



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**MEMORANDUM**

**TO:** The Commission  
**FROM:** Commissioner Sandstrom  
**SUBJECT:** MUR 4250  
**DATE:** September 27, 1999

The Respondents in MUR 4250, the RNC and Haley Barbour, argue that the transactions culminating in the receipt of \$1.6 million by the RNC should be viewed as individual and separate transactions, and not as a single transaction with more than one component part. I have provided this memorandum to show that, based on the Act and numerous federal court decisions, courts would not reach the same conclusion. I begin by analyzing the arguments made by the Respondents.

**I. THE RESPONDENTS' ARGUMENTS**

**A. The RNC's Brief**

The RNC argues in its brief that the payment to the RNC, and the bank loan to NPF, "must be treated as two distinct transactions." RNC Brief at 33. In support of this argument, the RNC cites two closed MURs and to the "teaching of Buckley." Id at 33 and 37.

**1. The MURs**

Citing MURs 4000 (Fisher for Senate) and 4314 (Sherman for Congress), the RNC argues that "it would be contrary to Commission precedent for the Commission to approve OGC's theory that two distinct transactions should be collapsed and treated as one transaction." Id at 33. The RNC alleges that in MUR 4000, "the Commission refused to authorize an enforcement action based on a theory that a set of contributions to different campaign committees should be combined with various loan repayments to construct a contribution to one campaign that would be in excess of the \$1,000 ceiling imposed by §441a(f). The FEC General Counsel, and the Commission

unanimously ruled, that otherwise lawful transactions *should not be collapsed* in order to find an unlawful transaction." RNC Brief at 34 (emphasis added)

This is a misstatement of the reasoning found in the cited General Counsel's Reports, and it is a mischaracterization of the Commission's decisions in those MURs.

In the Fisher matter, the NRSC filed a complaint against Fisher and the DSCC based on what the NRSC termed "money laundering" or "illegal earmarking," for the purpose of evading contribution limits. A corporation, Hicks, Muse, Tate and Furst, Inc., along with Fisher and the DSCC, mailed a solicitation for contributions to retire Fisher's debts from earlier campaigns. Fisher guaranteed that he would match every dollar contributed by a new donor for debt retirement with his own personal funds. Fisher's personal funds would be contributed to his current general election campaign.

Recommending no reason to believe, the General Counsel reasoned that "each of these types of contributions is permitted individually under the Act, and they are not prohibited collectively." MUR 4000, FGCR at 13 (emphasis added)

The General Counsel considered whether each of the individual contributions constituted violations in and of themselves *and* whether the transactions were prohibited collectively. *Id*. Therefore, it is simply incorrect to state that "the Commission unanimously ruled that otherwise lawful transactions should not be collapsed." RNC Brief at 34.

MUR 4314 involved a personal loan from a candidate (Sherman) to his state campaign account, prior to his becoming a federal candidate. Sometime before the general election, the state committee repaid the debt to Sherman. Sherman immediately loaned the money to his federal principal campaign committee. Because the statute and regulations prohibit transfers of funds from state to federal candidate committees, the complainant alleged this was an illegal conduit contribution, with Sherman himself acting as the conduit. On advice of the General Counsel, the Commission found no reason to believe

Again, the RNC misstates the Commission's decision when it claims that "the FEC again focused on the objective reality and refused to collapse a set of lawful transactions." *Id* at 35. Nowhere in the Report did the General Counsel discuss whether or not to collapse a set of transactions, and in fact noted that "the funds were legitimately loaned to the nonfederal committees *before* the candidate decided to run for any federal office." MUR 4314, FGCR at 6 (emphasis added)

Contrary to RNC assertions, the Commission looked at both the individual transactions *and* the factual circumstances surrounding the transactions in reaching its decisions. Neither case involved §441e, and neither can be deemed "Commission precedent" because, in recommending no reason to believe, OGC never suggested, nor did the Commission adopt or reject, any particular legal test or theory.

