# Item 12
## Action

## *Post-election Fundraising Window*

**Executive Summary:** This item provides an opportunity to discuss the post-election fundraising window in light of charges recently brought against a prominent campaign treasurer and the effect of those charges on City and LAUSD candidates.

**Recommended Action:** Adopt the proposed resolution extending the post-election fundraising window for affected candidates in the March 2011 elections.

**Presenters:** Heather Holt, Executive Director
Mike Altschule, Director of Policy

# *Post-election Fundraising Window*

## A. Introduction

City law limits the time periods within which candidates for City office may solicit and receive contributions for their campaigns. In the wake of allegations of criminal activity against well-known campaign treasurer Kinde Durkee, the post-election fundraising window has created challenges for City candidates who were represented by Ms. Durkee in the elections that were held on March 8, 2011.

On November 29, 2011, a motion (Krekorian-Huizar) was introduced asking the Ethics Commission to review the post-election fundraising window, both in terms of addressing the immediate needs of candidates in the March 2011 elections and in terms of considering permanent improvements as part of the comprehensive review of the campaign finance laws that is currently underway. A copy of the motion is provided in Attachment A.

## B. The Law

The Campaign Finance Ordinance (CFO) identifies specific time periods within which City candidates and their campaign committees are permitted to solicit and receive campaign contributions for City elections. Fundraising may not begin until 24 months prior to an election for Citywide office or until 18 months prior to an election for City Council office. Los Angeles Municipal Code (LAMC) § 49.7.7(A). Similarly, the Los Angeles City Charter (Charter) prohibits candidates for the Los Angeles Unified School District (LAUSD) Board of Education from engaging in fundraising more than 18 months before an election. Charter § 803(q).

Post-election fundraising is also limited by both time and type. Campaign contributions may not be solicited or received more than nine months after the date of an election, regardless of the office the candidate sought. Charter § 803(q); LAMC § 49.7.7(B). Furthermore, all contributions that are solicited or received during the post-election fundraising window must be used to retire debt. *Id.*

The current nine-month post-election fundraising window has existed since 2003. When the CFO was first adopted, in 1990, the post-election fundraising window was limited to just three months. However, extensions could be granted if the purpose of the continued fundraising was to retire debt that was incurred during the campaign. *See* former LAMC § 49.7.7 (Ordinance No. 165607, effective July 1, 1991).

## C. The Circumstances

Kinde Durkee is a long-time campaign treasurer, who reportedly controlled nearly 400 accounts for candidates and committees at all three levels of government. On September 2,

2011, Ms. Durkee was arrested by the FBI on charges of mail fraud. As reported in the press, the United States Attorney's Office has filed a federal complaint, charging Ms. Durkee with misappropriating hundreds of thousands of dollars of her clients' money for her own, personal use. Ms. Durkee had signatory authority for nearly 400 committee accounts, and some estimates indicate that she could have stolen as much as $25 million from those accounts. All of Ms. Durkee's business files have been seized as part of the federal prosecution against her. In addition, the bank accounts that she controlled have been frozen.

Ms. Durkee has represented City candidates and officeholders for at least as long as the Ethics Commission has existed. In the elections held this past March 8, she represented three City candidates, including current City Council Members Tony Cárdenas (CD 6), Paul Krekorian (CD 2), and Tom LaBonge (CD 4). She also represented LAUSD candidate John Fernandez. These candidates have limited access to their campaign funds and records and are unable to accurately determine the assets and debts of their campaign committees.

The nine-month post-election fundraising window for the March 2011 elections expires on December 8, 2011. For more than three months of that window, the candidates represented by Ms. Durkee have been involuntarily entangled in legal issues (including being named as defendants in an interpleader action filed by First Bank of California, which held most of the committee bank accounts created by Ms. Durkee), while attempting to determine the state of their campaign affairs—something they had been paying Ms. Durkee to do. As a result, they have not been able to focus on retiring debt in the same way that they might in other elections. The best we are able to determine, given the lack of reliable documentation, two of the candidates represented by Ms. Durkee in the March 2011 elections have outstanding debt totaling at least $84,470.

**D. Analysis**

Post-election fundraising is limited for a variety of reasons. Closing the window closes an election cycle and enables effective auditing. It helps to protect campaign creditors. It helps ensure that debt is actually paid off, because the more time that passes after an election, the less inclined contributors are to give toward that election. It helps limit debt, because candidates know they have a limited time in which to pay it off. It also helps to shift an officeholder's focus from campaigning to the duties of serving the public.

When the post-election fundraising window was amended in 2003, 13 years of experience had shown that three months is too short a window and results in repeated requests for extensions. To avoid multiple extensions, nine months was settled on as an appropriate average and granted by law to all candidates. In the same process, however, the right to request an extension was eliminated.

The fundraising windows are part of the comprehensive campaign finance review that is underway. We will consider the issues raised in the motion, as well as other issues raised in the wake of Ms. Durkee's arrest, as part of that review. And, in the next several months, we will make recommendations to you regarding any permanent changes to the fundraising windows that may be appropriate.

Between now and then, however, the post-election fundraising window is an immediate concern for the candidates who were represented by Ms. Durkee in the March 2011 elections. City law does not currently allow for extenuating circumstances, such as criminal activity on the part of a treasurer or natural disasters, which are outside a candidate's control and can directly and negatively affect their ability to manage their campaign accounts and retire their debt.

The state is also grappling with this situation, and the Fair Political Practices Commission (FPPC) has recently determined that some state laws may be applied differently for Ms. Durkee's clients under specific conditions. For example, the FPPC has concluded that contribution limits do not apply to contributions that were delivered to Ms. Durkee but were misappropriated and never deposited into the intended account. *See* Attachment B. The FPPC has also advised regarding alternative compliance with the state laws that govern the termination of campaign committees, the disclosure of campaign activities, and the requirement that committees maintain just one bank account. *See* Attachment C.

