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AGENDA ITEM

For Meeting of 5-10-12

SUBMITTED LATE

MEMORANDUM

TO: The Commission

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

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.

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:

DRAFT C

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, publicly available court documents, your
26 representations at the Commission’s Open Meeting on April 12, 2012, and your comment
27 filed on May 1, 2012.

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

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

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

13 The Committee represents that, because of Ms. Durkee's commingling of funds, it
14 is not clear at this time whether some or all of the funds currently in the Committee's
15 bank accounts belong to the Committee, nor is it clear whether funds in accounts
16 belonging to other of Ms. Durkee's clients belong to the Committee. The Committee's
17 bank froze the Committee's accounts pending the resolution of an interpleader action
18 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 new contributions from persons whose original attempted
12 contributions were never deposited into any account or cashed⁵, (*i.e.*, where the funds
13 never left the account of the contributor), and those attempted contributions will not
14 count against the contributor's per-election limits to the Committee, as described below.⁶

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 also provides that a "candidate,

⁵ Of course, nothing in this advisory opinion should be interpreted to prohibit the Committee from accepting new contributions from any contributor who has not reached their per-election limit, (so long as the new contribution would not exceed the limit when aggregated with prior contributions).

⁶ 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 individual holding office, agent of a candidate or an individual holding office, or an entity
2 directly or indirectly established, financed, maintained or controlled by or acting on
3 behalf of 1 or more candidates or individuals holding Federal office, shall not... solicit,
4 receive, direct, transfer, or spend funds in connection with an election for Federal
5 office... unless the funds are subject to the limitations, prohibition, and reporting
6 requirements of this Act.” 2 U.S.C. 441i(e)(1). Finally, the Act’s contribution
7 limitations provide that “no person shall make contributions . . . to any candidate and his
8 authorized political committee with respect to any election for Federal office which, in
9 the aggregate, exceed \$2,000.”⁷ 2 U.S.C. 441a(a)(1)(A); *see also* 2 U.S.C. 441a(a)(2)(A)
10 (establishing \$5,000 limitation for contributions from multicandidate committees);
11 11 CFR 110.1(b)(1), 11 CFR 110.2(b).

12 For the purposes of contribution limits, “a contribution [is] considered to be made
13 when the contributor relinquishes control over the contributions. A contributor [is]
14 considered to relinquish control over the contribution when it is delivered by the
15 contributor to the candidate, to the political committee, or to an agent of the political
16 committee.” 11 CFR 110.1(b)(6). A contribution that is mailed to a candidate,
17 committee, or agent of the committee is considered “made” on the date of the postmark.
18 *Id.* A contribution that is made by credit card is “made” when the credit card or credit
19 card number is presented. *See* Advisory Opinion 2008-08 (Zucker); Advisory Opinion
20 1990-14 (AT&T). Therefore contributors to the Committee “made” their contributions
21 when they mailed checks to the Committee or when they presented their credit cards or

⁷ 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 credit card numbers to be charged. Accordingly, those contributions made to the
2 Committee during the 2012 election cycle will count against the contributors' applicable
3 aggregate contribution limits. *See* Advisory Opinion 2008-08 (Zucker) (addressing both
4 annual contribution limits and biennial contribution limits).

5 The treasurer is the only officer that political committees must have under the Act
6 and political committees may not accept contributions or make expenditures without one.
7 2. U.S.C. 432(a). Committee treasurers must maintain an accounting of all contributions
8 received. 2 U.S.C. 432(c)(1); 11 CFR 102.9; *see also* 2 U.S.C. 432(b)(1); 11 CFR
9 102.8(a) (every person who receives a contribution for an authorized committee shall
10 forward it to the treasurer within 10 days). The treasurer is “responsible for examining
11 all contributions received for evidence of illegality and for ascertaining whether
12 contributions received, when aggregated with other contributions from the same
13 contributor, exceed the contribution limitations.” 11 CFR 103.3(b). Within ten days of
14 receipt of a contribution, treasurers may return the contribution to the contributor without
15 having deposited it; otherwise, treasurers must deposit contributions within ten days of
16 receipt. 11 CFR 103.3(a). If, after deposit, the contribution cannot be determined to be
17 from a legal source, the treasurer must refund the contribution within 30 days of the
18 receipt of the deposit or the discovery of the illegality (if not initially apparent). 11 CFR
19 103.3(b)(1)-(2). Contributions that, on their face or as aggregated, would exceed the

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1 contributors' limit may be deposited, but only if the treasurer requests redesignation or
2 reattribution of the contribution. 11 CFR 103.3(b)(3).⁸

3 Here, Ms. Durkee, the Committee's treasurer, received contributions made to the
4 Committee. The Commission concludes that, for purposes of 2 U.S.C. 441a(f), this
5 constitutes acceptance of those contributions when she either deposited or cashed them
6 assuming that the Committee did not return, refund, or seek redesignation or reattribution
7 of the contributions during the relevant time periods. Accordingly, any additional
8 contributions that the Committee accepts from contributors who have already made
9 contributions to the Committee must be aggregated with the contributors' earlier
10 contributions that the treasurer deposited or cashed.

