

PUBLIC COMMENTS ON DRAFT ADVISORY OPINIONS

Members of the public may submit written comments on draft advisory opinions.

DRAFT ADVISORY OPINION 2012-07 is now available for comment. It was requested by Marc E. Elias, Esq., Kate Sawyer Keane, Esq., and Jonathon S. Berkin, Esq., on behalf of Feinstein for Senate, and is scheduled to be considered by the Commission at its public meeting on April 12, 2012. The meeting will begin at 10:00 a.m. and will be held in the 9th Floor Hearing Room at the Federal Election Commission, 999 E Street, NW, Washington, DC. Individuals who plan to attend the public meeting and who require special assistance, such as sign language interpretation or other reasonable accommodations, should contact the Commission Secretary, at (202) 694-1040, at least 72 hours prior to the meeting date.

If you wish to comment on DRAFT ADVISORY OPINION 2012-07, please note the following requirements:

- 1) Comments must be in writing, and they must be both legible and complete.
- 2) Comments must be submitted to the Office of the Commission Secretary by hand delivery or fax ((202) 208-3333), with a duplicate copy submitted to the Office of General Counsel by hand delivery or fax ((202) 219-3923).
- 3) Comments must be received by noon (Eastern Time) on April 11, 2012.
- 4) The Commission will generally not accept comments received after the deadline. Requests to extend the comment period are discouraged and unwelcome. An extension request will be considered only if received before the comment deadline and then only on a case-by-case basis in special circumstances.
- 5) All timely received comments will be made available to the public at the Commission's Public Records Office and will be posted on the Commission's website at <http://saos.nictusa.com/saos/searchao>.

REQUESTOR APPEARANCES BEFORE THE COMMISSION

The Commission has implemented a pilot program to allow advisory opinion requestors, or their counsel, to appear before the Commission to answer questions at the open meeting at which the Commission considers the draft advisory opinion. This program took effect on July 7, 2009.

Under the program:

- 1) A requestor has an automatic right to appear before the Commission if any public draft of the advisory opinion is made available to the requestor or requestor's counsel less than one week before the public meeting at which the advisory opinion request will be considered. Under these circumstances, no advance written notice of intent to appear is required. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2).
- 2) A requestor must provide written notice of intent to appear before the Commission if all public drafts of the advisory opinion are made available to requestor or requestor's counsel at least one week before the public meeting at which the Commission will consider the advisory opinion request. This one-week period is shortened to three days for advisory opinions under the expedited twenty-day procedure in 2 U.S.C. 437f(a)(2). The notice of intent to appear must be received by the Office of the Commission Secretary by hand delivery, email (Secretary@fee.gov), or fax ((202) 208-3333), no later than 48 hours before the scheduled public meeting. Requestors are responsible for ensuring that the Office of the Commission Secretary receives timely notice.
- 3) Requestors or their counsel unable to appear physically at a public meeting may participate by telephone, subject to the Commission's technical capabilities.
- 4) Requestors or their counsel who appear before the Commission may do so only for the limited purpose of addressing questions raised by the Commission at the public meeting. Their appearance does not guarantee that any questions will be asked.

FOR FURTHER INFORMATION

Press inquiries: Judith Ingram
Press Officer
(202) 694-1220

Commission Secretary: Shawn Woodhead Werth
(202) 694-1040

Comment Submission Procedure: Kevin Deeley
Acting Associate General Counsel
(202) 694-1650

Other inquiries:

To obtain copies of documents related to Advisory Opinion 2012-07, contact the Public Records Office at (202) 694-1120 or (800) 424-9530, or visit the Commission's website at <http://saos.nictusa.com/saos/searchao>.

ADDRESSES

Office of the Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Office of General Counsel
ATTN: Kevin Deeley, Esq.
Federal Election Commission
999 E Street, NW
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AGENDA DOCUMENT NO. 12-23

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

2012 APR -6 P 4: 21

AGENDA ITEM

April 6, 2012

For Meeting of 4/12/12

SUBMITTED LATE

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
General Counsel

Kevin Deeley *KS*
Acting Associate General Counsel

Amy Rothstein *AR by TL*
Assistant General Counsel

Jessica Selinkoff *JS by TL*
Attorney

Joanna S. Waldstreicher *JSW by TL*
Attorney

Subject: Draft AO 2012-07 (Feinstein for Senate)

Attached is a proposed draft of the subject advisory opinion. We have been asked to have this draft placed on the Open Session agenda for April 12, 2012.

