FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: November 25,1998

SUBJECT: MUR 4763-General Counsel's Report

The attached is submitted as an Agenda document for the Commission Meeting of December 1, 1998

Open Session _____ Closed Session ____XX____

CIRCULATIONS		DISTRIBUTION	
SENSITIVE	☒		
NON-SENSITIVE	☐	COMPLIANCE	☐
72 Hour TALLY VOTE	☐	Open/Closed Letters	☒
		MUR	☐
24 Hour TALLY VOTE	☒	DSP	☐
24 Hour NO OBJECTION	☐	STATUS SHEETS	☐
		Enforcement	☐
INFORMATION	☐	Litigation	☒
		PFESP	☐
		RATING SHEETS	☐
		AUDIT MATTERS	☒
		LITIGATION	☐
		ADVISORY OPINIONS	☐
		REGULATIONS	☐
		OTHER	☐

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 4763
Texas Democratic Party, *et al.*	)	

GENERAL COUNSEL'S REPORT

I. BACKGROUND

On June 23, 1998, the Commission found reason to believe that the Texas Democratic Party and seven Democratic county committees in Texas violated 2 U.S.C. § 441a(f) by accepting excessive contributions totaling $109,666 from various political committees in 1996. These findings were premised on the fact that the respondent committees appear to be affiliated and, hence, subject to a common contribution limit of $5,000 per calendar year. Respondents have recently requested preprobable cause conciliation, plus additional time to respond to the Commission's subpoenas and orders.

Accordingly, staying discovery in this matter would be appropriate while an early settlement is attempted. Therefore, this Office recommends that the Commission agree to enter into conciliation with Respondents prior to a finding of probable cause to believe, approve the attached proposed agreement, and stay discovery pending conciliation negotiations.

Because of concerns raised by the Commission, this report further analyzes the receipt of contributions by state parties and their local affiliates. As discussed below, this Office believes there are sufficient grounds for the Commission to apply a common limitation on federal contributions received by such committees.

II. ANALYSIS OF CONTRIBUTION LIMITATIONS APPLIED TO STATE AND SUBORDINATE PARTY COMMITTEES

A. Statutory Framework and Legislative History

Section 441a(a)(5) of the Federal Election Campaign Act of 1971, as amended ("the Act"), also known as the "antiproliferation" provision, regulates affiliated political committees:

> For purposes of the limitations provided by [2 U.S.C. § 441a(a)(1) and (2)], all contributions made by political committees established or financed or maintained or controlled by any corporation, labor organization, or any other person, including any parent, subsidiary, branch, division, department, or local unit of such corporation, labor organization, or any other person, or by any group of such persons, shall be considered to have been made by a single political committee . . . .

2 U.S.C. § 441a(a)(5). Congress carved out an exception for certain political party committees at 2 U.S.C. § 441a(a)(5)(B), specifying that contributions made by a national committee of a political party and by a state committee of the party "shall not be considered to have been made by a single political committee." However, as stated in the First General Counsel's Report and the Factual and Legal Analyses in this matter, there is no exemption from combined contribution limitations for a state party committee and its subordinate committees.

Section 441a(a)(5) was enacted as part of the 1976 amendments to the Act. By adding this provision, Congress was attempting to prevent groups involved in federal elections from circumventing contribution limits merely by proliferating their number of political committees, each of which would then obtain separate contribution limits. *See* H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 58 (1976). Discussion of political party committees in the House and Senate committee reports focused on treatment of these committees as either separate or affiliated for purposes of contribution limits, depending on their place in the party structure. For example, the House report explained the party committee provisions of what was to become § 441a(a)(5) as follows:

> There is an exception to the [affiliation] rules by which a political committee set up by a national political party, and a political committee set up by each State political party, are to be treated separately for the purposes of H.R. 12406's contribution limitations. However, all political committees set up by a national political party would be treated as a single political committee for the purposes of H.R. 12406's contribution limitations. Moreover, all political committees set up by a State political party or by county or city parties in that State would be treated as a single political committee for the purposes of H.R. 12406's contribution limitations.[1]

H.R. Rep. No. 94-917, 94th Cong., 2d Sess. 6 (1976). *See also* S. Rep. No. 94-677, 94th Cong., 2d Sess. 9-10 (1976); H.R. Conf. Rep. No. 94-1057, 94th Cong., 2d Sess. 55, 58 (1976).

Although the history of the provision indicates an intent to prevent affiliated committees from each making contributions up to the statutory limits, it does not address their collective receipt of contributions. Both the House and the Senate bills did include a provision addressing generally the receipt of excessive contributions by persons and multicandidate committees which was to become § 441a(f): "No candidate or political committee shall knowingly accept any contribution . . . in violation of the provisions of [§ 441a]." Accordingly, the 1976 legislative history appears to treat affiliated party committees other than national/state combinations as single committees which consequently would be governed by § 441a(a)(1) or (2) as to the amounts they may collectively give and, by extension, § 441a(f) as to the amounts they may jointly receive.