We believe it would be appropriate to permit the candidates who were represented by Ms. Durkee in the March 2011 City and LAUSD elections to continue to solicit and receive campaign contributions for an additional four months. That would extend their post-election fundraising window to April 8, 2012, and would approximately mirror the amount of time during the nine-month window that those candidates have been dealing with the fallout of Ms. Durkee's arrest and prosecution.

The recommendation would not affect the City or LAUSD contribution limits or the requirement that post-election contributions be used to retire debt. It would simply restore to the affected candidates the post-election fundraising time they have lost, so that they can retire debt by seeking contributions from persons who have not already given to their 2011 campaigns.

We recommend that the resolution in Attachment D be adopted to clarify the Commission's position regarding this unique and unfortunate set of circumstances.

*Attachment:*

- *A Motion (Krekorian-Huizar) 11/29/11, Council File No. 10-0127-S2*
- *B Morazzini Memo to FPPC, 10/31/11*
- *C FPPC Advice Letter I-11-213*
- *D Resolution*

RULES & ELECTIONS

10-0127-S2

NOV 29 2011

# MOTION

The city's existing campaign finance law prohibits candidates from doing any fundraising for a campaign committee nine months after the date of the election for which the committee was formed (LAMC Section 49.7.7(B)).

In the nine-month period following an election, candidates controlling such committees may raise funds for debt retirement only, except to the extent prohibited by Los Angeles Municipal Code Sections 49.7.6 and 49.7.12

The policy, previously allowed for administrative extensions of the fundraising window, but the current version of the prohibition does not consider or accommodate circumstances beyond the control of candidates whose committees may hold debt.

In light of recent allegations of misappropriation of campaign funds against a well-known political treasurer, several candidates for municipal office may have been impeded in their ability to retire debt within the nine month period. Although they potentially were direct or indirect victims of crimes, such candidates have no recourse under current policy.

I THEREFORE MOVE that the City Council REQUEST that the City Ethics Commission consider and report to Council in 30 days regarding potential administrative action or actions to allow an extension of the fundraising window for committees that may have been affected by the recent investigations and surrounding circumstances.

I FURTHER MOVE that the City Council REQUEST that the City Ethics Commission consider and report to Council on the following items when it brings forward its planned comprehensive campaign finance reform recommendations:

(1) The rationale for the city's ordinance prohibiting fundraising for committees nine months after the date of the election for which they were formed and an assessment of that policy; and

(2) Recommendations for revisions to that ordinance to grant the City Ethics Commission greater flexibility to deal with a rapidly changing political landscape and extenuating circumstances.

Presented by: Paul Krekorian
PAUL KREKORIAN
Councilmember, 2nd District

NOV 29 2011

Seconded by: Jose Huizar

ORIGINAL

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**To:** Chair Ravel and Commissioners Eskovitz, Garrett, Montgomery and Rotunda

**From:** Zackery P. Morazzini, General Counsel

**Subject:** Legal Division Analysis of Contribution Limits and LDFs in Wake of Recent Accounts of Widespread Campaign Fraud and Pending Interpleader Action

**Date:** October 31, 2011

The Commission has asked that the Legal Division analyze the legal issues regarding application of campaign contribution limits for donors that have already contributed to state officers, candidates, or committees[1] given the alleged widespread fraud perpetrated by political treasurer Kindee Durkee and her firm Durkee & Associates. We have also been asked to discuss the scope of the proper use of contributions raised through Legal Defense Funds, and anticipate issuing an Advice Letter on this topic.

## SUMMARY OF CONCLUSIONS

The Commission is bound by the Political Reform Act and does not have independent authority to waive contribution limits or the post-election fundraising prohibitions to allow candidates to raise replacement funds in the event of treasurer malfeasance. However, under the unique circumstances being faced by many candidates and committees that previously employed Durkee as their treasurer, the Act's contribution limits and implementing regulations can be interpreted to not apply where a contribution for an upcoming election was delivered to Durkee, but the contribution was never deposited into the intended candidate or committee account, and was instead misappropriated by Durkee. Under these facts, it appears to staff that, given the breadth of the alleged criminal conduct by Durkee, she was not acting as an agent for the candidate or committee when she received these contributions, but rather was acting with the intent to defraud her clients at the time of receipt. Therefore, these contributions were never accepted for purposes of the Act's contribution limits. However, once a contribution is deposited into the candidate or committee's account, the contribution is considered made and accepted and the Act's contribution limits apply, regardless of whether funds are thereafter misappropriated from the account. The Act provides no

[1] The Act's contribution limits apply per election, and do not apply to federal or local officers or candidates.

exception for the misappropriation of contributions once they are made and accepted. Any such exception would have to be enacted through legislation and further the purposes of the Act. There may, however, be instances where the evidence demonstrates that Durkee was in fact never acting as an agent for a candidate or committee, made no proper expenditures from their campaign accounts, and gave them no access to their accounts prior to misappropriating funds. Staff would consider such facts on a case-by-case basis to determine whether contributions were "accepted" for purposes of the Act's contribution limits.

Candidates and committees that have been named as defendants in the interpleader action filed by First California Bank may establish Legal Defense Funds to pay for attorneys' fees and legal costs related to their defense in that action. Candidates and committees interested in using these funds to pay for such costs in pursuing a cross-complaint against Durkee as part of their defense in the interpleader action are encouraged to request advice from Commission staff based upon the specific facts of their case.

However, a Legal Defense Fund cannot be used to pay attorneys' fees or costs incurred if a candidate or committee brings a separate plaintiff's action against Durkee seeking restitution of misappropriated contributions. The Act strictly limits the use of such funds to a candidate or officer's "legal defense" if they are "subject to one or more civil or criminal proceedings or administrative proceedings arising directly out of the conduct of an election campaign...." Any exception for a plaintiff's action filed by a candidate or committee against Durkee would have to be enacted through legislation and further the purposes of the Act.

## FACTUAL ALLEGATIONS

As discovered during an audit by the Commission's Enforcement Division, and as alleged in the federal complaint against Durkee filed by the United States Attorney's Office, Durkee engaged in an illegal scheme whereby she transferred campaign funds from committee accounts for Assemblymember Jose Solorio to her firm's account without the knowledge or consent of her client. She also is alleged to have improperly transferred funds between accounts, sometime transferring funds from federal committee accounts to state committee accounts and vice versa, in an attempt to cover up her actions. It has also been reported that Durkee misappropriated contributions prior to depositing them into her clients' accounts.