Attachment

1 ADVISORY OPINION 2012-07

2

3 Marc E. Elias, Esq.

DRAFT

4 Kate Sawyer Keane, Esq.

5 Jonathan S. Berkon, Esq.

6 Perkins Coie LLP

7 700 Thirteenth Street, N.W., Suite 600

8 Washington, DC 20005-3960

9

10 Dear Messrs. Elias and Berkon and Ms. Keane:

11 We are responding to your advisory opinion request concerning the application of
12 the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission
13 regulations to the treatment by Feinstein for Senate (the "Committee") of embezzled
14 contributions. The Commission concludes that if a contributor's previous contributions
15 were either deposited in a bank account or cashed, those contributions count against the
16 contributor's per-election limit to the Committee and must be added to any new
17 contributions in determining whether the contribution limits have been met. On the other
18 hand, if a contribution was never deposited or cashed, (*i.e.*, the funds never left the
19 account of the contributor), the Commission concludes that the attempted contribution
20 does not count against the contributor's per-election limits to the Committee, and the
21 Committee may accept replacement contributions for those funds.

22 ***Background***

23 The facts presented in this advisory opinion are based on your letter received on
24 January 25, your emails received on February 17 and 22, 2012, publicly available reports
25 filed by the Committee with the Commission, and publicly available court documents.

26 The Committee is the authorized campaign committee of Senator Dianne
27 Feinstein. From 1992 until September 2011, Kinde Durkee served as treasurer to the
28 Committee. Her responsibilities included maintaining the Committee's bank accounts,

1 receiving and depositing receipts into the accounts, issuing disbursements from the
2 accounts, and filing all required reports with the Commission. Ms. Durkee and her firm,
3 Durkee & Associates, provided similar services for hundreds of political committees and
4 nonprofit organizations. In September 2011, Ms. Durkee was arrested and charged with
5 defrauding a state candidate's committee by mail fraud. On March 27, 2012, Ms. Durkee
6 was charged with five counts of mail fraud, one count of which concerns a report filed for
7 the Committee. On March 30, 2012, Ms. Durkee pled guilty to those five counts. The
8 plea agreement includes a provision that Ms. Durkee will pay full restitution as ordered
9 by the court. The court has not yet sentenced Ms. Durkee.

10 The Committee represents that it took several precautions to ensure that Ms.
11 Durkee handled its funds properly. Durkee & Associates provided regular financial
12 statements to the Committee, reporting the cash balances in the Committee's accounts
13 and the Committee's receipts and disbursements; these statements were consistent with
14 the Committee's own internal fundraising records. The Committee represents that Ms.
15 Durkee had authority to sign checks written on the Committee's accounts only after a
16 disbursement had been approved by designated Committee personnel. The Committee
17 has not provided any information about which Committee personnel had authority to
18 approve disbursements but the Committee represents that Ms. Durkee did not have such
19 authority herself. The Committee states that its bills were generally paid on time.

20 The Committee states that it recently learned that Ms. Durkee and her firm

21

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

12 The Committee represents that, because of Ms. Durkee's commingling of funds, it
13 is not clear at this time whether some or all of the funds currently in the Committee's
14 bank accounts belong to the Committee, nor is it clear whether funds in accounts
15 belonging to other of Ms. Durkee's clients belong to the Committee. The Committee's
16 bank froze the Committee's accounts pending the resolution of an interpleader action
17 currently pending in California state court. The Committee also represents that some

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 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).

1 contributions to the Committee may never have been deposited in the Committee's
2 accounts.³

3 The Committee proposes to obtain "replacement contributions" from those
4 persons who contributed in any form, including via check and credit card, during the
5 current election cycle, up to the day of Ms. Durkee's arrest on September 2, 2011, and
6 had their contributions subsequently embezzled from the Committee. To identify persons
7 whose funds were embezzled, the Committee proposes to use a "first in, first out"
8 accounting method ("FIFO"). Under this approach, the Committee states that it would
9 deem its earliest contributions for the 2012 election cycle to have been used for
10 authorized disbursements for the 2012 cycle, until all of its authorized disbursements
11 have been covered.⁴ The Committee represents that it would "make appropriate refunds"
12 of replacement contributions if it later obtains restitution (in either a civil or criminal
13 action), but does not specify the methodology it would utilize for such refunds.

14 ***Questions Presented***

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

³ These contributions may include contributions deposited into non-Committee accounts (e.g., other committees' accounts or Durkee's business accounts) as well as contributions that were never deposited into any account.

⁴ 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.