B. The Commission's Regulations, Advisory Opinions and Enforcement Matters

Section 110.3 of the Commission's regulations implements the provisions against the

---

[1] For an extensive analysis by this Office of the 1976 legislative history regarding affiliation between state and local committees, *see* FEC Agenda Document #87-79 (July 22, 1987, considered on August 6, 1987). As discussed in that document, the history of the antiproliferation provision reveals that Congress did not intend state and local party committees to have the benefit of separate contribution limits.

proliferation of political committees set forth in 2 U.S.C. § 441a(a)(5).[2] The original regulation, which became effective April 13, 1977, referred only to contributions *made* by affiliated political committees, tracking the language used in the Act. The part of the regulation dealing with state and local party committees was identical to the current provision at 11 C.F.R. § 110.3(b)(3), except that it included specific examples of permissible contributions.

1. Relevant History Prior to the 1989 Revisions of 11 C.F.R. § 110.3

In 1989 the Commission revised 11 C.F.R. § 110.3 by, *inter alia*, adding "received" to certain subsections related to particular categories of affiliated committees. Prior to these revisions the Commission had stated, in Advisory Opinion ("AO") 1976-104, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5255, that the Act's limitations apply to contributions made by affiliated political action committees ("PACs") as well as contributions received by them:

> The establishment of several PACs within a single organization is not precluded; all such PACs are, however, deemed affiliated and treated as "a single political committee," for purposes of sharing a single contribution limit both with respect to contributions made to the affiliated PACs by other persons, and contributions made by the PACs to candidates and committees.

---

[2] The entire text of § 110.3(b)(3) currently reads as follows:

> All contributions made by the political committees established, financed, maintained, or controlled by a State party committee and by subordinate State party committees shall be presumed to be made by one political committee. This presumption of affiliation shall not apply if –
> (i) The political committee of the party unit in question has not received funds from any other political committee established, financed, maintained, or controlled by any party unit; and
> (ii) The political committee of the party unit in question does not make its contributions in cooperation, consultation or concert with, or at the request or suggestion of any other party unit or political committee established, financed, maintained, or controlled by another party unit.

11 C.F.R. § 110.3(b)(3). Affiliated committees are further addressed in the Commission's regulations at 11 C.F.R. §§ 100.5(g), 102.2(b)(1), and 110.14(j), (k).

The Commission reiterated this position in AO 1978-39, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5372 ("contributions to [affiliated PACs] would be regarded as contributions to a single committee for limitation purposes"); AO 1979-68, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5447 ("contributions by or to [affiliated committees] are considered under the Act to have been made by or to a single committee"); and in AO 1985-31, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5832 ("all [affiliated PACs] are subject to a single set of contribution limitations with respect to contributions received and made"). *See also* AO 1979-77, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5454; AO 1980-40, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide, (CCH) ¶ 5501; AO 1988-37, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5945; and AO 1989-16, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5967. The only advisory opinion addressing affiliation in the context of state and local party committees, either before or after the 1989 revisions, involved the making of contributions; the Commission did not specifically address the receipt of contributions in that opinion. AO 1978-9, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5330. However, the other advisory opinions cited above demonstrate that the Commission took an expansive view of the Act's antiproliferation provision long before *any* of the provisions at 11 C.F.R. § 110.3 expressly covered the receipt of contributions.

The Commission also pursued matters involving the receipt of excessive contributions by affiliated committees in an enforcement context prior to the addition of the word "received" at § 110.3(a)(1). In MUR 1038, the complainant alleged that the Machinists Non-Partisan Political League ("the League") had made contributions to several affiliated "draft Kennedy" political

committees and that, because of this affiliation, the contributions exceeded the League's aggregated $5,000 limit for calendar year 1979. The First General Counsel's Report, dated October 12, 1979, pointed out that 2 U.S.C. § 441a(a)(5), on its face, does not expressly cover contributions *received* by affiliated committees. However, the Report noted that the Commission had interpreted the Act to include such contributions, citing AOs 1976-104 and 1978-39. The Commission found reason to believe that the League violated 2 U.S.C. § 441a(a)(2)(C) and that the "draft Kennedy" committees violated 2 U.S.C. § 441a(f).[3]

