FEDERAL ELECTION COMMISSION
Washington, DC 20463

Toner

SENSITIVE

MEMORANDUM

TO: Commissioners
Acting Staff Director
Director, ADR
General Counsel

FROM: Office of the Commission Secretary

DATE: January 5, 2006

SUBJECT: Statement of Reasons for
ADR 264/RAD Referral 05L-23 and
ADR 293/RAD Referral 05L-43
Chairman Michael E. Toner,
Vice Chairman Danny L. McDonald,
Commissioners David M. Mason,
Scott E. Thomas and Ellen L. Weintraub

The attached document is being circulated for a 48-hour review prior to public release. Absent objection, the Office of Alternative Dispute Resolution will include this statement in the public record file in this case.

Attachment

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	**ADR 264/RAD Referral 05L-23**
Brady for Congress and	)	
W. R. Eissler, Treasurer	)	
In the Matter of	)	
	)	**ADR 293/RAD Referral 05L-43**
Thelma Drake for Congress and	)	
Robert J. Catron, Treasurer	)	

STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER, VICE CHAIRMAN DANNY L. McDONALD AND COMMISSIONERS DAVID M. MASON, SCOTT E. THOMAS AND ELLEN L. WEINTRAUB

Two campaign committees, the Brady for Congress and Thelma Drake for Congress committees, were referred to the Commission's Alternative Dispute Resolution ("ADR") Office, because they had not responded to Reports Analysis Division ("RAD") inquiries noting that occupation and employer information for a substantial number of their individual contributors was missing.

I. THE ADR PROCESS

In the course of the ADR process, both committees produced evidence to demonstrate that they had complied with the "best efforts" provision of the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, and Commission regulations to obtain, maintain and submit this information. *Id.* § 432(i); 11 C.F.R. § 104.7.

The Commission, however, rejected the proposed ADR settlement agreements because both agreements contained identical language that could be confusing as to the Commission's ADR process and the "best efforts" requirements. The agreements suggested the Commission prematurely had found a violation of law, and further indicated that it would be inappropriate for the Commission to make even a preliminary finding where, as here, the committees had failed to make "best efforts" showing to RAD.

The Commission's ADR process is not initiated based on a conclusion, or even a preliminary judgment, that someone has violated the law or Commission regulations. In contrast to the Commission's statutory enforcement process, 2 U.S.C. § 437g, not even a preliminary

"reason to believe" ("RTB") finding, *id.* § (a)(2), is made before initiating the ADR process. Rather, the ADR process begins after a complaint or an internal Commission review shows evidence that someone may have violated the law or Commission regulations, and the matter is deemed appropriate for ADR.

During the ADR process, the parties may agree that a violation did occur, they may conclude that one did not occur, or they may settle the matter without any definitive conclusion or acknowledgement that a law or regulation was violated. The Commission itself makes no determination of whether violations occurred.

Thus, arguments in the ADR process or statements in ADR agreements about the appropriateness of Commission findings or conclusions are simply misplaced. Moreover, statements interpreting the law (other than straightforward explanations of black-letter law or clearly settled guidance) generally are not useful in ADR agreements, because, by the terms of the ADR program, ADR agreements cannot be cited as precedent.

II. BEST EFFORTS

Because the Brady and Drake committees apparently used "best efforts" to obtain, maintain and submit contributor information, the Commission voted unanimously to dismiss these matters, close the files and send the appropriate letters. The Commission also voted unanimously to reject the proposed settlement agreements with Respondents because of the language in the proposed agreements that may have caused confusion about what ADR and "best efforts" entail.

FECA requires that political committees report the occupations and employers of individuals who contribute more than $200 in a calendar year. *See* 2 U.S.C. §§ 434(b)(3)(A), 431(13)(A), *cited in Republican Nat'l Comm. v. FEC,* 76 F.3d 400, 403 (D.C. Cir. 1996) ("*RNC*"), *cert. denied,* 519 U. S. 1055 (1997); *cf. RNC,* 76 F.3d at 403 (holding that neither FECA nor any other law requires that *contributors* disclose this information). FECA then provides:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of Title 26.

Id. § 432(i); *see also* 11 C.F.R. § 104.7; *see generally RNC,* 76 F.3d at 403-04; *Lovely v. FEC,* 307 F. Supp.2d 294, 299 (D. Mass. 2004).

