



FEDERAL ELECTION COMMISSION
Washington, DC 20463

FEDERAL ELECTION
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May 8, 2012

AGENDA ITEM

MEMORANDUM

TO: The Commission

FROM: Anthony Herman *AH*
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Subject: AO 2012-07 (Feinstein for Senate) (Draft B)

For Meeting of 5-10-12

SUBMITTED LATE

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 May 10, 2012.

Attachment

1 ADVISORY OPINION 2012-07

2

3 Marc E. Elias, Esq.

DRAFT B

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 the Committee may accept replacement
15 contributions from contributors whose intended contributions were not deposited into the
16 Committee’s accounts, cashed or otherwise used by the Committee, because the original
17 intended contributions would not count against the contributors’ contribution limits. The
18 Committee may not, however, accept replacement contributions from contributors whose
19 original contributions were deposited into one of the Committee’s accounts and therefore
20 do count against the contributors’ contribution limits.

21 ***Background***

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

27 The Committee is the authorized campaign committee of Senator Dianne
28 Feinstein. From 1992 until September 2011, Kinde Durkee served as treasurer to the

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

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

18 The Committee states that it recently learned that Ms. Durkee and her firm
19 embezzled \$4,545,386.12 from the Committee,² as well as from other clients.³

¹ The Commission's conclusions in this advisory opinion are limited to circumstances in which criminal conduct has been confirmed by a criminal plea or conviction, a civil judgment or admission of liability, or a finding of fact by a Federal or State government agency.

² In addition to the criminal matter discussed above, a civil action has been instituted against Ms. Durkee by the Committee, among other plaintiffs.

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

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

17 The Committee represents that Ms. Durkee, as a means to conceal her fraudulent
18 activity, developed a practice of receiving funds into the Committee's accounts before
19 transferring them to her own accounts. The Committee also represents that some
20 contributions to the Committee may never have been deposited in the Committee's

³ 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).

1 accounts; these may include contributions deposited into non-Committee accounts (e.g.,
2 other committees' accounts or Ms. Durkee's accounts) as well as contributions that were
3 never deposited into any account. The Committee may also have received contributions
4 made by credit card into one or more "merchant accounts" that Ms. Durkee held to
5 process credit card transactions; this may include a joint merchant account to process
6 contributions made to multiple committees.

7 The Committee proposes to obtain "replacement contributions" from those
8 persons who contributed in any form, including via check and credit card, during the
9 current election cycle, up to the day of Ms. Durkee's arrest on September 2, 2011, and
10 had their contributions subsequently embezzled from the Committee. To identify persons
11 whose funds were embezzled, the Committee proposes to use a "first in, first out"
12 accounting method ("FIFO"). The Committee would deem its earliest contributions for
13 the 2012 election cycle to have been used for authorized disbursements for the 2012
14 cycle, until all of its authorized disbursements have been covered.⁴ The Committee
15 represents that it would "make appropriate refunds" of replacement contributions if it
16 later obtains restitution (in either a civil or criminal action).

17 ***Question Presented***

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

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 The Committee may accept replacement contributions from contributors whose
9 funds were never deposited into any Committee account or cashed, without the original
10 intended contributions counting against the contributors' per-election limits under the
11 Act.⁵ The Committee may not, however, accept replacement contributions from
12 contributors whose original contribution funds were deposited into any of the
13 Committee's accounts before being embezzled, however, without both the original and
14 the replacement contribution counting against the limits in the Act, and therefore needing
15 to be aggregated.

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

⁵ Contributions that do not count against the contributors' per-election limits also would not count against the contributors' biennial aggregate contribution limits.

1 authorized political committee with respect to any election for Federal office which, in
2 the 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 the 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” on the date the credit card or
12 credit card number is presented. 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, under ordinary circumstances, those
16 contributions made to the Committee during the current election cycle would count
17 against the contributors’ aggregate contribution limits. *See* Advisory Opinion 2008-08
18 (Zucker) (addressing both annual contribution limits and biennial contribution limits).

19 Unlike the word “make” in 2 USC 441a(a)(1)(A), neither the Act nor Commission
20 regulations define the word “accept” in 2 USC 441a(f). However, in describing the
21 actions that a committee may take with respect to a contribution after receiving it and

⁶ 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 the 2011-2012 election cycle is \$2,500.

