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FAIR POLITICAL PRACTICES COMMISSION
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To: Chair Miadich, Commissioners Baker, Wilson, and Wood

From: Dave Bainbridge, General Counsel
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Subject: Prenotice of Proposed Amendments to Regulation 18531 – Return of Excessive Contributions

Date: March 6, 2023

Executive Summary

On September 29, 2022, the Governor signed SB 794 (Glazer) into law. SB 794 codified part of existing Regulation 18531, which permits a committee that receives a contribution over the applicable contribution limit to return the contribution within 14 days without a violation so long as certain parameters are met. SB 794 expanded these parameters and now permits a committee that receives an over-the-limit contribution to avoid violating an applicable contribution limit by attributing the excess amount to a different election if certain criteria are met. Staff proposes amendments to Regulation 18531 to eliminate language that has now been codified, directly address non-monetary over-the-limit contributions, and directly address provisions in the new law that provide for the Commission to promulgate regulations in the context of the new attribution allowance. Staff presents these proposed regulations for pre-notice discussion, with potential adoption proposed for the May 2023 Commission meeting.

Reason for Proposed Regulatory Action

In light of SB 794, current Regulation 18531 needs to be amended to remove old language that is no longer necessary, address the return or attribution of non-monetary contributions and to address notice and confirmation provisions for attribution of over-the-limit contributions to another election, which the legislation directs the Commission to address.

Background

Existing Regulation 18531 allows a committee to return a contribution, or a portion thereof, that exceeds an applicable contribution limit to the contributor if done within 14 days of receipt as long as the committee does not:

- (1) Deposit or allow deposit of the contribution with actual knowledge that the contribution exceeds the applicable limit.
- (2) Make use of the contribution prior to returning it.

Additionally, existing Regulation 18531 provides a definition for “makes use”¹ and provides that a non-monetary contribution that is over the applicable limit may also be returned to the contributor to avoid a violation of the contribution limits either in its original form or in a monetary equivalent. Subdivision (f) of existing Regulation 18531 requires that an over-the-limit contribution that is returned be reported in full on committee campaign reports and statements and the return be reported as an expenditure.

New Section 85319.5 enacted by SB 794 codifies Regulation 18531’s provisions related to return of an over-the-limit contribution and the definition of “makes use”². Additionally, SB 794 provides new provisions allowing not only the return of an over-the-limit contribution, but now allows a committee to attribute the over-the-limit contribution, or a portion thereof, to another election. There are different rules provided for the return or attribution depending on whether there was actual knowledge on the part of the committee that the contribution received was over the limit and whether it was monetary or non-monetary.

Specifically new Section 85319.5(a) provides that a committee that receives an over-the-limit contribution (this would include both monetary and non-monetary) may return or attribute if the following conditions are met:

- (1) The amount in excess of the contribution is returned or attributed within 14 days of receiving the contribution.
- (2) The committee does not deposit or allow deposit of the contribution with actual knowledge that the contribution exceeds the applicable limit.
- (3) The committee does not make use of the contribution prior to returning or attributing it.

New Section 85319.5(b) also provides for return or attribution of an over-the-limit **monetary** contribution that was received with **actual knowledge** that it was over the limit if the following conditions are met:

- (1) The amount in excess of the contribution limit is returned or attributed within 72 hours of receipt, or is returned or attributed on or before the date of the election, whichever is sooner.
- (2) The committee does not make use of the contribution prior to returning or attributing it.

¹Existing regulation 18531(b) provides that a committee makes use of a monetary contribution if, after receiving the contribution, it makes expenditures exceeding what the committee's available cash balance would be had it not received the contribution and any other contributions that exceed the applicable contribution limit.

- (3) The committee does not deposit or allow deposit of the contribution with actual knowledge that the contribution is more than two times the applicable limit.

