California Fair Political Practices Commission

MEMORANDUM

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

From: John W. Wallace, Assistant General 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, and 18537.1.

Date: October 2, 2001

I. INTRODUCTION

At the July and August 2001 Commission meetings, the Commission considered several issues related to the "one-bank-account" rule of Proposition 73. At the August meeting, the Commission made several preliminary decisions, which Commission staff has implemented through regulatory language contained herein. Several issues remain unresolved. Staff has attempted to provide the Commission a broad range of options on these remaining items. The issues are organized (both in the memorandum and in the attached draft language) as follows: Issue 1, Carryover Issues (Section 85317); Issue 2, Redesignation (Section 85200).

In August, the Commission was also presented options with respect to the application of Regulation 18525 to candidates and incumbents in elections for elective state office. However, the Commission was unable to consider these items in part because discussion of the scope of Regulation 18525 must take into account decisions made on "carry over" and redesignation. Staff has separated the consideration of Regulation 18525. Currently, Regulation 18525 applies to all candidates.

II. BACKGROUND

In June 1988, Proposition 73 was approved by the voters as amendments to the Political Reform Act (the "Act").[1] Among other things, Proposition 73 enacted section 85201[2], which required that all contributions or loans made to a candidate, or to the candidate's controlled committee, had to be deposited into a single campaign bank account. This section came to be known as the "one-bank-account" rule. The important impacts of this rule are as follows:

- Section 85201 provided that all contributions or loans made to a candidate, or to the candidate's controlled committee had to be deposited in a single campaign bank account.

- Section 85201(e) provided that all campaign expenditures had to be made from the appropriate campaign bank account.

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

[2] This section has been amended several times since the adoption of Proposition 73. Pertinent differences between the Proposition 73 language and the current language will be noted.

- Section 85202(b)[3] provided that contributions deposited into the campaign account must be used only for expenses associated with the election of the candidate to the specific office which the candidate intended to seek or expenses associated with holding that office.

The Commission adopted this approach in December 1988 when it considered and adopted Regulations 18520, 18521, and 18522.[4] The November 30, 1988 memorandum stated: "Proposed Regulation 18520 provides that in a statement of intention a candidate must name a particular election for a specific office. This provision furthers the purposes of the Political Reform Act and Proposition 73 by limiting an incumbent's ability to stockpile contributions and thereby also reducing campaign expenditures by incumbents and challengers." (Emphasis in original.)

Numerous other regulations were enacted in order to effectuate 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.

As conceived, Proposition 73 prohibited a candidate from transferring contributions directly or indirectly among his or her various campaign bank accounts.

On September 25, 1990, the United States District Court in *Service Employees International Union, AFL-CIO, et al. v. Fair Political Practices Commission* invalidated portions of the Act added by Proposition 73, including the fiscal year contribution limitations and the ban on inter and intra candidate transfers. However, despite a candidate's ability to transfer campaign funds among his or her own campaign bank accounts, the "one-bank-account" rule continued to prohibit more than one bank account per election. For example, in 1999 we advised the Oakland City Attorneys' Office that the officeholder account provisions of the Oakland ordinance conflicted with requirements of state law because the Oakland ordinance permitted candidates to set up (1) a campaign committee and campaign bank account, (2) a separate officeholder account and (3) a legal defense fund account in connection with the same election. We advised "the one bank account rule is currently interpreted to mean that a candidate for elective office may have only one campaign bank account and one controlled committee for each specific election." (*Hicks* Advice Letter, No. I-99-120.)

Senate Bill 34: Sen. Bill No. 34 (2001-2002 Reg. Sess.) made further revision to the statutes considered in this memorandum. Section 85317 was merely amended to correct a typographical error in the text of the statute. The erroneous term "state elective office" has been replaced with the correct term, "elective state office." In addition, section 85318, while not formerly at issue in this memorandum, has been amended to include bank account language which brings the statute into the purview of this agenda item. Specifically, the new language in section 85318 provides: "Notwithstanding Section 85201, candidates for elective state office may establish separate campaign contribution accounts for the primary and general elections or special primary and special general elections." This legislative amendment has been reflected in the proposed regulations to avoid any conflict between the regulation and the amended statute.[5]

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[3] This section has been renumbered to 89510.

[4] Regulation 18521 continues to exist in the form adopted in 1988.

[5] In addition, section 89510, which sets forth the definition of "acceptable contributions," was also amended

III. SPECIFIC REGULATORY CHANGES

ISSUE 1 – SECTION 85317.

