



STATE OF CALIFORNIA
FAIR POLITICAL PRACTICES COMMISSION
1102 Q Street • Suite 3050 • Sacramento, CA 95811
(916) 322-5660 • Fax (916) 322-0886

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

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

Subject: Disposition of Contributions after Election to Office in Primary Election, Proposed Amended Regulation 18537.1.

Date: April 15, 2024

Executive Summary

Staff presents for adoption three options for the amendment of Regulation 18537.1 concerning the disposition of general election contributions when a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election.

Sections 85306, 85317 and 85318 of the Political Reform Act (Act)¹ address the transfer, carry over, and return of campaign funds after an election. Section 85306 generally permits a candidate to transfer campaign funds after an election from one controlled committee to another controlled committee but requires that the transferred funds be attributed to specific contributors. Section 85317, as interpreted in Regulation 18537.1, operates as an exception to the general rule in Section 85306 and permits the “carry over” of campaign funds from a candidate-controlled committee to that candidate’s committee for the next election to the same office. Regulation 18537.1 does not require attribution to specific contributors for the carry over of contributions after a general election. Section 85318 permits raising general election campaign funds during the primary election. However, the candidate may use these funds only for expenditures associated with the general election. Upon the defeat of the candidate, Section 85318 requires the candidate to return general election funds to contributors on a pro rata basis. Both Section 85306 and Section 85317 presume the candidate ran in the general election, so they do not address the situation where a candidate is elected to office by receiving a majority of votes in the primary election, without advancing to the general election, nor does Section 85318 or Regulation 18531.2. Staff recommends specifying in regulation what a committee can do with funds in this situation and has identified three options for the Commission’s consideration.

Staff presented this proposal to the Commission for pre-notice discussion at its August 2023 meeting. It was also discussed at the March Commission meeting. The original proposal also included amendments to Regulation 18531.1, which would have clarified the applicable requirements for return or transfer of general election contributions when a candidate withdraws

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.

from the primary election. However, in light of the fact that that the Legislature is now considering a proposal that would address that issue statutorily, SB 948, the Commission voted in March to postpone any potential action on that amendment until the September meeting, after the legislative session had ended. So the only regulatory change before the Commission currently is the question of the appropriate disposition of general election funds when a candidate wins office in the primary election.

Reason for Proposed Regulatory Action

Although existing regulations address the return, transfer, and carry over of contributions, the Legal Division has found that the existing regulations do not address a specific, narrow scenario relating to campaign contributions; where a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election. Staff presents this issue for the Commission’s determination, so that it may determine which of three statutes should apply when a candidate is elected to office outright in a primary election and does not participate in a general election. The Legal Division has received advice requests on this issue on previous occasions and anticipates it will come up again, so staff recommends addressing this in regulation to provide clear and consistent rules.

Background

While typically election to office requires a candidate to be successful in both a primary and general election, some offices can be won at a primary election, particularly at the local level. Under Elections Code Section 8140, “[a]ny candidate for a nonpartisan office who at a primary election receives votes on a majority of all the ballots cast for candidates for that office shall be elected to that office.” This provision of the Elections Code does not apply to charter cities and counties however, some of these jurisdictions have enacted similar ordinances.² Several others have implemented ranked-choice, or “instant runoff,” voting for specified local offices. This eliminates the need for separate runoff elections, and results in a single general election held for these offices, as opposed to separate primary and general elections. For State offices, candidates running for State Superintendent of Public Instruction or candidates for voter-nominated offices in special elections can win outright by getting a majority of the vote in the primary election.³

Existing statutes and regulations do not explicitly indicate what a winning candidate can do with funds raised for the general election in which the candidate will not need to run.

² For example, Section 108(a) of the City of Los Angeles Elections Code provides that “[i]n the event that any candidate receives a majority of the votes cast for an office at the Primary Nominating Election, that candidate shall be elected to the office.”

