

June 19, 2014

The Honorable Lou Correa  
California State Senate  
State Capitol, Room 5061  
Sacramento, CA 95814

Re: Your Request for Advice  
**Our File No. A-14-098**

Dear Senator Correa:

This letter responds to your request for advice regarding the campaign provisions of the Political Reform Act (the "Act").<sup>1</sup> This letter should not be construed as assistance on any conduct that may have already taken place. (See Regulation 18329(b)(8)(A).) Additionally, 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.)

### QUESTION

In transferring funds to a committee, which previously recovered funds in the interpleader action resulting from the arrest and conviction of former campaign treasurer Kinde Durkee exceeding the amount from known donors, how does the committee attribute the transferred funds for purposes of Section 85306, and may the committee retain the recovered funds if the committee does not have records identifying the donors?

### CONCLUSION

For purposes of transferring funds under Section 85306, the committee receiving the funds may attribute funds based upon either the LIFO or FIFO accounting methods to known contributors. Moreover, so long as you have taken all reasonable steps to try to identify the donors, the Act does not require the forfeiture of the funds recovered in the interpleader action to the state general fund, and the funds may be retained by the committee. We caution that under

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<sup>1</sup> 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.

the facts provided the funds being transferred must be transferred prior to June 30, 2014. Any funds not transferred prior to this date become surplus funds and their use will be restricted under Section 89519.

## FACTS

You would like to transfer funds from your committee, Lou Correa for Board of Equalization 2014, FPPC #1344156, (the “BOE 2014 Committee”) to another committee you have established, Lou Correa for Attorney General 2018, FPPC #1336555, (the “AG 2018 Committee”). In making this transfer, you seek assistance in completing the transfer in light of missing donor information resulting from the arrest and conviction of professional campaign treasurer Kinde Durkee, who was the former treasure of the AG 2018 Committee.

After the crime was discovered, California First Bank, the bank holding campaign funds for many of Ms. Durkee’s clients, transferred the remaining balances in all accounts controlled by Ms. Durkee to the Los Angeles County Superior Court filing an interpleader action asking the court to allocate the balance of the funds remaining in the accounts. As a victim of Ms. Durkee’s actions, funds remaining in the AG 2018 Committee’s account were deposited with the court and subsequently returned to the committee upon the disposition of the interpleader action. The following is a summary of the transactions reporting the funds involved in the interpleader action as reported by the AG 2018 Committee:

- 12/31/2011: In the interpleader action, the California First Bank transfers a reported balance of \$68,744.32 in the committee account to Los Angeles County Superior Court. (Last filed campaign report shows a cash balance of \$55,039.65.)
- 12/31/2012: Upon the disposition of the interpleader action, the Los Angeles Superior Court returns the entire \$68,744.32 balance to the committee.
- 12/31/2012: The Committee “reconciles” campaign statement by reporting the difference between the amount awarded and amount last reported (\$13,704.67) as a miscellaneous increase in cash.

You state that the \$13,704.67 is likely to be campaign contributions legally raised by the AG 2018 committee. However, because of the unprecedented magnitude of Ms. Durkee’s arrest and conviction, the financial records have been lost, and you have not been able to determine or document the source of the contributions.

## ANALYSIS

### *Attribution*

Section 85306 permits candidates to “transfer campaign funds from one controlled committee to a controlled committee for elective state office of the same candidate” requiring

candidates to attribute transferred contributions using either a LIFO or FIFO accounting method. Funds may not be transferred if the funds attributed to a specific contributor exceed the contribution limits of Section 85301 or 85302 when aggregated with all other transfers attributed to, and contributions from, the same contributor.

Regulation 18536 outlines the Commission's rules pertaining to the transferring and attribution of contributions and provides in pertinent part:

“(a) A committee transferring funds must designate in its record at the time of its first transfer whether it elects the 'first in, first out' or a 'last in, first out' method of accounting for the current and future transfers. That designation is irrevocable.

[¶] ... [¶]

“(3) Campaign funds shall be attributed to contributors in the lesser of the following amount:

“(A) The actual amount of the original contribution from the person to whom the campaign funds are being attributed;

“(B) The applicable contribution limit under Government Code [S]ection 85301 or 85302; or

“(C) The amount of campaign funds the committee is seeking to transfer that has not yet been attributed.”

To the extent that a transfer is made and attribution to any particular contributor would exceed applicable contributions limits, neither Section 85306 nor Regulation 18536 prohibit an official from making the transfer so long as the funds exceeding the contribution limit are attributed to the closest preceding contributor (if using a LIFO accounting method) or to the closest subsequent contributor (if using a FIFO accounting method) whose aggregated contributions would not exceed the limits. (See *Lawler Advice Letter*, No. I-07-047.)

