt or within 3 days after receiving notification from the appropriate filing office, whichever is sooner. A contribution is received on the date that is accepted by the committee. A contribution or donation made by credit card, PayPal, or other intermediary service is accepted on the date the contributor or donor authorizes the payment, or if unknown, on the date the payment intermediary service electronically transfers the contribution or donation.[4]

- **Arizona:** A candidate committee has 60 days from receipt to remedy by refunding amount to original donor. Receipt is defined as the date the committee knowingly takes possession of the contribution, or the date shown on the check, credit card payment, or other instrument.[5]

Limitations on Return of Excessive Contributions

Because staff's proposal to allow excessive contributions to be returned within 14 days, even after deposit, is an expansion of the current stricter standard staff proposes some additional limitations for consideration.

Under staff's proposed subdivision (a), a committee may return a contribution, or portion thereof, that exceeds an applicable contribution limit to the contributor within 14 days of receiving the contribution without violating the contribution limits set forth in Sections 85301, 85302, and 85303, so long as the committee does not have actual knowledge that the contribution exceeds the limits at the time of receipt, or does not make use of the contribution prior to returning it. As defined in proposed subdivision (b), a committee makes use of a monetary contribution if it makes expenditures exceeding what the committee's available cash balance would be had it not received the contribution that exceeds the applicable contribution limit.

These limitations are proposed to prevent willful and intentional actors from accepting and depositing excessive contributions and from making expenditures they would have not made but for the deposit of the excessive contribution. These limitations alleviate concerns with official's intentionally overstating the campaign's account balance in an attempt to discourage other candidates and also prevents candidates from accepting and using excessive contributions for short-term funding.

[3] https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/remedying-excessive-contribution/

[4] https://www.sos.state.co.us/pubs/rule_making/CurrentRules/8CCR1505-6CPF.pdf (Rule 10.6.)

[5] https://azsos.gov/sites/default/files/2018%200926%20-%20Campaign%20Finance%20Handbook%20-%20Candidates.pdf (Rule 3.6.)

Reporting Deposited Contributions

Currently, subdivision (a) states that a contribution, which either in the aggregate or on its face exceeds the contribution limits, shall not be deemed not to have been accepted. This allows for the contribution to not be reported. However, because the proposed amendment will permit returning excessive contributions even after deposit, proposed subdivision (f) will clarify that any contribution deposited into the campaign account must be reported under the Act, while the returned contribution must be reported as an expenditure.

Non-substantive and Technical Recommendations

Lastly, staff has made other non-substantive and technical changes for clarity and improved readability including:

- Incorporating relevant provision in former subdivision (b) into subdivision (a).
- Simplifying existing language in subdivision (c) regarding the return of non-monetary contributions.
- Amending cross references to conform to current drafting conventions.

Summary

The proposed amendments to existing Regulation 18531 will allow a return of an excessive contribution after it has been deposited within certain parameters, provide important clarifications with regard to the excessive contribution return process, and make other needed technical changes. Staff recommends the Commission approve the noticing of the proposed amendments for future adoption on or after the Commission's April 2020 meeting.

Attachments: Proposed Regulation 18531 for Amendment.