



FAIR POLITICAL PRACTICES COMMISSION

428 J Street • Suite 620 • Sacramento, CA 95814-2329

(916) 322-5660 • Fax (916) 322-0886

April 23, 2007

Kelly A. Lawler
Friends of Rick Keene
P.O. Box 984
Willows, CA 95988

**RE: Your Request for Informal Assistance
Our File No. I-07-047**

Dear Ms. Lawler:

This letter is in response to your request, on behalf of Friends of Rick Keene, for advice regarding the campaign provisions of the Political Reform Act (the "Act").¹ Because your request seeks general guidance, we are treating your request as one for informal assistance.²

QUESTION

Assembly Member Rick Keene's controlled Assembly Committee is considering whether to transfer excess funds to a committee Assembly Member Keene has established for a future election to the Senate. Some of the amounts contributed to the Assembly Committee by specific contributors, if transferred in full to the Senate Committee, would exceed contribution limits. Under the transfer rules of Section 85306 and Regulation 18536, is Assembly Member Keene permitted to attribute the excess funds to other contributors and transfer them within the contribution limits to the Senate Committee?

CONCLUSION

Under Section 85306 and Regulation 18536, Assembly Member Keene may transfer the excess funds to his Senate Committee if the funds are attributed to the closest preceding contributor (if using a LIFO accounting method) or to the closest subsequent

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

² Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3), copy enclosed.)

contributor (if using a FIFO accounting method) whose aggregated contributions would not exceed the Act's contribution limits.

FACTS

Assembly Member Keene has funds remaining in his controlled Assembly Committee. You are the treasurer of that committee and are considering transferring some or all of these funds to Assembly Member Keene's controlled Senate Committee for an upcoming campaign. Where a contributor has contributed to both committees, you are aware that the Act prohibits transferring funds if the funds, when aggregated with all other transfers attributed to, and contributions from, the same contributor, exceed the Act's contribution limits at the time of the transfer. However, you ask whether the funds may be attributed to an earlier or a subsequent contributor (depending on the accounting method used) to prevent violating the applicable contribution limits.

ANALYSIS

Section 85306 permits candidates to "transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate." Moreover, Section 85306 requires candidates to attribute transferred contributions using either a LIFO or FIFO 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.

Regulation 18536 outlines the Commission's rules pertaining to the transferring and attribution of contributions and provides in pertinent part:

"(a) A committee transferring funds must designate in its record at the time of its first transfer whether it elects the 'first in, first out' or a 'last in, first out' method of accounting for the current and future transfers. That designation is irrevocable.

(¶)

"(3) Campaign funds shall be attributed to contributors in the lesser of the following amount:

"(A) The actual amount of the original contribution from the person to whom the campaign funds are being attributed;"

"(B) The applicable contribution limit under Government Code [S]ection 85301 or 85302; or

“(C) The amount of campaign funds the committee is seeking to transfer that has not yet been attributed.”

You are aware that Assembly Member Keene’s Assembly Committee is prohibited from transferring funds to Assembly Member Keene’s Senate Committee if the funds exceed the contribution limits applicable to the candidate at the time of the transfer when aggregated with all other transfers attributable to, and contributions from, the same contributor. (Regulation 18536(b).) However, where the amount of funds attributed to a specific contributor exceeds the applicable contribution limits, you ask the more fundamental question of whether the committee is prohibited from ever transferring the excess funds if the excess funds can still be attributed to earlier or subsequent contributors (depending on the selected accounting method).

In a historical context, contributions to candidates for state office were made subject to monetary limits after passage of Proposition 73 in 1988. With the exception of previous Section 85305, the contribution limits of Proposition 73 were challenged as unconstitutional and were permanently enjoined in the ensuing litigation.³ As Section 85305 read at that time, it imposed a \$1,000 contribution limit on special elections.

