



## FAIR POLITICAL PRACTICES COMMISSION

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**This letter SUPERSEDES the *Kaufman* Advice Letter, No. A-06-106.**

January 25, 2010

Edmund G. Brown, Jr.  
291 3<sup>rd</sup> Street  
Oakland, CA 94612

Re: Your Request for Advice  
**Our File No. A-09-276**

Dear Mr. Brown:

This letter responds to your request for advice regarding the campaign reporting provisions of the Political Reform Act (the "Act").<sup>1</sup>

### QUESTION

May you transfer, with attribution, contributions raised for the 2010 general election for the office of attorney general ("Brown for Attorney General") to your campaign committee for the 2010 election for the office of governor ("Brown for Governor 2010 Exploratory<sup>2</sup> Committee")?

### CONCLUSION

Yes. You may transfer funds raised for the Brown for Attorney General committee to the Brown for Governor Exploratory Committee pursuant to requirements under Section 85306. This means that funds must be transferred with attribution as required under Section 85306 and Regulation 18536. In addition, transferred funds are subject to contribution limits specified under Sections 85301(c) and 85302(c), and Regulation 18545.

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<sup>1</sup> The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair Political Practices Commission are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

<sup>2</sup> We note that your facts indicate that the "Brown for Governor 2010 Exploratory Committee" is a controlled committee established for the purpose of your election to the office of California Governor. Therefore, we assume it is your campaign committee for the office of Governor in the 2010 primary and general elections.

## FACTS

You are the current Attorney General of California. You have received contributions for both the primary and general elections into your Brown for Attorney General campaign committee (ID #1292687). The campaign contribution limits for the office of attorney general are \$6,500 each for the primary and general elections.

In October, you established the Brown for Governor 2010 Exploratory Committee, a committee for election to the office of Governor of California (ID #1321867). The limits for a candidate for Governor are \$25,900 each for the primary and general elections.

You would like to transfer funds from your attorney general committee to your California governor exploratory committee. The transfer of funds between your two committees would be made prior to the 2010 primary election (while you are still a candidate for Attorney General). You state that the contributions would be within the primary election contribution limits for the office of governor when aggregated with all other transfers attributable to, and contributions from, the same contributors.

## ANALYSIS

### Primary and General Elections:

Section 82022 defines an "election" as "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."

Therefore, contribution limits apply separately to primary and general elections (Sections 85301 and 85302), even if the primary and general elections are for the same office. Two different contributions up to the applicable limits (one for the primary election and one for the general election) are permitted from each contributor. When reporting contributions received, candidates are required to specifically identify whether the contribution was for the primary or general election. (Regulation 18421.4.)

### Timing:

Section 85318 allows "a candidate for elective state office" to accept contributions towards the general election prior to the primary election. As the offices of the Attorney General and the Governor are elective state offices under Section 82024, you are able to raise funds into a general election account or committee for either office prior to the conclusion of the primary election in 2010.

**Defeat or Withdrawal:**

However, Section 85318 also provides: "If the candidate for elective state office is defeated in the primary election or special primary election, or otherwise withdraws from the general election or special general election, the general election or special general election funds shall be refunded to the contributors on a pro rata basis less any expenses associated with the raising and administration of general election or special general election contributions."

In the *Kaufman* Advice Letter, A-06-106, the Commission advised a candidate for state treasurer that he could *not* transfer with attribution, contributions he raised for the 2006 general election to his campaign committee established for a 2010 election for the same office. The candidate's withdrawal from the 2006 primary election was in effect a withdrawal from the general election and under Section 85318, funds raised for the general election had to be returned to contributors.

You state that you would like to transfer with attribution contributions in your attorney general campaign account raised for the 2010 general election to your campaign committee for the 2010 election for the office of governor. This transfer would occur prior to the primary election, while you are still an active candidate for attorney general. Applying the analysis of the *Kaufman* Letter, *supra*, to your question, it would appear that you would be prohibited under Section 85318 from transferring the funds raised by your committee for the 2010 general election in the attorney general's race to your campaign committee for the 2010 election for governor.

Section 85318 states, in pertinent part, that when a "candidate for elective state office is defeated in the primary election . . . , or otherwise withdraws from the general election . . . ," the general election funds must be returned to the contributors on a pro rata basis. *Kaufman* essentially read Section 85318 to require a candidate to return contributions raised for the general election to a particular office in three situations: (1) when the candidate is defeated in the primary election for that office; (2) when the candidate does not choose to run in the primary election for that office; and (3) when the candidate wins the primary election but withdraws from the general election campaign. *Kaufman*, as does the current advice request, dealt with the second situation above: when the candidate chooses not to run in the primary election for the office for which the general election contributions were raised. Upon closer review of Section 85318, we believe *Kaufman's* application of the section to this situation was incorrect.

