FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 18, 1999

Ms. Judith L. Corley, Esq.
Ms. Ellen Weintraub, Esq.
Perkins Coie, L.L.P.
607 14th Street, N.W.
Washington, D.C. 20005-2011

RE: MUR 4803
John Tierney for Congress Committee
(FEC ID #C00283283)
and Roy F. Gelineau, as treasurer
Tierney for Congress
(FEC ID #C00318196)
and Roy F. Gelineau, as treasurer

Dear Ms. Corley and Ms. Weintraub:

On September 8, 1998, the Federal Election Commission notified your clients, the John Tierney for Congress Committee (FEC ID #C00283283), Tierney for Congress (FEC ID #C00318196), and Roy F. Gelineau, as treasurer of both committees (collectively, "the committees"), of a complaint alleging violations of certain sections of Title 11, *Code of Federal Regulations.* A copy of the complaint was forwarded to your clients at that time.

Upon further review of the allegations contained in the complaint, information supplied by your clients, and other information in the Commission's possession, the Commission, on October 7, 1999, found that there is reason to believe the committees violated 2 U.S.C. §§ 441a(f) and 441b(a), which are provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), and 11 C.F.R. § 116.2(c)(2), a provision of the Commission's regulations. Further, the Commission found reason to believe that the John Tierney for Congress Committee (FEC ID #C00283283) and Roy F. Gelineau, as treasurer, violated 2 U.S.C. § 434(b), which is also a provision of the Act. The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of receipt of this letter. Where appropriate, statements should be

submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred and proceed with conciliation.

If you are interested in pursuing pre-probable cause conciliation, you should so request in writing. See 11 C.F.R. § 111.18(d). Upon receipt of the request, the Office of the General Counsel will make recommendations to the Commission either proposing an agreement in settlement of the matter or recommending declining that pre-probable cause conciliation be pursued. The Office of the General Counsel may recommend that pre-probable cause conciliation not be entered into at this time so that it may complete its investigation of the matter. Further, the Commission will not entertain requests for pre-probable cause conciliation after briefs on probable cause have been mailed to the respondent.

Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

If you have any questions, please contact Lawrence L. Calvert Jr., the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Scott E. Thomas
Chairman

Enclosure
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENTS: The John Tierney for Congress Committee
(FEC ID # C00283283) and
Roy F. Gelineau, Jr., as treasurer
Tierney for Congress
(FEC ID # C00318196) and
Roy F. Gelineau, Jr., as treasurer

MUR: 4803

I. GENERATION OF MATTER

This matter was generated by a complaint filed with the Federal Election Commission by the Massachusetts Republican Party through its executive director, Marc DeCourcey. *See* 2 U.S.C. § 437g(a)(1). The complaint alleges that a prior committee of U.S. Representative John Tierney transferred all of its cash on hand to a subsequent committee while the prior committee had net debts outstanding, in violation of 11 C.F.R. § 116.2(c). Review of the available facts surrounding the outstanding debts raised two additional issues: whether a loan to the prior committee in which Tierney obtained funds from a bank was properly reported, and whether some of the outstanding debts constituted excessive or prohibited contributions from the creditors to either Tierney committee.

II. FACTUAL AND LEGAL ANALYSIS

A. Prohibited Transfer of Funds

1. Applicable Law

The Federal Election Campaign Act of 1971, as amended ("the Act"), provides that each candidate for Federal office, including a candidate for the office of United States Representative,

shall designate in writing a political committee to serve as his or her principal campaign committee. A candidate may designate additional committees to serve as authorized committees of the candidate. Such designation must be in writing and filed with the principal campaign committee. 2 U.S.C. § 432(e)(1).

