FAIR POLITICAL PRACTICES COMMISSION
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November 23, 2011

Stephen J. Kaufman
Kaufman Legal Group
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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;
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> "(2) Has eliminated or has declared that it has no intention or ability to discharge all of its debts, loans received and other obligations;
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> "(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.
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> "(3) Take steps to ensure compliance with all requirements of the Act concerning the receipt and expenditure of funds and the reporting of funds.
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> "(4) Either prepare campaign statements personally or review with care the campaign statements and underlying records prepared by others.
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> "(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.
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> "(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.
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> "(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

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