³ See SOS website, Primary election in California: <https://www.sos.ca.gov/elections/primary-elections-california> Proposition 14, passed in 2020 to create the “Top-Two Open Primary Act” added Cal. Const. art. II, § 5 also specifically amended Cal. Const. art. II, § 6 to add the Superintendent, so that the provision now reads “[a]ll judicial, school, county, and city offices, *including the Superintendent of Public Instruction*, shall be nonpartisan.” (Emphasis added.)

Section 82022 defines “election” as: “... any primary, general, special or recall election held in this state. The primary and general or special elections are separate elections.” The Act’s contribution limits apply on a per election basis. (Section 85301.) Accordingly, a person may contribute up to that applicable limit to a candidate for the primary, and make another contribution up to that limit for the general election. Although contribution limits apply on a per election basis, Section 85318 permits a candidate for elective state, county, or city office to raise general election campaign funds prior to the primary election for the same office provided the candidate sets aside these contributions and uses these contributions for the general election. The apparent reason for this allowance is as a matter of convenience for candidates, as well as contributors who often write a single check to make contributions for both a primary and general election. However, Section 85318 requires a candidate who is unsuccessful in the primary election to return general election contributions to contributors. The requirements of Section 85318 serve the purpose of preventing candidates defeated in a primary election from circumventing the Act’s contribution limits by using general election funds raised during the primary election, which would otherwise exceed the primary election’s applicable contribution limits, for purposes unrelated to the general election.

Sections 85306 and 85317 on the other hand set forth parameters within which candidates are permitted to transfer and carryover funds raised for one election to a committee established for another election. 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 using either a “last in, first out” or “first in, first out” accounting method. Funds may not be transferred if the funds attributed to a specific contributor exceed the contribution limits of Section 85301 or 85302 when aggregated with all other transfers attributed to, and contributions from, the same contributor. Section 85317 makes an exception to the attribution requirement in 85306 when the candidate is shifting funds to a committee set up in connection with a subsequent election to the same office. Under these circumstances, no attribution is required, and limits do not apply.

However, the three statutes concerning the return of contributions, transfer of contributions, and carrying over of contributions do not specifically address what a candidate may do with general election funds when the candidate is elected to office by receiving a majority of votes in the primary election.⁴ Staff has identified three possible options for interpreting existing law in the circumstance where a general election is not required: (1) permit carry over of general election funds pursuant to Section 85317; (2) permit transfer of general election funds with attribution to contributors and subject to contribution limits pursuant to Section 85306; or (3) require the return of the general election funds to contributors pursuant to Section 85318.

⁴ Proposition 34 created contribution limits, and most of the discussion in the Voter Information Guide for the 2000 General Election focused on contribution limits, disclosure requirements, and penalties for violations. There is a mention of prohibitions on campaign fund transfers, but nothing that provides insight into any express intent as to the matters currently before the Commission.

Proposed Regulatory Options

Staff proposes adding a new subdivision (d) to Regulation 18537.1, addressing the transfer of campaign funds when a candidate is elected to office at the primary election without advancing to the general election. The issue for the Commission's consideration is whether this amendment would require the return of general election funds to contributors, or permit the candidate to retain the funds either by carrying over the contributions without attribution, or transferring with attribution. The three regulatory options are as follows:

Option 1: Carry Over without Attribution

Under this option, when a candidate is elected to the office without advancing to the general election, funds raised for the general election may be transferred, without attribution, to a committee for subsequent election to the same office. This would include these funds with the attribution exception of Section 85317, and permit a candidate elected at the primary election to "carry over" contributions for the general election as if the candidate had run in, and won, the general election. By treating an outright win in a primary as the equivalent of winning in a general election, this approach permits a candidate to carry over funds without attribution and, therefore, without regard for contribution limits. Under these circumstances, the candidate would still shift funds to a committee set up in connection with a subsequent election to the same office, and the exception found in Section 85317 would apply.

Specifically, for this option, staff offers the following language as new subdivision (d) to Regulation 18537.1, to address the transfer of remaining primary election funds where a candidate is elected to office in the primary election without advancing to the general election:

If a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, the remaining campaign funds may be transferred to a committee for a subsequent election to the same office without attributing funds to specific contributors.

