



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

**SENSITIVE**

**MEMORANDUM**

**TO:** Commissioners  
Staff Director  
General Counsel

**FROM:** Office of the Commission Secretary 

**DATE:** December 16, 2009

**SUBJECT:** Statement of Reasons of MUR 5903  
(PBS&J Corporation, *et al.*)  
from Vice Chairman Matthew S. Petersen  
and Commissioners Caroline C. Hunter  
and Donald F. McGahn II

The attached Statement of Reasons is being circulated for a 48-hour review prior to public release. Absent objection, the Office of General Counsel will include this statement in the public record file in this case.

cc: Lawrence Calvert

Attachment



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**SENSITIVE**

**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 ) MUR 5903  
PBS&J Corporation, *et al.* )

**STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN  
AND COMMISSIONERS CAROLINE C. HUNTER AND DONALD F. McGAHN**

In this matter, the Office of General Counsel (“OGC”) recommended seeking civil penalties from the PBS&J Corporation (“PBS&J”) for illegal corporate reimbursements of contributions to federal political committees. Although the underlying conduct in this matter was unquestionably egregious, the Department of Justice (“DOJ”) had already successfully prosecuted the three senior corporate officers involved in the scheme.

More importantly, by the time this matter was first brought before us in September 2009, the five-year statute of limitations had already expired on all violations (in fact, some of the conduct stretched back nearly 20 years).<sup>1</sup> Nonetheless, OGC recommended proceeding to pre-probable cause conciliation against the corporation, arguing that the doctrine of equitable tolling could apply since the respondent may have concealed its violations.

There is no disagreement as to the seriousness of the underlying criminal conduct. However, no court has ever granted the Commission such extraordinary relief with respect to time-barred activity. In fact, the only circuit court to consider the application of the doctrine of equitable tolling to the statutory provisions at issue rejected its usage. Therefore, because we could not conclude that the five-year statute of limitations could be tolled under the facts in this matter, we voted against pursuing this matter further.

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<sup>1</sup> Even when it had been brought before the Commission in September 2007, many of the violations were already time-barred, and the DOJ proceedings were already well underway.

## I. Background

None of the facts in this matter are in dispute.<sup>2</sup> After a lengthy investigation, DOJ obtained guilty pleas from three senior officers of PBS&J<sup>3</sup> for violations relating to corporate reimbursements of contributions to federal political committees that occurred between 1990 and 2004. Additionally, both DOJ and an employee of PBS&J<sup>4</sup> brought this matter to the Commission's attention. In 2007, the Commission found reason to believe PBS&J, along with a number of its employees, violated two provisions of the Federal Election Campaign Act of 1971, as amended ("FECA" or "the Act"), but held the matter in abeyance pending DOJ's prosecution. Based on information uncovered during its subsequent investigation into this matter, OGC recommended taking no further action against any PBS&J employees, but sought authorization to enter into pre-probable cause conciliation with PBS&J to settle alleged violations of sections 441b and 441f of the Act.<sup>5</sup> This recommendation was forwarded to us on September 21, 2009—after the limitations period for all violations had expired. For the reasons set forth below, on October 20, 2009, we voted to take no further action and close the file.

## II. Analysis

We are not the first Commissioners who have struggled with the five-year window within which the Commission must (i) be notified of a potential violation; (ii) find reason to believe a violation may have occurred; (iii) investigate the potential violation; (iv) find probable cause a violation occurred; (v) attempt to conciliate with the party or parties involved; and, if such attempts are unsuccessful, (vi) institute civil action for relief.<sup>6</sup> In the mid-1990's, the Commission filed suit against Larry Williams for making excessive contributions in the name of another in violation of sections 441f and 441a(a)(1)(A) of the Act, seeking civil penalties and declaratory and injunctive relief, even though the conduct took place more than five years before the FEC filed suit.<sup>7</sup> Mr. Williams allegedly purchased 40 football tickets from the Philadelphia Eagles for \$4,000 with the intention of giving the tickets to individuals he would persuade to contribute

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<sup>2</sup> The full factual record in this matter is ably set forth by OGC in its reports.

<sup>3</sup> Other PBS&J employees pled guilty for their involvement in an embezzlement scheme.

<sup>4</sup> This employee complainant also pled guilty to violations of federal law and was part of the scheme to fraudulently reimburse contributions for approximately 20 years.

<sup>5</sup> We recognize that the application of section 441f in certain circumstances has been called into question by a federal district court in *United States v. O'Donnell*, No. 08-872 (2009). Given that we believe that any potential violation of the Act happened outside the applicable limitations period, the court's decision in *O'Donnell* held no relevance to our decision in this matter.