## 2. The "Teaching of Buckley" Argument

The RNC also argues that "it would be contrary to the *teaching* of Buckley for the FEC to accept the General Counsel's recommendation based on a theory that two distinct transactions should be collapsed and treated as if they were one transaction" RNC Brief at 37 (emphasis added) According to the RNC, the "the teaching of Buckley" refers to the Court's emphasis generally on "the need for bright lines when interpreting the FECA." Id.

Contrary to the RNC's assertion, the application of §441e in this case does not rely "on a vague and shifting subjective theory that will blanket [] [first amendment activity] with uncertainty" Id. Congress obviously intended that §441e apply to foreign contributions passed to a candidate or committee through another entity Section 441e applies where a foreign "contribution of money or other thing of value" is made "*directly or through any other person...*" 2 U.S.C. §441e (emphasis added) Without inclusion of the phrase "or through any other person," the prohibition on contributions from foreign nationals could not be enforced against individuals who provide foreign funds to a recipient not covered by §441e, who then makes "permissible" contributions to candidates or committees. Therefore, application of §441e in circumstances where a contribution is made indirectly is appropriate and is neither vague nor uncertain.

### B. Haley Barbour's Brief

Barbour's Brief relegates to footnotes the arguments made by the RNC. Citing the same two MURs, Barbour states, "[m]oreover, to 'collapse' the unquestionably lawful parts of this transaction so as to deem the transaction as a whole illegal would clearly be contrary to both fundamental fairness and past Commission practice" Barbour Brief at 27, fn. 29 Barbour cites no court decisions in support of these assertions

## II. A SINGLE TRANSACTION

I would argue that the so-called "two distinct transactions" are in fact a single transaction I refer again to the language of §441e - "It shall be unlawful for a foreign national *directly or through any other person* to make any contribution of money or other thing of value..." Section 441e specifically applies where there has been an indirect foreign contribution to a committee The parties from the beginning intended that the funds reach the RNC, and in light of the unambiguous language of the statute, it is not necessary to "collapse" the transactions

The evidence clearly shows that Haley Barbour, Chairman of the RNC, solicited a foreign national for the loan guarantee for the express purpose of providing funds to the RNC in time for the November 1994 elections. What followed that successful solicitation were documented legal agreements between the parties - the transfer of funds from the foreign national, the bank loan which earmarked \$1.6 million to the RNC, the subordination agreement between the RNC and the bank (which provided that the RNC would not seek any repayment from NPF while the loan was outstanding), and the transfer of funds to the RNC The loan, subordination agreement and

transfer of funds to the RNC were each done in full contemplation of the other, and in full consultation between the parties

The documentary and testimonial evidence includes

- The Credit and Security Agreement dated 10/13/94, and the Subordination Agreement between the RNC and Signet dated 10/13/94, in which
  - \$1.6 million was earmarked for RNC
  - the RNC agreed to postpone and subordinate any indebtedness of borrower to the RNC until the Bank paid in full, and in which the Bank agrees to pay \$1.6 million out of the proceeds of the loan as defined in the Credit and Security Agreement
- Richard Richards', former RNC Chairman, discussions with Barbour about the need to repay loans to the RNC in time for the '94 elections, and Barbour asking about, as Barbour put it to Richards, the "well to do Chinese fellow" associated with Richards who might loan \$3 million for that purpose Richard Richards, Deposition at 69, Senate Testimony at 106-107
- Barbour's discussions with Ambrous Young, Chinese foreign national, at August '94 dinner in D C , where Barbour discussed the possibility of a loan or guarantee Barbour Deposition at 69-71
- Haley Barbour, RNC Chairman, writes a letter to Young in Hong Kong, with "enclosed fact sheet about NPF" that "NPF would like to refinance its debt to the RNC via a \$3.5m bank loan," and that the GOP could win the Senate and House, and that the RNC is increasing its budget, etc Letter from Haley Barbour, to Young, 8/30/94
- In a letter from Barbour to Benton Becker, Young's counsel, Barbour notes the \$2.1 million debt to the RNC - the exact amount Young then supplies as a guarantee Letter from Barbour to Benton Becker, Young's counsel, 8/30/94, RNC letterhead
- In a letter from Young to Haley Barbour, Young writes: "We prefer to give to the Republican party...If not possible, we are willing to consider the support of \$2.1m which is the amount you expressed is urgently needed..." Letter from Young to Barbour at RNC 9/9/94
- In two letters, Barbour writes to Young in Hong Kong, thanking Young for his help Letters from Barbour to Young 9/19/94, 10/10/94