1 setting forth the time periods within which those actions must be completed, the
2 Commission's regulations contemplate a distinction between the receipt of a contribution
3 and the acceptance of that contribution. A committee treasurer is "responsible for
4 examining all contributions received for evidence of illegality and for ascertaining
5 whether contributions received, when aggregated with other contributions from the same
6 contributor, exceed the contribution limitations." 11 CFR 103.3(b). Within ten days of
7 receipt of a contribution, treasurers may return the contribution to the contributor without
8 having deposited it; otherwise, treasurers must deposit contributions within ten days of
9 receipt. 11 CFR 103.3(a). If, after deposit, the contribution cannot be determined to be
10 from a legal source, the treasurer must refund the contribution within 30 days of the
11 receipt of the deposit or the discovery of the illegality (if not initially apparent). 11 CFR
12 103.3(b)(1)-(2). Contributions that, on their face or as aggregated, would exceed the
13 contributors' limit may be retained, but only if the contributions could be legally
14 redesignated or reattributed and the treasurer requests such redesignation or reattribution.
15 11 CFR 103.3(b)(3).⁷

16 Here, the Committee's treasurer received the contributions that were made to the
17 Committee and that are the subject of this advisory opinion. The Committee deposited at
18 least some of the contributions and did not return, refund, or seek redesignation or

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 reattribution of those contributions during the relevant time periods. Accordingly, under
2 ordinary circumstances, any additional contributions that the Committee accepts from
3 contributors who have already made contributions to the Committee must be aggregated
4 with the contributors' earlier contributions for purposes of applying the contribution
5 limits in the Act.

6 *A. Contributions that were Never Deposited in any Account or Cashed*

7 In some circumstances, however, the Commission has previously allowed
8 committees to accept replacement contributions for contributions that have already been
9 made without aggregating the original intended contributions and the replacement
10 contributions. In Advisory Opinion 1999-23 (Arkansas Bankers PAC), a multicandidate
11 committee mailed a contribution to a separate segregated fund ("SSF") and reported
12 making the contribution, but the SSF never received the check. The Commission
13 determined that the contributor's funds did not reach the intended recipient committee as
14 a result of events beyond the control of the committee or its agents, and that the making
15 of the contribution was "effectively nullified."

16 Similarly, in Advisory Opinion 1992-42 (Lewis), the committee received ten
17 contribution checks and attempted to deposit them by mailing them to its bank, but the
18 checks never arrived at the bank and the checks were never deposited. The Commission
19 determined that the loss appeared to have been beyond the committee's control. The
20 funds represented by the checks were never in the committee's account, and the
21 Commission concluded that the committee could accept replacement checks from the
22 contributors.

1 Here, the contributors whose contributions were never deposited relinquished
2 control of their funds, yet the Committee never exercised control over the funds. Ms.
3 Durkee’s criminal conduct thwarted the contributors’ intent to provide funds for the
4 Committee’s use, “effectively nullify[ing]” the original contributions. *See* Advisory
5 Opinion 1999-23 (Arkansas Bankers PAC). Permitting the Committee to seek
6 replacement contributions for contributions that were never cashed or deposited, without
7 requiring aggregation, will give effect to the contributors’ intent to make their funds
8 available to the Committee, and would not be providing any more funds than the Act
9 permits for the Committee’s use, as the original funds never left the contributors’
10 accounts.

11 Therefore, the Commission concludes that the Committee may accept
12 replacement contributions in this circumstance without aggregating these contributions
13 with the original intended contributions.

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

15 The analysis that applies to contributions that were never cashed or deposited also
16 applies to those contributions that were received by Ms. Durkee but deposited in non-
17 Committee accounts, rather than in the Committee’s accounts.⁸ As with contributions
18 that were never cashed or deposited, the Committee did not have possession of or
19 exercise control over these funds, and the contributors’ intent to provide funds to the
20 Committee was thwarted.

⁸ The Commission’s response assumes that none of the original contributions were deposited directly into non-Committee accounts in order to provide a benefit to the Committee (for example, to pay for services to be rendered or procured by the account holder). A contribution deposited into a non-Committee account for the Committee’s use would be analogous to a cashed check, and thus would count against the applicable contribution limits.

1 As explained above, the Commission has previously addressed the situation
2 where contributors relinquished possession and control of their funds, but the committee
3 that was the intended recipient never gained possession of or exercised control over the
4 funds. In Advisory Opinion 2000-11 (Georgia-Pacific), for example, an SSF's former
5 treasurer failed to deposit a number of checks from the corporation representing properly
6 withheld payroll deduction contributions to the SSF. The Commission noted that the
7 contributors had already relinquished both possession and control of their funds, and that
8 barring the committee from depositing the funds at that point "would not effectuate the
9 intent of contributors who have lawfully relinquished control and possession of the
10 funds." *See also* Advisory Opinion 1999-23 (Arkansas Bankers PAC).

11 Here, although the contributors relinquished possession and control of intended
12 contributions that were deposited into non-Committee accounts, the Committee never had
13 possession of the funds or an opportunity to exercise control over them. Counting these
14 intended contributions against the limits of the Act, thereby prohibiting the Committee
15 from accepting replacement contributions without aggregation would, as in Advisory
16 Opinion 2000-11 (Georgia-Pacific) and Advisory Opinion 1999-23 (Arkansas Bankers
17 PAC), fail to effectuate the contributors' intent to provide funds to the Committee.
18 Moreover, contributors making replacement contributions would not be providing the
19 Committee with any more funds than the Act permits.

