



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
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ADVISORY OPINION 2012-07

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Dear Messrs. Elias and Berkon and Ms. Keane:

We are responding to your advisory opinion request concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to the treatment by Feinstein for Senate (the "Committee") of embezzled contributions. The Commission concludes that if a contributor's previous contribution was either deposited into one of the Committee's accounts, cashed, or otherwise used by the Committee, that contribution counts against the contributor's per-election limit to the Committee and must be added to any new contributions in determining whether the contribution limits have been met. On the other hand, the Commission concludes that, if an attempted contribution was never deposited or cashed, the attempted contribution does not count against the person's per-election limit to the Committee, and the Committee may accept funds from that contributor in place of his or her original attempted contribution. The Commission could not approve a response by the required four affirmative votes as to the appropriate treatment of a contribution from a person whose prior intended contribution was deposited into an account other than one of the Committee's accounts and not used by the Committee.

Background

The facts presented in this advisory opinion are based on your letter received on January 25, your emails received on February 17 and 22, 2012, the Committee's representations at the Commission's Open Meeting on April 12, 2012, supplemental material received on May 1, 2012, publicly available reports filed by the Committee with the Commission, and publicly available court documents.

The Committee is the authorized campaign committee of Senator Dianne Feinstein. From 1992 until September 2011, Kinde Durkee served as treasurer to the Committee. Her responsibilities included maintaining the Committee's bank accounts, receiving and depositing receipts into the accounts, issuing disbursements from the accounts, and filing all required reports with the Commission. Ms. Durkee and her firm, Durkee & Associates, provided similar services for hundreds of political committees and nonprofit organizations. In September 2011, Ms. Durkee was arrested and charged with defrauding a state candidate's committee by mail fraud. On March 27, 2012, Ms. Durkee was charged with five counts of mail fraud, one count of which concerns a report filed for the Committee. On March 30, 2012, Ms. Durkee pled guilty to all five counts. The plea agreement includes a provision that Ms. Durkee will pay full restitution as ordered by the court. The court has not yet sentenced Ms. Durkee.

The Committee represents that it took several precautions to ensure that Ms. Durkee handled its funds properly. Durkee & Associates provided regular financial statements to the Committee, reporting the cash balances in the Committee's accounts and the Committee's receipts and disbursements; these statements were consistent with the Committee's own internal fundraising records. The Committee represents that Ms. Durkee had authority to sign checks written on the Committee's accounts, but did not have authority to approve disbursements. The Committee states that its bills were generally paid on time.

The Committee states that, within the last few months, it learned that Ms. Durkee and her firm embezzled \$4,545,386.12 from the Committee,¹ and funds from other committees.² According to the original Federal criminal information, Ms. Durkee commingled the funds of various political committees and organizations and made repeated unauthorized transfers between accounts on which she had signing authority. As a result of this unlawful activity, the Committee represents that the balance in any given bank account did not accurately reflect the amount of funds rightfully belonging to the committee or organization named as the holder of the account. The Committee represents that Ms. Durkee also transferred funds from her clients' accounts to her firm's accounts without her clients' knowledge or authorization. The Committee represents that Ms. Durkee used the embezzled funds to pay personal and business expenses. According to the March 2012 criminal information, Ms. Durkee caused a loss exceeding \$7 million to her clients, and there were at least 50 victims of her embezzlement scheme.

The Committee represents that, because of Ms. Durkee's commingling of funds, it is not clear at this time whether some or all of the funds currently in the Committee's

¹ In addition to the criminal matter discussed above, a civil action has been instituted against Ms. Durkee by the Committee, among other plaintiffs.

² The Committee represents that Ms. Durkee commingled funds and transferred funds between committees for which she was treasurer and notes that it "continues to face challenges in obtaining access to the Committee's records." *See* Letter from Feinstein for Senate Committee Treasurer to the FEC, October 2011 Quarterly Report Amendment (Dec. 28, 2011).

bank accounts belong to the Committee, nor is it clear whether funds in accounts of other clients of Ms. Durkee in fact belong to the Committee. The Committee's bank froze the Committee's accounts pending the resolution of an interpleader action currently pending in California state court.

The Committee represents that, as a means to conceal her fraudulent activity, Ms. Durkee developed a practice of receiving funds into the Committee's accounts before transferring them to her own accounts. The Committee also represents that some contributions to the Committee may never have been deposited in the Committee's accounts; these undeposited funds may include contributions deposited into non-Committee accounts (*e.g.*, other committees' accounts or Ms. Durkee's accounts) as well as contributions that were never deposited into any account. The Committee represents that it may also have received contributions made by credit card into one or more merchant accounts that Ms. Durkee held to process credit card transactions; these accounts may include a joint merchant account to process contributions made to multiple committees.

