



FAIR POLITICAL PRACTICES COMMISSION

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August 6, 2003

Mike Morrell
8780 19th Street, #232
Alta Loma, CA 91701

**Re: Your Request for Advice
Our File No. A-03-089**

Dear Mr. Morrell:

This letter is in response to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹

QUESTION

May you transfer to your current committee for California State Senate funds that are left over from your 1998 congressional race and located in your federal committee?

CONCLUSION

You may transfer to your current state Senate committee funds remaining in your federal congressional committee, subject to the attribution requirements of section 85306 and regulation 18536.

FACTS

In 1998, you considered a run for the 42nd Congressional District and raised approximately \$11,000 for that race. There came a point in time when you stopped campaigning but kept your federal campaign committee open. You spent approximately \$2,100 and approximately \$8,900 remains. You have now formed a committee for a state Senate race. You request advice on transferring the campaign funds from your federal campaign committee to your state election committee.

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

ANALYSIS

The Political Reform Act ("Act") regulates California state and local elections, but not federal elections. Candidates for election to federal office are governed by the Federal Election Campaign Act. Accordingly, the Act's definition of "candidate" in section 82007 means a candidate for state or local elective office and specifically excludes federal candidates:

"Candidate" means an individual who is listed on the ballot or who has qualified to have write-in votes on his or her behalf counted by election officials, for nomination for or election to any elective office,² or who receives a contribution or makes an expenditure or gives his or her consent for any other person to receive a contribution or make an expenditure with a view to bringing about his or her nomination or election to any elective office, whether or not the specific elective office for which he or she will seek nomination or election is known at the time the contribution is received or the expenditure is made and whether or not he or she has announced his or her candidacy or filed a declaration of candidacy at such time. "Candidate" also includes any officeholder who is the subject of a recall election. An individual who becomes a candidate shall retain his or her status as a candidate until such time as that status is terminated pursuant to Section 84214. "*Candidate*" does not include any person within the meaning of Section 301(b) of the Federal Election Campaign Act of 1971." (Emphasis added.)

Because committees controlled by candidates for federal office are governed by federal election law, we have not treated them as "recipient committees" under the Act. Committees controlled by candidates for federal office are viewed as "persons"³ for purposes of determining the contribution limits that apply if a federal committee contributes to a state candidate. (See, e.g., *Miller* Advice Letter, No. A-00-242; *Weems* Advice Letter, No. A-91-326; and *Riffenburgh* Advice Letter, No. A-90-761.) For example, a federal committee controlled by a United States Senator may contribute \$3,200⁴ to your state Senate campaign under section 85301(a), the same amount that any other individual or entity may contribute to your campaign.

² "Elective office" means any state, regional, county, municipal, district or judicial office which is filled at an election. (Section 82023.)

³ "Person" means an individual, proprietorship, firm, partnership, joint venture, syndicate, business trust, company, corporation, limited liability company, association, committee, and any other organization or group of persons acting in concert. (Section 82047.)

⁴ This is based on the original \$3,000 contribution limit, as adjusted by Commission regulation for inflation. Since the contribution limit applies separately to both the primary and general election, the total amount any one donor could contribute to a state Senate candidate who succeeds through the primary election would be \$6,400.

However, you are asking about a transfer of funds between two of your own campaign committees. Proposition 34 added a specific provision permitting transfers of funds between a candidate's own "controlled committees." Section 85306(a) states:

"(a) A candidate may transfer campaign funds from one controlled committee to a controlled committee for elective state office⁵ 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." (Footnote added.)

Proposition 34 specifically permits a candidate to transfer funds that he or she may have raised for a local or state race to another state race of the same candidate, subject to applicable contribution limits. For example, a mayoral candidate could use funds from his citywide race to a later race for the state Senate, subject to the state contribution limits.

The intra-candidate transfer provision of Proposition 34 permits a candidate to transfer funds between his or her "controlled committees." A "controlled committee" is defined in section 82016(a) as follows:

"Controlled committee" means a committee that is controlled directly or indirectly by a candidate or state measure proponent or that acts jointly with a candidate, controlled committee, or state measure proponent in connection with the making of expenditures. A candidate or state measure proponent controls a committee if he or she, his or her agent, or any other committee he or she controls has a significant influence on the actions or decisions of the committee."

