

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Getman, Commissioners Downey, Knox, Scott and Swanson

From: John W. Wallace, Senior Commission Counsel
Luisa Menchaca, General Counsel

Re: Proposition 34 Regulations: Pre-notice Discussion of Regulatory Action Regarding Sections 85200 (“One-Bank-Account” Rule); Section 85317 (Carry-Over of Contributions); Proposed Regulations 18520, 18521, 18523, 18523.1, 18525; 18537.1.

Date: July 25, 2001

I. Introduction

At the July 2001 Commission meeting, the Commission considered several issues under the rubric of the “one-bank-account” rule of Proposition 73. The Commission made several preliminary decisions, which Commission staff has implemented through regulatory language contained herein. In addition, an “Interested Persons” meeting was held on July 18, 2001, to discuss issues related to the changes proposed in this memorandum. Opinions of the interested persons have been included below.

II. Background

As you will recall, in June 1988, the voters approved Proposition 73 as amendments to the Political Reform Act (the “Act”).¹ Among other things, Proposition 73 enacted Section 85201, which required that all contributions or loans made to a candidate, or to the candidate’s controlled committee, be deposited into a single campaign bank account. This section came to be known as the “one-bank-account” rule.

Numerous regulations were enacted in order to implement this rule. These include:

- Regulation 18521. Establishment of separate controlled committee for each campaign account.
- Regulation 18523. Non-designated contributions or loans.
- Regulation 18523.1. Written solicitation for contributions.
- Regulation 18524. Investment and expenditure of candidates’ campaign funds.
- Regulation 18525. Incumbent candidates’ election expenses and officeholder expenses.

Each of the regulations set forth above serves a role in implementing this one-bank-account rule and ensures that contributions to and expenditures for a given election come out of the proper campaign account.

¹ Government Code sections 81000 - 91014. Commission regulations appear at title 2, sections 18109 - 18997, of the California Code of Regulations.

However, the United States District Court in *Service Employees International Union, AFL-CIO, et al. v. Fair Political Practices Commission* (E.D. CA., 1990) 747 F.Supp. 580 (“*SEIU*”)² invalidated substantial portions of Proposition 73, including the fiscal year contribution limitations of the Act, and the inter and intra-candidate transfers bans. In 1991, the “one-bank-account” rule was modified to allow redesignation. In the *Buck-Walsh* Advice Letter, No. A-91-075, we advised: “In light of the changes caused by the federal court order, on January 14, 1991, the Commission began advising that a candidate may redesignate a campaign committee and campaign bank account established after January 1, 1989, for reelection to the same office at a future date. Thus, the 1990-campaign bank account and campaign committee of Attorney General Lungren may both be redesignated for the 1994 election.”

The logic supporting redesignation appears to be that since Section 85201 and Regulation 18521 continued to require a separate campaign bank account for each election to a specific office, redesignation simply allowed the candidate to avoid the procedural steps of opening a new committee and a new bank account and having to transfer funds from the old committee to the new committee (with attendant committee and bank account number changes). Rather, the candidate could leave the funds where they were and simply “redesignate” the existing committee and bank account for the new election. This way, by simply amending the campaign bank account statement and the statement of organization, the candidate could avoid having to physically move the funds, and could proceed with his or her campaign for the next election for the same office.

As noted previously,³ the “one-bank-account” rule was not repealed by Proposition 34. However, in working through the implementation of Proposition 34, we have encountered numerous instances where the modified “one-bank-account” rule can impact, or be impacted, by the new regulations under consideration. Included herein are regulatory approaches to harmonizing Proposition 73’s “one-bank-account” rule to Proposition 34.

In Section III below, we discuss the various issues faced by the Commission with respect to each of the decision points. Rather than reach a conclusion as to each particular decision point serially, however, we suggest that the Commission review the entire discussion of all issues in Section III, as many of the decisions are intertwined. Consequently, the actual decision points and staff recommendations are included as a group in Section IV of this memo.

III. Regulatory Changes

Decision Point 1 - Redesignation

(a) In light of the passage of Proposition 34, should candidates subject to Proposition 34 be required to establish new committees/bank accounts for each election to each term of office?