Option 2: Transfer with Attribution

Under this option, when a candidate is elected to the office without advancing to the general election, funds raised for the general election may be transferred to a committee for subsequent election to the same office. However, these contributions would not be exempt from attribution under the exception created in Section 85317 and the attribution requirements of Section 85306(a) would apply. This approach ensures that contributions will be attributed to a specific contributor, and thus the applicable contribution limits for the subsequent election will not be exceeded. Requiring the attribution of transferred funds is also consistent with Section 85306 and Regulation 18536, and contribution limits specified in Section 85301.

For this option, staff proposes adding the following language as new subdivision (d) to Regulation 18537.1 to address the transfer of both the remaining primary election funds, and general election contributions where a candidate is elected to the office in the primary election

without advancing to the general election:

If a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, the remaining campaign funds raised for the primary election may be transferred to a committee for a subsequent election to the same office without attributing funds to specific contributors. Funds raised for the general election may be transferred to a committee for a subsequent election to the same office but shall be attributed to specific contributors as provided in Section 85306 and Regulation 18536.

Option 3: Return of Contributions

Under this option, when a candidate is elected to the office without advancing to the general election, funds raised for the general election must be refunded under Section 85318, consistent with other instances where a committee raises funds for a general election but does not ultimately run in the election.

Under existing law, a candidate does not get to keep general election funds when the candidate does not run or withdraws from a general election, regardless of why the candidate did not run in the general election. Requiring the return of contributions received for use in a general election in which a candidate did not participate, as the result of having been elected to office in the primary election, is consistent with 85318(a); which provides a narrow exception to the Act's contribution limits that allows a candidate to receive contributions for a general election before the primary election for the same elective office but only "if the candidate sets aside these contributions and *uses these contributions for the general election...*" (Emphasis added.)

For this option, staff proposes adding the following language as new subdivision (d) to Regulation 18537.1 to address the transfer of both the remaining primary election funds, and the return of general election contributions where a candidate is elected to office in the primary election without advancing to the general election:

If a candidate receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, the remaining campaign funds raised for the primary election may be transferred to a committee for a subsequent election to the same office without attribution, while funds raised for the general election must be refunded under Section 85318 and Regulation 18531.2.

In addition to the proposed language addressing the return of general election contributions when the candidate does not run or withdraws from a primary election, for Option 3, staff also proposes adding additional language to existing subdivision (a) of Regulation 18531.2, that requires a candidate who receives a majority of the votes cast for an office at the primary election, so that the candidate is elected to the office without advancing to the general election, to return the general election contribution.

Staff recommends Option 3 because it provides an appropriately narrow interpretation of the exception in 85318 permitting receipt of general election funds before a primary “if the candidate sets aside these contributions and uses the contributions for the general election” and is consistent with the rules governing what a committee may do with general election contributions in the other instances where a candidate does not run in a general election.

Public Comment

Staff received public comment from the California Political Attorneys Association on the draft regulations shortly before they were presented for pre-notice discussion at the August Commission meeting. These comments expressed a preference for the regulatory option allowing candidates who win outright in the primary election to carry over funds raised for the general election without attribution.

Education/Outreach Efforts

Staff will distribute the amended regulation to interested parties via the Newly Adopted, Amended or Repealed Regulations email list, update the “Newly Adopted, Amended or Repealed Regulations” page on the Commission’s website, and make necessary updates to training and educational materials resulting from the regulatory changes. Further, staff will reach out to city and county elections officials to ensure they are aware of the new and amended regulation.

Conclusion

The proposed amendment would clarify the rules for the disposition of general election funds when a candidate wins office in a primary election. Staff recommends Option 3; however, any of the three options would be beneficial in providing a clear, definitive rule in instances where a candidate wins office in a primary election.

Attachments:

Proposed Option 1: Carry Over without Attribution

Proposed Option 2: Transfer with Attribution

Proposed Option 3: Return of Contributions