In striking down Proposition 73, the district court found, and the Ninth Circuit Court of Appeals concurred, that limitations on a candidate’s transfer of campaign funds between committees controlled by the same candidate must be reviewed under the “strict scrutiny” applied by the courts to limitations on candidate expenditures, rather than under the less demanding standard of review applied to contribution limits. (*Service Employees International Union v. Fair Political Practices Commission* (1992) 955 F.2d 1312, 1322.) Underlying the Ninth Circuit’s conclusion is the idea that “contributions are fungible” and that “there is no way to trace particular transfers to particular contributors” (*Service Employees International Union v. Fair Political Practices Commission* (1990) 747 F. Supp. 580, 593.)

Prior to January 1, 2001, and Proposition 34, the Act allowed most transfers of funds between a candidate’s campaign accounts without limits or detailed reporting requirements. The one exception to that rule was the requirement that transfers of funds to a special election committee be “attributed” to specific contributors and subject to the contribution limits in previous Section 85305. However, we permitted the use of any reasonable accounting method to attribute contributions to specific contributors for these special election transfers. (See Memorandum to Commission, “Proposition 34 Regulations: Transfers and Attribution (§85306) – Pre-notice Discussion of Proposed Regulation 18536,” dated April 27, 2001.)

³ Proposition 34 repealed the \$1,000 contribution limit for special elections in previous Section 85305 and introduced new Sections 85301, 85302, and 85314, which limited the amount that any person or small contributor committee may contribute to a candidate for state legislative office including candidates running in special elections for state legislative offices.

Section 85306 and Regulation 18536 derive from Proposition 34 and require attribution at the time of the transfer. To prevent candidates for state legislative office from simply attributing funds, transferred from another of the candidate's controlled committees, to those contributors the candidate finds the least likely to make additional contributions, both Section 85306 and Regulation 18536 mandate a sequential accounting method (either LIFO or FIFO) to attribute contributions. Where funds attributed to a specific contributor (under LIFO or FIFO) exceed contribution limits when aggregated with all other transfers attributed to, and contributions from, that contributor and cannot be transferred, neither Section 85306 nor Regulation 18536 specifically precludes the transferring these funds if the funds are attributed to the next earlier or subsequent contributor (depending on the selected accounting method) whose aggregated contributions would not exceed the Act's contribution limits.

Moreover, we have recognized the "constitutional questions inherent in an overly restrictive interpretation of intra-candidate transfers" under the Act's contribution limits. (*Miller Advice Letter*, No. A-00-242.) As stated above, prohibitions on the intra-candidate transfers of funds must be reviewed under the "strict scrutiny" applied by the courts to limitations on candidate expenditures. Under a "strict scrutiny" analysis, prohibitions on intra-candidate transfers "will be upheld only if they are 'narrowly tailored to serve a compelling state interest.'" (*Service Employees International Union, supra*, 955 F.2d at p. 1322.)

Turning to the idea that contributions are fungible, contributions are deposited into a single common account, and it is impossible to trace the specific contributor from which funds originated in most instances. An interpretation of Section 85306 prohibiting funds from being transferred, when there are other contributors to whom the funds may be attributed, could prohibit transfers even in instances when the funds originated from contributors not exceeding the applicable contribution limits. Because this interpretation may restrict transfers of funds from contributors not exceeding the contribution limits, it is doubtful whether the interpretation could pass constitutional muster.

Given the "constitutional questions inherent in an overly restrictive interpretation of intra-candidate transfers" and taking the historical context of the transfer and attribution rules into consideration, we do not interpret either Section 85306 or Regulation 18536 to prohibit Assembly Member Keene's Assembly Committee from transferring funds to Assembly Member Keene's Senate Committee so long as the funds are attributed to the closest preceding contributor (if using a LIFO accounting method) or to the closest subsequent contributor (if using a FIFO accounting method) whose aggregated contributions would not exceed the Act's contribution limits.

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

Sincerely,

Scott Hallabrin
General Counsel

A handwritten signature in black ink, appearing to be 'BGL', written over a horizontal line.

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl
I:\AdviceLtrs\07-047