An individual who is a candidate for the same Federal office in successive election cycles has two options with respect to the principal campaign committee for his or her subsequent campaign. Under one option, the candidate may continue the operations of an authorized committee from the previous campaign, and simply redesignate the committee as the principal campaign committee of the current campaign. Advisory Opinion 1977-24. Under the other option, the candidate may create a second, or "current," political committee, and designate it as the principal campaign committee for the current campaign. *See* 11 C.F.R. §§ 110.3(c)(4)(ii) (definition of "current Federal campaign committee"), 101.1(a) (requirement for designation of principal campaign committee). In general, a candidate choosing this option may make unlimited transfers of funds from the previous campaign committee to the current one. 11 C.F.R. § 110.3(c)(4). However, there are some important caveats to that statement. One is that transferred funds may not be composed of contributions that would be in violation of the Act; the cash on hand of the committee from which the transfer is made is considered to consist of the funds most recently received by the transferor committee, and the transferor committee must be able to demonstrate that the cash on hand contained sufficient permissible funds at the time of the transfer to cover the amount transferred. *Id.* In addition, the regulations prohibit a transfer of funds from a candidate's authorized committee to another authorized committee of the same candidate if the transferor committee has any "net debts outstanding" at the time of the transfer. 11 C.F.R. § 116.2(c)(2).

As set forth in 11 C.F.R. § 110.1(b)(3)(ii), "net debts outstanding" means, in pertinent part:

> the total amount of unpaid debts and obligations incurred with respect to an election, including the estimated cost of raising funds to liquidate debts incurred with respect to the election . . . less the sum of:
>
> (A) The total cash on hand available to pay those obligations, including: currency; balances on deposit in banks, savings and loan institutions, and other depository institutions; traveler's checks; certificates of deposit; treasury bills; and any other committee investments valued at fair market value; and
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> (B) The total amounts owed to the candidate or political committee in the form of credits, refunds of deposits, returns, or receivables, or a commercially reasonable amount based on the collectibility of those credits, refunds, returns or receivables.

2. Relevant Facts

On August 18, 1993, John F. Tierney of Salem, Massachusetts filed Form 2 with the Commission, declaring himself a candidate for the Democratic nomination for U.S. Representative from the Sixth Congressional District of Massachusetts in the 1994 primary election. The same day, the John Tierney for Congress Committee (FEC ID #C00283283, hereafter referred to as the "first committee"), which Tierney designated as his principal campaign committee, filed a Statement of Organization with the Commission.

Throughout the 1994 election cycle, the first committee apparently was both Tierney's principal campaign committee and his only authorized committee. In the September 20, 1994 primary election, Tierney won the Democratic nomination for U.S. Representative from the Sixth District, receiving 34 percent of the vote to 33 percent and 25 percent for his two closest competitors. On November 8, 1994, Tierney lost the general election, receiving 47 percent of the vote.

Later, on March 29, 1996, Tierney filed a new Form 2, declaring himself once again a candidate for U.S. Representative from the Sixth District. Tierney listed a new committee, "John Tierney for Congress '96" (now known as "Tierney for Congress" and hereafter referred to as "the second committee") as his principal campaign committee, and "John Tierney for Congress," the "first committee," as an "other authorized committee." On the same day, treasurer Gelineau filed a Statement of Organization for the second committee.[1]

On March 31, 1996, two days after the second committee was formed, the first committee transferred to it $90,976.63, which, according to the first committee's disclosure reports, was all of the first committee's cash on hand. As of March 31, 1996, the first committee reported outstanding debt to Tierney ($82,000), Goldman Associates ($15,000) and H & C Service Corp. ($1060.31). *See infra.*[2]

On April 15, 1996, the second committee filed its April 1996 Quarterly Report. The cover letter from treasurer Gelineau contained the following pertinent passage:

> Please note that the only activity for the John Tierney for Congress '96 campaign committee was the receipt of all the assets of the previous principal campaign committee, the John Tierney for Congress Committee, in the amount of $90,976.63 effective March 31, 1996 . . . The [first committee] will be filing a

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[1] Without looking at Tierney's accompanying Statement of Candidacy and the April Quarterly Report discussed *supra,* it would be difficult to discern from the Form 1 that Gelineau intended to create a new committee. The Form 1 used the first committee's FEC ID number, C00283283, and contained a check in the box marked "Check if name is changed." The apparently changed name is "John Tierney for Congress '96," and no other affiliated committees are listed. The committee depository continues to be listed as the Salem Five Cents Savings Bank.

Nevertheless, the Commission's Reports Analysis and Data Systems Development Divisions appear to have given effect to Tierney's apparent intent, as expressed in the Statement of Candidacy, which refers to two committees, and the transfer of funds between the committees, which took place only two days after the Form 1 was filed. The second committee was eventually assigned FEC ID number C00318196.