- Becker, Young's counsel, was drawing up papers for the \$2.1 million Signet loan and Young loan guarantee, and negotiating the terms with Norcross, the RNC General Counsel. Becker Deposition at 38-40.
- Richards tells Barbour the money would be transferred from YBD-Hong Kong to YBD-USA. Richards Senate Testimony at 73.
- Volcansek directly informs Barbour of foreign source of funds. Volcansek Deposition at 106-109; Barbour calendar.

**NOTE: copies of all documents listed above and below are available in Commissioner Sandstrom's office.**

The loan, the subordination agreement and the transfer of funds to the RNC were dependent on, for the purpose of, and virtually contemporaneous with each other. As will be discussed further below, each party to the transaction, including the foreign national, intended that the RNC be provided funds in time for the November 1994 elections. The loan, the subordination agreement and the transfer of funds to the RNC were, therefore, interdependent parts of the same transaction

### **III. THE STEP TRANSACTION DOCTRINE**

Even if we find it necessary to engage in the fiction that this transaction consisted of two or more separate transactions, courts have adopted a number of tests to determine when two or more steps should be treated as one. Courts have done this to prevent similar end runs around statutory provisions. This is called the Step Transaction Doctrine, and these tests are widely used by courts.

#### **A. The Tests**

Briefly described, these tests are

##### **(1) The End Result Test**

- Courts will combine two or more closely related transactions into a single transaction when the separate events appear to be component parts of something undertaken to reach a particular result.

##### **(2) The Interdependence Test**

- When it is unlikely that any one step would have been undertaken except in contemplation of the other integrating acts, courts disregard the effects of individual transactional steps.

### (3) The Binding Commitment Test

- If a binding commitment existed as to the second step at the time the first step was taken, the steps are considered one transaction.

NOTE: More than one test might be appropriate under any given set of circumstances; however, the circumstances need only satisfy one of the tests in order for the step transaction doctrine to operate. *True v. U.S.*, 1999 WL 699838 (10<sup>th</sup> Cir. Sept. 9, 1999)(publication page references not available) citing *Associated Wholesale Grocers, Inc. v. United States*, 927 F.2d 1517, 1527-28 (10th Cir.1991)(finding end result test inappropriate, but applying the step transaction doctrine using the interdependence test)

#### B. Legal Authority

##### 1. End Result Test

The end result test combines "into a single transaction separate events which appear to be component parts of something undertaken to reach a particular result." *True v. U.S.* citing *Associated Wholesale Grocers*, 927 F.2d at 1523 and *Kornfeld v. Commissioner of Internal Revenue*, 137 F.3d 1231, 1235 (10<sup>th</sup> Cir. 1998).

If the court finds that a series of closely related steps in a transaction are "merely the means to reach a particular result," the court will not separate those steps, but instead treat them as a single transaction. *True v. U.S.* citing *Kanawha Gas & Utils. Co. v. Commissioner*, 214 F.2d 685, 691 (5th Cir 1954)

"The taxpayer's subjective intent is especially relevant under this test because it allows the court to determine whether the taxpayer directed a series of transactions to an intended purpose." *True v. U.S.* citing *Brown v. United States*, 782 F.2d 559, 563 (6th Cir.1986) ("[e]nd result test" for determining when to apply "step transaction doctrine" makes intent a necessary element for application of doctrine)

The intent the court applying the end result test is not whether the taxpayer intended to avoid taxes. *True v. U.S.* citing *Gregory v. Helvering*, 293 U.S. 465, 469 (1935). Instead, the end result test focuses on whether the taxpayer intended to reach a particular result by structuring a series of transactions in a certain way. *True v. U.S.* citing *King Enters., Inc. v. United States*, 418 F.2d 511, 516 (Ct.Cl.1969).