If the "one-bank-account" rule in the context of "per election" contribution limits creates a closed system with respect to fundraising and expenditure of funds, new section 85317 creates a breach with this system. As the Commission is aware, section 85317 provides:

> "Notwithstanding subdivision (a) of Section 85306, a candidate for elective state 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."

Section 85306(a) provides:

> "A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate. Contributions transferred shall be attributed to specific contributors using a 'last in, first out' or 'first in, first out' accounting method, and these attributed contributions when aggregated with all other contributions from the same contributor may not exceed the limits set forth in Section 85301 or 85302."

At the August 2001 Commission meeting, two versions of interpretative regulation 18537.1 were presented. The first version recognized that section 85317 allows the "carry over" of contributions to a "subsequent election for the *same elective state office*." Under this option, funds raised in a primary election could be carried over to the general election since these were elections to the "same office" as contemplated by the Act. The second version presents a more expansive construction of the statute and allowed the "carry over" of contributions, without attribution, from any committee established for an election to state elective office to a committee for reelection to that same office. The Commission approved neither approach.

In an effort to gain consensus on this matter, staff explored variations on the two options initially proposed. For example, one suggestion was to construe section 85317's statement that "[n]otwithstanding subdivision (a) of section 85306, a candidate for elective state office may carry over contributions ..." to mean that the carry over without attribution only applied to attribution for contribution limit purposes. Under this approach, attribution could still be required in other contexts, such as reporting or recordkeeping. However, staff has not found any support for this approach in the statutory language or history. While staff believes that there is room for interpretation by this Commission with respect to which elections the carry over rules apply, staff cannot see a way to

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as follows: "(a) A candidate for elective state office may only accept contributions ~~in accordance with the provision set forth~~ within the limits provided in Chapter 5 (commencing with Section 85100). [¶] (b) All contributions deposited into the campaign account shall be deemed to be held in trust for ~~purposes set forth in Chapter 5 (commencing with Section 85100)~~ expenses associated with the election of the candidate or for expenses associated with holding office."

construe the language to require the attribution of carried over contributions for reporting purposes.

Thus, staff has returned with refined versions of the options presented in August and a new third option for the Commission's consideration.

Option A: Option A presents language that was presented to the Commission in August. The first option recognizes that section 85317 allows the "carry over" 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 primary election may be carried over to a special general election for the same office. This is permitted because these are elections to the "same elective office" consistent with the proposed interpretation of the "one-bank-account" rule in Regulation 18520 (the interpretation favored by the Commission in August). Proposed Regulation 18520 would provide that each term of office is a "separate elective state office."[6] Thus, funds raised in a primary election may be carried forward to the associated general election because they are both elections for the same elective state office. Similarly, funds raised in a special primary election may be carried over to a special general election for the same office for the same reason. In addition, a new subdivision (b) has been added to clarify the purpose for the definitions set forth in subdivision (a).

Option B: Option B presents language suggested by Commissioner Knox. It reflects a broader reading of the statute, which would allow carry over in any case where a candidate is running for re-election to the same elective state office. This requires a reading of the term "one" election in section 85317 to mean "any" election. While this construction, including reading it along with "a subsequent election for the same elective state office" is arguably supported by the statutory language, it appears inconsistent with the overall intent of the proposition to limit campaign contributions on a per election basis. "Proposition 34 brings strict contribution limits to every state office." (Ballot Pamp., Gen. Elec. (November 2000) argument in favor of Prop. 34 at p.16.)

In addition section 85317 is an exception to the general rules permitting transfers with attribution. Therefore, it should be construed narrowly (*Julius Goldman's Egg City v. Air Pollution Control District of Ventura County* (1981*)* 116 Cal.App.3d 746).

Option C: Option C is a version presented at the August Commission meeting. Similar to Option B above, it would allow carry over in any case where the candidate runs for re-election for the same elective state office. However, unlike Option B, this option contains limitations. These limitations, for the most part, are reiterations of other statutory restrictions found in Proposition 34.

- **Decisionpoint 1:** Decisionpoint 1 is whether to add subdivision (b) which would prohibit carry over of funds until all net debt for the prior election has been extinguished. This provision effectuates the Commission's earlier decision that contributions *raised* after an election may only be used for payment of net debts outstanding for an election. This rule would be the natural corollary that contributions on hand must be used first to pay net debt, and then anything remaining can be carried over. If this broader interpretation of the carry over regulation is chosen, staff recommends the inclusion of this limitation.