Federal prosecutors accuse Durkee of misappropriating over $670,000 from Assemblymember Solorio alone. Representatives of Senator Diane Feinstein have reported that Durkee misappropriated approximately $4.7 million in federal contributions. Having signatory authority for nearly 400 committee accounts, some estimate that Durkee could have stolen as much as $25 million in campaign funds over the past few years.

In September of 2011, First California Bank[2] filed an interpleader action in the Los Angeles County Superior Court, naming nearly 400 officers, candidates, and committees

[2] We are informed that Durkee maintained most or all of her clients' campaign accounts at First California Bank.

as defendants, and remitting the remaining balance of each account to the court. As discussed more fully below, should that action proceed as a proper interpleader action, the candidates and committees named as defendants will have an opportunity to establish their entitlement to the remaining funds.

## CONTRIBUTION LIMITS UNDER THE POLITICAL REFORM ACT

The Supreme Court of the United States has recognized that limits on political contributions serve the government's important interest in preventing corruption because they reduce the risk of *quid pro quo* arrangements and mitigate "the appearance of corruption spawned by the real or imagined coercive influence of large financial contributions on candidates' positions and on their actions if elected to office." (*Buckley v. Valeo* (1976) 424 U.S. 1, 25.)

Most recently, in *Citizens United v. Federal Election Commission* (2010) 130 S.Ct. 876, the Supreme Court reaffirmed the *Buckley* Court's holding with regard to the corrupting potential of large direct contributions. (*Id.*, at 908 ["The *Buckley* Court ... sustained limits on direct contributions in order to ensure against the reality or appearance of corruption."].) It is the state's interest in preventing candidate corruption, or the appearance thereof, that supports the Act's limits on political contributions.

The Act imposes limits on direct contributions to state officers and candidates. These limits apply per election. Section 85301[3] provides:

> (a) A person, other than a small contributor committee or political party committee, **may not make** to any candidate for elective state office other than a candidate for statewide elective office, and a candidate for elective state office other than a candidate for statewide elective office **may not accept** from a person, any contribution totaling more than three thousand dollars ($3,000) **per election**.
>
> (b) Except to a candidate for Governor, a person, other than a small contributor committee or political party committee, **may not make** to any candidate for statewide elective office, and except a candidate for Governor, a candidate for statewide elective office **may not accept** from a person other than a small contributor committee or a political party committee, any contribution totaling more than five thousand dollars ($5,000) **per election**.
>
> (c) A person, other than a small contributor committee or political party committee, **may not make** to any candidate for Governor, and a candidate for governor **may not accept** from any person other than a small contributor committee or political party committee, any contribution totaling more than twenty thousand dollars ($20,000) **per election**.

[3] The limits set forth in this Section apply per election and are adjusted biennially by the Commission based upon changes to the Consumer Price Index. The limits applicable for the 2011 -12 election cycle are $3,900 for legislative candidates, $6,500 for statewide candidates except governor, and $26,000 for candidates for governor. (Section 83124; Regulation 18544.)

(d) The provisions of this section do not apply to a candidate's contributions of his or her personal funds to his or her own campaign.

Under Section 85302, "small contributor committees" are subject to separate contribution limits for various candidates, as are individual contributions to committees and political parties under Section 85303. This legal analysis applies equally to those provisions to the extent Durkee was the treasurer for the intended recipients of the contributions and the recipients were victims of the alleged fraud.

Under the relevant provisions of Regulation 18421.1, appearing within the campaign reporting provisions of the Commission's regulations, the following standards apply to the making and receipt of monetary contributions:

(a) A monetary contribution, including one made through wire transfer, credit card transaction, debit account transaction or similar electronic payment option (including one made via the Internet), **is "made" on the date that the contribution is mailed, delivered, or otherwise transmitted to the candidate or committee.** Alternatively, the date of the check or other negotiable instrument by which the contribution is made may be used in lieu of the date on which the contribution is mailed, delivered, or otherwise transmitted, provided it is no later than the date the contribution is mailed, delivered, or otherwise transmitted.

(b) Notwithstanding subdivision (a), for purposes of the disclosure of late contributions, as defined in Government Code section 82036 and pursuant to Government Code section 84203, a monetary contribution is "made" on the date the contribution is mailed, delivered, or otherwise transmitted to the candidate or committee. Consistent with 2 Cal. Code Regs. section 18401, the candidate or committee shall maintain documentation to support the date the contribution was made.

(c) **A monetary contribution is "received" on the date that the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check or other negotiable instrument by which the contribution is made.** All contributions received by a person acting as an agent of a candidate or committee shall be reported to and disclosed by the candidate or committee, or by the committee's treasurer, no later than the closing date of the next campaign statement that the committee or candidate is required to file.

ANALYSIS

At the Commission's October 13, 2011 public hearing in Los Angeles, staff's earlier Interested Persons meeting in Sacramento, and through written correspondence, members of the regulated community, the public, and representatives of candidates and committees previously represented by Durkee provided comments regarding potential action or non-action by the Commission with regard to application of the Act's contribution limits and the use of Legal Defense Funds. Specifically, it has been suggested that the contribution limits should not be applied in instances where a contribution was delivered to Durkee but never deposited into the candidate's account, but was instead either stolen by Durkee

for her personal use or deposited into another client's account without the knowledge or consent of the candidate, or a contribution was delivered to Durkee and deposited into the candidate's account but thereafter transferred to Durkee's account, another client's account, or otherwise misappropriated. It has also been suggested that contribution limits should not be applied to those whose accounts are frozen and their assets have been remitted by the bank to the Superior Court as part of the interpleader action.

The question is whether under any of these scenarios the Commission has the authority to apply the Act and Regulations, or amend the Regulations, in a manner that permits contributors that have already "maxed out" to a candidate or committee to again contribute up to the contribution limit for the same election. Each scenario will be addressed below.