20 As previously noted, the Act does not define the term "accept" in 2 USC 441a(f).
21 The Commission concludes, however, that the term "accept" reasonably does not include
22 circumstances where contributions were criminally misappropriated before being cashed,

1 deposited or otherwise put to use by a committee. *See Wagner Seed Co., Inc. v. Bush*,
2 946 F.2d 918, 920 (D.C. Cir. 1991) (where statute is ambiguous, an administrative
3 agency “is entitled to make a reasonable policy choice” in interpreting it) (quoting
4 *Chevron USA, Inc. v. Nat’l Resources Defense Council, Inc.*, 467 U.S. 837, 845).⁹
5 Therefore, the Committee may accept replacement contributions from contributors whose
6 intended contributions were embezzled by Ms. Durkee before being deposited in the
7 Committee’s accounts, because the intended contributions do not count against the
8 contributors’ applicable contribution limits, and need not be aggregated with the
9 replacement contributions.¹⁰

10 The Commission further concludes that the Committee may use any reasonable
11 accounting method to determine which intended contributions were never deposited into
12 the Committee’s accounts. Advisory Opinion 2006-06 (Busby) (requiring the requestor
13 to use a reasonable accounting method to identify particular funds). The Commission
14 notes, however, that the Committee’s proposed FIFO accounting method would *not* be
15 reasonable in this circumstance, because the Committee cannot accept a replacement
16 contribution until it first determines that an intended contribution was never deposited

⁹ The Commission’s reasoning in this opinion does not negate any potential liability of the Committee for reporting violations arising from Ms. Durkee’s misappropriations. The Act’s reporting requirements, unlike the contribution limits, turn on the *receipt* of contributions, not their acceptance. *See, e.g.*, 2 USC 434(a)(1), a(6); 11 CFR 104.8.

¹⁰ In Advisory Opinion 1989-10 (DeConcini), the Commission noted in passing that a committee that planned to raise post-election funds to pay debts incurred because of embezzlement would need to aggregate the new funds “with other contributions made by the same donors for the [same] election.” The requestor in Advisory Opinion 1989-10 (DeConcini) did not ask the Commission to address replacement contributions such as those proposed by the requestor here, and the Commission did not do so. To the extent Advisory Opinion 1989-10 (DeConcini) implies a different result from that which the Commission reaches here, it is superseded.

1 into a Committee account.¹¹

2 *C. Contributions that were Deposited in one of the Committee's Account(s)*

3 Although the Commission concludes that the Committee may seek replacement
4 contributions to the extent explained above, the Commission must reach a different
5 conclusion with respect to contributions that the Committee, through its treasurer,
6 received and deposited in one of the Committee's accounts,¹² and that the Committee did
7 not return or refund, and for which it did not seek redesignation or reattribution, during
8 the relevant time periods.

9 These funds were in the Committee's possession and control once they were
10 deposited. The Commission has never extended the reasoning of the "lost check"
11 advisory opinions discussed above to circumstances in which contributions were actually
12 deposited in the intended recipient committee's account. *See* Advisory Opinion 1992-42
13 (Lewis) (distinguishing contributions that have been deposited into a bank account and
14 subsequently embezzled from those that have not yet been deposited); Advisory Opinion
15 1993-05 (Fields) (same). To do so would be beyond the Commission's statutory
16 authority, because such contributions plainly were "accepted" under 2 USC 441a(f), and
17 therefore must be counted against the limits established by the Act.

18 Accordingly, any additional contributions that the Committee accepts from

¹¹ For any contribution for which the Committee obtains a replacement, the Committee should amend its report on which the original intended contribution was disclosed to disclose the replacement check. Should the Committee subsequently recover any replaced funds in any criminal or civil action, the Committee must make appropriate refunds to contributors who made replacement contributions to avoid accepting excessive contributions.

¹² Any "joint merchant account" through which the Committee received credit card contributions as described in Advisory Opinion 1999-22 (Aristotle Publishing), is a "Committee account."

1 contributors whose contributions were deposited in one of the Committee's accounts
2 must be aggregated with the contributors' earlier contributions.

3 2. *If the answer to Question 1 is no, may contributors whose funds were*
4 *never deposited into the Committee's accounts make replacement contributions to the*
5 *Committee, without the contributions counting against the contributors' per-election*
6 *limits to the Committee?*

7 Having answered question one as to all misappropriated contributions, it is
8 unnecessary for the Commission to address question two separately.

9 This response constitutes an advisory opinion concerning the application of the
10 Act and Commission regulations to the specific transaction or activity set forth in your
11 request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any
12 of the facts or assumptions presented, and such facts or assumptions are material to a
13 conclusion presented in this advisory opinion, then the requestor may not rely on that
14 conclusion as support for its proposed activity. Any person involved in any specific
15 transaction or activity which is indistinguishable in all its material aspects from the
16 transaction or activity with respect to which this advisory opinion is rendered may rely on
17 this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or
18 conclusions in this advisory opinion may be affected by subsequent developments in the
19 law including, but not limited to, statutes, regulations, advisory opinions, and case law.

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1 The cited advisory opinions are available on the Commission's website, or directly from
2 the Commission's Advisory Opinion searchable database at <http://www.fec.gov/searchao>.

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On behalf of the Commission,

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Caroline C. Hunter
Chair

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