² Affirmed on appeal *SEIU v. FPPC*, 955 F.2d. 1312 (9th Cir. 1992)

³ See the staff memorandum discussed at the Commission’s July 9, 2001 meeting; *Proposition 34 Regulations: Policy Issues Associated with the Interpretation of Single Bank Account Rule* dated June 28, 2001, for additional background on these issues.

(a)(1) If no, should the Commission codify the “redesignation” rule that allows candidates to redesignate their committees/bank accounts for their reelection to the next term of the same office?

(a)(2) What restrictions should apply? For example, should redesignation only be allowed when a candidate has no debt outstanding for his or her election to office?

(b) Should the same rules apply to local candidate controlled committees?

At the July 2001 Commission meeting, the Commission approved the staff recommendation to permit staff to present regulatory language that would eliminate the “redesignation” exception as it has evolved under Proposition 73. As discussed in the staff memorandum, Proposition 34 is organized entirely around a “per election” scheme. Therefore, requiring a separate account and controlled committee per election will harmonize with the overall scheme of Proposition 34 and other regulations being drafted to implement Proposition 34.

The Commission also instructed staff to hold an interested persons’ meeting before presenting that proposed regulatory language. Those who attended the meeting of July 18, 2001 were strongly in support of retaining the “redesignation” rule. They argued that the costs associated with having separate committees for each election outweighed the marginal benefits in tracking contributions and expenditures. Moreover, consensus of the interested persons was that any new problems under Proposition 34’s per election system could be resolved by means of special codes on campaign reports. However, there was some agreement that limiting redesignation to only committees without debt was reasonable. As noted at the July meeting, the redesignation rule has never been codified or placed in a regulation.

Decision Points (a)(1) and (b). After considering the proposed regulatory amendments discussed below (Decision Points 1 and 2), the Commission may decide it will retain the exception. If this was the Commission’s decision, staff would recommend codification of the redesignation rule, with the restriction that committees with debt could not be redesignated. This would be brought back to the Commission in the form of a second pre-notice discussion on this item. The additional time will allow staff to work with statewide and local officials in order to craft a rule that will be practical for all candidates.

Decision Points (a)(2) and (b). If the Commission chooses to repudiate the “redesignation” rule, the difficulty will be in repealing an unwritten rule by means of regulatory amendment. However, we have proposed language that staff believes adequately accomplishes this.

1. Regulation 18520: New Regulation 18520 codifies the requirement of Section 85200 of Proposition 73 that candidates must file a statement of intent to be a candidate for each specific term of office for which they intend to run. The new regulation expressly states that “specific office” means each specific term of office. Consequently, an assembly member elected to a two-year term would be required to file a new statement of intent for his reelection to another two-year term in the Assembly. This is the existing rule. The same rule applies to local elected officers.

2. **Regulation 18521:** Regulation 18521 is being amended to apply specifically to candidates for elective state office and statewide elective office. The amendments clarify that a separate controlled committee and separate campaign bank account is required for each specific term of office as set forth in 18520.
3. **Regulation 18523.** Regulation 18523 has been amended and reformatted into three separate subdivisions for ease of use. In subdivision (a), language has been inserted to clarify that when allocating contributions or loans received by a candidate that are not designated for a particular controlled committee, the candidate may allocate the contribution to any of his or her controlled committees, but only to the extent allowed under applicable law (including the contribution limits in Sections 85301 and 85302). Subdivision (b) has been amended to clarify the existing language.
4. **Regulation 18523.1.** Regulation 18523.1 sets out the disclosure requirements applicable to written solicitations for contributions. The existing language of the regulation has been retained as subdivision (a). A new subdivision (b) has been added specifically listing the requirements applicable to candidates for elective state office or statewide elective office. These requirements include identification of the particular controlled committee for which the contribution is solicited, the specific office, the specific term of office, as well as disclosure as to whether the contribution is being solicited for a primary or general election, or a special or special runoff election and the applicable contribution limits.
5. **Regulation 18525.** Regulation 18525 sets out which account is to be used to pay for campaign and other allowable expenses. This regulation is further discussed below.

