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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: Request for Adoption of Amendments to Regulation 18531, Return of Excessive Contributions

Date: April 6, 2020

Requested Action and Summary of Proposal

Staff presents amendments to Regulation 18531 for adoption. The 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 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 recommends that the Commission adopt the proposed regulatory changes, which would allow for return of a contribution after deposit but still within 14 days.

Background

Currently, Regulation 18531 allows for a return of an excessive contribution “prior to deposit or negotiation” within 14 days of receipt.¹ In light of this requirement, an issue has come to staff’s attention with regard to contributions received via auto-deposit. Specifically, a committee that receives contributions via auto-deposit may be unaware of an excessive

¹ The existing 14-day time period set forth in Regulation 18531 was added to the regulation in anticipation of Proposition 68 (1988) becoming law, however the provision including the 14-day time period under Proposition 68 never became law, despite gaining enough votes, due to competing reform schemes with Proposition 73 (1988).

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. 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.

This regulation was heard for prenotice discussion at the Commission's February 2020 meeting and was also discussed at the Commission's Law and Policy Committee meeting in March 2019. No public comment seeking additional regulatory changes has been received since CPAA's initial comments at the December Commission Meeting.

Proposed Amendments

In response to CPAA's comments, staff proposes to amend Regulation 18531 to allow 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. 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.

Staff has communicated with a compliance manager at a prominent third-party vendor, ActBlue, with regard to allowing a committee to make a refund within the 14-day time period. The compliance manager stated that committees have the ability to access the contributor information and the amount contributed nearly instantaneously. Generally, to receive live updates in real time (no delay) a committee would need to set up email alerts. However, the information is available on the committees' ActBlue dashboard immediately after it is submitted to ActBlue and a committee may process a refund instantly after the payment is received by ActBlue or after it is reflected in the committee's bank account within 2-4 days.² Issuing a refund prior to the contribution being deposited into the committee's account would result in no reporting requirement.

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 deposit or allow the deposit of the contribution with actual knowledge that the contribution exceeds the limits at the time of receipt. The committee must also 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

² <https://support.actblue.com/campaigns/faq/donations-refunds-and-finances/> and <https://support.actblue.com/campaigns/merchant-accounts/transfers-to-your-bank-account/>

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 candidates intentionally overstating a campaign account balance in an attempt to discourage other candidates and also prevents candidates from accepting and using excessive contributions for short-term funding.

We note that a Commissioner expressed concern at the prenotice meeting with the possibility of a committee accepting a physical check that on its face is over the limit. In response, staff interprets the "actual knowledge" limitation in subdivision (a) as prohibiting the acceptance of a physical check that on its face exceeds the contribution limit. In other words, receiving a physical check in excess of the contribution limit would constitute actual knowledge of an over the limit contribution and would not be permitted.

Reporting Deposited Contributions

Currently, subdivision (a) states that a contribution, which either in the aggregate or on its face exceeds the contribution limits, shall 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 return of the contribution must also be reported.

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 amend Regulation 18531 as proposed.

Attachments: Proposed Regulation 18531 for Amendment.