2. The 1989 Revisions of 11 C.F.R. § 110.3

On July 30, 1986, the Commission published a Notice of Proposed Rulemaking seeking comments on proposed revisions to § 110.3 (along with other sections) of its regulations. 51 Fed. Reg. 27183 (July 30, 1986). Among the proposed language changes was the addition of the word "to" after the word "contributions" in three places, such that it would be clear that contributions made *and received* by all affiliated party and non-party committees are covered under the section. *Id.* at 27189, 27190. None of the commenters specifically addressed this particular proposed revision. *See* FEC Agenda Document #87-79 (July 22, 1987, considered on August 6, 1987). In accordance with the Commission's discussion of the proposals, this Office

---

[3] The Commission also voted in MUR 1038 to approve a subpoena to flesh out the issue of affiliation. The League refused to obey the subpoena, arguing that, *inter alia*, the "draft Kennedy" committees were not "political committees" as defined by the Act. The appellate court agreed and ruled against the Commission without discussing the scope of 2 U.S.C. § 441a(a)(5). *See FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981); *FEC v. Citizens for Democratic Alternatives in 1980*, 655 F.2d 397 (D.C. Cir. 1981). *See also FEC v. Florida for Kennedy Committee*, 492 F. Supp. 587 (S.D. Fl. 1979), *rev'd*, 681 F.2d 1281 (11th Cir. 1982). Following the denial of *certiorari* by the Supreme Court, 454 U.S. 897 (1981), the Commission voted to take no further action against the respondents and closed the file.

Although the Commission has litigated other cases involving affiliated political committees, in each of these cases the committees were alleged to have *made*, rather than *received*, excessive contributions. The Commission has also pursued several enforcement matters specifically involving affiliated state and local party committees, but the present matter appears to be the first that involves the *receipt* of excessive contributions by such committees.

prepared a revised draft which replaced the phrase "contributions made to or by" with "contributions made or received by." *See* FEC Agenda Document #88-1 at 6 (December 23, 1987, considered on January 21, 1988).

The final version of the new affiliation rules included the phrase "contributions made or received by" at § 110.3(a)(1) (non-party committees) and § 110.3(b)(1) (national party committees). However, no consensus could be reached as to how to revise § 110.3(b)(3), addressing state party committees and their local affiliates. *See* FEC Agenda Document #89-25 at 3 (April 12, 1989, considered on May 11, 1989). The proposed revision rejected by the Commission included the phrase "contributions made or received by" as well as additional criteria for demonstrating the independence of subordinate party committees; it would have also replaced the word "presumed" with "considered."[4] The Commission's discussion of § 110.3(b)(3) at its public meetings during this period appears to have focused on the presumption language rather than the "made or received" language. The Explanation and Justification ("E&J") for the revised rules simply states that "[n]ew paragraph (b)(3) follows [the existing rule] by explaining that contributions made by a State party committee and by

---

[4] The proposed revision stated that contributions made or received by affiliated state and local party committees shall be "considered" to have been made or received by a single committee, except that any such committee

> able to demonstrate its independence under the following criteria shall have a separate contribution limitation:
> (i) Neither committee has a role in the formation of the other committee, such as through the development of its constitution or bylaws;
> (ii) The committees conduct their activities, such as the election of officers, independently;
> (iii) Neither committee makes contributions or expenditures in cooperation, consultation or concert with or at the request or suggestion of the other committee; and
> (iv) The committees neither receive from nor donate funds to the other, except proceeds from a joint fundraising activity . . . .

FEC Agenda Document #88-1 at 8 (December 23, 1987, considered on January 21, 1988).

subordinate State party committees are presumed to be made by a single committee." 54 Fed. Reg. 34102 (Aug. 17, 1989). The revised regulations took effect on November 24, 1989.

Although the current regulation at 11 C.F.R. § 110.3(b)(3) does not expressly address the receipt of contributions by affiliated state and local party committees, this Office believes that the Commission may reasonably rely on its consistent interpretation of 2 U.S.C. § 441a, including in its AOs and MURs prior to the 1989 revisions, to cover receipts by all affiliated committees. Moreover, the E&J and other documents discussing the revisions appear to treat the addition of the word "received" at § 110.3(a)(1) and (b)(1) as a clarification of the Commission's position, rather than as a substantive rule change. For example, in its *Supplement for Political Party Committees* summarizing the 1989 revisions (published in the Commission's *Record*, Vol. 20 (1994)) under the heading "Contributions Limitations for Political Party Committees," the Commission noted that the "[n]ew language clarifies . . . that the limitations [for national and state party committees] apply to contributions both made and received." The E&J explained the change at § 110.3(a)(1) as follows: "[T]he revisions specify that the shared contribution limits for affiliated committees apply to both contributions made by those committees and to contributions they receive." 54 Fed. Reg. 34099 (Aug. 17, 1989).