Decision Point 2 – Election Candidates’ Campaign and Officeholder Expenses.

The issue before the Commission with respect to Regulation 18525 is whether the Commission wishes to repeal the less burdensome rule of Regulation 18525 that allows officeholder expenses to be paid from either a current or future campaign account. The Commission should consider this issue concurrently with the issues in Decision 1. The Commission is provided two options.

Option 1 is to make the regulation inapplicable to candidates for elective state office or statewide elective office.

Option 2 allows the Commission to leave Regulation 18525 intact, separating the local candidates from the state candidates.

Option 2(a) asks the Commission to determine whether it wishes to consider remaining issues concerning “termed out” candidates.

Regulation 18525 presents special problems in the context of Proposition 34’s contribution limits. Under Proposition 73, Regulation 18525 regulated the interplay between a candidate’s committee and campaign bank account for election to office, and his or her future campaign bank account for reelection to the same office. Section 85201(c) requires all campaign

expenditures to be made from the same bank account created for election to the office. Therefore, Regulation 18525 was enacted to specify which expenditures were considered “campaign expenditures” and which ones were not. The regulation was then drafted to deal with the problem of “mixed purposes” expenditures, which are those expenditures that do not qualify as “campaign expenditures” for purposes of the one-bank-account rule. At the interested persons’ meeting, former General Counsel Kathy Donovan explained that the staff recommendation at the time the regulation was adopted was a practical solution that would not require a determination on a case-by-case basis as to whether a payment qualified as a “campaign expenditure.”

The rulemaking file on Regulation 18525, as it was first adopted in 1989, indicates that the regulation was necessary to clarify which expenses are campaign expenses and which expenses are officeholder expenses. The Initial Statement of Reasons states:

“The Political Reform Act provides no definition of ‘campaign’ expenses or ‘officeholder’ expenses to assist incumbent candidates in determining from which campaign bank account particular expenses should be made. Developing a definition of these terms presents considerable difficulty because it is not always possible to draw a firm line between ‘campaign’ expenses and ‘officeholder’ expenses.

For example, a legislator who is considering authoring legislation on a controversial subject, such as gun control, might want to survey his or her constituents to determine their views on that issue. The purpose of the survey is related to the legislator’s official duties as an elected officeholder. Arguably, the survey is an officeholder expense. However, the opinions of the legislator’s constituents concerning his or her job performance are crucial to the legislator’s success in a reelection campaign or in a future campaign for election to a different office. Is the survey therefore a campaign expense? Both conclusions appear equally supportable.

In contrast, if the legislator were to conduct a constituent survey specifically to determine his or her chances of success in an upcoming election, that expense appears to be a campaign expense and not an officeholder expense. Thus, some expenses are more clearly related to the incumbent officeholder’s future candidacy.”

The regulation is currently structured to specify which expenses qualify as “campaign” expenses and which ones do not. Subdivision (a) specifies the expenses for which campaign funds from the campaign account for election to a future office *must* be used. Subdivision (b) provides for the use of funds for mixed purposes; thus, officeholder expenses may be paid from either the officeholder’s campaign account established for the election to his or her current office or from a campaign bank account established for a future election.

Interested persons suggested that Proposition 34 did not limit nor change how candidates

“spend” campaign funds. However, this argument is contradicted by the fact that Section 85316 has been construed by the Commission to allow campaign funds raised after an election to be used only for the payment of debt. Moreover, this argument ignores that Proposition 34 presents a new statutory scheme and that amendments added by Proposition 34 provide the Commission more than ample authority to revisit its policy interpretations on this issue. For example, Proposition 34 amended the Act’s trust provision in Section 89510(b), which deals with the use of campaign funds. It provides that campaign funds are held in trust for purposes set forth in Chapter 5 (Sections 85100 – 85802). One of the statutes in Chapter 5 is Section 85201, the one-bank-account rule.

