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December 3, 1996

Memorandum

To: Lawrence M. Noble
General Counsel

Through: John C. Surina
Staff Director

From: Robert J. Costa
Assistant Staff Director
Audit Division

Subject: North Carolina Democratic Victory Fund - Referral Matters

On November 7, 1996, the Commission approved the final audit report on North Carolina Democratic Victory Fund. The report will be released to the public on December 3, 1996. The attached findings are being referred to your office:

Finding:

II.A.2. Goods and Services Purchased Apparently on Behalf of Clinton/Gore
II.A.3.b. Direct Mail Program
II.A.3.c. Phone Bank Program
II.D. Disclosure of Occupation and Name of Employer
II.I.2. Apparent Prohibited Contributions

All workpapers and related documents are available for review in the Audit Division. Should you have any questions, please contact Wanda Thomas at 219-3720.

Attachments:

FAR Findings II.A.2., II.A.3.b., II.A.3.c., II.D., and II.I.2.

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2. <u>Goods and Services Purchased Apparently on Behalf of the Clinton/Gore Campaign</u>

During audit fieldwork the Audit staff identified 63 expenditures totaling $139,433 made by the CC which appeared to have been made on behalf of the Clinton/Gore campaign. Except for $3,700 in bank drafts received from the Clinton/Gore campaign, no other transactions and/or materials originating from the Clinton/Gore campaign were identified. For the purposes of this review, since the $3,700 could not be associated with a specific activity or any of the 63 expenditures discussed above, this amount has been applied as an offset against the $139,433 in expenditures made apparently on behalf of the Clinton/Gore campaign, leaving a net total of $135,733.[4]

The Audit staff obtained a copy of the Democratic Coordinated Fall Campaign Budget, and the check register which detailed the CC's activity through October 28, 1992. The budget contained event expense codes and explanations of the event expense codes. In many instances, the check register contained notations detailing the purpose of the expenses. The Audit staff identified 6 event expense codes which appear to be related to Clinton/Gore activities: #7150 - a Gore event at East Carolina University, #7151 - October 4 Clinton Raleigh event, #7152 - October 12 Clinton Charlotte event, #7154 - October 26 Clinton/Gore Bus Trip, #7400 - Gore Reception-Coor. Campaign, and #7450 - a Gore Dinner-DNC. We were able to identify invoices associated with these expense codes as well as additional invoices which were either billed to the Clinton/Gore campaign or appeared to relate to expenses incurred on behalf of the Clinton/Gore campaign.

Fifteen expenditures, totaling $40,796, were billed to the Clinton/Gore campaign and paid by the CC. Items purchased included: several bus trips to Clinton/Gore rallies, production services for a rally in Durham, mobile phone usage,

4 According to the documentation made available to the Audit staff, the Committee was not authorized by the DNC under 11 CFR §110.7(a)(4) to make expenditures pursuant to 2 U.S.C. §441a(d)(1). The DNC reported that $9,682,711 of its $10,331,703 National Party Limit for the 1992 Presidential election had been expended through September 30, 1994.

bulk mailing for the Clinton/Gore campaign, event phone charges, windbreakers for a Clinton/Gore bus trip and buttons and bumper stickers.

The remaining 48 expenditures, totaling $98,637, were billed to the CC. Expenses which appeared to have been made on behalf of the Clinton/Gore campaign included: buses, meals, equipment rentals, production services, fireworks, a banner, flowers, and postage.

During a conference with the current Committee Chair it was stated that anything billed to the Clinton/Gore campaign which was paid by the CC was based upon an agreement between the parties. No documentation has been provided to support this statement.

In the interim audit report, the Audit staff recommended that the Committee provide the evidence which demonstrates that the expenditures totaling $135,733 were not made on behalf of the Clinton/Gore campaign. Such evidence should include, but is not limited to, specific explanations from vendors detailing reasons why the purchase of goods and services were invoiced to the Clinton/Gore campaign, why the expense codes appeared to be for activities for the Clinton/Gore campaign and why the other purchases of goods and services which appear to have been incurred for the benefit of the Clinton/Gore campaign should not be considered expenditures on behalf of the Clinton/Gore campaign.