Section 85318 makes no mention of a candidate choosing not to run in the primary election. It applies when a candidate is "defeated in the primary election . . . , or otherwise withdraws from the general election . . . ." Had the drafters intended Section 85318 to apply when a candidate withdraws before the primary election, it seems logical they would have stated that. Furthermore, it is difficult to conclude that a candidate who has not even run in the primary election, let alone won it, can "withdraw" from the general election. A more logical reading of Section 85318's requirement to return general election contributions is that it applies only after the candidate has either been defeated in the primary or has won the primary but subsequently withdraws from the general election campaign. This reading is more consistent with the actual

language of Section 85318 and also more consistent with other provisions of the Act applicable to the use of campaign funds. Specifically, Section 85306(a) permits a candidate for elective state office to transfer campaign funds between his or her committees for different elective offices so long as the transfers are attributed to specific contributors to the prior committee and do not exceed the contribution limits for that contributor. Presumably, this section recognizes the constantly shifting fortunes of electoral politics and therefore grants candidates the flexibility to shift their funds to seek another office when the opportunity presents itself. Our revised interpretation of Section 85318 would be consistent with this presumed intent and still preserve the Act's contribution limits.

In addition, we think *Kaufman* has increased, and that our revised interpretation will decrease, the likelihood of candidates engaging in the potentially misleading practice of opening campaign committees for multiple offices simply for the purpose of maximizing their potential contributions for seeking one particular office. The Act does not prevent a candidate from opening more than one campaign committee for a future office and the very liberal transfer provisions of Section 85306(a), subject to attribution and contribution limits as described above, permit the free transfer of funds between these committees. If *Kaufman* were to stand, instead of raising funds for the general election prior to the primary for a particular office, candidates would be encouraged to open campaign committees for more than one office and hold contributions to those committees for eventual transfer and use in the general election to the office they ultimately decide to seek.<sup>3</sup> The revised interpretation will reduce this incentive by not penalizing candidates for raising contributions for the general election to the office they decide to seek and allowing them to transfer the contributions if political conditions change.

In any event, *Kaufman* would not in every case prevent candidates from using contributions raised for a particular general election in an entirely different election. For instance, Section 85318 does not prevent a candidate from continuing to run in a primary election but, under Section 85306(a), transferring, subject to attribution and contribution limits, some or all of the contributions raised for the general election to another of his or her committees formed to run for some future election.<sup>4</sup> In that case, the candidate has not been defeated in the primary election or withdrawn from the general election and Section 85318 would not apply.

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<sup>3</sup> For example, under *Kaufman*, if an incumbent Assembly member who is running again for the same office wanted to keep her options open in case the Senate seat for her district was vacant at the next election, the Assembly member would be in a better position to pursue the Senate seat if she opened a new committee for the Senate seat and raised funds for that instead of raising funds for the general election to the Assembly. If the Senate seat did not open, she could then, under Section 85306(a), transfer the Senate funds to her Assembly committee and use them in the Assembly general election. However, if she instead raised contributions for the Assembly general election and, prior to the Assembly primary, decided to run for the Senate, *Kaufman* would prevent her from transferring any of the general election funds to her Senate committee.

<sup>4</sup> This is not inconceivable, given the number of legislative districts that are widely recognized to be dominated by one political party and where the overwhelming amount of campaign spending is for the primary rather than general election.

Rather than encourage candidate behaviors that seek loopholes and are potentially misleading to the public, we think it better to apply Section 85318 in a focused, sensible way aimed at preventing the use of contributions raised for an election in which the candidate can no longer. For all of the following reasons, we think that Section 85318 does not prohibit a candidate for elective state office who has raised contributions for the general election to transfer those contributions, subject to the provisions of Section 85306(a), to another of his or her committees prior to the primary election.

### **Transfers between Candidate Controlled Committees:**

Section 85306(a) states:

“(a) 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.”

Regulation 18536 specifies the transfer and attribution rules applicable to 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.

{...}

“(e) Transfers made prior to a primary election, when aggregated with all other transfers attributable to, and contributions from, the same contributor, may include amounts that could have been raised for the general election pursuant to

Government Code section 85318, provided the receiving committee complies with the requirements of this section.”

Therefore, the Brown 2010 Attorney General committee may use either the LIFO or FIFO method to transfer contributions raised for the 2010 general election to your Brown for Governor 2010 Exploratory Committee.

However, funds may not be transferred if contributions by 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.

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

Sincerely,

A handwritten signature in cursive script that reads "Scott Hallabrin".

Scott Hallabrin  
General Counsel

SH:jgl