**1) Contributions Delivered to Durkee But Never Deposited Into Candidate or Committee Account**

The audit findings, criminal allegations, and resulting interpleader action all indicate that Durkee was not acting as an agent for a candidate or committee for purposes of receiving the contributions that were never deposited into the clients' accounts, but was instead acting with the intent to misappropriate the contributions for her personal benefit at the time she received them.

The Act's contribution limits prohibit the completion of a transaction: the making and accepting of a contribution above the set limit. It is upon completion of the transaction that the possibility of corruption, which the limits are intended to prevent, comes into being. When receiving campaign contributions, treasurers are acting as agents of the candidate or committee for purposes of this transaction. Thus, a contribution is considered "received" on the date that "the candidate or committee, or the agent of the candidate or committee, obtains possession or control of the check or other negotiable instrument by which the contribution is made...." (Regulation 18421.1, subd. (c).)

In California, "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." (Civ. Code, § 2295.) However, an agent can never have authority to commit fraud upon the principal. (*Meyer v. Glenmoor Homes, Inc.* (1966) 246 Cal.App.2d 242, 264.) Those committing fraud against the principal are not acting as agents, as "an agency can be created only for the performance of lawful acts." (*Vaughan v. People's Mortg. Co.* (1933) 130 Cal.App. 632, 644 [internal citation omitted].)

The wide spread pattern and practice of fraud alleged to have been employed by Durkee indicates that, in instances where she never deposited the contributions into her clients' accounts, she was committing fraud at the outset and thus did not "receive" these contributions as an agent for the candidate or committee. Agents have no authority to defraud the principal. Therefore, under these specific circumstances, prior to deposit the candidate or committee had no possession or control of the contributions. As such, although those contributions that were given to Durkee were "made," they were never "accepted" or "received" as set forth in Section 85301 and Regulation 18421.1, subdivision (c), because neither the candidate, committee, nor proper agent "obtain[ed]

possession or control of the check or other negotiable instrument by which the contribution is made." Absent acceptance or receipt by the candidate, committee, or proper agent, the transaction has not been completed and there has been no contribution that would be subject to the contribution limit.

This analysis only applies to contributions to a candidate or committee being raised for the current election cycle. The Act's ban on post-election fundraising presents a barrier to applying this analysis to contributions received for prior elections, unless a committee had debt. The prohibition on post-election fundraising set forth in Section 85316, subdivision (a) states:

> [A] contribution for an election may be accepted by a candidate for elective state office after the date of the election only to the extent that the contribution does not exceed net debts outstanding from the election, and the contribution does not otherwise exceed the applicable contribution limit for that election.

The misappropriation of funds by the Durkee firm does not create a "debt" that a candidate or committee owes. Rather, those who had funds misappropriated by Durkee may be owed money by the firm. For purposes of the post-election fundraising ban, the Durkee firm's activities do not give rise to new debts for the affected candidates and committees.

Importantly, in the event a candidate or committee recovers from Durkee, through the interpleader action, or otherwise misappropriated funds that were never deposited into their account, any such recovery must be returned to the contributor if the contributor to which the amount of recovery can be attributed has contributed again and the combined total would violate the applicable contribution limit.

**2) Contributions Delivered to Durkee and Deposited Into Candidate or Committee Accounts**

Even under the unique facts presented, once a contribution is deposited into a candidate or committee account, it is considered "made" and "accepted" under the plain language of the Act and is therefore subject to contribution limits.[4] Once the contribution is deposited, the transaction is complete and the candidate or committee has actual possession and control of the contribution – even if only for a limited time. The Act's language appears to provide no exception for contributions that are misappropriated from the account prior to use by the candidate or committee. Any such exception would require a legislative amendment to the Act, and would have to further its purposes.

[4] There may be instances where the evidence demonstrates that Durkee accepted and deposited contributions into a candidate or committee account over which the client had no control or signatory authority, yet she made no expenditures from the account for campaign purposes but instead misappropriated all contributions for her own personal benefit. Staff would consider such facts on a case-by-case basis to determine whether the evidence is sufficient to demonstrate that Durkee was in fact at all relevant times acting with an intent to defraud the candidate or committee and not as an agent such that those deposited and then misappropriated contributions would not be considered "accepted" for purposes of the Act's contribution limits.

**3) Candidate or Committee Accounts Frozen or Remitted to Court Due to Interpleader Action**

Because a contribution remaining in a frozen account, or remitted to the court as part of the interpleader action, was necessarily deposited into the account, it would be considered "made" and "accepted" under the plain language of the Act and therefore subject to contribution limits. Once the contribution is deposited, the transaction is complete and the candidate or committee has actual possession and control of the contribution – even if only for a limited time before the account is frozen or the funds are remitted to the court. The Act's language appears to provide no exception for contributions that are frozen or remitted to a court prior to use by the candidate or committee. Any such exception would require a legislative amendment to the Act, and would have to further its purposes.

PROPER USE OF LEGAL DEFENSE FUNDS

Commission staff also anticipates receiving a request for an Advice Letter regarding the proper use of Legal Defense Funds (LDFs) under the circumstances described herein. Below is the analysis that will be employed in responding to any such request.

The Act permits candidates to establish LDFs for certain purposes. Contributions to LDFs are not subject to limits. Section 85304 states:

> (a) A candidate for elective state office or an elected state officer may establish a separate account to defray **attorney's fees and other related legal costs** incurred for the **candidate's or officer's legal defense if the candidate or officer is subject to one or more civil or criminal proceedings or administrative proceedings** arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. These funds may be used only to defray those attorney fees and other related legal costs.
>
> (b) A candidate may receive contributions to this account that are not subject to the contribution limits set forth in this article. However, all contributions shall be reported in a manner prescribed by the commission.
>
> (c) Once the legal dispute is resolved, the candidate shall dispose of any funds remaining after all expenses associated with the dispute are discharged for one or more of the purposes set forth in paragraphs (1) to (5), inclusive, of subdivision (b) of Section 89519.