"The individual tax significance of each step of a multi-step transaction is irrelevant when, considered as a whole, the steps accomplish but a single intended result." *True v. U.S.* citing *Crenshaw v. United States*, 450 F.2d 472, 475 (5th Cir 1971)

## 2. Interdependence Test

Applying this test, courts disregard the tax effects of individual transactional steps if "it is unlikely that any one step would have been undertaken except in contemplation of the other integrating acts." *Kuper v. Commissioner*, 533 F.2d 152, 156 (5th Cir.1976).

"The interdependence test relies to a lesser degree on the taxpayer's subjective intent than the end result test. It focuses not on a particular result, but on the relationship between the individual steps and 'whether under a reasonably objective view the steps were so interdependent that the legal relations created by one of the transactions seem fruitless without completion of the series'" *True v. U.S* citing *Kornfeld*, 137 F.3d at 1235.

This test "requires an inquiry as to 'whether on a reasonable interpretation of objective facts the steps were so interdependent that the legal relations created by one transaction would have been fruitless without a completion of the series.'" *Associated Wholesale Grocers*, 927 F.2d at 1523 citing Paul and Zimet, "Step Transactions," *Selected Studies in Federal Taxation* 200, 254 (2d Series 1938), quoted in *King Enters.*, 418 F.2d at 516.

## 3. Binding Commitment

This has been called the most restrictive of the three tests. *Security Industrial Insurance Co. v. U.S.*, 702 F.2d 1234, 1245 (5<sup>th</sup> Cir 1983)

The Supreme Court enunciated this standard in *Commissioner v. Gordon*, 391 U.S. 83 (1968), when it refused to aggregate stock distributions occurring several years apart for tax purposes. The Court commented that "if one transaction is to be characterized as a 'first step' there must be a binding commitment to take the later steps." *Id.* at 96

Thus the "binding commitment" test requires telescoping several steps into one transaction only if a binding commitment existed as to the second step at the time the first step was taken. Subsequent decisions, however, have tended to confine *Gordon* to its facts. The Seventh Circuit, for example, has concluded that lack of a "binding commitment" should be determinative only in cases involving multi-year transactions, in other situations, the presence or absence of a "binding commitment" is simply one factor to be considered. See *McDonald's Restaurants v. Commissioner*, 688 F.2d 520, 525 (7th Cir 1982)[citation omitted].

Similarly, the Court of Claims has read *Gordon's* "binding commitment" requirement as limited to an interpretation of particular statutory language in section 355 concerning divisive reorganizations. See *King Enterprises*, 418 F.2d at 517-18.

*Security Industrial Insurance Co.*, 702 F.2d at 1245

### **C. The Three Tests as Applied to MUR 4250**

Applying these tests to the facts of MUR 4250 illustrates how the courts might consider the transactions.

#### **1. End Result Test**

Several steps are considered one where each was undertaken to reach a particular result. The subjective intent of the parties is particularly relevant.

##### **Steps:**

1. Loan of funds, secured by Young's \$2.1 million guarantee, with \$1.6 million earmarked for RNC
2. Transfer of earmarked \$1.6 million to RNC according to terms of Credit Agreement with NPF and Subordination Agreement with RNC (NPF requested this money be held in NPF's savings account until October 20, 1994, one day after FEC report is due)

Both the Credit Agreement and Subordination Agreement were executed on the same day. There was little or no time lapse between the transactions.