[2] As will be discussed in more detail *infra,* $25,000 of the $82,000 reportedly owed to Tierney was in fact owed to Eastern Bank of Lynn, Massachusetts.

> Report of Receipts and Disbursements on July 31, 1996 on a non-election year cycle. The [second committee] will be filing reports on an election year cycle.

Included with the second committee's report were memorandum Schedules A itemizing all contributions received in the first quarter of 1996 by the first committee, even those it would not have otherwise been required to itemize, and memorandum Schedules B itemizing the first committee's disbursements for the first quarter of 1996.[3] However, the second committee did not file its own Schedule A itemizing the transfer in from the first committee. This drew a Request for Additional Information ("RFAI") from the Commission's Reports Analysis Division ("RAD"), which was transmitted to the second committee on June 11, 1996.

The RAD analyst with responsibility for the Tierney committees recalls a telephone conversation with treasurer Gelineau after he received the June 11, 1996 RFAI. The analyst recalls the treasurer stating that the funds transferred from the first committee to the second committee comprised contributions for the 1996 campaign that were "misdeposited" in the first committee's account when they should have been deposited in the second committee's account. This was the first, and to date the only, time that the committee made this assertion to the Commission. On June 25, the second committee amended its April 1996 Quarterly Report to include its own schedule A itemizing the transfer in from the first committee.

On July 15, 1996, the first committee filed a July 1996 Quarterly Report that showed no activity during the reporting period, and that continued to show outstanding debts to Tierney, Goldman Associates, and H & C Service Corp. However, even though the second committee had itemized the first committee's contributions for the first quarter of the year on memorandum

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[3] It appears from later reports filed by the second committee that the contributions received by the first committee in the first quarter of 1996 were aggregated with others subsequently received by the second committee from the same contributors for purposes of reporting the later year-to-date amounts received from each contributor.

Schedules A, the first committee had not filed its own April 1996 Quarterly Report. On November 19, 1996, RAD sent an RFAI to the first committee, reminding it that it had to file an April Quarterly Report. The first committee did so on December 4, 1996.

From that time through the 1998 Year-End Report, the first committee filed nearly identical eight-page reports disclosing no receipts, no disbursements, no cash-on-hand, and continuing debts of $98,061.31 owed to Tierney, Goldman Associates, and H & C Service Corp.[4]

3. Analysis

It appears from the first committee's reports that on March 31, 1996, immediately prior to transferring all of its cash on hand to the second committee, the first committee owed $98,060.31 to Tierney (or to Tierney and Eastern Bank, *see infra)*, Goldman Associates, and H & C Service Corp. It had cash on hand of $90,976.63, and reported having no receivables. Thus, applying the formula of 11 C.F.R. § 110.1(b)(3)(ii) to the data reported by the first committee, it had at that moment net debts outstanding of $7,083.68, plus an indeterminate amount of costs to raise money to liquidate the debt.[5] After the transfer, of course, the first committee had no cash on hand, and had reported net debts outstanding of $98,060.31, plus an indeterminate amount of costs to raise money to liquidate the debt. Thus, the first committee reportedly had net debts

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[4] As of September 15, 1999, the first committee had filed no 1999 Mid-Year Report. The 1999 Mid-Year Report was due July 31, 1999.

[5] The figure is arrived at through the following calculation, per the regulation: (Total debt of $98,060.31 plus indeterminate cost of fundraising for debt liquidation) minus ($90,976.63 plus zero receivables) = >$98,060.31 - $90,976.63 = >$7,083.68. Because the first committee continued to report through the 1998 Year End Report, we do not treat it here as a terminating committee, and therefore do not apply that part of the regulation that accounts for winding down costs.

In fact, because the first committee never reported any servicing of principal on Eastern Bank's $25,000 loan to the first committee through Tierney, it is impossible at this stage to determine the exact amount of the first committee's net debts outstanding as of March 31, 1996.

outstanding both before and after it transferred all of its cash on hand to the second committee. On its face, the transfer appears to have violated 11 C.F.R. § 116.2(c)(2).