<sup>6</sup> 2 U.S.C. § 437g; 2 U.S.C. § 455(a) (state of limitations for criminal penalties); 28 U.S.C. § 2462 (statute of limitations for civil penalties).

<sup>7</sup> *FEC v. Williams*, 104 F.3d 237, 239 (9th Cir. 1996).

\$1,000 to the 1988 presidential campaign of Jack Kemp.<sup>8</sup> Apparently, Mr. Williams was unsuccessful in his efforts to find 40 willing takers, because Williams allegedly made contributions directly to the Kemp campaign in the name of 22 individuals and then, instead of giving them the tickets, sold the tickets to third parties and pocketed the proceeds as a “reimbursement.”<sup>9</sup>

The Ninth Circuit Court of Appeals held that FEC enforcement actions are subject to the default five-year statute of limitations in 28 U.S.C. § 2462. According to the *Williams* court, the limitations period began running at the time the activities at issue occurred and, as a result, the FEC’s complaint was time-barred.<sup>10</sup> In reaching this conclusion, the court rejected the Commission’s argument that, under the doctrine of equitable tolling, “the running of the statute of limitations was tolled during the time that Williams allegedly fraudulently concealed his illegal payments.”<sup>11</sup>

According to the court, to establish that equitable tolling applies, a plaintiff must prove the following:

Fraudulent conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and due diligence by the plaintiff until discovery of those facts.<sup>12</sup>

The court agreed that equitable tolling applies to statutes of limitations imposed upon the government. However, the court found that the Commission could not establish the elements of the doctrine. Specifically, the court held that “FECA’s campaign finance reporting requirements are, *as a matter of law*, sufficient to give FEC ‘notice of facts that, if investigated, would indicate the elements of a cause of action.’”<sup>13</sup> The court noted that the amounts and the individuals in whose name Williams allegedly made the contributions were listed on the campaign reports filed with the Commission, and that the reports themselves did not contain any other false information.<sup>14</sup> Thus, according to the court, “[t]he reports required by FECA provide sufficient information to FEC that through a duly diligent exercise of its investigatory power, it could have discovered the

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<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 240 (relying, in part, on *FEC v. NRSC*, 877 F. Supp. 15 (D.D.C. 1995) and *FEC v. Nat’l Right to Work Comm.*, 916 F. Supp. 10 (D.D.C. 1996)).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* (summarizing authority).

<sup>13</sup> *Id.* at 240-241 (quoting Calvin W. Corman, *Limitation of Actions* § 9.7.1(1991) (internal citations omitted)) (emphasis added).

<sup>14</sup> *Id.* at 241.

operative facts giving rise to this suit.”<sup>15</sup> Therefore, under the court’s holding in *Williams*, the Commission may not avail itself of the doctrine of equitable tolling to get out from under the five-year statute of limitations in matters where contributions are alleged to have been made in the name of another.<sup>16</sup>

While one could argue that the Commission should nevertheless proceed in this matter because (1) the *Williams* case was wrongly decided and, (2) even if it was correct, the facts in this matter are distinguishable from *Williams*, neither of these arguments is persuasive. First, we cannot say that *Williams* wrongly held that the FEC was not entitled to equitable tolling in cases involving contributions made in the name of another. Although some courts have distinguished *Williams* on other grounds, none has cast doubt on its central holding. OGC noted that equitable tolling may be available in the Eleventh Circuit (which would have jurisdiction over this matter if it went to court), because that circuit distinguished *Williams* in holding that a statute of limitations did not apply to a federal agency’s claims for equitable relief.<sup>17</sup> Thus, under this argument, the Commission should not be hindered by either the five-year statute of limitations or the Ninth Circuit’s holding in *Williams* in seeking conciliation with PBS&J; if PBS&J were to reject conciliation, the Commission could find probable cause and then file suit in the hopes that the Eleventh Circuit’s decision to distinguish *Williams* in a case where equitable relief—not a civil penalty—was sought might result in the court rejecting the *Williams*’ holding as to FECA and equitable tolling.

This is too thin of a basis on which to proceed. First, the Eleventh Circuit decision in *U.S. v. Banks* never discussed the equitable tolling doctrine at issue in this matter. The specific holding in that case was “[b]ecause Congress did not expressly indicate otherwise in the statutory language of section 2462 [the statute of limitations], its provisions apply only to civil penalties; the government’s equitable claims . . . are not barred.”<sup>18</sup> Because the Commission *would* be seeking a civil penalty here—not merely equitable relief—the *Banks* holding is irrelevant. Moreover, the *Banks* decision in fact confirmed that the statute of limitations at issue in *Williams* would bar untimely actions

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<sup>15</sup> *Id.*

<sup>16</sup> There is no evidence the PBS&J made contributions to any committee in its own name. Rather, it made its contributions in the names of others and, thus, the corporate contribution violation is merely a subset of the overarching violation for which the Commission found reason to believe—that contributions were improperly made in the name of another in violation of section 441f.

