FEDERAL ELECTION COMMISSION
Washington, DC 20463

SENSITIVE

MEMORANDUM

TO: Commissioners
Staff Director
General Counsel

FROM: Office of the Commission Secretary VFV

DATE: December 20, 2005

SUBJECT: MUR 5453 – Statement of Reasons of Vice Chairman Michael E. Toner

The attached document 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: Vincent Convery
Thomasenia Duncan

Attachment

TO: The Commission
Commissioner Secretary
General Counsel's Office
Staff Director's Office

FROM: Vice Chairman Michael E. Toner

DATE: December 20, 2005

SUBJECT: Statement of Reasons, MUR 5453

2005 DEC 20 P 3: 29

I would like to withdraw my Statement of Reasons dated November 1, 2005 and substitute the attached Statement of Reasons.

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5453
Salvatore Trovato	)	

STATEMENT OF REASONS
OF
VICE CHAIRMAN MICHAEL E. TONER

I. Introduction

On October 17, 2005, by a vote of 4 to 1[1], the Commission accepted the Office of General Counsel's ("OGC") recommendation to approve a proposed conciliation agreement finding that Salvatore Trovato violated 2 U.S.C. §§ 441a(a)(1)(A) and (a)(3) of the Federal Election Campaign Act of 1971, as amended ("the Act") by making a $298,000 excessive contribution to the Giordano for U.S. Senate Committee. Mr. Trovato's excessive contribution arose out of a $300,000 gift that he gave to his son-in-law, Philip Giordana, which was reportedly used as collateral for a loan to the Giordano for U.S. Senate Committee. The conciliation agreement imposed a $99,000 civil penalty.

I voted against imposing a civil penalty of $99,000 because the penalty is grossly disproportionate to the offense. I continue to believe that such large penalties are not appropriate in excessive contribution cases involving family money.

II. Analysis and Conclusions

FECA prohibits individuals from contributing to any candidate and his or her authorized political committees with respect to any election for Federal office which in

[1] Chairman Thomas, Commissioners Mason, McDonald, and Weintraub voted in favor of the General Counsel's recommendation. Vice Chairman Toner dissented.

the aggregate exceeds $1,000.[2] 2 U.S.C. § 441a(a)(1)(A). The Commission has defined the term "contribution" as: "A gift, subscription, loan... advance, or deposit of money or anything of value made... for the purpose of influencing any election for Federal office." 11 CFR §100.7(a)(1). Commission regulations allow candidates for Federal office to make unlimited expenditures from personal funds. 11 CFR § 110.10(a). The Commission has defined the term "personal funds" as including: "bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy of which the candidate is the beneficiary; gifts of a personal nature which had been customarily received prior to candidacy." 11 CFR § 110.10(b)(2). The Commission has interpreted gifts to a candidate not to be contributions if they are "of a personal nature which had been customarily received prior to candidacy." 11 CFR § 110.10(b). *See also* AO 2000-8, 1988-7.

The Supreme Court has upheld the constitutionality of FECA's contribution limits as applied to members of a candidate's family, while invalidating any limits on a candidate's use of his or her own funds. In *Buckley v. Valeo,* 424 U.S. 1, 51 n.57 (1976) ("*Buckley*"), the Court noted that the legislative history of the Act indicated that "[i]t is the intent of the conferees that members of the immediate family of any candidate shall be subject to the contribution limitations established by this legislation.... The immediate family member would be permitted merely to make contributions to the candidate in amounts not greater than $1,000 for each election involved." S. Conf. Rep. No. 93-1237, p. 58 (1974), U.S. Code Cong. & Admin. News 1974, p. 5627.

However, even while upholding FECA's limits against family member contributions, the Court in *Buckley* made clear that the potential for actual or apparent corruption from familial contributions is not as great as from contributions received from persons outside a candidate's family. "The prevention of actual or apparent corruption of the political process does not support the limitation on the candidate's expenditure of his own personal funds... Although the risk of improper influence is somewhat diminished in the case of large contributions from immediate family members, we cannot say that the danger is sufficiently reduced to bar Congress from subjecting family members to the same limitations as nonfamily contributors." *Buckley* at 53 & n.59. The Court also emphasized that "'[m]anifestly, the core problem of avoiding undisclosed and undue influence on candidates from outside interests has lesser application when the monies involved come from the candidate himself or his immediate family.'" 424 U.S. at 53, *quoting Buckley v. Valeo*, 519 F.2d 821, 855 (D.C.Cir. 1975).

In light of the Court's ruling in *Buckley*, I accept that family member contributions to a federal candidate are subject to FECA's contribution limits. However, I also believe the Commission has the power, and indeed the responsibility, to ensure that any penalties that are levied in this area are commensurate with the seriousness of the offense and take into account the importance of these kinds of violations relative to other types of FECA violations. *See* Statement of Reasons of Commissioners Smith and Toner

[2] The Bipartisan Campaign Reform Act of 2002 ("BCRA") raised the individual contribution limit to candidates from $1,000 to $2,000 per election and indexed the limits for inflation, but this matter arose prior to BCRA's effective date.

in MUR 5138 at 3, Ferguson for Congress, et al. (dissenting from Commission's decision to levy a $210,000 civil penalty given "the Supreme Court's admonition in *Buckley* that contributions from family members do not have the same potential for actual or apparent corruption as other kinds of contributions"). *See also* Friends of Weiner, Audit Referral 03-05 (assessing statutory minimum civil penalty of $5,500 for reporting violations arising out of excessive family contributions).

In this matter, the Commission correctly found probable cause to believe that Mr. Giordano's use for campaign purposes of the $300,000 gift he had received from his father-in-law violated the Act. However, I could not support imposing a nearly six-figure civil penalty in this matter, which is grossly disproportionate to the seriousness of the violation. As Commissioner Smith and I noted in MUR 5138 (Ferguson for Congress):

> We do not believe a civil penalty of nearly a quarter of a million dollars in this matter- which is one of the highest penalties the Commission has ever assessed against a congressional candidate- is consistent with the Court's teaching in *Buckley*. The civil penalty here greatly exceeds the civil penalties that the Commission has imposed in other matters that involve much more serious violations of core provisions of FECA.

For the foregoing reasons, I voted against the proposed conciliation agreement in this matter.

Michael E. Toner
Vice Chairman

12/20/05
Date