In the face of this apparently clear-cut violation, the first committee argues that the regulation was not intended to apply to facts such as these.[6] Quoting the Commission's Explanation and Justification for 11 C.F.R. § 116.2, the first committee argues that Section 116.2(c) "was intended to prevent impermissible corporate contributions through repeated and 'substantial extensions of credit from the same incorporated vendors' which had given credit to the candidate's previous committee and to 'prevent principal campaign committees from settling debts in situations where the candidate has another campaign committee capable of paying the amount owed.'" Response at 1. The problems the regulation was intended to cure are not present here, the first committee argues, because "the only substantial creditor of the [old] Committee is John Tierney himself," rather than an incorporated vendor; as for the other vendors, both "have ongoing business relationships with the candidate" and "both the candidate and the debtors [sic] anticipate that all debts of the [old] committee will be paid in full."[7] Response at 2.

Whether or not Tierney is the first Committee's only "substantial" creditor, the Commission eliminated the relevance of such subjective characterizations, drafting Section 116.2(c)(2) as an unambiguous, bright-line prohibition, which respondents appear to have

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[6] A response was filed by counsel on behalf of "the John Tierney for Congress Committee," that is, the first committee. After the matter was activated, the Commission's Office of General Counsel, by letter dated March 10, 1999, reminded treasurer Gelineau that the second committee was also a respondent in this matter, and asked him to submit a Designation of Counsel form if he wished counsel for the first committee to represent the second committee as well. On April 5, 1999, the Commission received a letter from Gelineau designating the same counsel as counsel for the second committee. No separate response was ever filed on behalf of the second committee.

[7] Although the response repeatedly refers to the first committee as the "1996 Committee," the first committee was in fact Tierney's principal campaign committee for the *1994* election.

violated. More importantly, respondents' characterization of the regulation's purpose hints at, but does not fully convey, the broader purpose of the debt settlement regulations – a purpose that applies here to the debts owed by the first committee to Goldman Associates and H &C Service Corp. This fundamental purpose is "to ensure that the creation and settlement of debts do not result in excessive or prohibited contributions to the debtor committees," 55 Fed. Reg. 26,378 (June 27, 1990), even where such subsidization is "indirect," *id.* at 26,379. The regulations attempt to fulfill this purpose through a series of provisions intended to ensure that the debts of political committees are settled or forgiven only when it is commercially reasonable to do so. Section 116.2(c)(2) "prohibit[s] transfers of funds between a candidate's authorized committees for different elections if the transferor committee has net debts outstanding," *id.* at 26,831, precisely because the shift of cash from the first committee to the second would otherwise allow a committee that is in debt to avoid payment of its debts and thereby effect an indirect subsidization of both the first and second committees by corporate creditors, or by unincorporated creditors who are owed more than $1,000. In this case, the first committee apparently received the benefit of certain services from Goldman Associates and H & C Service Corp. without paying for some of them; the second committee has received the benefit of being able to conduct two election campaigns without applying any of its own funds to pay the first committee's debts. Thus, enforcement of 11 C.F.R. § 116.2(c)(2) in this matter is entirely consistent with the purpose of the debt regulations.

The first committee argues that even if the transfer was improper, the Commission should not seek a civil penalty. The first committee attempts to find support for this in Advisory Opinion 1997-10. That opinion involved a situation in which a candidate's prior principal campaign committee had received about $90,000 in unspent contributions, but it owed more than

$170,000 to the candidate, the prior committee's only remaining creditor. The prior committee then transferred its funds to a subsequent principal campaign committee. The response reflects the fact that, "[b]oth the [requesting committee] and the Commission acknowledged that the transfer violated 11 C.F.R. § 116.2(c)(2)[.]" Response at 2. The AO request did not even pertain to that initial transfer. Rather, the requestor sought Commission approval for a corrective transfer back to the prior committee, and for a series of other transactions involving both committees and the candidate that would have allowed both committees to terminate.

The Tierney committee's response argues that because no penalty was imposed in AO 1997-10, no penalty should be imposed here. We agree with respondents that AO 1997-10 is informative. In the advisory opinion, there was no question but that the prohibition of 11 C.F.R. § 116.2(c)(2) applied to the intercommittee transfer even when the candidate was the committee's major – or, as in the case of the advisory opinion, its only – creditor. However, because there was no enforcement matter accompanying AO 1997-10, the issue of a civil penalty for the initial illegal transfer never arose.