(Emphasis added.) The Act was amended to provide for the establishment of LDFs by local candidates under the same terms as set forth in Section 85304 (see Section 85304.5). Regulation 18530.45 further identifies what procedures must be used in establishing an LDF at the local level.

Regulation 18530.4, in relevant part, implements Section 85304 for state candidates and officers and clarifies the proper uses of and limitations on LDFs:

(g) Limitations. For the purposes of Section 85304(a), the following limitations apply:

(1) Legal defense funds may only be raised in an amount reasonably calculated to pay, and may only be expended for, attorney's fees and other related legal costs.

(A) "Attorney's fees and other related legal costs" includes only the following:

(i) Attorney's fees and other legal costs **related to the defense of the candidate or officer**.

(ii) Administrative costs directly related to compliance with the requirements of subdivisions (b) and (d) and the recordkeeping requirements of subdivision (c) of this regulation.

(B) "Attorney's fees and other related legal costs" does not include for example expenses for fundraising, media or political consulting fees, mass mailing or other advertising, or a payment or reimbursement for a fine, penalty, judgment or settlement, or a payment to return or disgorge contributions made to any other committee controlled by the candidate or officer.

(2) A candidate or officer **may only raise funds under this regulation for defense against a civil or criminal proceeding, or for defense against a government agency's administrative enforcement proceeding** arising directly out of the conduct of an election campaign, the electoral process, or the performance of the officer's governmental activities and duties. [...]

(3) **Legal defense funds may not be raised in connection with a proceeding until the following has occurred:**

(A) **In a proceeding brought by a government agency, when the candidate or officer reasonably concludes the agency has commenced an investigation or the agency formally commences the proceeding**, whichever is earlier.

(B) **In a civil proceeding brought by a private person, after the person files the civil action.**

The plain language of both the statute and the implementing regulation is clear that LDF funds may only be used in connection with a candidate or officer's "legal defense" if the

candidate or officer is "subject to" a "civil or criminal proceeding or administrative proceeding."

**Use of LDFs to Pay for Attorneys' Fees and Legal Costs Related to the Interpleader Action**

Soon after the federal complaint was filed against Durkee, First California Bank filed an interpleader action and remitted to the superior court all the remaining funds in the approximately 400 accounts managed by Durkee, totaling nearly $2.5 million. It is our understanding that all, or nearly all, alleged victims of Durkee are named as defendants in the action.

An interpleader action is a procedure whereby a person holding money or personal property to which conflicting claims are being made by others can join all claimants and force them to litigate their claims among themselves. Interpleader is proper whenever multiple claims are made by two or more persons such that they may expose the person against whom the claims are asserted to multiple liability. (*Id.*; see also Ca. Code Civ. Proc., § 386, subd. (b).)

Under such circumstances, it appears that the persons named in the interpleader action, including those named by reference to their candidate controlled committee, are defendants in a civil action directly related to the conduct of an election campaign for purposes of Section 85304, and may use funds raised through an LDF to pay attorneys' fees and legal costs related to the interpleader action. Such costs could include fees for auditors to examine bank records for purposes of establishing the amount of funds embezzled or otherwise misappropriated by Durkee or others, and other matters related to proving up the amount of money to which the defendant is entitled.

Additionally, because Durkee & Associates are also named as defendants in the interpleader action, we believe LDF funds may properly be used by candidates or committees that wish to file cross-complaints in that action against Durkee, to the extent appropriate or permitted in the interpleader action.[5] Defendants in an interpleader action may file claims against each other as part of the action. (Ca. Code. Civ. Proc., § 386.) In fact, those interpleader defendants having claims against each other may be required to assert such claims through a cross-complaint. (Compare *Cheiker v. Prudential Ins. Co. of America* (9th Cir. 1987) 820 F2d 334, 336 [cross-complaint compulsory in interpleader action] with *State Farm Fire & Cas. Co. v. Pietak* (2001) 90 Cal.App.4th 600, 615 [arguably not].) Under such circumstances, we believe LDF funds may be properly used for attorneys' fees and legal costs related to both the defense of the interpleader action and the directly related, and perhaps compulsory, cross-complaint to the extent necessary to defend one's rights. Establishing all claims against the other defendants in an interpleader action would appear to be part and parcel to one's legal defense in such an action. Therefore, such use would appear to be directly related to the legal defense of a candidate or officer subject to a civil proceeding in accordance with Section 85304. Candidates or committees interested in using LDF funds to pursue such a cross-complaint

[5] The extent to which a cross-complaint may be a legally or procedurally appropriate vehicle for seeking recovery or restitution from Durkee is beyond the scope of this memorandum.

are encouraged to seek advice from Commission staff based upon the individual facts of their case so staff can make a determination based upon concrete facts.

**Use of LDFs to Pay for Attorneys' Fees and Legal Costs Related to Defending the Victim's Federal Rights During the Course of a Federal Prosecution of Durkee in Which the Candidate or Committee is a Victim in the Specific Case**

Federal law (18 U.S.C. § 3771) provides enumerated rights for crime victims. Specifically, this law states, in relevant part:

> (a) Rights of crime victims. -- A crime victim has the following rights: [¶¶]
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> > (3) The right not to be excluded from any such public court proceeding, unless the court, after receiving clear and convincing evidence, determines that testimony by the victim would be materially altered if the victim heard other testimony at that proceeding.
> >
> > (4) The right to be reasonably heard at any public proceeding in the district court involving release, plea, sentencing, or any parole proceeding.
> >
> > (5) The reasonable right to confer with the attorney for the Government in the case.
> >
> > (6) The right to full and timely restitution as provided in law. [¶¶]
>
> (c) ... (2) Advice of attorney. -- The prosecutor shall advise the crime victim that the crime victim can seek the advice of an attorney with respect to the rights described in subsection (a).
>
> (d) ... (1) Rights. -- The crime victim or the crime victim's lawful representative, and the attorney for the Government may assert the rights described in subsection (a).

Section 3771, subdivision (e) defines "crime victim" as "a person directly and proximately harmed as a result of the commission of a Federal offense...."