In response to the interim audit report the Committee's response stated that:

> "Each of the expenditures identified [by the Audit staff] represent exempt expenditures which can be generally grouped as follows:
>
> "Many of the itemized expenditures represent purchases by the Committee of bumper stickers, buttons, t-shirts, jackets and fliers distributed by volunteers. The purchase of such materials distributed by volunteers is exempt pursuant to 11 C.F.R §100.7(b)(15), 11 C.F.R. §100.8(b)(16).
>
> "Numerous additional expenditures including ... the rental of the North Carolina State University Faculty Club, expenses incurred with the United States Postmaster, the rental of and expenses at the Sheraton Imperial and other expenses incurred in connection with the 'Gore Fundraiser' are fundraising expenses of the [CC] which conducted a fundraiser at which Al Gore was the featured guest. The event was not a 'Clinton-Gore' event, but was instead the principal fundraising event of the Committee during the fall of 1992. [There] was no express advocacy of Clinton-Gore and no fundraising in behalf of Clinton-Gore."

The response states further that the remaining expenses conducted during the month of October 1992 were incurred at GOTV rallies for the CC. The response refers to GOTV rallies conducted on October 4th in Raleigh, October 12th in Charlotte and October 26 in Durham at the North Carolina Central University, in which, Bill Clinton was the key speaker; however the response states that event was attended by and conducted on behalf of the entire Democratic slate.

Finally, the Committee contends that the invoices which are either designated or coded and marked Clinton-Gore:

> "... reflects merely error or inadvertence on the part of the vendor or committee staff. For example, the printing of Clinton-Gore literature obviously has been coded or invoiced as Clinton-Gore, but clearly the printing of such literature by the Party for distribution by volunteers is an exempt activity. The fact that the Vice Presidential or Presidential nominee was to be [in] attendance at an event may explain the naming of the event or the coding of the expenditure, but does not establish that the expenditure was made for or in behalf of the Clinton-Gore Committee. The costs of these events were not paid with funds donated by the National Committee, and thus the expenditures are exempt GOTV activities."

The Committee stated that much of the activity incurred by the CC was conducted by volunteers and on behalf of the CC not the Clinton/Gore Committee; however, the Committee did not provide any evidence that supports these statements. For example, the Committee states that it has "...examined available records and, through counsel and staff, has interviewed numerous volunteers and staff members involved..." during the audit period. Yet, no documentation or a description of what was discussed in the interviews was provided to support its position.

Although the Committee's general commentary relating to the use of volunteers to distribute campaign materials seems plausible, the Committee did not demonstrate that this was in fact the case. Consequently it appears that the expenditures for the campaign materials were incurred on behalf of the Clinton/Gore campaign.

Regarding the expenditures in relation to the specific events mentioned by the Committee, the information provided by the Committee did not demonstrate that the expenses were not in connection with the Clinton/Gore campaign.

Section 110.8(e)(1) and (2)(ii) of Title 11 of the Code of Federal Regulations state that a political party may make reimbursement for the expenses of a candidate who is engaging in party-building activities, without the payment being considered a contribution to the candidate, and without the unreimbursed expense being considered an expenditure counting against the limitations as long as the event is a bona fide party event or appearance, and no aspect of the solicitation for or the setting of the event and the remarks or activities of the candidate were for the purpose of influencing the candidate's nomination or election. Not withstanding those requirements, an event or appearance occurring on or after January 1 of the year of the election for which the individual is a candidate is presumptively for the purpose of influencing the candidate's election, and any contributions or expenditures are governed by the contribution and expenditure limitations of this part 110. Further, Section 110.8(e)(2)(iii) states, in relevant part, that the presumption in paragraph (ii) of this section may be rebutted by a showing to the Commission that the appearance or event was party related.

The information provided by the Committee in rebuttal to the presumption is not persuasive for the following reasons:

a. The memo and purpose lines of the check and the check request form for the expenditures incurred at the N.C. State University Faculty Club stated that these expenditures were for a Gore fundraiser. The expenditures incurred for the U.S. Postmaster and the Sheraton Imperial Hotel were assigned event expense codes [#7400 and #7450] by the Committee as a Gore event, not an event for the CC.

b. Three North Carolina Democratic Party Check Request Forms in which the request for payment of goods and services was made by the Clinton/Gore Campaign manager in North Carolina. These requests were approved by the director of the CC and paid by the CC. Moreover, the event expense code [#7152] assigned to these expenditures by the Committee was entitled, "Oct. 12 Clinton Charlotte event."

c. An invoice billed to Clinton/Gore '92 stated, "production services for Clinton/Gore campaign in Durham, North Carolina--October 26, 1992." This invoice was paid by the CC and was assigned by the Committee an event expense code [#7154] entitled, "Oct. 26 CG Bus Trip." In addition, the Audit staff identified two bank drafts from the Clinton for President Committee dated October 26, 1992 and made payable to the North Carolina Unity '92 which have noted on the purpose line "reimbursement for bus trip expense". Thus, it appears that this event was incurred for the benefit of the Clinton/Gore Committee.