It is interesting to note that the Tierney Committee response does not repeat the treasurer's initial assertion to the RAD analyst in 1996 that the transferred funds represented contributions that were "misdeposited" in the first committee's account when they should have been deposited in the second committee's account. As the matter progresses, the Commission will seek clarification as to whether this is still respondents' claim. However, at this stage it does not appear likely that there was any such "misdeposit." Assuming the committees' filings were

timely, it appears that until shortly before the transfer there was no new committee to which the contributions could have been made.[8]

For the reasons stated, there is reason to believe that both the first and second committees and Roy F. Gelineau, as treasurer of both committees, violated 11 C.F.R. § 116.2(c)(2).

B. Incorrect Reporting of Loan from Eastern Bank

1. Applicable Law

Section 432(e)(2) of Title 2, United States Code provides, *inter alia,* that each candidate for Federal office who receives a loan for use in connection with his or her campaign shall be considered, for purposes of the Act, as having received the loan as an agent of his or her authorized committee or committees.

Each treasurer of a political committee is required to file with the Commission periodic reports of receipts and disbursements in accordance with 2 U.S.C. § 434. Each report shall disclose the identification of, *inter alia*: each person (other than a political committee) who makes a contribution to the reporting committee during the reporting period whose contributions have an aggregate amount or value in excess of $200 within the calendar year, together with the date or amount of any such contribution, 2 U.S.C. § 434(b)(3)(A); each political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution, 2 U.S.C. § 434(b)(3)(B); each person who makes a

[8] In addition, 11 C.F.R. § 116.2(c)(2) would not allow such a "misdeposit," if made, to be corrected by transfer from the prior committee to the new committee if the transferring committee had net debts outstanding, assuming the contributions were actually payable to the transferring committee. Candidates can avoid this problem in at least three ways. They may simply continue the operations of the prior committee for the new election; they may form the new committee prior to receiving contributions for the new election; or, even if there is a "misdeposit" of the sort that may be claimed here, the prior committee may engage in activity in connection with the new election as an "other authorized committee" subject to a single, aggregated contribution limit with the candidate's other committees for the same election. The one way such a misdeposit can not be cured is by transferring the funds in violation of 11 C.F.R. § 116.2(c)(2).

loan to the reporting committee (or to the candidate acting as an agent of the committee) within the reporting period, together with the identification of any endorser or guarantor of such loan, the date the loan was made and the amount or value of the loan, 2 U.S.C. § 434(b)(3)(E) and 11 C.F.R. § 104.3(a)(4)(iv); and the name and address of each person to whom an expenditure in an aggregate amount or value in excess of $200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount and purpose of such operating expenditure. 2 U.S.C. § 434(b)(5)(A). In-kind contributions are to be reported both as contributions received and expenditures made. 11 C.F.R. § 104.13(a)(2). Committees must also report the amount and nature of outstanding debts and obligations owed by or to them, 2 U.S.C. § 434(b)(8) and 11 C.F.R. § 104.3(d), and such debts and obligations must be continuously reported until extinguished. 11 C.F.R. § 104.11(a).

2. Relevant Facts

Between August 18, 1993, when he established the first committee, and the end of 1993, Tierney made two loans to the first committee in the aggregate amount of $57,000. The first committee's Schedule C for the 1993 Year-End and subsequent reports indicated that the loans were interest-free and payable upon demand, and that Tierney made the loans from his personal funds.

Schedule C of the first committee's 1994 October Quarterly Report reported another loan received from Tierney on September 2, 1994 in the amount of $25,000, apparently on the same terms as its previous loans from him – that is, interest-free and payable on demand. This transaction brought the total debt reported as owed by the first committee to Tierney to $82,000. However, in the box marked "Full name, Mailing Address and ZIP Code of Loan Source," the first committee included, along with Tierney's name and address, the notation "(see details

attached)". Attached was a Schedule C-1 for the loan indicating that Tierney obtained the funds for the loan from Eastern Bank of Lynn, Massachusetts. Eastern Bank in turn appears to have lent Tierney the principal amount of $25,000 at a 7.75 percent rate of interest, with a maturity date of September 2, 2009, secured by a mortgage on real property at 25 Beach Avenue, Unit #3, Salem, Massachusetts.

