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MEMORANDUM

TO: The Commission

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EXECUTIVE SESSION

SUBMITTED LATE

SUBJECT: Effect of FEC v. Williams on MUR 4250

A question arose at the Executive Session of September 16, 1999 concerning the effect of the Ninth Circuit Court of Appeals' decision in FEC v. Williams, 104 F.3d 237 (9th Cir. 1996), *cert denied*, 118 S. Ct. 600 (1997), on the application of the statute of limitations at 28 U.S.C. § 2462 in MUR 4250 (*RNC et. al*). Because the District of Columbia and the Ninth Circuits have addressed the application of the statute of limitations to the FECA, this memorandum will focus on these circuits.

For purposes of the discussion of MUR 4250, the Williams opinion raises three distinct legal issues: the date when a claim first accrues under § 2462, the application of equitable tolling to § 2462 and the reach of § 2462 to equitable remedies.

Cause of Action Accrues on Date of Violation

As an initial matter, the courts that have addressed the application of § 2462 to the FECA are in agreement with the Williams decision that the statute begins to run on "the date of the violations giving rise to the penalty." 104 F.3d at 240, (quoting 3M Co. v. Browner, 17 F.3d 1453, 1462-1463 (D.C. Cir. 1994)). Williams involved a series of conduit contributions made between "the autumn of 1987 and the end of January, 1998," which were reported by the recipient committee. *Id.* at 239 and 241. The court found that the statute began to run not on the date the contributions were disclosed in the committee's reports (a date that is not even mentioned in the opinion), but "at the latest on January 31, 1998", the last date any of the conduit contributions were made. *Id.* at

24.¹ Consistently, the court in FEC v. Christian Coalition, 965 F.Supp. 66, 70 (D.D.C. 1997), noted that “[i]n sum, the law of this Circuit is clear and the facts, as pled by the FEC, control: the FEC’s cause of action accrued when the events at issue occurred.” (citations omitted). Accordingly, in MUR 4250 the cause of action would appear to have accrued, and the limitations period begun to run, when the repayment funds were received by the RNC on October 20, 1994.²

§ 2462 is Subject to Equitable Tolling

The D.C. Circuit in 3M noted in dicta that “in future cases EPA could invoke the fraudulent concealment doctrine to toll the statute of limitations.” 17 F.3d at 1461, n.15. The court in Christian Coalition cited favorably to this portion of the 3M decision as “suggest[ing] that fraudulent concealment might toll the applicable statute of limitations” 965 F.Supp. at 70.

Indeed, Williams also acknowledged that § 2462 is subject to equitable tolling, and set forth the requisite elements for equitable tolling of the statute:

To establish that equitable tolling applies, a plaintiff must prove the following elements: 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.

104 F.3d at 240-241.

However, as in Christian Coalition, it does not appear that MUR 4250 meets the initial element. Although the record shows that the RNC delayed its receipt of the loan proceeds until after the cut-off date for the 12 day pre-general election reporting period, thus avoiding disclosure of the repayments prior to the election, *see* GC Briefs at 23, this fact alone does not establish fraudulent concealment by Respondent because the FECA nowhere imposes an affirmative duty on a committee to take immediate receipt of all funds to which it has a legal right. Indeed, FECA only imposes a duty on national party committees to timely report all actual receipts, both federal and non-federal. Respondent complied with the reporting provision of the FECA by disclosing the repayment on the proper report as determined by the date of receipt. Therefore, in contrast to the conduit scheme used by Williams to avoid disclosure to the Commission of his contributions to

¹ The Williams court discussed the disclosure of the contributions to the Commission in the Kemp Committee’s reports in explaining its conclusion that the Commission had not investigated diligently enough to warrant equitable tolling of the limitation period. The court, however, did not refer to disclosure in its discussion of when the limitations period began to run.

² Should the Commission determine that the allonge regarding the January 1996 loan installment constitutes an separate violation of the FECA, this violation would appear to have accrued on the date the new collateral CD for the installment was issued – April 1, 1996. Accordingly, the statute of limitations for such violation would not expire until April 1, 2001.

Kemp, there is no evidence here that the RNC took any fraudulent action to conceal its transaction from the Commission. Since the first element is not satisfied, it does not matter for limitations purposes when the transaction was reported to the Commission, for the Ninth Circuit in Williams only discussed that in connection with the third element, due diligence by the Commission.

§ 2462 is Not Applicable to Equitable Remedies

Three district judges in the D.C. Circuit have divided on the question of the applicability of the statute of limitations to equitable remedies. Citing to a 1947 Supreme Court case and without further elaboration, the Williams court held the statute applicable to both legal and equitable remedies. 104 F.3d at 240 (citing Cope v. Anderson, 331 U.S. 461 (1947)). One district court decision in the D.C. Circuit followed Williams in this regard. The court in FEC v. National Right to Work Committee, 916 F.Supp. 10, 14 (D.D.C. 1996), found § 2462 applicable to both legal and equitable remedies under essentially the same analysis presented by the Williams court. However, two other district courts in the D.C. Circuit, both prior to and subsequent to the Williams opinion, have found § 2462 not to apply to equitable remedies. In FEC v. National Republican Senatorial Committee, 877 F.Supp. 15, 20-21 (D.D.C. 1995) the court found the explicit language of § 2462, referring to "enforcement of any civil fine, penalty or forfeiture," to limit the statute to only legal remedies. Similarly, in a more recent opinion, the court in Christian Coalition distinguished Cope v. Anderson, the case relied on by the court in both Williams and NRWC, from FECA matters because unlike Cope where the equitable remedy flowed from the legal remedy, the FECA provides "exclusive" equitable remedies. 965 F.Supp. at 70-72. *see also* 2 U.S.C. § 437g(a)(6). Two other circuit courts of appeals have also rejected the conclusion in Williams that § 2462 limits equitable remedies as well as legal ones. United States v. Banks, 115 F.3d 916, 918-919 (11th Cir 1997), *cert. denied*, 118 S. Ct. 852 (1998), United States v. Telluride Co., 146 F.3d 1241, 1248 (10th Cir. 1998).¹

Conclusion

Accordingly, as in Williams, courts in the D.C. Circuit are likely to find that the statute of limitations in this matter began to run on the date Respondent received the loan proceeds and, while the D.C. Circuit does appear to recognize equitable tolling, it does not appear that the requisite elements can be established in MUR 4250. Last, although one district judge in the D.C. Circuit disagreed, the substantial opinions of the two district courts that the statute of limitations should not apply to equitable remedies, which are supported by the reasoning of two federal appellate courts, appear to represent the stronger position.

¹ It should be noted that § 2462 covers forfeitures and it is unclear whether disgorgement would be considered a forfeiture within the statute of limitations, or the kind of equitable relief that these courts have found not to be limited by § 2462.