The language of Section 3771 contemplates the existence of formal charges pending against the accused (see § 3771, subd. (a)(2) [right to timely notice of public court proceeding]; (a)(3) [right not to be excluded from public court proceedings]) and for purposes of Section 85304, formal charges are necessary to qualify the candidate or committee as being subject to a criminal proceeding. Thus, under federal law, crime victims may defend their rights with the assistance of an attorney, including the right to restitution, in the course of a federal prosecution. We believe that LDF funds may properly be used by a candidate or officer that meets the definition of "crime victim" to cover attorneys' fees and related legal costs in a federal criminal action against Durkee under the facts described herein, because such use is directly related to the legal defense of a candidate or officer's rights, and the candidate or officer is subject to the criminal proceeding, in accordance with Section 85304.

**Use of LDFs to Pay for Attorneys' Fees and Costs Related to a Separate Civil Action to Recover Contributions**

It has also been asked whether LDF funds could be used by a candidate or officer to institute a separate civil action against Durkee for purposes of pursuing recovery of misappropriated contributions. The answer appears to be no.

Under the Section 85304, as discussed above, use of such funds is strictly limited to a candidate or officer's "legal defense" if the candidate or officer is "subject to" a "civil or criminal proceeding or administrative proceeding." Given the strict language of the statute and implementing regulations, the Commission receives very few requests for legal opinions on the proper use of LDFs. Therefore, we find no guidance in our prior opinions. However, under these facts, we do not see how instituting a plaintiff's action against Durkee to recover misappropriated contributions would meet the plain terms of the Act. Unlike an interpleader action where a candidate or officer is named as a defendant, a plaintiff's suit is not a "legal defense," nor does it make the candidate or officer "subject to" a civil action. To the contrary; the candidate or officer would be the prosecutor of, rather than subject to, the civil suit. Therefore, we do not believe LDF funds may be used for such purposes under the present statutory language. We believe a legislative amendment to Section 85304 would be necessary in order to authorize such use.

**Potential LDF Legislation**

The Commission may wish to support legislation to amend Section 85304 to authorize the use of LDF funds to pursue civil restitution actions against treasurers or others accused of misappropriating contributions. A narrowly-drawn amendment could be put forth that would authorize such use. We believe such an amendment would further the purposes of the Act in that candidates or officers would be using such funds to recover contributions. Pursuant to Section 89510, contributions are deemed to be held in "trust for expenses associated with the election of the candidate or for expenses associated with holding office." Permitting LDF funds to be used to recover misappropriated contributions that were held in trust would fit within the intent expressed in Section 85304, because the recovery of contributions "aris[es] directly out of the conduct of an election campaign" and serves the purpose of ensuring that elections are conducted more fairly by not disadvantaging a candidate or officer by requiring either personal or campaign funds to be used to recover funds held in trust. (Section 81002, subd. (e).)

November 23, 2011

Stephen J. Kaufman
Kaufman Legal Group
777 S. Figueroa Street, Suite 4050
Los Angeles, CA 90017

Re: Your Request for Informal Assistance
**Our File No. I-11-213**

Dear Mr. Kaufman:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").[1] Because your questions seek general guidance, we are treating your request as one for informal assistance.[2] This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) In addition, this letter is based on the facts presented. The Fair Political Practices Commission (the "Commission") does not act as a finder of fact when it renders assistance. (*In re Oglesby* (1975) 1 FPPC Ops. 71.)

## QUESTIONS

In light of the pending investigation by the federal government regarding the possible misappropriation of campaign funds by professional campaign treasurer Kinde Durkee and the subsequent interpleader action filed by the First California Bank in the Los Angeles County Superior Court asking the court to allocate the remaining funds held in Ms. Durkee's numerous committee bank accounts:

(1) Under what conditions may a candidate terminate his or her committee for elective office if the committee is unable to meet the criteria identified in Regulation 18404(b)?

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

[2] Informal assistance does not provide the requestor with the immunity provided by an opinion or formal written advice. (Section 83114; Regulation 18329(c)(3).)

(2) For a candidate that may not terminate his or her committee for elective office, how should the candidate report transactions that have occurred since the committee's last filed campaign statement including the difference between the last reported cash balance and the amounts actually remaining in the campaign bank account, as well as funds currently inaccessible because of the interpleader action?

(3) May a candidate with an existing committee bank account that is inaccessible because of the interpleader action establish a new bank account notwithstanding the single-bank account rule?

## CONCLUSIONS

(1) A candidate who has fully disclosed all known and authorized campaign activity on his or her last filed campaign report may seek a termination of his or her campaign committee by sending a written request to the Commission, signed by the candidate, disclosing the amount of funds believed to be misappropriated and attesting that each of the five conditions identified below are, or will be, met.

(2) Addressing general reporting requirements, we can only advise that a candidate for elective office, and the committee's subsequent treasurer, must continue to take all reasonable steps necessary to fully disclose campaign activity based on the information available or that becomes available. Misappropriated funds and funds inaccessible because of the interpleader action should be reported as detailed below.

(3) Notwithstanding the one-bank account rule, a second bank account is permissible under the conditions specified below.

## FACTS

You represent several clients who formerly used Kinde Durkee and her company Durkee & Associates to administer their campaign bank accounts and prepare campaign reports under the Act. More specifically, you represent numerous candidates and their controlled committees for whom Ms. Durkee served as treasurer.

As widely reported, Ms. Durkee has recently been charged with mail fraud by the federal government arising out of her alleged misappropriation and commingling of clients' funds on a massive scale, the true extent of which is yet to be fully determined. The purported amounts missing from her clients' campaign bank accounts total in the millions of dollars. In the case of each of your candidate clients, Ms. Durkee maintained control of the committees' bank accounts and had the sole signature authority.