d. Finally, a letter dated November 9, 1992 from North Carolina Central University addressed to the executive director of the Committee requested payments for an event held at the University on October 26, 1992. The letter states in part, "The Clinton/Gore registration rally was held at North Carolina Central University on October 26, 1992. ...I met with the Clinton/Gore staff and explained that the University could not absorb the cost for any activity or event associated with the rally. I was assured by the Clinton/Gore staff that the [Committee] would pay for the entire event." The letter details the expenditures associated with the rally and who the CC should pay. It should be noted that the Audit staff could not determine if the Committee paid these expenditures, however, there appears to be understanding between the Clinton/Gore staff and the CC that the CC would absorb the costs associated with this event.

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Based upon the invoices and event expense codes relating to Clinton/Gore activities, the request forms written by the Clinton/Gore campaign manager of N.C. and approved by the director of the CC, the invoices describing the production services for the Clinton/Gore rally, events coded by the Committee as Clinton/Gore events and the letter which states the Committee would pay for the entire event that was described as a Clinton/Gore registration rally and not a CC event, it appears that the CC incurred expenditures on behalf of the Clinton/Gore Committee.

Further, regarding the Committee's last assertion that invoices coded or marked Clinton/Gore were errors on the part of vendors or Committee staff, the Committee did not, as requested in the interim audit report, provide any explanation from vendors detailing reasons why the purchase of goods and services were invoiced to the Clinton/Gore campaign.

Since the Committee's response to the interim report does not contain documentation to the contrary, the Audit staff concludes that the $135,733 in goods and services discussed above were purchased on behalf of the Clinton/Gore campaign.

6 According to notations on the Committee's bank records, one transfer from the DNC General Fund in the amount of $25,000 was erroneously deposited into the North Carolina Judicial Campaign Committee Account, a non-federal account, and subsequently transferred to the Unity account on November 9, 1992.

b. Direct Mail Program

The Coordinated Campaign conducted a direct mail program to identify swing voters. "Persuasion" mail pieces were used to encourage these voters to vote for the Democratic candidates.

The CC contracted with Gold Communications to develop a direct mail voter contact program. Gold Communications developed eight mailings for the Committee. The Audit staff obtained direct mail pieces and a summary of costs associated with each mailing. In addition, we reviewed available mailing permit documentation as well as disbursement records to determine the total cost of each mailing. The CC was responsible for depositing money for postage into the Committee's bulk mailing permit account #1006.

Of the eight mailings reviewed, two mailings qualified as activities exempt from the definitions of contribution and expenditure pursuant to 11 CFR §§100.7(b)(9) and 100.8(b)(10). Three other mailings appeared to benefit the candidate for Governor and did not mention any federal candidates.

Of the remaining mailings, all three appeared to benefit the Clinton/Gore campaign. These mailings did not mention or have a picture of the Democratic candidate, rather, these mailings described his opponent's record and his position on various issues. It appeared that these mailings clearly tried to persuade the voter towards the Democratic candidate and therefore, should be considered as expenditures made on behalf of the Clinton/Gore campaign.

The Audit staff reviewed a memorandum and invoices between Gold Communications and the CC, as well as printing and postage costs to calculate a total cost per mailing. We calculated allocation percentages based on the proportion of space devoted to each of the candidates within the mailings.[7]

Based on the information made available during fieldwork, it appeared that the use of a commercial vendor and the apparent use of mailings made from commercial lists for these mailings voided the exemption under 11 CFR §100.8(b)(18).

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7 The disbursements were reported on Schedule H-4 and allocated based on the CC's ballot composition ratio; 30% federal, 70% non-federal.

Therefore, it appeared the CC made expenditures on behalf of the Clinton/Gore campaign totaling \$177,217.[8]

At the exit conference, the Audit staff requested additional information regarding the direct mail expenditures. The Committee did not comment.

The interim audit report recommended that the Committee provide documentation which demonstrates that the mailings were not made by a commercial vendor; that the mailings were not made from commercial mailing lists; and provide invoices or other information generated by the vendor detailing the cost of each mailing. The detailed cost information for each mailing should include, but is not limited to, the number of pieces mailed, the origination point of each mailing, the drop date(s) of the mailings, postage cost, costs of mailing lists used, cost of labels, if used, and any other relevant costs associated with the mailings.