In addition, as noted in staff’s July 2001 memorandum, Proposition 34 is explicitly a “per election” system. The limits of Proposition 73 were based on a fiscal year system. Under a “per election” system, all contributions received by a committee established for a specific election are subject to contribution limits. (Sections 85301 and 85302.) However, a per election contribution scheme functions properly only if *all* the funds coming into the account are subject to these limits. Consequently, Proposition 34 requires that funds “transferred” into the committee be attributed to specific contributors so that no contributors make contributions to a candidate *for* a specific election in an amount that exceeds the statutory limits. (Section 85306.)

Thus, the rule in Regulation 18525 creates an apparent conflict with Proposition 34’s contribution limits. Funds will be raised into a committee within the limits and expended within the limits. However, expenditures could also be made from another source (the future campaign committee) to benefit the candidate as a current officeholder.

Example: Assemblymember Jones was elected in 2010. Mr. Smith and XYZ Corporation made maximum contributions to the assembly member’s 2010 committee for his 2010 election to office. Assemblymember Jones has only debt left in his 2010 account.

Assuming that as an incumbent he will have a greater number of contributors to his 2012 campaign, Assemblymember Jones establishes his 2012 committee. Mr. Smith and XYZ Corporation make maximum contributions to the assembly member’s 2012 committee. Assemblymember Jones expends these funds to buy advertising time thanking the voters for electing him to office in 2010. Has Assemblymember Jones violated the contribution limits of Proposition 34?

The answer may depend on whether the Commission sees Proposition 34 as concerned primarily with limiting contributions on a per-election basis or as concerned with limiting both contributions and expenditures. Interested persons believe that Regulation 18525 should be retained and candidates allowed to make expenditures for officeholder purposes from a committee for future election to office.

However, the “officeholder” issue may not be an issue that can be resolved solely in the context of Regulation 18525. As also noted previously, under Proposition 73, a successful candidate would simply use his or her existing campaign account to pay campaign debts and officeholder expenses during that term of office. This was the framework under which

Regulation 18525 was developed and adopted. Proposition 34 changed the law with respect to these current office committees by prohibiting post-election fundraising, except for the payment of debt. Thus, Proposition 34 in effect nullifies one aspect of Regulation 18525, the use of funds in a current election account for officeholder expenses, except under two scenarios: (1) Where the committee has no debt and only surplus funds which were raised prior to an election; (2) Where the committee has more funds remaining after the election than debt.

With respect to these two scenarios, nothing in Proposition 34 prohibits the use of campaign funds for officeholder expenses. In addition, the Commission has previously adopted Emergency Regulation 18536 detailing the attribution process under Section 85306 where candidates transfer funds among their own committees.⁴ Under such circumstances, the candidate may transfer funds back from his or her future election account to the candidate's prior election account and use these funds either for officeholder purposes or to pay debt. This system of transfer (in contrast to the cross spending allowed by Regulation 18525) with attribution⁵ may be the preferred method because it ensures that the contribution limits of the Act are complied with and that the expenditures are made from the correct committee and bank account. This may be an option that can be utilized to deal with the officeholder dilemma without the utilization of Regulation 18525.

In light of this background, staff presents two options.

Regulation 18525, Option 1: *One option is to make Regulation 18525 inapplicable to candidates for elective state office or statewide elective office.* Without Regulation 18525, expenditures for the 2010 election and associated officeholder expenses may only be made from the 2010 committee. This can be accomplished by simply inserting language into the existing regulation excluding candidates for elective state office or statewide elective office from its coverage.

However, if the Commission chooses this course, it may be the case that some incumbents will not be able to raise funds prior to an election for officeholder expenses. If these are "termed out" and have no future election committee open for fundraising, this is a problem. For example, in any case where there is debt in the 2010 committee, fundraising is capped by the amount of debt and any money raised after an election must be used to pay for debt. No funds will be available in the 2010 account to pay for officeholder expenses.

Another problem in rejecting the Regulation 18525 approach for candidates for elective state office or statewide elective office is that some determination will need to be made as to how candidates attribute "mixed purposes" expenditures to a specific committee. Due to this practical difficulty, the staff does not view this to be a viable option.

