FEDERAL ELECTION COMMISSION
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SENSITIVE

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EXECUTIVE SESSION

MEMORANDUM

TO: The Commission

FROM: Lawrence M. Noble
General Counsel

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SUBJECT: MUR 4250

During consideration of MUR 4250 at the Executive Session of October 26, 1999, Commissioner Wold's Office submitted a Memorandum of the same date, seeking clarification on three issues: 1) the proper application of the "step transaction doctrine" as advanced by Commissioner Sandstrom's Office in its Memorandum of September 27, 1999; 2) whether the repayment to the RNC need be characterized as a "contribution," as distinct from a loan repayment, for purposes of Section 441e's prohibition on foreign national contributions; and 3) whether it is necessary to trace foreign national contributions made to a political party's non-federal account to specific election expenses in finding a violation of the prohibition.

1) Application of the "step transaction doctrine."

It is this Office's understanding that Commissioner Sandstrom's Office will clarify the application of the "step transaction doctrine" to MUR 4250. Accordingly, this Office does not address this distinct issue. This Office does note its belief that the doctrine, although providing guidance in understanding the relationship between the various elements of the foreign national transaction at issue, is not crucial to finding a violation in this matter in that the foreign national prohibition at Section 441e independently addresses, and consequently prohibits, the indirect provision of foreign national funds "through any other person." 2 U.S.C. § 441e(a).

2) Pursuant to the Commission's Regulations at 11 C.F.R. § 100.7(a)(1)(i)(E), the payment to the RNC need not be characterized as a "contribution" for Section 441e to apply and the election influencing intent behind the payment provides an independent basis for finding a violation of Section 441e.

One of the questions posed by Commissioner Wold's Office is whether the provision of otherwise prohibited funds need be characterized as a "contribution" for the prohibition to apply. In the present matter, the method of transfer to the RNC was a repayment from the NPF to the RNC of numerous outstanding loans. Commissioner Wold's Memorandum appears to question whether *this* method of transfer removes the entire transaction at issue from the reach of Section 441e.

It is this Office's opinion that, as in the federal context, loan repayments to a party committee's non-federal election account are subject to the foreign national prohibition pursuant to Section 100.7(a)(1)(i)(E) of the Commission's Regulations. As discussed at the Executive Session, Section 100.7 clearly contemplates the potential for the indirect influx of prohibited funds to committees through the repayment of re-existing debts. Under this provision, the characterization of the transfer as a contribution is immaterial: what is relevant is that prohibited funds not make their way into the election process through an otherwise permissible transaction. *See* 11 C.F.R. § 100.7(a)(1)(i)(E) (noting that while loan repayments are not "contributions" under the Act, repayment may nonetheless not be made with, *inter alia*, foreign national funds). All that must be shown to establish a violation is that the repayment originated from a foreign national source. As part of the Regulations defining the term "contribution," the Commission may look to this provision in interpreting the Section 441e prohibition as applied to non-federal activity. *See*, A.O. 1987-25, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 5903, at p. 11,393 (Sept. 17, 1987) (advising that the foreign national prohibition is subject to the definition of contribution "while retaining the aspect of the prohibition that extends to all elections").[1] Under this analysis, it is well established that a violation resulted as the loan repayments to the RNC would not have occurred absent the foreign national backing.

Even if it is found that Section 100.7(a)(1)(i)(E) is unavailable in the non-federal context, and consequently that some showing beyond the prohibited source of the repayment is necessary for finding a violation, in the present matter there is strong evidence that the expressed intent and purpose behind the provision of the loan collateral was to provide funds to the RNC for the purpose of influencing elections.[2] This was not

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[1] It has been observed that the application of this provision in the non-federal context may raise fair notice issues. However, no such concern arises in the present case where Respondents in their defense substantially rely on advice from counsel premised on the portion of the same provision restricting "contributions" to only federal elections. *See* Letter from Braden to Becker of 10/6/94, at 2. Respondents cannot adopt one portion of the provision while ignoring the remainder.

[2] *In fact*, finding Section 100.7(a)(1)(i)(E) inapplicable to non-federal activity may not result in rendering non-federal loans unregulable, but rather may exclude non-federal accounts from the permissive provision of this section, rendering all aspect of loan transactions subject to the Act.

just the subjective intent of the collateral provider, but the expressed and documented purpose for the transaction. As such, the transaction cannot be viewed simply as the repayment of a pre-existing loan by the NPF. The repayment was only the last step in the transaction, and the source providing the necessary value for the repayment was *not* the debtor, but an unrelated entity with no pre-existing obligation to the RNC. In short, this was not YBD – Hong Kong's debt. There is no question that the RNC received value from the transaction, as an otherwise unrecoverable debt was satisfied.[3] Had the numerous communications not characterized the transaction as intended to influence elections, and had the RNC not directly solicited the collateral and played the primary role in structuring the transaction, it would be a more difficult question whether a violation resulted. However, under the present circumstances, the parties' expressed intent behind the transaction was to make funds available to the RNC for use in the 1994 elections.