##### **End Result Sought by Parties:**

**RNC:** RNC intended to receive money in time for the 1994 elections, using loan proceeds secured by foreign funds

##### **Evidence:**

- Richard Richards, former RNC Chairman, tells of discussions he had with Barbour about the need to repay loans to the RNC in time for the '94 elections, and Barbour asking about, as Barbour put it to Richards, the "well to do Chinese fellow" who might loan \$3 million for that purpose. Richard Richards, Deposition at 69, Senate Testimony at 106-107
- Barbour had discussions with Ambrous Young, Chinese foreign national, at August '94 dinner in D.C., and confirms that YBD-USA would make a loan or guarantee to NPF. Barbour Deposition at 69-71
- Haley Barbour, RNC Chairman, writes a letter to Young in Hong Kong, with "enclosed fact sheet about NPF" that "NPF would like to refinance its debt to the RNC via a \$3.5m bank loan," and that the GOP could win the Senate and



House, and that the RNC is increasing its budget, etc. Letter from Haley Barbour, to Young, 8/30/94.

- In a letter from Barbour to Benton Becker, Young's counsel, Barbour notes the \$2.1m debt to the RNC, the exact amount Young then supplies as a guarantee. Letter from Barbour to Benton Becker, Young's counsel, 8/30/94, RNC letterhead.
- In a letter from Young to Haley Barbour, Young writes: "We prefer to give to the Republican party... If not possible, we are willing to consider the support of \$2.1m which is the amount you expressed is urgently needed..." Letter from Young to Barbour at RNC 9/9/94.
- In two letters, Barbour writes to Young in Hong Kong, thanking Young for his help. Letters from Barbour to Young 9/19/94, 10/10/94.
- Becker, Young's counsel, was drawing up papers for the \$2.1m Signet loan and Young loan guarantee, and that he was negotiating the terms with Norcross, the RNC General Counsel. Becker Deposition at 38-40
- The Credit and Security Agreement dated 10/13/94, and the Subordination Agreement between RNC and Signet dated 10/13/94, in which:
  - \$1.6 million was earmarked for RNC
  - the RNC agreed to postpone and subordinate any indebtedness of borrower to the RNC until Bank paid in full. Bank agrees to pay \$1.6 million out of the proceeds of the Loan as defined in the Credit and Security Agreement
- Richards told Barbour the money would be transferred from YBD-Hong Kong to YBD-USA. Richards Senate Testimony at 73
- Volcansek directly informed Barbour of foreign source of funds. Volcansek Deposition at 106-109. Barbour calendar

**Other Supporting Evidence:**

- Reed Deposition at 116-117 (Reed conversations with Barbour about getting money repaid to RNC)
- Reed Memo to Haley Barbour (mentions foreign funding, and was directed to Barbour in his capacity as Chair of NPF and RNC, according to Reed Deposition)

- Young Deposition at 35-37 (tells of dinner in DC in August '94, of conversation with Barbour who requested the \$3m and that Young told him that he would have to present it to YBD-Hong Kong board of directors)
- Barbour Talking Points (prepared for his conversation with R. Richards, discusses seeking funding from Young)
- Barbour Deposition at 31 (seeking foreign funding)
- Becker Affidavit pp. 5-7 (tells of numerous conversations between Young and Barbour. Barbour told Young he sought funding to repay RNC)
- Denning Deposition at 151-151 (Fierce and Reed were made aware of source of funding -YBD, before deal was made)
- Volcansek Deposition at 40-42 (discussions with Fierce about repaying loan to RNC and general understanding that money sought was for purpose of paying back RNC in time for elections)