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[6] See also section 82022: " 'Election' means any primary, general, special or recall election held in this state. The primary and general or special elections are separate elections for purposes of this title." Section 82023: " 'Elective office' means any state, regional, county, municipal, district or judicial office which is filled at an election...."

- **Decisionpoint 2:** Decisionpoint 2 is whether to add subdivision (c) which clarifies that the carry over provision applies only to funds on hand and does not authorize fundraising after an election. The question of post-election fundraising is controlled by sections 85316 and 85321, and California Code of Regulations, Title 2, section 18536.1. Staff recommends the inclusion of this limitation.

- **Decisionpoint 3:** Decisionpoint 3 is whether to add subdivision (d) which is simply a cross reference to the new termination rules of section 84214 and California Code of Regulations, Title 2, sections 18404 and 18404.1. Staff recommends the inclusion of this limitation.

Staff Recommendation: Staff continues to recommend Option A which is a more narrow interpretation of the terms used in the statute and is most consistent with the overall contribution limit scheme of Proposition 34. Staff prefers this option because it best reflects the apparent intent of the voters without impacting the closed system created by 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.

ISSUE 2 – REDESIGNATION.

The issue of "redesignation" of committees and/or campaign bank accounts is not an issue of multiple committees for the same election, but rather a question of the procedure to be used to establish a committee for a new election to the same office.

The logic supporting redesignation is that since section 85201 and Regulation 18521 continues to require a separate campaign bank account for each election to a specific office, redesignation simply allows 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. Of course the redesignation rule was created at a time when there were no contribution limits (other than in special elections),[7] no cap on post-election fundraising, and no requirement that funds raised after an election be used only for the payment of net debt.

At the August 2001 Commission Meeting, the Commission favored staff's recommendation that redesignation of committees not be allowed. However, the Commission also asked for a hybrid version of the rule, a "redesignation-allowed-with-limits" approach.[8] Thus, we have two options attached.

Option A: The first option is essentially the same as that presented in August. The Commission favored this option in August. 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

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[7] Even in this context, where committees and accounts were redesignated to become special elections, attribution of funds on hand was required.

[8] Note that under Federal law, a candidate may redesignate a former campaign committee as the principal campaign committee of his or her current campaign and use the excess funds of the previous campaign for the current campaign. (FEC AO 1980–30.)

proposed regulatory changes: the addition of Regulation 18520, and amendment of Regulations 18521, 18523 and 18523.1. Specifically, this consists of:

- **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.

- **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 are required for each specific term of office as set forth in Regulation 18520. The only substantive change to this regulation since August is the addition of a subdivision (b). This subdivision merely reflects the statutory language added to section 85318 by SB 34.

- **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.

- **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. 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.

Option B: At the request of Commissioner Downey to see language implementing a limited redesignation rule, option B has been added. If the Commission determines that it prefers to codify the "redesignation" rule, they may choose Option B. Option B, while maintaining the general "one-bank-account" rule, expressly allows redesignation under limited circumstances. In order to accomplish this, the Commission would adopt all the regulatory changes in Option A. However, the proposed amended Regulation 18521 in Option A should be replaced by the version set out in Option B. The Option B version, in subdivision (c), expressly allows redesignation and sets forth the requirements. The subdivision would only allow redesignation in the case of reelection to the same elective office.

Decisionpoint 4 in Issue 2 is similar to **Decisionpoint 1** under Issue 1 above. Decisionpoint 4 is whether to include subdivision (c)(2) which would prohibit redesignation of committees and bank accounts with net debt. Redesignation would be permitted after the debt is extinguished. This provision again effectuates the Commission's earlier decision that contributions *raised* after an election may only be used for payment of net debts outstanding for an election. This rule simply extends the reasoning to funds on hand as well.

This draft also includes a subdivision (b), which again reflects the change made by SB 34

concerning primary and general elections.

Staff Recommendation: Staff recommends Options A, the option initially selected by the Commission. Staff recommends that candidates be required to open new bank accounts and controlled committees for each election, regardless of whether the candidate is running for reelection to the same office or not. 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 the other regulations being drafted to implement Proposition 34. While it is true that candidates will be required to formalize the process (creating a new bank account and committee for each election and closing the old one rather than going through the fiction of "redesignating" the old account), the actual changes required to implement the new procedure will be minor.

Attachments
Draft regulations

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