This reliance on the proven intent behind the transaction is consistent with the enforcement of many provisions of the Act involving the indirect transfer of funds. In the Section 441f context for example, where an employer reimburses an employee for a contribution through a bonus, because neither the making of the contribution nor the payment of a bonus independently constitutes a violation, in finding a violation the Commission necessarily determines that the intent behind the bonus was not to reward the employee's good efforts, but to compensate him for the expense of his contribution.[4] *See generally*, MUR 4884 (Future Tech International) (Commission found corporation and its officers in violation of Section 441f by providing employee bonuses and other forms of salary compensation with the specific intent of reimbursing prior employee contributions.), MUR 2893 (Westwood One) (Commission found corporation in violation of Section 441f by providing false expense reimbursements to its employee with the specific intent of reimbursing prior employee contributions), MUR 2693 (Larry

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[3] Commissioner Wold's Memorandum questions this Office's conclusion that the RNC's loans to the NPF were not *bona fide* because they were not commercially reasonable, suggesting that even a commercially unreasonable loan may be *bona fide* so long as there is an expectation of repayment. This Office does not believe the facts in this matter demonstrate a reasonable expectation of repayment. By the time of the transaction at issue in this matter, the NPF had repaid only $200,000 of a total accumulated debt of approximately $2.3 million. There is no evidence that the RNC at any time during this period sought repayment from the NPF. In fact, subsequent to the October 1994 transfer, the RNC loaned the NPF approximately another $2 million which was never repaid.

[4] Commissioner Wold's Memorandum also notes that the Section 441f prohibition has only been applied to matters where the second leg of the transaction was a "contribution." Although the Commission has limited its application of Section 441f to matters where the last step was the making of a direct contribution by the conduit, it appears that on its face the regulation could be applied to other transactions. Section 441f prohibits the making of "contributions" in the name of another. *See* 2 U.S.C. § 441f. The term contribution, for purposes of Section 441f, encompasses "the deposit of money or anything of value," which presumably would include something other than a contribution. *See* 2 U.S.C. § 431(8)(A)(i). However, the practical effect of finding that any form of transfer provided value to the recipient committee for purpose of influencing an election, would be, by definition, to render the transfer a contribution. Consequently, as in the soft money context, the form of the transfer is immaterial, what controls is the election influencing intent behind the transaction.

Williams) (Commission found respondent in violation of Section 441f by purchasing promotional tickets provided at a discount to $1,000 contributors for the full amount of their contributions with the specific intent of reimbursing the contributors through the purchases). This same reliance on intent has arisen in other contexts where otherwise lawful transactions resulted in a violation because of their election influencing purpose. *See generally*, MURs 3620 (DSCC) (Commission found that respondent violated the Act's earmarking provisions by receiving otherwise permissible contributions with the understanding that they were intended to benefit specifically identified candidates). MUR 3670 (California Democratic Party) (Commission found respondent in violation of the allocation regulations by making payments to a state initiative drive with the intent of increasing the number of democratic voters in the upcoming elections, thereby enhancing their candidates' prospects in the elections). Indeed, a number of pending matters involving the provision of prohibited funds through intermediaries rely substantially on the intent of the parties to influence elections.

Consequently, it is this Office's opinion that Section 100.7(a)(1)(i)(E) governs the transaction at issue in this matter. This Office additionally believes that even if this provision is found inapplicable, the election influencing intent behind the contribution forms an independent basis for finding a violation in this matter.

3) The Commission need not trace the foreign national funds to expenditures for a specific election in finding a violation of Section 441e.

Commission Wold's Office also questions whether the Commission must find, in the non-federal context, that prohibited funds accepted by party committees' non-federal elections accounts need be traced to specific non-federal election expenditures in finding a violation of Section 441e. As noted in the General Counsel's Probable Cause Report in this matter, party committees like the RNC by definition exist for the sole purpose of electing their candidates to office across the political spectrum. *See* GCR dated 9/8/99, at 35-36. Accordingly, with only a few specifically delineated exceptions, the Act treats these entities' activities as election influencing.[5] This treatment is best illustrated in Advisory Opinion 1995-25, wherein the Commission advised that national party disbursements for legislative advocacy media advertisements seeking "to gain popular support for the [party's] position on given legislative measures, and to influence the public's positive view of the [party] and their agenda . . . encompasses the goal of electing candidates to Federal office." AO 1995-25, 2 Fed. Election Camp. Fin. Guide (CCH) ¶ 6162, at p. 12,109 (Aug. 24, 1995). The Commission determined that, like other types of party building activity such as get-out-the-vote activity and voter registration drives, [a]dvocacy of a party's legislative agenda is one aspect of building or promoting

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[5] As discussed at the Executive Session, the two exceptions are payments to a party committee's building fund and payments for redistricting expenses. *See* MUR 4398 (Republican Party of Florida) (portion of foreign national contribution to state party deposited in redistricting account not in violation of Section 441e.)

support for the party that will carry forward to its future election campaigns." *Id.* Consequently, the very fact that the funds were deposited into the RNC state elections account suffices to demonstrate that the funds were election influencing. This approach has been adopted by the Commission in past foreign national matters, including MUR 4398 (Kramer) (Commission found reason to believe a foreign national and various recipient committees violated Section 441e in connection with contributions to the non-federal accounts of the recipient party committees without a showing of the funds ultimate expenditure), and MUR 4884 (Future Tech International) (Commission found foreign national and his corporation violated Section 441e in connection with contributions to a party committee's non-federal account without a showing of the funds ultimate expenditure).

It is also significant that the RNC in its response brief does not even argue that the funds need be traced to specific elections and, although Mr. Barbour's brief does argue that the funds need to be traced to expenses, the response does not claim that they were not expended in connection with elections. *See* Barbour Brief at 36-37. Additionally, as noted in the General Counsel's Probable Cause Report, because of the various transfers that often precede the funds ultimate expenditure, the practical effect of requiring that non-federal funds be traced to their ultimate use would be to render the foreign national prohibition unenforceable. *See* GCR dated 9/8/99, at 36.

Accordingly, there is no legal requirement that the funds be traced to their direct expenditure for elections in finding a violation of Section 441e, and the imposition of such a requirement would adversely impact on the Commission's ability to enforce the Act.