11 In certain circumstances, the Commission has allowed committees to re-solicit
12 contribution *checks* that contributors sent to the committee but that the committee never
13 negotiated. *See* Advisory Opinion 1999-23 (Arkansas Bankers PAC) (committee never
14 received contribution check mailed to it); Advisory Opinion 1992-42 (Lewis) (committee
15 received ten contribution checks, which it attempted to deposit by mailing to its bank; the
16 deposit never arrived at the bank and the checks were never negotiated).

17 Consistent with these opinions, the Commission concludes that, if the Committee
18 is able to determine that any of its intended contributors' funds were never deposited into

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.

1 any account or cashed by the treasurer, the Committee may accept new contributions
2 from those intended contributors to replace the original attempted contributions. Since
3 the initial attempted contributions were never accepted by the Committee, they would not
4 count towards the attempted contributors' contribution limits.⁹

5 However, the Committee may not solicit additional contributions from persons
6 whose original contribution were already cashed or deposited by the treasurer, and for
7 whom an additional contribution, when aggregated with the previous contribution, would
8 exceed the limits of the Act. The Commission has never extended the reasoning of the
9 "lost check" advisory opinions to circumstances in which contributions were actually
10 deposited or cashed by a treasurer. *See* Advisory Opinion 1992-42 (Lewis)
11 (distinguishing contributions that have been deposited into a bank account and
12 subsequently embezzled from those that have not yet been deposited); Advisory Opinion
13 1993-05 (Fields) (same); *cf.* 11 CFR 102.8(a) (receipt of a contribution by a committee's
14 treasurer or other agent of the committee constitutes receipt by the committee). In fact,
15 the Commission has specifically stated that, where a committee solicits contributions to
16 replace embezzled funds, those contributions "must be aggregated with other
17 contributions made by the same donors for [the same] election." Advisory Opinion 1989-

⁹ The Committee should report any such new 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 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 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.

1 10 (DeConcini).¹⁰ The Commission has decided, moreover, that such contributions must
2 be aggregated with other contributions made by the same contributors during the election.
3 *Id.*; *see also* Advisory Opinion 1993-15 (Tsongas) (post-election funds raised to defray
4 legal costs associated with committee fundraiser’s embezzlement are contributions that
5 must be aggregated with contributors’ previous contributions). Extending the “lost
6 check” rationale to the situation here, where contributions were deposited or cashed but
7 then embezzled by the Committee’s treasurer, would be inconsistent with the
8 Commission’s treatment of deposited and embezzled contributions in Advisory Opinion
9 1989-10 (DeConcini) and Advisory Opinion 1993-15 (Tsongas).

10 Consistent with the reasoning of the “lost check” advisory opinions, the
11 Commission has allowed separate segregated funds (“SSFs”) to solicit new checks from a
12 collecting agent when the funds were never deposited in the SSF’s account. *See*
13 Advisory Opinion 2000-11 (Georgia-Pacific) (funds were withdrawn from corporate
14 employees’ paychecks and checks were sent to the SSF, but the checks were never
15 deposited by the SSF’s treasurer); Advisory Opinion 1999-33 (MediaOne Pac) (funds
16 were withdrawn from corporate employees’ paychecks and held in a corporate account
17 but never forwarded to the SSF). In the circumstances described in the SSF advisory
18 opinions, the funds were obtained through a payroll deduction program, and therefore,
19 under the Act, the contributions were made by the contributors. The issue in that context,
20 however, was not whether the committees could solicit additional funds from the
21 contributors, whose funds had been already been negotiated into the corporate account,

¹⁰ In Advisory Opinion 1989-10 (DeConcini), the election for which the committee sought to solicit additional contributions had already occurred. Nonetheless, the principle that embezzlement does not obviate contribution limits is equally applicable here.

1 but simply whether the funds could be obtained *from the collecting agent*, who had
2 received them on the SSF's behalf. Thus, those advisory opinions did not address the
3 question that the Commission faces here: whether a committee could solicit additional
4 contributions that, when aggregated with previous contributions from the same
5 *contributors*, exceed the limits of the Act.

6 The purpose of the contribution limit, and the basis for the Supreme Court's
7 decision to uphold its constitutionality, is to prevent corruption or the appearance of
8 corruption "stemming from the dependence of candidates on large campaign
9 contributions." *Buckley v. Valeo*, 424 U.S. 1, 58 (1976). Allowing contributions in
10 excess of the contribution limits would contravene the purpose of those limits.

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

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

18 As stated in response to question one, above, the Committee may accept new
19 contributions from persons whose original, attempted contributions were never deposited
20 or cashed, (*i.e.*, where the funds never left the account of the contributor), and those
21 attempted contributions will not count against the contributor's per-election limits to the
22 Committee. However, for the reasons stated above, any contribution that was deposited

1 or cashed by the treasurer has been made and accepted for the purposes of the Act. Such
2 contributions count towards the contributors' per-election limits to the Committee. Any
3 additional contributions received from the same contributors must not exceed the limits
4 of the Act when aggregated with the original contributions.

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

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

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Chair