New Section 85319.5(c) requires a committee that receives an over-the-limit contribution to provide notice to the contributor of the over-the-limit contribution by the applicable deadline for returning or attributing the over-the-limit contribution or a portion thereof but does not provide the format in which this must be done. Staff believes this would best be required in writing so there is a clear record. Section 85319.5(c) also provides that in cases where a committee automatically attributes an over-the-limit contribution to a connected primary or general election as allowed by Section 85319.5(d), (discussed below) the committee must also provide notice to the contributor that their contribution was attributed and that they may request a refund but does not provide what format this must be done or that the same timeline applies for this notice. Staff believes this should be done on the same timeline as the over-the-limit notice and the wording of the statute implies that this notice should be given at the same time as the over-the-limit notice.³ Staff also recommends this be done in writing so there is a clear record.

New Section 85319.5(d)(1) provides that a committee may, in accordance with any regulations adopted by the Commission, request that the contributor attribute in writing a contribution to a different election and Section (d)(2) provides that a committee may, in accordance with any regulations adopted by the Commission, automatically attribute the portion of a contribution that is in excess of the applicable limit between the primary and general elections. Staff proposes amendments to Regulation 18531 to address this direction from the Legislature as described below in the Proposed Regulatory Actions section of this memorandum.

Finally, since the process a committee must follow in returning or attributing an over-the-limit contribution under Section 85319.5 depends on whether the committee had “actual knowledge” of the over-the-limit contribution, staff proposes providing clarification on what constitutes “actual knowledge” of an over-the-limit contribution. At the February 2020 Commission meeting, a Commissioner expressed concern that existing Regulation 18531 permitted a committee to accept a physical check that on its face is over the limit. In response, staff indicated that its interpretation was that the “actual knowledge” limitation in subdivision (a) of existing Regulation 18531 prohibited the acceptance of a physical check that on its face exceeds the contribution limit. The proposed regulatory changes below spell out this “actual knowledge” standard in greater detail.

³ Specifically Section 85319.5(c) states: “By or before the applicable deadline for returning or attributing the contribution, or excess portion thereof, in subdivision (a) or (b), a committee that receives a contribution that exceeds a contribution limit set forth in Section 85301, 85302, 85303, or 85316 shall inform the contributor that their contribution was in excess of the applicable limit. If the contribution was attributed pursuant to paragraph (2) of subdivision (d), the committee shall also inform the contributor that the contribution was attributed and that the contributor may request a refund.”

Proposed Regulatory Actions

Amend Regulation 18531 Subdivisions – Application of Government Code Section 85319.5

In response to new Government Code Section 85319.5, staff proposes amending Regulation 18531 in six substantive ways:

First, subdivisions (a) and (e) of new Section 85319.5 codify all of subdivisions (a) and (b) of existing Regulation 18531. Thus, staff proposes deletion of current subdivisions (a) and (b) of existing Regulation 18531 because they are duplicative of language now in statute. Staff recommends a similar minor update to existing subdivision (d) (proposed new subdivision (c)) to include Section 85316 in the list of applicable contribution limits as this has been included in the new statute.

Second, staff recommends adding a new subdivision (a) to Regulation 18531 addressing language provided in new Section 85319.5(d) that provides that (1) a committee may, in accordance with any regulations adopted by the Commission request that a contributor attribute in writing a contribution to a different election and (2) a committee may, in accordance with any regulations adopted by the Commission, automatically attribute the portion of a contribution that is in excess of the applicable limit between the primary and general elections without permission from the contributor. New Regulation 18531(a) addresses these requirements for monetary contributions attributed per Section 85319.5(a) and (b).

Specifically, staff proposes adding the following language as new subdivision (a) to Regulation 18531 to allow the automatic attribution provided for in Section 85319.5(d)(2) and to require the written confirmation referenced in Section 85319.5(d)(1) to be in writing and be obtained prior to the attribution:

(a) Attribution. A committee that elects to attribute a contribution, or a portion thereof, that exceeds the applicable contribution limit set forth in Section 85301, 85302, 85303, or 85316 to another election pursuant to Section 85319.5(a) or (b) must obtain written confirmation from the contributor that the contribution may be attributed to another election except the committee may attribute a contribution, or a portion thereof, between a primary and general election for the same term of office without obtaining prior permission from the contributor.