Ms. Durkee maintained these bank accounts at the First California Bank, which has refused the committees access to the funds remaining in their accounts. In response to Ms. Durkee's suspected misappropriation, the bank has filed an interpleader action in the

Los Angeles County Superior Court depositing the remaining funds with the court and asking the court to determine the amounts that should be allocated to each committee. Currently, it is unclear when or how much of the deposited funds will be recovered by any particular committee. Undoubtedly, the process will be both costly and time consuming. Moreover, in addition to the fact that committees do not currently have access to the remaining funds in their campaign accounts, it is unclear when and if the committees will be granted access to files and records maintained by Ms. Durkee and her company that are necessary for filing subsequent campaign reports.

## ANALYSIS

*(1) Under what conditions may a candidate terminate his or her committee for elective office if the committee is unable to meet the criteria identified in Regulation 18404(b).*

Section 84214 of the Act requires committees and candidates to terminate their filing obligation pursuant to regulations adopted by the Commission. Pursuant to Commission Regulation 18404(b), a recipient committee[3] may terminate its status as a committee only if the committee treasurer completes the termination section of a Statement of Organization (Commission Form 410) declaring, under penalty of perjury, that the committee:

> "(1) Has ceased to receive contributions and make expenditures and does not anticipate receiving contributions or making expenditures in the future;
>
> "(2) Has eliminated or has declared that it has no intention or ability to discharge all of its debts, loans received and other obligations;
>
> "(3) Has no surplus funds; and
>
> "(4) Has filed all required campaign statements disclosing all reportable transactions."

Regulation 18404(b) was adopted as a general rule for termination assuming typical circumstances. Based upon the facts you have provided, the unprecedented misappropriation of campaign funds currently under investigation has resulted in exceptional circumstances that warrant additional consideration. In some circumstances, it would be unreasonable to insist on strict compliance with the termination requirements of Regulation 18404(b). (See *Rios* Advice Letter, No. A-11-198.)

Based upon the circumstances you have provided, there are no compelling reasons to require a candidate to incur the costs of maintaining his or her committee when all known and authorized campaign activity has been fully reported, and the candidate does not intend to engage in additional campaign activity. Accordingly, we find no reason to deny a candidate's

[3] A recipient committee is any person or combination of persons who directly or indirectly receive contributions totaling $1,000 or more in a calendar year. (Section 82013(a).)

request to terminate his or her campaign committee, so long as all of the following conditions have been, or will be, met:

(1) The candidate does not know of any deposits into the committee's campaign account, and has not authorized campaign expenditures from the account, subsequent to the closing date of the period covered by the committee's last filed campaign statement.

(2) The amount of funds misappropriated is less than the likely costs of recovering the funds.

(3) The candidate has ceased to receive contributions and make expenditures, and does not anticipate receiving contributions or making expenditures in the future, relating to the office sought.

(4) The committee had no surplus funds as of the date that its bank account became inaccessible.[4]

(5) Any funds ultimately recovered will be immediately deposited into the bank account of the committee reopened pursuant to Regulation 18404.1(g)(1) or transferred into a subsequent committee as permitted under Regulation 18404.1(g)(1)(A-C).[5]

For these reasons, we find Regulation 18404(b) inapplicable to candidate controlled committees that meet the criteria cited above. To seek termination, qualifying candidate committees should send a written request to the Commission, signed by the controlling candidate, disclosing the amount of funds believed to be misappropriated and attesting that each of the five conditions above are, or will be, met.

*(2) For a candidate that may not terminate his or her committee for elective office, how should the candidate report transactions that have occurred since the committee's last filed campaign statement including the difference between the last reported cash balance and the amounts actually remaining in the candidate campaign account, as well as funds currently inaccessible because of the interpleader action?*

As limited by the conditions stated above, a candidate may terminate his or her committee for elective office only if all known and authorized campaign activity has been disclosed and only when there is no reasonable expectation of additional reportable activity. In

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[4] Funds become surplus funds on the later of the date "upon leaving elected office" or "the end of the postelection reporting period following the defeat of a candidate for elective office." (Section 89519(a).) Surplus funds may be used only for those purposes specified in Section 89519(b).

[5] Regulation 18404.1(g)(1)(A) permits a candidate committees for elective office to "accept a refund from a vendor or other person without reopening if the committee did not know of its entitlement to the refund prior to termination and the refund or refunds total no more than $10,000." However, any refund must "be transferred to a committee that would have been lawfully allowed to receive funds from the terminated committee prior to termination" (Regulation 18404.1(g)(1)(B)) and must be reported pursuant to Regulation 18404.1(g)(1)(C).

any other circumstances, termination is not a viable option and the committee must continue to file campaign reports pursuant to Section 84211 because any known or authorized campaign activity must be fully disclosed to protect the public's interest as specified in Section 81002(a), which states:

> "Receipts and expenditures in election campaigns should be fully and truthfully disclosed in order that the voters may be fully informed and improper practices may be inhibited."

In this regard, the Act specifically requires each candidate for elective office and the candidate's designated treasurer to verify the committee's campaign statement under the penalty of perjury. (Sections 81004 and 84213.) A candidate must also verify that that the committee's treasurer used reasonably diligence in the preparation of the campaign statement. (Section 84213.) Clarifying these requirements, the Commission has determined that both the candidate for elective office and the candidate's designated treasurer shall (1) verify that to the "best of their knowledge" the committee's campaign statements are "true and complete" and (2) use "all reasonable diligence" in the preparation of the statements." (Regulation 18427(a) and (b).) To comply with these duties, a candidate and treasurer must do all of the following:

> "(1) Establish a system of record keeping sufficient to ensure that receipts and expenditures are recorded promptly and accurately, and sufficient to comply with regulations established by the Commission related to record keeping.
>
> "(2) Either maintain the records personally or monitor record keeping by others.
>
> "(3) Take steps to ensure compliance with all requirements of the Act concerning the receipt and expenditure of funds and the reporting of funds.
>
> "(4) Either prepare campaign statements personally or review with care the campaign statements and underlying records prepared by others.
>
> "(5) Correct inaccuracies or omissions in campaign statements of which the treasurer [or candidate] knows, and cause to be checked, and, if necessary, corrected, information in campaign statements a person of reasonable prudence would question based on all the surrounding circumstances of which the treasurer [or candidate] is aware or should be aware by reason of his or her duties under this regulation and the Act." (Regulation 18427(a); also see subdivision (b).)