Pursuant to the Act's transfer rules, even assuming the contributors were known by the AG 2018 committee and that their contributions exceeded applicable limits if aggregated with the transferred funds, the transfer would still be permissible so long as the funds were attributed to the next available contributor whose aggregated contributions did not exceed limits. With this in mind, the option most consistent with the Act, considering the unique circumstances surrounding this particular transfer, is to exclude the unknown donors for purposes of attribution. Accordingly, to complete the transfer, the AG 2018 Committee may skip the unknown contributors and attribute funds based upon either the LIFO or FIFO accounting methods only to known contributors.

*Donor Identification and Contribution Limits*

The Act generally prohibits anonymous contributions of \$100 or more from any particular contributor. Under Section 84304:

“No person shall make an anonymous contribution or contributions to a candidate, committee or any other person totaling one hundred dollars (\$100) or more in a calendar year. An anonymous contribution of one hundred dollars (\$100) or more shall not be kept by the intended recipient but instead shall be promptly paid to the Secretary of State for deposit in the General Fund of the state.”

Moreover, in the context of the unprecedented fraud by Ms. Durkee, we have recognized that “[t]he Commission is bound by the Political Reform Act and does not have the independent authority to waive contributions limits.” (Staff Memorandum to Commission, *Legal Division Analysis of Contribution Limits and LDFs in Wake of Recent Accounts of Widespread Campaign Fraud and Pending Interpleader Action*, dated October 31, 2011.) Nonetheless, we have also determined that the Act’s contribution limits and implementing regulations may be interpreted in light of the “unique circumstance being faced by many candidates and committees that previously employed Durkee.” (*Ibid.*)<sup>2</sup>

Turning to the question before us, we are left with the determination of whether or not the donor identification rules or applicable contribution limits preclude the AG 2018 Committee from retaining the funds returned upon the disposition of the interpleader action. In making this determination, we find it persuasive that there are no reasons to believe any particular contribution was made anonymously or exceeded applicable contributions limits. Thus, the issue is not a matter of anonymous contributions or contributions exceeding limits, but an issue of an unprecedented failure by the committee’s previous treasurer to produce the committee’s records resulting from fraudulent activity outside of the scope of the treasurer’s representation of the committee.

For missing records resulting from Ms. Durkee’s arrest, we have previously advised, “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.” (*Kaufman* Advice Letter, No. I-11-213.) To the extent that you have taken all reasonable steps to try to identify the donors but have been unable to determine their identities, we do not find either the donor identification rules or contribution limits applicable to

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<sup>2</sup> Contributions limits are established by Section 85301 of the Act and are adjusted biennially by the Commission based upon changes to the Consumer Price Index under Section 83124. The applicable contribution limit for candidates for the State Board of Equalization and the Attorney General is currently \$6,800 per person per election. (Regulation 18545.)

the question at hand. Accordingly, considering the unique circumstances faced by the AG 2018 committee, the Act does not require the forfeiture of the funds to the state general fund, and the funds may be retained by the committee subject only to the Act's general restrictions on the use of campaign funds.<sup>3</sup>

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

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<sup>3</sup> You have specifically asked whether or not the committee may contribute the funds to a state political action committee. While not required, we do appreciate the fact that contributing the funds to a state political action committee would all but ensure that no funds exceeding applicable contributions limits were utilized by your committee, thereby avoiding even the appearance of impropriety. Pursuant to general restrictions on the use of campaign funds, funds may be contributed to a state political action committee so long as the contributions do not exceed the limits established by Section 85303 as adjusted in Regulation 18545(a)(7) and (8).

## LEGAL DIVISION ASSIGNMENT SHEET

|                         |       |
|-------------------------|-------|
| <b>Tracking Number:</b> | 14102 |
|-------------------------|-------|

| ITEM DESCRIPTION       |        |           |                  |
|------------------------|--------|-----------|------------------|
| Advice Letter No.      | 14-098 | Requestor | Martinez, Xavior |
| Regulation Project No. |        |           |                  |
| Other (describe)       |        |           |                  |

|                                 |          |                                  |          |
|---------------------------------|----------|----------------------------------|----------|
| Received By<br>FPPC On:         | 05/28/14 | Due Date:                        | 06/26/14 |
| Assigned To:                    | Brian    | Date To<br>Assignee:             | 05/28/14 |
| Date sent to AG/DA<br>(if 1090) |          | Date AG/DA<br>respond, if<br>any |          |

| REVIEWERS   | Date To<br>Review | 1st Approval &<br>Date (Including Regulation<br>Notices) | Date To<br>Review | Final Approval & Date<br>(Incl. Regulation Adoption<br>Memos) |
|---|-------------------|--|-------------------|---|
| Proofed   |                   |  |                   |   |
| Senior  | 6/12/14           | 6/12 HPW   |                   |   |
| TAD Chief<br>(SEI, Campaign,<br>Conflict of Interest<br>Code letters) |                   | 6/17 LC via Email  |                   |   |
| Assistant GC  |                   | JWW  |                   |   |
| General Counsel   |                   | ZPM  |                   |   |
| Executive Director<br>(discretion of GC)                              |                   |  |                   |   |
| Chair<br>(discretion of GC)   |                   |  |                   |   |