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

4 ***Legal Analysis and Conclusions***

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

8 No, the Committee may not accept additional contributions from contributors
9 whose funds were embezzled by Ms. Durkee without the additional contributions
10 counting against the contributors' per-election limits to the Committee. The Committee
11 may, however, accept replacement contributions from contributors whose contributions
12 were never deposited or cashed, (*i.e.*, where the funds never left the account of the
13 contributor), and those attempted contributions will not count against the contributor's
14 per-election limits to the Committee, as described below.⁵

15 The Act provides that "no candidate or political committee shall knowingly
16 accept any contribution . . . in violation of the provisions of this section. No officer or
17 employee of a political committee shall knowingly accept a contribution made for the
18 benefit and use of a candidate . . . in violation of any limitation imposed on contributions
19" 2 U.S.C. 441a(f); *see also* 11 CFR 110.9. The Act's contribution limitations
20 provide that "no person shall make contributions . . . to any candidate and his authorized

⁵ Because the Commission concludes that the Committee may not accept additional contributions without the additional contributions counting against the contributors' per-election limits, the Commission need not address whether the Committee's proposed FIFO accounting method is an appropriate or workable means to identify embezzled funds.

1 political committee with respect to any election for Federal office which, in the
2 aggregate, exceed \$2,000.”⁶ 2 U.S.C. 441a(a)(1)(A); *see also* 2 U.S.C. 441a(a)(2)(A)
3 (establishing \$5,000 limitation for contributions from multicandidate committees);
4 11 CFR 110.1(b)(1), 11 CFR 110.2(b).

5 For the purposes of contribution limits, “a contribution [is] considered to be made
6 when the contributor relinquishes control over the contributions. A contributor [is]
7 considered to relinquish control over the contribution when it is delivered by the
8 contributor to the candidate, to the political committee, or to an agent of the political
9 committee.” 11 CFR 110.1(b)(6). A contribution that is mailed to a candidate,
10 committee, or agent of the committee is considered “made” on the date of the postmark.
11 *Id.* A contribution that is made by credit card is “made” when the credit card or credit
12 card number is presented. *See* Advisory Opinion 2008-08 (Zucker); Advisory Opinion
13 1990-14 (AT&T). Therefore contributors to the Committee “made” their contributions
14 when they mailed checks to the Committee or when they presented their credit cards or
15 credit card numbers to be charged. Accordingly, those contributions made to the
16 Committee during the 2012 election cycle will count against the contributors’ applicable
17 aggregate contribution limits. *See* Advisory Opinion 2008-08 (Zucker) (addressing both
18 annual contribution limits and biennial contribution limits).

19 Committee treasurers must maintain an accounting of all contributions received.
20 2 U.S.C. 432(c)(1); 11 CFR 102.9; *see also* 2 U.S.C. 432(b)(1); 11 CFR 102.8(a) (every
21 person who receives a contribution for an authorized committee shall forward it to the

⁶ This amount is increased for inflation in odd-numbered years. 2 U.S.C. 441a(c); 11 CFR 110.1(b)(1)(i)-(iii). The applicable contribution limit for 2011-2012 is \$2,500.

1 treasurer within 10 days). The treasurer is “responsible for examining all contributions
2 received for evidence of illegality and for ascertaining whether contributions received,
3 when aggregated with other contributions from the same contributor, exceed the
4 contribution limitations.” 11 CFR 103.3(b). Within ten days of receipt of a contribution,
5 treasurers may return the contribution to the contributor without having deposited it;
6 otherwise, treasurers must deposit contributions within ten days of receipt. 11 CFR
7 103.3(a). If, after deposit, the contribution cannot be determined to be from a legal
8 source, the treasurer must refund the contribution within 30 days of the receipt of the
9 deposit or the discovery of the illegality (if not initially apparent). 11 CFR 103.3(b)(1)-
10 (2). Contributions that, on their face or as aggregated, would exceed the contributors’
11 limit may be deposited, but only if the treasurer requests redesignation or reattribution of
12 the contribution. 11 CFR 103.3(b)(3).⁷

13 Here, the Committee, through its treasurer, received the contributions that were
14 made to the Committee, and that are the subject of this advisory opinion. The Committee
15 deposited the contributions and did not return, refund, or seek redesignation or
16 reattribution of the contributions during the relevant time periods. Accordingly, any
17 additional contributions that the Committee accepts from contributors who have already

⁷ 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.

1 made contributions to the Committee must be aggregated with the contributors' earlier
2 contributions.