Finally, the Commission's campaign guides designed for party committees – approved by the Commission to help state and local party committees comply with the Act and regulations – have consistently stated that the receipt of contributions by affiliated state and local party committees is covered. The 1981 and 1985 editions contained the following paragraph:

> A State party committee and all of its affiliated committees share one contribution limit. All local committees of a State are presumed to be affiliates of the State committee. This means that all contributions made or received by the local committees count against the State committee's limitations. For example, if a State party committee is a multicandidate

> committee . . . then the State committee and all of its affiliated local committees may contribute a combined total of $5,000 to a Federal candidate, per election . . . Similarly, the State committee and its local affiliates share the same limit on contributions received: an annual limit of $5,000 for contributions from an individual, group or nonparty political committee.

Campaign Guide for Political Party Committees ("*Campaign Guide*") at 4 (March 1981), *Campaign Guide* at 6 (Oct. 1985). The 1989 edition included the following statement: "[T]he State committee and local committees may receive a combined total of $5,000 per calendar year from any one contributor (the maximum amount allowable)." *Campaign Guide* at 10 (Sept. 1989). The current edition similarly states that "the state committee and local committees may receive a maximum of $5,000 per calendar year from any one contributor." *Campaign Guide* at 9 (Aug. 1996) (cited in the First General Counsel's Report in this matter). Although not legally binding, the campaign guides have long provided notice of the Commission's position to the regulated community.

C. Policy Considerations

Congress designed the antiproliferation provision to prevent evasion of the Act's contribution limits by the existence of splinter political committees; this objective would be difficult to accomplish unless the provision is applied in a uniform manner. From a policy standpoint, a narrow reading of the affiliation regulation that excludes contributions received by state and subordinate party committees would create a loophole for large amounts of hard dollars to be funneled into such committees by contributors who would otherwise be bound by a single $5,000 limit per year. The consequences would be that, in the larger states where there are many district, county, city or other subdivisions of the state party, a single PAC or individual would be able to give $5,000 to each such committee. In addition, as affiliated committees, they could

freely transfer the money among themselves. Further, an existing local party committee could simply split itself into multiple units and register each one as a separate committee, each permitted to receive $5,000 from the same contributor. Because these units would remain affiliated, they could be granted automatic multicandidate status (*see* AO 1983-19, [1976-1990 Transfer Binder] Fed. Elec. Camp. Fin. Guide (CCH) ¶ 5722), and the existing administrative structure could remain virtually intact except for minor changes (e.g., establishing separate checking accounts).

D. Summary

In summary, the Commission's reason to believe finding in this matter appears to be consistent with the legislative history of 2 U.S.C. § 441a; further, the Commission has historically interpreted the limitations of the Act to cover contributions received by affiliated committees. Although the early examples provided did not involve political party committees alone, they demonstrate that the Commission applied the limitations in § 441a to the receipt of contributions by affiliated committees long before certain portions of the affiliation regulations were revised in 1989 to include the word "received." If the Commission were to take a narrow approach in the present matter, all of the contributions at issue presumably would be deemed legal, and an anomalous and unjustifiable situation would result wherein *affiliated* state and county committees would actually be considered *disaffiliated* for purposes of accepting contributions. Accordingly, this Office believes that the Commission should interpret the Act and regulations as covering contributions made *and received* by state party committees and their local affiliates.

III. DISCUSSION OF CONCILIATION PROVISIONS AND CIVIL PENALTY

IV. RECOMMENDATIONS[5]

1. Enter into conciliation prior to a finding of probable cause to believe with the following respondents:

Texas Democratic Party and Jane Hedgepeth, as treasurer
Bexar County Democratic Party and John J. Murnin, as treasurer
Dallas County Democratic Party and David A. Parnell, as treasurer
Galveston County Democratic Party and Mary Ellen Brennan, as treasurer
Harris County Democratic Party and Charlie Gerhardt, as treasurer
Jefferson County Democratic Party and Gilbert T. Adams Jr., as treasurer
Travis County Democratic Party and Mina Clark, as treasurer
21st Century Political Action Committee and Art Brender, as treasurer

2. Approve the attached proposed joint conciliation agreement.

3. Stay discovery pending preprobable cause conciliation.

4. Approve the appropriate letter.

Lawrence M. Noble
General Counsel

November 25, 1998
Date

BY: [signature]
Lois G. Lerner
Associate General Counsel

Attachment
Proposed Joint Conciliation Agreement

Staff Assigned: Thomas J. Andersen

---

[5] Two of the committees have new treasurers: Jane Hedgepeth replaced Jorge A. Ramirez as treasurer of the Texas Democratic Party on October 15, 1998, and Charlie Gerhardt replaced David Mincberg as treasurer of the Harris County Democratic Party on August 24, 1998. Pursuant to Commission practice, the new treasurers are named in these recommendations.