A "controlled committee" is one that is controlled by a "candidate" which is defined in the Act to exclude federal candidates. Because a federal candidate committee is not considered a "controlled committee" under the Act, section 85306 does not specifically address the question of transfers from an old federal committee of a state candidate to a state committee of the same candidate.

To answer your question, we look to the policy expressed in section 85306 and to the Ninth Circuit Court of Appeals case *Service Employees International Union v. Fair Political Practices Commission* (9th Cir. 1992) 955 F.2d 1312, cert. den. 505 U.S. 1230, which considered the issue of a candidate moving funds between two of his or her own campaign committees. The contribution limits enacted by Proposition 73 (except those applicable to special elections) were struck down because the limits were based on a

⁵ "Elective state office' means the office of Governor, Lieutenant Governor, Attorney General, Insurance Commissioner, Controller, Secretary of State, Treasurer, Superintendent of Public Instruction, Member of the Legislature, member elected to the Board of Administration of the Public Employees' Retirement System, and member of the State Board of Equalization." (Section 82024.)

fiscal year rather than an election cycle, and the court found this would unconstitutionally discriminate against challengers. (*Id.* at 1316-1321.) The Ninth Circuit in *SEIU* affirmed that in the absence of valid contribution limits, a candidate may freely transfer funds between his or her own committees. (*Id.* at 1322.) The court invalidated a provision of Proposition 73 that banned transfers between a candidate's own committees.⁶

The district court found that limitations on a candidate's transfer of campaign funds between committees controlled by the same candidate must be reviewed under the "strict scrutiny" standard applied by the court to limitations on expenditures, rather than under the less demanding standard of review applied to contribution limits. *Service Employees International Union v. Fair Political Practices Commission* (E.D. Ca. 1990) 747 F.Supp. 580, 591. The Ninth Circuit Court of Appeals concurred, stating:

"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.' *Austin*, 110 S.Ct. at 1396." (955 F.2d 1312, 1321)

The intra-candidate transfer ban invalidated in *SEIU* did not specifically involve a transfer from a federal to a state committee. Nevertheless, the holding in the case has been instructive. Specifically, our prior advice in *Miller*, above, when addressing a question and circumstances similar to what you present, found *SEIU* instructive in its discussion of the constitutionally-imposed limits on the Act's limits to associational and other constitutional rights of political contributors. *Miller* concluded that, consistent with our interpretation of Proposition 73's contribution limits applicable to special elections, as upheld in *SEIU*, a state candidate could provide funds from his or her federal candidate committee to his or her state controlled-committee, subject to the attribution requirements of section 85306.

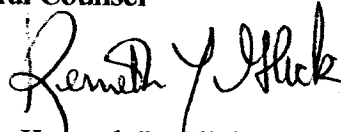
Although the intra-candidate transfer provisions of section 85306 do not expressly apply to your facts, for constitutional reasons similar to those articulated by the court in *SEIU*, we advise, as we did in *Miller*, that these provisions are to be followed with respect to movements of funds from your federal congressional committee to your state Senate committee. Specifically, funds from your old federal congressional committee may be provided to your state Senate committee, subject to the attribution rules of section 85306 and regulation 18536 (copy enclosed). This means that funds must be attributed to the individual donors to your federal congressional committee and each such contribution may only be provided to your state Senate committee if it would not cause a donor to your state Senate committee to exceed the applicable contribution limit under section 85301(a).

⁶ Then section 85304 stated: "No candidate for elective office or committee controlled by that candidate or candidates for elective office shall transfer any contribution to any other candidate for elective office. Transfers of funds between candidates or their controlled committees are prohibited."

If you have any other questions regarding this matter, please contact me at (916) 322-5660.

Sincerely,

Luisa Menchaca
General Counsel

A handwritten signature in cursive script that reads "Kenneth L. Glick". The signature is written in black ink and is positioned to the right of the typed name.

By: Kenneth L. Glick
Counsel, Legal Division

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