The Committee did not comply with all of the recommendations of the interim audit report. Specifically, the Committee did not provide invoices or other information generated by the vendor which detailed the cost of each mailing; the number of pieces mailed, the origination point of each mailing, the drop date(s), postage cost, cost of mailing list used, cost of labels and any other relevant costs associated with the mailings.

Rather, the Committee stated in its response that:

> "the three mail pieces that are challenged by the Interim Report are designed to promote the entire Democratic Party slate saying 'Vote Democratic, Vote For Change.' ... [T]he pieces do not mention the Democratic nominees for President or Vice President, nor the Democratic senatorial nominee, and instead promote the concept of voting 'Democratic.' The focus of the direct mail pieces which are challenged is the distinction between the ideology of the Democratic Party and the ideology of the Republican Party. The intent of the pieces is to distinguish the Republican ideology from the interests of swing voters. Therefore, the focus of the pieces is on economic issues including unemployment and tax matters so as to elicit the interest of middle class 'swing voters' in the nominees of the Democratic Party. There is no express advocacy of the Clinton-Gore ticket. The express advocacy is in behalf of the entire Democratic slate premised upon the identification of the interest of those voters with the ideology of the nominees of the North Carolina Democratic Party.

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8 The Audit staff did not perform a modified FIFO analysis to associate the deposit of party funds with the payment of direct mail or phone bank expenses prior to issuance of the interim audit report.

> "In addition ... is the involvement of volunteers in the sorting, packing and delivery of the direct mail pieces. ... Gold Communications developed the concepts for the mail pieces, which work was done in conjunction with the Democratic Party staff. The lists of names and addresses used was compiled from files in each of North Carolina's 100 counties by the Party. The lists collected were then collated and assembled into a unified format.
>
> "The [CC] procured space in which volunteers sorted, bundled, and bagged mail by zip code for purposes of obtaining efficient bulk mail delivery. Volunteers then delivered the mail into the custody of the United States Postal Service."

The Audit staff acknowledges that the pieces in question did not name any of the candidates on the Democratic slate. One piece included references to George Bush's middle class tax policies, and also included a picture and references to the Republican candidate for the U.S. Senate. The second piece included references to George Bush's handling of economic issues. Both pieces contain language urging the reader to "Vote Democratic - Vote For Change."

In addition, the Committee claims to have used a volunteer effort to mail these pieces and to have produced the mailing lists in-house. However, aside from the statements made in the Committee's response, the Committee did not provide any other documentation that supports its position. Moreover, a memorandum from the direct mail vendor to the Committee detailing the costs of the program states, in part, "That leaves $196,000 to cover list costs and remaining production costs. ... We can review the accounting next week after the exact postage and list costs can be pinned down." Based on these statements, it appears that direct mailing vendor purchased lists for the mailings.

Since the Committee's response to the interim audit report did not contain documentation that the direct mail was not processed by a commercial vendor or the mailings made from commercial lists, the Audit staff concludes that the exemption under 11 CFR §100.8(b)(18) was voided. Therefore, the CC made expenditures on behalf of the Clinton/Gore campaign totaling $177,217.

c. Phone Bank Program

During fieldwork the Audit staff obtained phone bank documentation, three phone scripts, payroll records, contracts and other relevant disbursement records regarding the phone bank program. Based upon the available records, it appeared the CC operated at least three phone bank operations with paid workers and, in addition, entered into a contract with a vendor to provide phone calling services. The total identified costs of these operations were $168,934. Due to a lack of documentation, we were not able to associate any of the scripts with any of the phone bank operations.

Two of the three scripts mentioned Bill Clinton as part of their get-out-the-vote message. The third script did not mention any candidates.

During fieldwork and at the exit conference we requested Committee officials to provide more documentation associated with the phone bank operations. At the time no additional information detailing which script was used with which phone bank had been provided by the Committee. The use of paid workers to conduct the phone bank operations voided the exemption under 11 CFR §100.8(b)(18).

At the exit conference, the Committee was provided with a schedule of the phone bank costs discussed above. The Committee did not comment.

In the interim audit report, the Audit staff recommended that the Committee provide the following:

a) evidence to demonstrate why the use of paid phone bank employees did not void the exemption provided under 11 CFR §100.8(b)(18);

b) a detailed analysis of all phone bank costs, including documentation which supports the costs of the GOTV phase and costs associated with other discreet phases, if any, based on the number of calls made for each phase. For phases of the program that utilized more than one script, the costs should be allocated to each script;

c) information detailing how the results of the GOTV phase and other discreet phases, if any, were utilized; and

d) information which correlates each paid caller to a specific script and to the location from which the calls were made.