3 In certain limited circumstances, the Commission has allowed committees to re-
4 solicit contributions that had been sent to the committee. These circumstances, however,
5 have been confined to situations where contributors retained possession of their funds
6 because their contribution checks were never deposited into any account. *See Advisory*
7 *Opinion 1999-23 (Arkansas Bankers PAC) (committee never received contribution check*
8 *mailed to it); Advisory Opinion 1992-42 (Lewis) (committee received ten contribution*
9 *checks, which it attempted to deposit by mailing to its bank; the deposit never arrived at*
10 *the bank and the checks were never negotiated). The common thread in these Advisory*
11 *Opinions is that the contributions were never negotiated by being deposited in a bank*
12 *account.*⁸

13 Thus, the Commission concludes that, consistent with the advisory opinions
14 discussed above, if the Committee is able to determine that any of its contributors'
15 contributions were never deposited or cashed, the Committee may accept replacement
16 contributions from those contributors, without the replacement contributions counting

⁸ The Commission declined to apply the reasoning in these advisory opinions to situations where the "use or deposit of the contribution checks" was "interrupted" due to committee negligence instead of by persons or events outside the control of the committee or its agents (such as the postal service). *Advisory Opinion 1999-23 (Arkansas Bankers PAC) at n. 1 (citing Advisory Opinion 1992-29 (Holtzman))*. The facts presented here involve outright embezzling by a single committee agent, rather than mere negligence, and advisory opinions regarding negligence do not dictate the outcome in this opinion.

1 against the contributors' contribution limits.⁹

2 The Commission, however, has never extended the reasoning of the "lost check"
3 advisory opinions to circumstances in which contributions were actually deposited. *See*
4 Advisory Opinion 1992-42 (Lewis) (distinguishing contributions that have been
5 deposited into a bank account and subsequently embezzled from those that have not yet
6 been deposited); Advisory Opinion 1993-05 (Fielitis) (same); *cf.* 11 CFR 102.8(a) (receipt
7 of a contribution by a committee's treasurer or other agent of the committee constitutes
8 receipt by the committee). In fact, the Commission has treated a committee's post-
9 embezzlement and post-election efforts to restore its cash balance to what it would have
10 been absent the embezzlement as the solicitation and acceptance of contributions.
11 Advisory Opinion 1989-10 (DeConcini). The Commission has decided, moreover, that
12 such contributions must be aggregated with other contributions made by the same
13 contributors during the election. *Id.*; *see also* Advisory Opinion 1993-15 (Tsongas)
14 (post-election funds raised to defray legal costs associated with committee fundraiser's
15 embezzlement are contributions that must be aggregated with contributors' previous
16 contributions). Extending the "lost check" rationale to the situation here, for those
17 contributions that were deposited but then embezzled, would be inconsistent with the
18 Commission's treatment of deposited and embezzled contributions in Advisory Opinion

⁹ The Committee should report any such replacement contributions as having been made in the year of the originally attempted contribution on Schedule A of its next report covering the period when the replacement check is received. *See* Advisory Opinion 1999-23 (Arkansas Bankers PAC). The report should include a brief notation explaining the circumstances of the non-deposited contribution, making reference to this opinion. The Committee should also amend its report on which the non-deposited contribution was disclosed, to disclose the replacement 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.

1 1989-10 (DeConcini) and Advisory Opinion 1993-15 (Tsongas).

2 The purpose of the contribution limit, and the basis for the Supreme Court's
3 decision to uphold its constitutionality, is to prevent corruption or the appearance of
4 corruption "stemming from the dependence of candidates on large campaign
5 contributions." *Buckley v. Valeo*, 424 U.S. 1, 58 (1976). The larger the contribution, the
6 greater the danger of actual and apparent corruption. *See generally Buckley*, 424 U.S. at
7 25-28. That danger does not disappear because some of the Committee's funds were
8 embezzled. To the contrary, if a campaign committee were to accept second
9 contributions to "replace" those that were made, deposited, and then misappropriated, the
10 candidate's indebtedness to those contributors would increase. In other words, to the
11 extent that the contributions aggregate in excess of the contribution limit, they would
12 pose the same risk of corruption or the appearance of corruption as if the candidate had
13 accepted a single excessive contribution. Therefore, allowing a committee to re-solicit
14 such contributions would contravene the purpose of the contribution limit.

15 In sum, the deposited contributions were made by contributors and accepted by
16 the Committee. The Act and Commission regulations, as interpreted through advisory
17 opinions and policy statements, requires any additional contributions to be aggregated
18 with the earlier, deposited, contributions for the purposes of the contribution limits.

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

22 The Commission has addressed this question in its answer to question one, above.

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

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On behalf of the Commission,

Caroline C. Hunter
Chair