Third, staff recommends adding a new subdivision (b) to Regulation 18531, addressing the return or attribution of over-the-limit non-monetary contributions. New Section 85319.5(a) applies to both monetary and non-monetary contributions but does not specifically provide for detailed rules tailored to non-monetary contributions as existing subdivision (c) of Regulation 18531 does for the return of non-monetary contributions. Staff proposes deleting current subdivision (c) and moving those provisions into a new subdivision (b) that addresses Section 85319.5(a)'s rules for return and attribution of over-the-limit non-monetary contributions and additionally adding that non-monetary contributions chosen to be attributed to another election pursuant to Section 85319.5(a) may be attributed either in original form or in a monetary

equivalent. This is the same rule currently applied to the return of over-the-limit non-monetary contributions in existing Regulation 18531(c).

Specifically, staff proposes the following language be added as new subdivision (b):

(b) Non-monetary contributions. A committee that receives a non-monetary contribution whose fair market value, or a portion thereof, exceeds a contribution limit set forth in Section 85301, 85302, 85303, or 85316, may return the non-monetary contribution, or a portion thereof, either in its original form or in a monetary equivalent, or attribute the portion of the non-monetary contribution whose fair market value exceeds the limit to a different election by transferring the monetary equivalent of the contribution to another committee established for a subsequent election. The return or attribution of a non-monetary contribution pursuant to Section 85319.5 must occur within 14 days of receiving a contribution and the committee may not make use of the non-monetary contribution prior to its return or attribution.

Fourth, staff proposes adding language to existing subdivision (f) (which would become subdivision (e)) of existing Regulation 18531 to apply the same campaign reporting rule that is applicable to *returned* over-the-limit contributions, which is to require that a contribution attributed per new Section 85319.5 be reported as a contribution in its entirety on applicable campaign reports and statements if it was deposited and the amount attributed to another election be reported as an expenditure. Specifically, the proposed amendments are in ~~strikeout~~ and underline as follows:

(e) Reporting. A contribution returned or attributed, in whole or in part, under ~~this regulation~~ Section 89519.5, must be reported as a contribution in its entirety pursuant to Chapters 4 and 5 of the Act ~~if if the contribution is deposited in the committee's bank account.~~ the committee deposits the contribution in its bank account. The amount returned must also be reported. The amount returned to the contributor or attributed to another election must be reported as an expenditure. An amount attributed to another committee must be reported by that committee as a contribution from the original contributor and identify the transferring committee as an intermediary pursuant to 84302.

Fifth, staff recommends adding a new subdivision (f) to Regulation 18531, defining what constitutes “actual knowledge” for purposes of attributing a portion of a contribution that exceeds the contribution limit to another election under subdivision (b) of Section 85319.5 as:

- (1) Accepting a check that on its face exceeds the applicable contribution limit; or
- (2) Receiving an electronic payment which, on its own or when aggregated with other payments from the same source during that period, exceeds the applicable contribution limit and was made in response to a solicitation from the committee.

Finally, staff recommends adding a new subdivision (g) to Regulation 18531 that provides clarification of Section 85319.5(c)'s requirement that by or before the applicable deadline for returning or attributing the contribution, or excess portion thereof, a committee that receives a contribution that exceeds a contribution limit must notify the contributor that their contribution was in excess of the applicable limit. If the contribution was automatically attributed pursuant to Section 85319.5(d)(2), the committee must also inform the contributor that the contribution was attributed and that the contributor may request a refund. Staff recommends this notice be in writing and that both notices are sent on the same timeline. Specially staff recommends the following language for new subdivision (g):

(g) Notification. For purposes of Section 85319.5(c), a committee shall be deemed to have “informed” a contributor that their contribution was in excess of the applicable contribution limit if the committee sends written notification to the contributor noting that their contribution exceeded the applicable limit by the applicable deadline for returning or attributing the contribution or excess portion thereof. A committee required to send notification to a contributor that their contribution, or a portion thereof, was automatically attributed under Section 85319.5(d)(2) and that they may request a refund as required by Section 85319(c) must send such notification in writing and at the same time as informing the contributor that their contribution exceeded the applicable limit.

Conclusion

The proposed amendments to Regulation 18531 will help clarify new provisions enacted by SB 794 and provide needed guidance to the regulated community. Staff seeks feedback and input from the public and the Commission at this time and will bring the amendments back to the Commission for adoption at a later meeting.

Attachment

- Proposed Regulation 18531 for Amendment