⁴ Note that a ban on intra-candidate transfers, even to an old committee, may raise legal questions: "We agree with the district court that the ban on intra-candidate transfers operates as an expenditure limitation because it limits the purposes for which money raised by a candidate may be spent. Expenditure limitations are subject to strict scrutiny and will be upheld only if they are 'narrowly tailored to serve a compelling state interest.'" (*SEIU* (1992) 955 F.2d 1312, 1322.)

⁵ This may require clarifying changes in Regulation 18536.

Regulation 18525, Option 2: *The Commission may choose to maintain the status quo, with only changes to the regulation necessary to fit it to candidates for elective state office or statewide elective office.* Option 2 keeps the rules applicable to local candidates and officeholders intact. Draft language is attached which shows the changes proposed. For example:

Proposed subdivisions (a)(5) and (a)(6) have been added to the list of expenditures that must be made from a future election account. Subdivision (a)(5) simply provides that if the expenditure is subject to Proposition 34's expenditure limits, it must be made from the future campaign committee. Any other result would circumvent these expenditure limits. Subdivision (a)(6) adds language concerning a recurring question staff receives regarding which account contributions to other candidates should be made. Adding subdivision (a)(6) would mean that the Commission chooses to categorize contributions to other candidates to always be considered a "campaign" expense.

Proposed subdivisions (c) and (d) tie the application of the regulation to candidates for elective state office and statewide elective office.

Proposed subdivision (e) alerts the reader to the application of the "personal use" rules of the Act, which also govern the use of campaign funds.

Similarly, proposed subdivision (f) alerts the reader that this regulation has no application to postelection fundraising, but rather deals only with funds held by a committee that has no debt and only surplus funds, or committees that have more funds remaining after the election than debt.

Regulation 18525, Option 2(a): The Commission should be aware that under this approach, certain candidates may continue to be without funds for officeholder expenses. For example, even where Regulation 18525 applies to candidates for elective state office or statewide elective office, candidates in their final term of office with debt in their election committee may not be able to use any other committee to pay officeholder expenses for that final term. Regulation 18525 is limited to reelection to the same office, i.e., officeholder expenses may be made from an account established to elect or reelect an official to an office. (See, *Statham* Advice Letter, No. A-90-064.) An officeholder may be able to transfer funds into a committee from another committee subject to other provisions in the Act and implementing regulations, but some officeholders may not have funds to transfer and will be unable to raise funds except to pay for debt. The Commission may wish to resolve this "officeholder" dilemma in a different regulation or recommend a legislative amendment to address this issue.

Decision Point 3 – Section 85317.

The Commission is provided two regulatory options for interpreting Section 85317, the "carryover" provision

Section 85317 poses an interrelated dilemma. 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

office.” As noted previously, the scope of this section is unclear and yet has wide-ranging effects. At the July 2001 Commission meeting, the Commission tentatively considered several alternative interpretations of Section 85317. The Commission instructed staff to return at this meeting with regulatory language. New Regulation 18537.1 is intended to interpret Section 85317. The Commission has been given two options.

- 1. Regulation 18537.1, Option 1:** The first option recognizes that Section 85317 allows the “carryover” 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 election may be carried over to a special runoff election for the same office.

Staff prefers this option since it best reflects the apparent intent of the voters without doing violence to the per election limits of Proposition 34. 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. Section 85317, being an exception to that preferred rule, should be construed narrowly.

- 2. Regulation 18537.1, Option 2:** Option 2 presents a more expansive construction of the statute and would allow the “carryover” of contributions, without attribution, from any committee established for an election to state elective office. However, because these funds are not subject to attribution, certain limiting factors have been placed in the regulation. For example, subdivision (b) requires the payment of net debt prior to the carryover of the funds. Subdivision (c) reaffirms the rule as set forth in Section 85316 that the committee may accept no new contributions. Finally, subdivision (d) would require termination of the committee upon carryover of the funds.

