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November 9, 2011

VIA FACSIMILE

Chairman Ravel and Commissioners Eskovitz,  
Garrett, Montgomery and Rotunda  
Fair Political Practices Commission  
428 "J" Street, Suite 600  
Sacramento, CA 95814

Re: *Agenda Item 26 – Campaign Fraud Workshop*

Dear Chairman and Commissioners:

This letter is submitted on behalf of Assemblyman Jose Solorio in response to the General Counsel's thorough and thoughtful memorandum of October 31, 2011 regarding the campaign accounts controlled by Kinde Durkee. While there is much in the memorandum with which we agree, we hope to persuade you that Durkee was not acting as an agent for Assemblyman Solorio with regard to any of the contributions that were diverted for her own use, regardless of where those contributions were initially deposited.

A contribution is "received" for purposes of the Political Reform Act when the candidate or someone who serves as the agent of the candidate obtains possession or control of the contribution. (FPPC Reg. 18421.1(c).) As the memorandum acknowledges,

*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.*

(Memorandum, p. 1, emphasis added.)

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Thus it is clear that Durkee was not Assemblyman Solorio's agent when she deposited contribution checks made out to his campaign committee, and those contributions were not accepted for purposes of the Act.

Given that conclusion, there is no basis in law for distinguishing between contributions that were not initially deposited in the campaign bank accounts associated with the Solorio campaigns, and those that were deposited but then diverted for Durkee's own uses. Under either scenario, Durkee was not serving as the candidate's agent, and the contributions were not "received" as that term is used in the Political Reform Act.

Any other interpretation fails to fully acknowledge the breadth of the fraud committed by Durkee. For example, in Assemblyman Solorio's situation, most (although not all) contributions were deposited into accounts that Durkee ostensibly set up for his campaign.<sup>1</sup> However, Durkee used those accounts as her own, randomly withdrawing and then replacing funds at will and moving the money between accounts according to her own needs, and not the candidate's. It appears, for example, that Durkee moved much of Assemblyman Solorio's campaign funds collected for the 2010 election into a money market fund, then withdrew the entirety of that money market fund – all \$677,181 – in *one* unauthorized transaction. Certainly she was not acting as Assemblyman Solorio's agent in any aspect of that transaction. It should make no difference that she deposited the funds into one account and transferred them to a money market account when her intent appears all along to have been to use those funds as her own.

It also is important to remember that Durkee set up the bank accounts so that the candidate never had "possession and control of the contribution[s]" even after they were deposited." (Memorandum, p. 6.) The candidates were not put down as signatories on the accounts and they were never shown the true bank statements on the accounts. Thus even when the contributions were deposited into an account ostensibly set up for the candidate, they were not in the candidate's possession and control but instead were in the sole possession and control of someone who clearly was not acting as the candidate's agent.

Footnote four of the memorandum suggests that staff will consider these issues on a case by case basis, depending on whether the evidence demonstrates that Durkee "made *no* expenditures from the account for campaign purposes but instead misappropriated *all* contributions for her own personal benefit." (Memorandum, fn. 4, emphasis added.) This was

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<sup>1</sup> We still are at the early stages of investigation and unfortunately continue to be hampered in those efforts by First California Bank, which is refusing to produce records of deposits and withdrawals in Assemblyman Solorio's accounts without a subpoena. We also do not yet have documents from Durkee's firm, as we have been told those documents have been subpoenaed by the federal grand jury.

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true for Assemblyman Solorio's 2010 money market fund, from which Durkee withdrew *all* the proceeds without making any authorized expenditures, but it is not true for all of Mr. Solorio's campaign bank accounts. Again, if Durkee was not acting as the candidate's agent for some of the transactions, it should not matter that she allowed some legitimate transactions to occur, particularly when it appears likely those legitimate transactions served only to lengthen the time it took to uncover her fraudulent enterprise.

The memorandum also expresses concern that the net debt statute somehow prevents the Commission from allowing contributions for prior elections to be replaced now, after those elections are over. However, this is not a situation where candidates are asking for a *new* contribution after the date of the election, calling into play the net debt rules. Instead, the defrauded candidates are asking to replace a contribution validly made prior to the election but fraudulently diverted. This is not the type of situation that the net debt statute was intended to reach.

In its *Pirayou* opinion, the Commission acknowledged "it has long been accepted that the Commission is not shackled by statutes that can only be read and applied with a wooden literalism that permits no appeal to the Act's fundamental purposes." (*In re Pirayou*, 19 FPPC Ops. 1, 5 (2006)). As the Commission wrote there, when faced with a treasurer's mistake that threatened to severely harm the candidate, the intent of the Political Reform Act is not necessarily served by a strict reading of the statute in every situation. After reviewing prior regulatory actions that were not necessarily consistent with the strict wording of the statute but nonetheless were upheld by the Court of Appeal as fully within the Commission's authority, the Commission wrote:

In other words, under its broad powers to amend and rescind rules and regulations to carry out the purposes of the Act, the Commission can interpret the Act and its implementing rules and regulations to respond effectively to a specific set of facts when necessary. (Section 83112; also see *In re Solis* (2000) 14 FPPC Ops. 7.) Therefore, the Commission is equipped to react in "real time" to address problems that, typically, emerge only in the context of or in close proximity to an election. This is why the Act confers on the Commission a broad grant of authority to consider the fundamental purposes of the Act in addition to the "literal language" of individual statutes, rules and regulations, as the *Watson* court explained. Thus, the Commission's authority to implement the intent of the Act, and not just the strict letter of a statute, is well established.

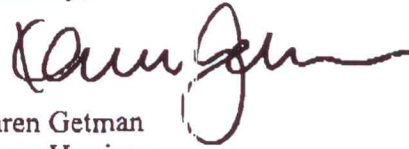
(19 FPPC Ops. at 6.)

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The intent of the net debt statute surely was not to cover the situation faced here. Candidates are not trying to skirt the Act's contribution limits or gain undue favor from repeated contributions. They simply are asking for the opportunity to ask prior contributors whether they would be willing to make the same contribution they thought they were making initially – one that was fully lawful, but never "received" for purposes of the Political Reform Act. In that regard, we agree fully with the General Counsel that should misappropriated funds ever be recovered, those funds should be used to reimburse contributors who re-make their contributions. (Memorandum, p. 6.)

Thank you for your willingness to engage in this dialogue about how best to approach this unique set of circumstances.

Sincerely,



Karen Getman  
James Harrison

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