The Committee proposes to obtain "replacement contributions" from those persons who contributed in any form, including via check and credit card, during the current election cycle, up to the day of Ms. Durkee's arrest on September 2, 2011, and had their contributions subsequently embezzled from the Committee. To identify persons whose funds were embezzled, the Committee proposes to use a "first in, first out" accounting method ("FIFO"). Under this approach, the Committee would deem its earliest contributions for the 2012 election cycle to have been used for authorized disbursements for the 2012 cycle, until all of its authorized disbursements have been covered.³ The Committee represents that it would "make appropriate refunds" of replacement contributions if it later obtains restitution (in either a civil or criminal action), but does not specify the methodology it would utilize for such refunds.

Questions Presented

- 1. May the Committee accept replacement contributions from contributors whose funds were embezzled by Ms. Durkee, without the contributions counting against the contributors' per-election limits to the Committee?*
- 2. May the Committee accept replacement contributions from contributors whose funds were never deposited into the Committee's accounts, without the contributions counting against the contributors' per-election limits to the Committee?*

³ The Committee represents that, under this method, if it had made, for example, \$1,000,000 in authorized disbursements, it would not seek to resolicit the first \$1,000,000 of contributions received in the 2012 cycle.

Legal Analysis and Conclusions

1. *May the Committee accept replacement contributions from contributors whose funds were embezzled by Ms. Durkee, without the contributions counting against the contributors' per-election limits to the Committee?*

If a contributor's previous contribution was deposited into one of the Committee's accounts, cashed, or otherwise used by the Committee, that contribution counts against the contributor's per-election limit to the Committee and must be aggregated with any new contributions in determining whether the contribution limits have been met.⁴ However, the Commission could not approve a response by the required four affirmative votes as to the appropriate treatment of a new contribution from a person whose prior intended contribution was deposited into an account other than one of the Committee's accounts and not used by the Committee.⁵ If a contribution was never deposited or cashed, the attempted contribution does not count against the contributor's per-election limit to the Committee, and the Committee may accept a new contribution in place of those funds.⁶

The Act provides that "no candidate or political committee shall knowingly accept any contribution . . . in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit and use of a candidate . . . in violation of any limitation imposed on contributions. . . ." 2 U.S.C. 441a(f); *see also* 11 CFR 110.9. The Act's contribution limitations provide that "no person shall make contributions . . . to any candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed \$2,000."⁷ 2 U.S.C. 441a(a)(1)(A); *see also* 2 U.S.C. 441a(a)(2)(A) (establishing \$5,000 limitation for contributions from multicandidate committees); 11 CFR 110.1(b)(1), 11 CFR 110.2(b).

For the purposes of contribution limits, "a contribution [is] considered to be made when the contributor relinquishes control over the contributions. A contributor [is] considered to relinquish control over the contribution when it is delivered by the

⁴ Nothing in this advisory opinion should be interpreted to prohibit the Committee from accepting a new contribution from any contributor who has not reached his or her per-election limit, so long as the new contribution would not exceed the limit when aggregated with prior contributions.

⁵ Because the Commission concludes that the Committee may not accept an additional contribution for one that was deposited in the Committee's accounts without the additional contribution counting against the contributor's per-election limits, the Commission need not address whether the Committee's proposed FIFO accounting method is a permissible method to identify embezzled funds.

⁶ A contribution that does not count against the contributor's per-election limit also would not count against the contributor's biennial aggregate contribution limit.

⁷ This amount is adjusted to account for inflation in odd-numbered years. 2 U.S.C. 441a(c); 11 CFR 110.1(b)(1)(i)-(iii). The contribution limit for 2011-2012 is \$2,500.

contributor to the candidate, to the political committee, or to an agent of the political committee.” 11 CFR 110.1(b)(6). A contribution that is mailed to the candidate, committee, or agent of the committee is considered “made” on the date of the postmark. *Id.* A contribution that is made by credit card is “made” on the date the credit card or credit card number is presented. Advisory Opinion 2008-08 (Zucker); Advisory Opinion 1990-14 (AT&T). Therefore, contributors to the Committee “made” their contributions when they mailed checks to the Committee or when they presented their credit cards or credit card numbers to be charged. Accordingly, under ordinary circumstances, those contributions made to the Committee during the current election cycle would count against the contributors’ aggregate contribution limits. *See* Advisory Opinion 2008-08 (Zucker) (addressing both annual contribution limits and biennial contribution limits).