Addressing a committee's general reporting requirements, considering the potential for missing or incomplete records resulting from a former campaign treasurer's breach of his or her duties to the committee, we can only advise that a candidate for elective office, and the committee's subsequently designated treasurer, must continue to take all reasonable steps

necessary to fully disclose campaign activity based on the information available or that becomes available.

Nonetheless, we do offer limited assistance regarding the reporting of misappropriated funds and funds inaccessible because of the interpleader action. Funds believed to be misappropriated, and for which the committee has no knowledge of how the funds were expended, should be reported as an expenditure with a short description stating that the funds are believed to have been misappropriated by the former campaign treasurer. Albeit involuntarily made, campaign funds inaccessible because of the interpleader action should be reported as an expenditure made to the court with a short description that the funds have been deposited by the bank with the court under the interpleader action. Subsequently, the disputed funds should be reported as a cash equivalent until a final disposition in the interpleader action (see Regulation 18421), at which time any recovered funds should be reported as a miscellaneous increase to cash.[6]

*(3) May a candidate for elective office, whose committee bank account is inaccessible because of the interpleader action, establish a new bank account notwithstanding the single-bank account rule?*

Section 85201 of the Act sets forth what is known as the "one-bank account rule." Pursuant to this rule, a candidate for elective office may establish only one campaign bank account and controlled committee for each office sought. Section 85201 provides, in pertinent part, the following:

> "(a) Upon the filing of the statement of intention pursuant to Section 85200, the individual shall establish one campaign contribution account at an office of a financial institution located in the state.
>
> "(b) As required by subdivision (f) of Section 84102, a candidate who raises contributions of one thousand dollars ($1,000) or more in a calendar year shall set forth the name and address of the financial institution where the candidate has established a campaign contribution account and the account number on the committee statement of organization filed pursuant to Sections 84101 and 84103.
>
> "(c) All contributions or loans made to the candidate, to a person on behalf of the candidate, or to the candidate's controlled committee shall be deposited in the account.

[6] In other words, the cash on hand reported on line 16 of the summary sheet of a committee's campaign statement (Form 460) should reflect the actual cash available to the committee. Inaccessible funds deposited with the court under the interpleader action should not be included in cash on hand until the action is completed and any funds are recovered.

"(d) Any personal funds which will be utilized to promote the election of the candidate shall be deposited in the account prior to expenditure.

"(e) All campaign expenditures shall be made from the account."

Under typical circumstances, the one-bank account rule would not permit a candidate to open a new bank account for the same elective office without simultaneously closing out his or her existing committee bank account. However, under the circumstances you have presented, campaign funds within accounts subject to the interpleader action are currently inaccessible to the affected committees. Most significantly, candidates are not permitted to engage in any campaign activity under Section 85201 without access to a bank account in which to deposit contributions and from which the candidate can make campaign expenditures. Thus, the one-bank account rule cannot reasonably be interpreted to restrict the candidate from opening a second bank account because of the inaccessibility of the candidate's current account subject to the interpleader action. However to ensure accountability for the reporting of campaign activity, a second bank account is permissible only under all of the following conditions:

(1) The committee files an amendment to its statement of organization within 10 days of opening the second account identifying the name and address of the financial institution where the committee has established the account and the account number. (Sections 84103(a) and 84102(f)).[7]

(2) All additional contributions or loans made to the candidate, to a person on behalf of the candidate, or to the candidate's controlled committee shall be deposited into the second account; any additional personal funds which will be utilized to promote the election of the candidate shall be deposited in the second account prior to expenditure; and all additional campaign expenditures shall be made from the second account. (Section 85201(c)-(e).)

(3) Any funds ultimately recovered from the first bank account must be immediately deposited into the second bank account and the first bank account simultaneously closed. (Section 85201(c)-(e).)

[7] Note, however, that an amendment occurring within the 16 days before an election in connection with the committee must be reported within 24 hours. (Section 84103(b).)

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

Sincerely,

Zackery P. Morazzini
General Counsel

By: Brian G. Lau
Counsel, Legal Division

BGL:jgl

**RESOLUTION**

WHEREAS Los Angeles Municipal Code section 49.7.7(B) prohibits City candidates and their City campaign committees from soliciting or receiving contributions more than nine months after the election at which the candidates seek office; and

WHEREAS Los Angeles City Charter section 803(q) prohibits a candidate for the Los Angeles Unified School District (LAUSD) Board of Education and their LAUSD campaign committees from soliciting or receiving contributions more than nine months after the election at which the candidate seek office; and

WHEREAS all contributions solicited and received during the nine-month post-election fundraising window must be used to retire debt; and

WHEREAS some City and LAUSD candidates in the March 2011 elections employed as their campaign treasurer Kinde Durkee, who has been charged with criminal activity, including misappropriation of funds, arising from her work for federal, state, and local candidates and committees; and

WHEREAS the Federal Bureau of Investigation has seized Ms. Durkee's business files, and hundreds of bank accounts that she managed have been frozen, leaving her clients unable to fully access their campaign records and funds; and

WHEREAS the nine-month post-election fundraising window imposed under Los Angeles Municipal Code section 49.7.7(B) and Los Angeles City Charter section 803(q) expired on December 8, 2011; and

WHEREAS it is appropriate to provide an additional four months of post-election fundraising time to City and LAUSD candidates whose March 2011 elections were affected by Ms. Durkee's conduct, to help them resolve their campaign commitments and retire debt;

THEREFORE, BE IT RESOLVED by the City Ethics Commission that, for City and LAUSD candidates who were represented by Ms. Durkee in the elections held on March 8, 2011, the post-election fundraising in Los Angeles Municipal Code section 49.7.7(B) and Los Angeles City Charter section 803(q) will not be enforced until April 8, 2012. No other provision of City law is affected by this resolution.

I certify that this resolution was adopted by the Los Angeles City Ethics Commission on December 13, 2011, under Los Angeles City Charter sections 702(d), 702(e), and 803(u).

_____

Paul Turner, President
City Ethics Commission