**YOUNG:** Young intended to provide funds to the RNC.

- In his deposition, Young tells of the dinner in D.C. in August '94, and of conversation with Barbour, who requested the \$3m and that Young told him that he would have to present it to YBD-Hong Kong board of directors before he could answer definitively Young Deposition at 35-37
- In a letter from Young to Haley Barbour, Young writes "We prefer to give to the Republican party...If not possible, we are willing to consider the support of \$2.1m which is the *amount you expressed is urgently needed...*" Letter from Young to Barbour at RNC 9/9/94
- Becker tells of numerous conversations between Young and Barbour in which Barbour sought funding to repay RNC Becker Affidavit pp. 5-7
- In a letter from Becker to Young, Becker discusses the deal and money owed to RNC. Letter from Becker to Young 9/23/94

**NPF:** NPF intended to provide funds to the RNC in time for the 1994 elections

- Haley Barbour, RNC Chairman, writes a letter to Young in Hong Kong, with "enclosed fact sheet about NPF" that "NPF would like to refinance its debt to

the RNC via a \$3.5m bank loan," and that the GOP could win the Senate and House, and that the RNC is increasing its budget, etc. Letter from Haley Barbour, to Young, 8/30/94.

- In a letter from Barbour to Benton Becker, Young's counsel, Barbour notes the \$2.1m debt to the RNC, the exact amount Young then supplies as a guarantee. Letter from Barbour to Benton Becker, Young's counsel, 8/30/94, RNC letterhead.
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- In two letters, Barbour writes to Young in Hong Kong, thanking Young for his help. Letters from Barbour to Young 9/19/94, 10/10/94.
- In his deposition, Young tells of the dinner in D.C. in August '94, and of conversation with Barbour, who requested the \$3m and that Young told him that he would have to present it to YBD-Hong Kong board of directors before he could answer definitively. Young Deposition at 35-37
- Becker tells of numerous conversations between Young and Barbour in which Barbour sought funding to repay RNC. Becker Affidavit pp. 5-7
- Volcansek tells of discussions with Donald Fierce, RNC "chief strategist," about repaying loan to RNC and general understanding that money sought was for purpose of paying back RNC in time for elections. Volcansek Deposition at 40-41, 77, 84, Senate Testimony at 27-30
- Barbour Talking Points, prepared for his conversation with R. Richards, discusses seeking funding from Young
- Barbour Deposition at 31 (seeking foreign funding)
- Baroody Deposition at 33, Senate Test. At 208 (seeking foreign funding, discussions with Barbour)

## 2. Interdependence Test

When applying this test, transactions that are technically separate will be collapsed into one where it is unlikely each would not have taken place without the other. This test focuses less on the subjective intent of the parties, and more on the relationship between the steps

**Steps:**

1. Loan of funds, secured by Young's \$2.1 million guarantee, with \$1.6 million earmarked for RNC
2. Transfer of earmarked \$1.6 million to RNC according to terms of Credit Agreement with NPF and Subordination Agreement with RNC (NPF requested this money be held in NPF's savings account until October 20, 1994, one day after FEC report is due)

Each of these transactions were dependent on the other:

- Without the collateral supplied by Young, Signet would not have loaned the funds
- Without the collateral supplied by Young and the loan of funds from Signet, NPF could not repay the RNC
- Without the subordination agreement with the RNC, Signet would not have agreed to the loan to NPF or earmarked the \$1.6m for the RNC

**3. Binding Commitment Test**

If a binding commitment existed as to the second step when the first was contemplated, the several steps are considered one transaction

**Steps:**

1. Loan of funds, secured by Young's \$2.1 million guarantee, with \$1.6 million earmarked for RNC
2. Transfer of earmarked \$1.6 million to RNC according to terms of Credit Agreement with NPF and Subordination Agreement with RNC (NPF requested this money be held in NPF's savings account until October 20, 1994, one day after FEC report is due)

The evidence described above demonstrates that there was a commitment from Young to provide the collateral for the loan from Signet and a commitment that a portion of the proceeds of that loan, \$1.6 million, would be transferred directly to the RNC

**IV. CONCLUSION**

For the reasons stated above, the Commission should

- determine that there existed a single transaction, and
- find probable cause to believe that the RNC and Haley Barbour violated 2 U.S.C. §441e as a result.