The Committee did not comply with all of the recommendations presented in the interim audit report. Specifically, the Committee did not provide a detailed analysis of all phone bank costs, or documentation which supports the costs of the GOTV phase and costs associated with other discreet phases, if any, based on the number of calls made for each phase. Further no information was provided which detailed how the results of the GOTV phase and other phases were utilized and which correlates each paid caller to a specific script and to the location from which the calls were made.

Rather, the Committee stated in its response that:

> "The [CC] organized and operated both volunteer and paid phone banks focused on its GOTV efforts. The GOTV efforts included the identification of Democratic voters and pre-election day and election day

calls to turn out voters. In addition, certain calling was directed to the generation of excitement among volunteers, election day workers and prospective voters coincident with GOTV rallies conducted in the State.

"... This [GOTV] paid phone banking used a purely generic script to remind voters of the upcoming election and to identify voters needing a ride on election day to their polling place. Voters were encouraged to vote a straight Democratic ticket. No candidate was identified by name...

"Of the substantial expenditures identified by the Commission for paid phone banks, only phone banking conducted on election day utilized a script which identified Bill Clinton and in some instances Al Gore in the GOTV phone calls...

"An analysis of these charges on a per diem basis suggests that should the Commission determine the phone bank scripts from election day not to contain a merely incidental reference to the Democratic Presidential nominee then the total expenditures for such election day calling would not likely exceed 8-10% of the total expenditures for paid phone bank.

"An examination of the three scripts shows that the pre-election day script is completely generic and contains only a GOTV and Vote Democratic message. The remaining two scripts are election day scripts and only those scripts identify a Democratic candidate.

"The Audit Staff has identified as expenditures on behalf of Clinton-Gore, the costs of a paid phone bank conducted to stir enthusiasm for the GOTV rally in Durham. As is set forth above, the rally was designed to motivate volunteers, election day workers and prospective voters by encouraging participation in a GOTV rally held in Durham on October 26, 1992. No script has been located for this phone bank."

As stated above the Audit staff previously noted that two of the three scripts identified Clinton/Gore; however due to the lack of information provided we were not able to identify which costs were associated with each program. Also addressed by the Committee is its use of paid workers. The Committee contends that the paid phone bank workers performed services for the generic script phase only, however, no documentation was provided by the Committee to support this assertion. Therefore, the exemption under 11 CFR §100.8(b)(18) was voided by the use of paid callers.

Although the Committee contends that only between 8-10% of the total phone bank expenditures identified could relate to Clinton/Gore it did not provide any documentation that would have allowed the Audit staff to independently verify that percentage or otherwise calculate what portion of the $168,934 in costs related to the phone banks were paid on behalf of the Clinton/Gore campaign.

D. Disclosure of Occupation and Name of Employer

Section 434(b)(3)(A) of Title 2 of the United States Code states that each report shall disclose the identification of each person (other than a political committee) who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of $200 within the calendar year, together with the date and amount of any such contribution.

Section 431(13)(A) of Title 2 of the United States Code defines the term "identification" as, in the case of any individual, the name, the mailing address, and the occupation of such individual, as well as the name of his or her employer.

Section 432(i) of Title 2 of the United States Code states, in part, that 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.

Section 104.7(b) of Title 11 of the Code of Federal Regulations states, in part, that with regard to reporting the identification of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of $200 in a calendar year (pursuant to 11 CFR 104.3(a)(4)), the treasurer and the committee will not be deemed to have exercised best efforts to obtain the required information unless he or she has made at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such information from the contributor. Such effort shall consist of a clear request for the information (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

The Audit staff conducted a sample review of contributions from individuals and identified a 100% error rate relative to the itemization of occupation and name of employer. Upon further review, it was noted that the occupation and name of employer was not itemized on Schedules A (itemized receipts) for any of the 649 contributors listed on disclosure reports filed during the audit period. The total dollar amount of contributions required to be itemized was $383,297.

The Audit staff examined two types of solicitations used by the Committee. One device, used in connection with the Victory Gala event did not contain a request for occupation and name of employer; nor did it contain language stating the reporting of such information is required by law. The other device which apparently was used for membership solicitations did contain a request for occupation and name of employer; however, it did not contain language stating the reporting of such information is required by law.

At the exit conference the Committee was informed that disclosure reports filed for 1991-1992 did not contain occupation and name of employer information. Committee officials stated they did not know why occupation or name of employer was not disclosed during the audit period.

In the interim audit report, the Audit staff recommended that the Committee provide evidence to demonstrate that it exercised best efforts; or absent such a showing, contact all contributors who have not provided the required contributor information, provide copies of responses to these requests, and file amended Schedules A to correct the public record. Such request to contributors, if necessary, was to include language that Federal law requires the reporting of such information.