While this construction has arguable support in the statutory language, it appears inconsistent with the overall intent of the proposition to limit campaign contributions on a per election basis and to require attribution of transferred contributions. Interested persons favored this latter approach.

IV. Summary of Decision Points

Decision Point 1 – Redesignation.

(a) In light of the passage of Proposition 34, should candidates subject to Proposition 34 be required to establish new committees/bank accounts for each election to each term of office?

If the Commission determines candidates subject to Proposition 34 should be required to establish new committees/bank accounts for each election to each term of office, as defined in newly proposed Regulation 18520, the Commission should approve the proposed regulatory changes: add Regulation 18520, and amend Regulations 18521, 18523 and 18523.1. The Commission should separately consider Regulation 18525.

If the Commission determines that it prefers to codify the “redesignation” rule instead to allow candidates to redesignate their committees/bank accounts for their reelection to the next

term of the same office, the Commission should instruct staff to return with language to codify that rule. Staff would recommend that such rule should only be allowed when a candidate has no debt outstanding for his or her election to office.

(b) Should the same rules apply to local candidate controlled committees?

The staff would not recommend any changes to rules impacting local candidates and officeholders. The proposed changes discussed above will not change the local rules. If the Commission chooses to codify the “redesignation” rule, the proposed language should apply to all candidates and officeholders.

Decision Point 2 – Election Candidates’ Campaign and Officeholder Expenses.

The issue before the Commission with respect to Regulation 18525 is whether the Commission wishes to repeal the less burdensome rule of Regulation 18525 that allows officeholder expenses to be paid from either a current or future campaign account. The Commission is provided two options. Option 1 is to make the regulation inapplicable to candidates for elective state office or statewide elective office. Option 2 allows the Commission to leave Regulation 18525 intact, separating the local issues from the state candidates. The staff recommends Option 2. Option 2(a) asks the Commission to determine whether it wishes to consider separately remaining issues concerning “termed out” candidates.

Decision Point 3 – Section 85317.

The Commission is provided two regulatory options for interpreting Section 85317, the “carryover” provision. Staff recommends Option 1.

Attachments

Proposed Regulations 18520 and 18537.1

Regulations 18521, 18523, 18523.1 and 18525

1 Adopt 2 Cal. Code Regs. Section 18537.1:

2 **18537.1. Carryover of Contributions.**

3 **OPTION 1:**

4 (a) For purposes of Government Code section 85317, “subsequent election for
5 the same elective state office” refers to:

6 (1) The “general election” as defined in Elections Code section 324, which is
7 subsequent to the “primary election,” as defined in Elections Code section 341.

8 (2) The special runoff election, which is subsequent to the “special election,” as
9 defined in Elections Code section 356.

10 **OPTION 2:**

11 For purposes of Government Code section 85317, “carry over” refers to the
12 transfers of funds between a candidate’s own controlled committees without attribution
13 as required by Government Code section 85306(a). “Carry over” is only allowed under
14 the following circumstances:

15 (a) Contributions raised by a candidate in connection with any election to elective
16 state office may be carried over and deposited into a campaign bank account established
17 for re-election of that candidate to the same elective state office and may be used for
18 campaign expenditures incurred in connection with that subsequent election. Funds
19 carried over are not subject to the attribution required by Government Code section
20 85306(a).

21 (b) A candidate for elective state office may not carry over contributions pursuant
22 to subdivision (a) until all net debt for the prior election is extinguished. Funds left over
23 after the extinguishing of net debt may then be carried over pursuant to subdivision (a).

1 (c) Contributions for an election to elective state office may not be accepted by a
2 candidate for elective state office after the date of the election, except as permitted by
3 Government Code section 85316.

4 (d) Upon payment of debt pursuant to Government Code section 85316 or the
5 carryover of remaining funds pursuant to Government Code section 85317, campaign
6 committees and bank accounts for the prior election will be terminated pursuant to
7 Government Code section 84214 and California Code of Regulations, Title 2, sections
8 18404 and 18404.1.

9 NOTE: Authority cited: Section 83112, Government Code.
10 Reference: Sections 84214, 85316 and 85317, Government Code.