The "best efforts" provision "is designed to 'promote the very gathering of information that *Buckley* [*v. Valeo,* 424 U.S. 1 (1976),] found to be in the public interest.'" Advisory Op. 1996-25, 1996 WL 536547, at *2 (Fed. Election Comm'n Sept. 12, 1996) (quoting *RNC,* 76 F.3d at 408), *available at* http://ao.nictusa.com/ao/no/960025.html (visited Dec. 14, 2005).

As the *RNC* court held, the provision "essentially offers an optional safe harbor or affirmative defense for political committees unable to secure the identifying information ... ." 76 F.3d at 409; *cf. United States v. Hsia,* 176 F.3d 517, 524 (D.C. Cir. 1999), *cert. denied,* 528 U.S. 1136 (2000).[1] It "requires committees to use their best efforts to gather the information and then report to the Commission whatever information [contributors] choose to provide." *RNC,* 76 F.3d at 406.[2]

The *RNC* court also held, in the same paragraph as the safe-harbor/affirmative-defense holding, that "the 'best efforts' regulation does not compel political committees to do anything, and there is no penalty for violation of the 'best efforts' regulation." 76 F.3d at 409. This is accurate in the sense that FECA requires disclosure of, for example, the occupations and employers of individuals who contribute more than $200 in a calendar year, *see* 2 U.S.C. §§ 434(b)(3)(A), 431(13)(A), *cited in RNC,* 76 F.3d at 403, and committees unable to obtain contributor information *may* assert the "best efforts" safe harbor/affirmative defense. *See RNC,* 76 F.3d at 409 (noting that the safe harbor/affirmative defense is "optional"). While there is no penalty for not asserting a safe harbor/affirmative defense, there may be a penalty for not disclosing information about contributions. *See generally* 2 U.S.C. § 437g(a)(5)-(6).

With this in mind, those asserting an affirmative defense should recall that the burden of proof is on the party asserting the affirmative defense. *See Smith v. Sac County,* 78 U.S. 139, 147 (1870) (holding that "a defendant is bound to prove all the facts necessary to constitute a defence"). The same is true of a safe harbor when it functions as an affirmative defense rather than as an element of the offense. *See United States v. Kloess,* 251 F.3d 941, 944 (11th Cir. 2001); *cf. Hsia,* 176 F.3d at 524 (calling the "best efforts" provision a "safe harbor," and contrasting the provision of an affirmative defense with the modification of FECA's substantive reporting requirements). Thus, the burden is on respondents to prove "best efforts." *See* 2 U.S.C. 432(i). This safe harbor/affirmative defense applies when "the treasurer of a political committee shows that best efforts have been used ... ." *Id.* It is not up to the Commission to prove that respondents have *not* used "best efforts." *See id.*

Because the burden of proving "best efforts" is on respondents, they should demonstrate "best efforts" as soon as the Commission inquires about missing contributor information. Thus,

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[1]The effect of this provision, which Congress passed after *Buckley, see generally RNC,* 76 F.3d at 403, is to make FECA's disclosure requirements "less stringent than the absolute disclosure requirements upheld in *Buckley.*" *Id.* at 409.

[2]The *RNC* court made this point in striking down a former Commission regulation. The regulation required that political committees include a particular statement when soliciting contributions in writing, and when following up with particular contributors who, in making contributions, did not volunteer all the information that FECA requires committees to disclose. *See* 11 C.F.R. § 104.7(b)(1)-(2) (1993), *quoted in RNC,* 76 F.3d at 404. The court held that the

> required language – that "federal law requires political committees to report the name, mailing address, occupation and name of employer for each individual" contributing more than $200 a year – is inaccurate and misleading. The statute does *not* require political committees to report the information for "each" donor.

RNC, 76 F.3d at 406 (brackets omitted). This does not mean that political committees are not required to report the information in a general sense. *See* 2 U.S.C. §§ 434(b)(3), 431(13), *cited in RNC,* 76 F.3d at 403. Rather, this means that it was misleading to require political committees to tell contributors, without mentioning "best efforts," that committees must report particular information about contributors. *See RNC,* 76 F.3d at 406.

for example, when RAD analysts inquire about missing contributor information, committees either should provide that information or explain their "best efforts" to obtain the information. Respondents who do not provide information at this stage potentially subject themselves to enforcement actions, including findings of reason to believe, and even probable cause to believe, that a violation of FECA has occurred. *See* 2 U.S.C. § 437g(a)(2)-(4).

January 5, 2006

Michael E. Toner
Chairman

Danny L. McDonald
Vice Chairman

David M. Mason
Commissioner

Scott E. Thomas
Commissioner

Ellen L. Weintraub
Commissioner