In response to the interim audit report, the Committee provided documentation which demonstrated that the Committee attempted to contact most of the individuals that were required to disclose this information. Documentation included: response devices returned by contributors with the required information; copies of letters returned to the Committee without the required information because contributor addresses were no longer valid.; and copies of letters dated September 1, 1995 sent to contributors requesting the information but no response was returned to the Committee. In addition, the Committee provided the required information for contributors that it had on its receipt data base.

Information obtained by the Committee was reported on amended Schedules A. In regard to the letters sent to contributors, the requests asked for the required information and included language informing the contributor that the reporting of such information is required by law. The requests for required information and subsequent reporting of information obtained occurred several years after the dates of the contributions in question.

2. <u>Apparent Prohibited Contributions</u>

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any corporation to make a contribution or expenditure in connection with any election to federal office and that it is unlawful for any political committee knowingly to accept or receive any contribution prohibited by this section.

Section 441b(b)(2) of Title 2 of the United States Code states, in part, that the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services, or anything of value to any political party in connection with any election to any of the offices referred to in this section.

Section 116.3(b) of Title 11 of the Code of Federal Regulations states, in part, that a corporation in its capacity as a commercial vendor may extend credit to a political committee or another person on behalf of a political committee provided that the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.

Section 116.3(c) of Title 11 of the Code of Federal Regulations states, in part, that in determining whether credit was extended in the ordinary course of business, the Commission will consider whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit; whether the commercial vendor received prompt payment in full if it previously extended credit to the same political committee; and whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

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16 In Advisory Opinion 1991-18 requested by the New York State Democratic Committee which was about to engage GSI to provide telemarketing services, the Commission concluded that for any prospecting to be performed by GSI on behalf of the requester, GSI would have to be reimbursed in an amount equal their normal expenses and expected profit prior to beginning the prospecting program in order that GSI not make a corporate contribution.

Section 116.8(a) of the Title 11 of the Code of Federal Regulations states, in part, that a creditor may forgive the outstanding balance of a debt owed by an ongoing committee if the creditor and the ongoing committee have satisfied the requirements of 11 CFR 116.3 regarding extensions of credit by commercial vendors, the debt has been outstanding for at least twenty-four months and the following conditions have been met. The creditor has exercised reasonable diligence in attempting to locate the ongoing committee and has been unable to do so; or the ongoing committee does not have sufficient cash on hand to pay the creditor and has receipts of less than $1000 during the previous twenty-four months and has disbursements of less than $1000 during the previous twenty-four months and owes debts to other creditors of such magnitude that the creditor could reasonably conclude that the ongoing committee will not pay this particular debt.

As stated in the background section, the NC3 program created a debt of approximately $64,000 during the audit period. In 1991, receipts of $6,279 were deposited into the NC3 account and disbursements of $6,013 were made. GSI billed the Committee $11,025 and deducted $5,350 from the account by check or telephone transfer, resulting in a debt of $5,675 as of 12/31/91. During 1992, receipts of $107,457 were deposited into the account and disbursements of $107,496 were made. GSI billed the Committee $165,704 and deducted $107,400 by either check or telephone transfer, resulting in additional debt of $58,304 by 12/31/92.[17] It appears the extension of credit by GSI, approximately $64,000 at 12/31/92, resulted in a prohibited corporate contribution having been made by GSI and accepted by the Committee.

In the interim audit report, the Audit staff recommended the Committee obtain from GSI and provide to the Audit staff additional documentation or any other comments to demonstrate that maintaining the outstanding debt was in the normal course of GSI's business. The information provided should include examples of other customers or clients of similar size and risk for which similar services have been provided and similar billing arrangements have been used. Also, information concerning GSI's billing policies for similar clients and work, advance payment policies, debt collection policies, and billing cycles should be included. Finally, provide information detailing the liquidation of the debt.

The Committee's response to the interim report did not include any documentation or comments from GSI that demonstrated that maintaining outstanding debt was in the normal course of GSI's business. No information regarding GSI's billing policies for similar clients and work, advance payment policies, debt collection policies, or billing cycles, was provided.

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17 The Committee has apparently severed its relationship with GSI after the audit period. The Audit staff has no information to determine whether the debt was eventually extinguished.