<sup>17</sup> MUR 5903, General Counsel’s Report #2 at 3 n.1 (citing *United States v. Banks*, 115 F.3d 916, (11th Cir. 1997)).

<sup>18</sup> *Id.* at 919. Indeed, in *Banks*, the government conceded this issue. *Id.* at 918, n.2 (“In the light of the application of the statute of limitations to the government’s claims for civil penalties, discussed below, the United States sought civil penalties in this case only for Banks’ filling activities in 1989 and 1990 [within the limitation period].”).

Other courts that have distinguished *Williams* likewise have not questioned its central holding that tolling is appropriate only under extraordinary circumstances where due diligence could not have uncovered the cause of action. Unfortunately, that threshold is not met here. Under *Williams*, when the violations in this matter were committed, the information available to the government was sufficient to start the five-year limitations period.

Second, it has been argued that this matter should proceed to conciliation because it is distinguishable from *Williams*. Specifically, OGC contends that PBS&J perpetuated a more extensive scheme—in terms of both amounts involved and efforts to hide the true source of the contributions—than Mr. Williams did. The legal principle articulated in *Williams* is in no way dependent on the extent of the violation, however. The relevant facts at issue here are not materially different from the facts in *Williams*. While larger amounts of money were at issue, that fact does not obviate the *Williams* court’s analysis. The Act still requires reporting of contributions in excess of \$200. There is no indication that the names of the contributors on whose behalf the contributions were made went unreported. And there is no showing that PBS&J filed any reports with the Commission that contained other false information.

We do not dispute that, as a result of this scheme, PBS&J’s internal documentation contained false or misleading information. However, the *Williams* court held that equitable tolling was inapplicable not because no other documents besides the FEC reports listing “false” contributors were falsified, but rather, because no other false documents were filed *with the Commission*. Therefore, because all pertinent reports filed with the Commission in this matter contained no false information other than the names of the persons on whose behalf the contributions were funneled, we should follow the most reasonable reading of the holding in *Williams*.<sup>20</sup>

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<sup>20</sup> The actions that PBS&J took, including the creation of misleading corporate accounts and the reimbursement of contributions based on falsified reimbursement requests for mileage or business development, were not actions taken after the fraud, but rather were steps of the fraud itself. The separate accounts were created to hide the real identity of the donor at the time the contributions were made. This is the heart of the alleged fraud. The same is true of the internal requests describing reimbursements for contributions as reimbursements for other activities. In other words, misnaming the reasons for reimbursement was not done after-the-fact to hide the real reason from internal oversight. Rather, it was the only way to receive reimbursement in the first place. Any conspiracy here was to reimburse contributors and make corporate contributions, not to hide those activities once they were completed. Thus, it is not a material distinction that the scheme in this matter was more extensive than that in *Williams*.

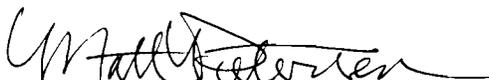
### III. Conclusion

Statutes of limitations serve a number of vital policy interests, including: protecting individuals from defending against stale claims; ensuring the reliability and integrity of evidence; promoting efficiency in the court system; and bringing finality to disputes.<sup>21</sup> The tolling of limitations periods, therefore, is reserved only for rare occasions when particularly compelling circumstances arise. Otherwise, the exceptions would threaten to swallow the rule, thus undermining the policy interests at stake.

In a regime of self-reporting and third-party complainants, many allegations of illegality involve the misreporting of activities to the Commission. For example, in both this matter and in *Williams*, the person or entity that served as the true source of the contributions was not reported; rather, the committee reports filed with the Commission provided the names of the persons or entities in whose names the contributions were made. If this were enough to equitably toll, then the statute of limitations would largely become irrelevant not only in matters involving contributions made in the name of another, but in virtually any instance of misreporting. For the policy reasons listed above, Congress chose to put temporal limits on the government's ability to bring enforcement actions. Absent extraordinary circumstances, which under *Williams* this matter does not present, those limits apply, even in hard cases like this one.

For the reasons stated above, we rejected OGC's recommendation to enter into pre-probable cause conciliation in this matter and, because the statute of limitations had run on all conduct, voted to close the file.

12/16/2009  
Date

  
MATTHEW S. PETERSEN  
Vice-Chairman

12/16/2009  
Date

  
CAROLINE C. HUNTER  
Commissioner

12/16/09  
Date

  
DONALD F. MCGAHN II  
Commissioner

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<sup>21</sup> AM. JUR. LIMITATION §§ 13-18.