A committee treasurer is “responsible for examining all contributions received for evidence of illegality and for ascertaining whether contributions received, when aggregated with other contributions from the same contributor, exceed the contribution limitations.” 11 CFR 103.3(b). Within ten days of receipt of a contribution, treasurers may return the contribution to the contributor without having deposited it; otherwise, treasurers must deposit contributions within ten days of receipt. 11 CFR 103.3(a). If, after deposit, the contribution cannot be determined to be from a legal source, the treasurer must refund the contribution within 30 days of the receipt of the deposit or the discovery of the illegality (if not initially apparent). 11 CFR 103.3(b)(1)-(2). Contributions that, on their face or as aggregated, would exceed the contributors’ limit may be deposited, but only if the treasurer requests redesignation or reattribution of the contribution. 11 CFR 103.3(b)(3).⁸

A. Contributions that were Deposited in one of the Committee’s Account(s), Cashed, or otherwise used by the Committee

As stated above, the Commission concludes that the Committee may not seek to replace a contribution that the Committee, through its treasurer, received and deposited in one of the Committee’s accounts,⁹ cashed, or otherwise used,¹⁰ and that the Committee

⁸ The Commission also notes that information about how committees can implement internal controls that may reduce the risk of misappropriation of committee funds is available on the Commission’s website. Internal Controls and Political Committees, http://www.fec.gov/law/policy/guidance/internal_controls_polcmtes_07.pdf. The use of internal controls are not required; however, a political committee that implements internal controls may find protection against a Commission enforcement action for reporting violations under the Commission’s safe harbor policy. *See* Statement of Policy: Safe Harbor for Misreporting Due to Embezzlement, 72 FR 16695 (Apr. 5, 2007), also available at http://www.fec.gov/law/cfr/ej_compilation/2007/notice_2007-9.pdf.

⁹ Any joint merchant account through which the Committee received credit card contributions as described in Advisory Opinion 1999-22 (Aristotle Publishing), is considered a “Committee account.”

¹⁰ A contribution deposited into a non-Committee account for the Committee’s use or in order to provide a benefit to the Committee (for example, to pay for services to be rendered to or procured by the account holder) would be analogous to a cashed check, and is treated, for purposes of this advisory opinion, as a contribution deposited in one of the Committee’s accounts.

did not return or refund, and for which it did not seek redesignation or reattribution, during the relevant time periods. Both the original contribution and any additional contributions would count against the contributor's per-election limit to the Committee.

The Commission has never applied the same reasoning to contributions that were actually deposited in the intended recipient committee's account as it has to circumstances where a committee lost a contribution check. *See* Advisory Opinion 1992-42 (Lewis) (distinguishing contributions that have been deposited into a bank account and subsequently embezzled from those that have not yet been deposited); Advisory Opinion 1993-05 (Fields) (same). To do so would be beyond the Commission's statutory and regulatory authority. *See* 2 USC 441a(f); 11 CFR 102.8(a).

Accordingly, any additional contribution that the Committee accepts from a contributor whose contribution was deposited in one of the Committee's accounts and accepted by the Committee must be aggregated with the contributor's earlier contribution.

B. Contributions that were Deposited in Non-Committee Account(s)

The Commission could not approve a response by the required four affirmative votes as to whether the Committee could accept a contribution from a person whose prior intended contribution was deposited into an account other than one of the Committee's accounts and not used by the Committee without the original intended contribution counting against the contributor's per-election limits under the Act.

C. Contributions that were Never Deposited in any Account or Cashed

In some circumstances, the Commission has allowed committees to accept replacement checks for attempted contribution checks that were sent to a committee but that the committee never negotiated. *See* Advisory Opinion 1999-23 (Arkansas Bankers PAC) (committee never received contribution check mailed to it); Advisory Opinion 1992-42 (Lewis) (committee received ten contribution checks, which it attempted to deposit by mailing to its bank, the deposit never arrived at the bank, and the checks were never negotiated).

Consistent with the opinions cited above, the Commission concludes that, if the Committee is able to determine that one of its intended contributor's funds were never deposited into any account or cashed by the treasurer, the Committee may accept funds from that contributor in place of the original attempted contribution. Since the initial funds were never received by the Committee, they would not count towards the attempted

contributor's contribution limit.¹¹

2. *May the Committee accept replacement contributions from contributors whose funds were never deposited into the Committee's accounts, without the contributions counting against the contributors' per-election limits to the Committee?*

Having addressed all categories of contributions in Question 1, it is unnecessary for the Commission to address Question 2 separately.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's website, or directly from the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

On behalf of the Commission,

(signed)
Caroline C. Hunter
Chair

¹¹ The Committee should report any such contribution as having been made in the year of the originally attempted contribution on Schedule A of its next report covering the period when the new check is received. *See* Advisory Opinion 1999-23 (Arkansas Bankers PAC). The report should include a brief notation explaining the circumstances of the attempted contribution that was never deposited, making reference to this advisory opinion. The Committee should also amend its report on which the attempted contribution was disclosed, to disclose receipt of the new check.

The Committee represents that it faces challenges in obtaining access to its records. The Committee thus may not have enough information at this time to determine that the non-deposit of some contribution checks may be due to Ms. Durkee's embezzlement.