Rather, in response to the interim audit report, the Committee stated that, "The Commission in its Audit Report has assumed that there has been an advance of value by GSI to the Party. The Commission has made this assumption based upon the statements furnished by GSI. However, there was a legitimate dispute between the parties as to whether any amount was owed to GSI by the Party, and this issue led the Party to terminate the relationship between the Party and GSI. Accordingly, the Party contends that it did not receive any contribution, loan, or advance of value from GSI. The Party was never able to obtain from GSI an explanation or accounting with respect to amounts claimed by GSI. The unsubstantiated claims that amounts are owed is not a sufficient basis for an assumption that a corporate contribution has been made."

The response also stated that:

> "... counsel for the Democratic Party, by letter dated February 2, 1994, alleged that GSI had breached the terms of the contract between the parties by soliciting on behalf of other clients, individuals who were proven donors of the Party, whose names and addresses were included in the NCD file. Counsel for the Democratic Party demanded immediate return of the NCD file, and sought to terminate the contract. The letter further made demand that GSI make no further solicitations on behalf of the party and demanded an accounting with respect to all costs and fees claimed by GSI."

A copy of the letter was provided.

In a second letter dated March 10, 1994, Counsel for the Committee stated in response to GSI's claim that the Committee owed them approximately $49,000 that they could not advise the Committee to pay their claim. "...The costs previously billed to the Party were both excessive and unsubstantiated... [Y]our unauthorized solicitation of the individuals on the party permanent file (N.C.D.) has damaged the Party. Therefore, the Party is of the opinion that there is no outstanding obligation to GSI."

The Committee's argument that there was a legitimate dispute between the parties as to whether any amount was owed to GSI and, thus, did not receive any contribution from GSI is not persuasive. The Committee did not provide any documentation that demonstrates the costs billed to the Committee were both excessive and unsubstantiated. The documentation made available demonstrates that GSI decided to finance the initial debt and pay themselves back the profits from future solicitation rounds. Therefore, the extension of credit of approximately $64,000 appears to constitute a prohibited corporate contribution.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of) 28 U.S.C. § 2462
) Statute of Limitations
)
)
)
)

GENERAL COUNSEL'S REPORT

I. INTRODUCTION

On December 26, 1996, the United States Court of Appeals for the Ninth Circuit issued a decision in *Federal Election Commission v. Williams*, No. 95-55320 (9th Cir. Filed Dec. 26, 1996). That decision held, *inter alia*, that the five-year statute of limitations for filing suit to enforce a civil penalty established at 28 U.S.C. § 2462 applies not only to judicial proceedings to enforce civil penalties already imposed, but also to proceedings seeking the imposition of these penalties, including the Commission's law enforcement suits under 2 U.S.C. § 437g(a)(6).

As noted in the memorandum regarding the filing of a petition for rehearing, the Office of General Counsel believes that the Commission should accept the court's core application of 28 U.S.C. § 2462 to its enforcement suits as the current state of the law. *See* Memorandum to the Commission, *Petition for Rehearing, and Suggestion for Rehearing En Banc, In Federal Election Commission v. Williams*, dated January 10, 1997. As also noted, however, we have sought further review of the court's decision relating to issues of equitable relief and equitable tolling.[1] *Id. See also FEC v. NRSC*, 877 F. Supp. 15, 21 (D.D.C. 1995).

This General Counsel's Report discusses the impact of 28 U.S.C. § 2462 on the Office of General Counsel's enforcement caseload.[2] This Report describes the active and inactive enforcement matters which are potentially affected by the application of the five-year statute of limitations under 28 U.S.C. § 2462, and makes recommendations for each of the potentially affected matters. This Report addresses all cases where the statute of limitations potentially expires, or partially expires, by the end of calendar year 1997 (December 31, 1997).

The Office of General Counsel is recommending that 18 matters be closed at this time. By doing so, this Office believes that it will be able to devote more resources toward more recent activity, particularly those matters that arose from the 1996 election cycle. To avoid potential statute of limitations problems in the future, this Office will track its cases against the relevant statute of limitations and will perform regular reviews of its caseload. In addition, this Office will be making periodic recommendations to the Commission with respect to matters that may be affected by the application of the five-year statute of limitations under 28 U.S.C. § 2462.

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[1] Pending the court's decision, issues such as equitable relief, equitable tolling and ongoing violations, will remain open. In some instances, although issues such as equitable tolling and equitable relief may still be viable, this Office has cited other factors to support our recommendation to close the matter. *See, e.g.*, cases involving apparent violations of 2 U.S.C. § 441a(f).

[2] This Report addresses enforcement matters assigned to the Public Financing, Ethics & Special Projects ("PFESP") and Enforcement areas.

III. RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

A. Decline to open a MUR, close the file, and approve the appropriate letters in Pre-MUR 344.

B. Take no action, close the file and approve the appropriate letters in the following matters:

1. MUR 4267
2. MUR 4370
3. MUR 4392
4. MUR 4432
5. MUR 4468
6. MUR 4591
7. MUR 4614

C. Take no further action, close the file and approve the appropriate letters in the following matters:

1. MUR 3351
2. MUR 3571
3. MUR 3582
4. MUR 3586
5. MUR 3838
6. MUR 3841
7. MUR 3969
8. MUR 4091
9. MUR 4183
10. MUR 4209

3/4/97
Date

Lawrence M. Noble
General Counsel

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
) Agenda Document #X97-15
28 U.S.C. § 2462,)
Statute of Limitations)

CERTIFICATION

I, Marjorie W. Emmons, recording secretary for the Federal Election Commission executive session on March 11, 1997, do hereby certify that the Commission took the following actions with respect to Agenda Document #X97-15:

1. Decided by a vote of 5-0 to -

A. Decline to open a MUR, close the file, and approve the appropriate letters in Pre-MUR 344.

B. Take no action, close the file, and approve the appropriate letters in the following matters:

1. MUR 4267;
2. MUR 4370;
3. MUR 4392;
4. MUR 4432;
5. MUR 4468;
6. MUR 4591;
7. MUR 4614.

(continued)

C. Take no further action, close the file, and approve the appropriate letters in the following matters:

1. MUR 3351;
2. MUR 3571;
3. MUR 3582;
4. MUR 3586;
5. MUR 3838;
6. MUR 3841;
7. MUR 3969;
8. MUR 4091;
9. MUR 4183;
10. MUR 4209.

Commissioners Aikens, Elliott, McDonald, McGarry, and Thomas voted affirmatively for the decision.

(continued)

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Attest:

3-12-97
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 28, 1997

W. Lyndo Tippett, Treasurer
North Carolina Democratic
Victory Fund
220 Hillsborough Street
Raleigh, NC 27603

RE: MUR 4591

Dear Mr. Tippett:

On December 4, 1996, the Audit Division referred certain matters to the Office of General Counsel involving the North Carolina Democratic Victory Fund ("the Committee") and W. Lyndo Tippett, as treasurer, for possible enforcement action. *See* Referral Materials. The referral emanated from an audit of the Committee undertaken pursuant to 2 U.S.C. § 438(b).

After considering the circumstances of this matter, the Commission has determined to exercise its prosecutorial discretion and to take no action against the Committee and W. Lyndo Tippett, as treasurer. Accordingly, the Commission closed its file in this matter on March 11, 1997. The Commission reminds you, however, that the activity set forth in the referral appears to constitute apparent violations of the Federal Election Campaign Act of 1971, as amended ("FECA"). You should take immediate steps to insure that this activity does not occur in the future.

The confidentiality provisions of 2 U.S.C. § 437g(a)(12) no longer apply and this matter is now public. In addition, although the complete file must be placed on the public record within 30 days, this could occur at any time following certification of the Commission's vote. If you wish to submit any factual or legal materials to appear on the public record, please do so as soon as possible. While the file may be placed on the public record prior to receipt of your additional materials, any permissible submissions will be added to the public record when received.

If you have any questions, please contact me at (800)424-9530 or (202) 219-3690.

Sincerely,

Gregory R. Baker
Special Assistant General Counsel

Enclosure
Referral Materials

MUR 4591 (North Carolina Democratic Victory Fund)
(audit referral) ('92 cycle)
PFESP Docket (Inactive)

This matter was referred to this Office on December 4, 1996. It involves five issues: (1) goods and services purchased apparently on behalf of Clinton/Gore '92 totaling $135,733; (2) direct mail program on behalf of Clinton/Gore '92 totaling $177,217; (3) phone bank program on behalf of Clinton/Gore '92 totaling $168,934; (4) disclosure of occupation and name of employer for 649 contributors totaling $383,297; and (5) apparent prohibited contributions totaling $64,000. This Office recommends that the Commission exercise its prosecutorial discretion and take no action, and close the file with respect to this matter. The activities at issue occurred prior to December 31, 1992. Thus, litigation to recover a civil penalty may be barred by the five-year statute of limitations by the end of the year. Moreover, further pursuit of this matter would not be an efficient use of the Commission's resources. If the Commission adopts these recommendations, we will include the appropriate admonishment language in the notification letter.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

THIS IS THE END OF MUR # 4591

DATE FILMED 4-25-97 CAMERA NO. 1

CAMERAMAN JMH

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