On November 16, 1994, RAD transmitted an RFAI to the first committee concerning this loan. The RFAI informed the committee that "*when a committee reports receiving a loan from a lending institution, the name of the lending institution must be provided on Schedule C.* Additionally, for loans from a lending institution, you must file a copy of the loan agreement" (emphasis added). The RFAI requested that the first committee amend its October Quarterly Report to include the missing information.

On December 1, 1994, the first committee submitted the loan agreement along with an amended Schedule C. However, on the amended Schedule C the Committee continued to list Tierney's name and address under "Full name, Mailing Address and ZIP Code of Loan Source," with the additional notation, "Loan Source: Eastern Bank, (See Schedule C-1)".

The first committee has filed with each of its subsequent reports, through the 1998 Year End Report, what appears to be a copy of the Schedule C it filed before the amendment, reflecting a $25,000 debt owed to Tierney, payable on demand and interest-free, without the notation "Loan Source: Eastern Bank." It has also filed with each subsequent report what appears to be a copy of the Schedule C-1 reflecting that Tierney's source of the funds was Eastern Bank. Perhaps because the loan has consistently been reported as an interest-free loan from Tierney to the Committee rather than as a loan from Eastern Bank to the Committee at a 7.75 percent rate of interest, the first committee has never reported any servicing of either principal or interest on this

loan, nor has it reported receipt of any in-kind contributions from any person who paid the principal or interest on its behalf.

3. Analysis

Inasmuch as 2 U.S.C. § 432(e)(2) provides that a candidate who obtains a loan for campaign purposes during the pendency of his or her candidacy is deemed to do so solely as an agent of the campaign, the loan from Eastern Bank reflected on the first committee's reports was, for purposes of the Act, made directly from Eastern Bank to the first committee.

By filing a Schedule C-1 for the loan, the first committee appears to have complied with 11 C.F.R. § 104.3(d)(1), which requires that a complete Schedule C-1 be filed "when a candidate or political committee obtains a loan from, or establishes a line of credit at, a lending institution." However, even after filing (on one occasion only) an amended Schedule C for the loan that at least denoted Eastern Bank as the "loan source," the first committee has otherwise consistently filed Schedules C reporting the loan as made by Tierney to the committee, interest-free and payable on demand. Thus, it appears that on each report subsequent to the October 1994 Quarterly Report, the first committee misidentified the lender as Tierney instead of the bank. By repeating the misidentification, and by misidentifying the terms of the loan and, apparently, the identity of the guarantor, Tierney, on each subsequent Schedule C through the 1998 Year End Report, the first committee appears to have repeatedly violated 2 U.S.C. § 434(b)(8)'s requirement that it report the "nature" of its outstanding debts and obligations.

In addition, and as noted, the first committee has never reported any payments to the bank for the servicing of either principal or interest on the loan. The first committee thus appears also to have violated 2 U.S.C. § 434(b)(8) by failing to continuously report the amount of its obligation to Eastern Bank. It would further appear likely that some other person -- probably

Tierney, but without disclosure there is no way of knowing -- has paid the principal and interest on the loan since 1994. Because the loan is, for purposes of the Act, an obligation of the first committee, these payments would constitute in-kind contributions to the first committee. However, the first committee has reported no such in-kind contributions, nor has it reported corresponding in-kind expenditures pursuant to 11 C.F.R. § 104.13(a)(2) The first committee therefore appears to have violated 2 U.S.C. § 434(b) by failing to disclose these contributions and expenditures or the identification of the person or persons who made them.

Therefore, there is reason to believe that the first committee and Roy F. Gelineau, as treasurer, violated 2 U.S.C. § 434(b).

C. Excessive and Prohibited Contributions Through Extensions of Credit

1. Applicable Law

No person other than a qualified multicandidate political committee may make contributions to a candidate or candidate's committee in excess of $1,000 per election. 2 U.S.C. § 441a(a)(1)(A). Moreover, no candidate, political committee or other person may knowingly accept or receive any contribution made in violation of the limitations of 2 U.S.C. § 441a. 2 U.S.C. § 441a(f). The term "contribution" includes any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office. 2 U.S.C. § 431(8)(A)(i). The Act also prohibits contributions from corporations, labor organizations and national banks, and prohibits Federal candidates or committees from knowingly accepting or receiving such contributions. 2 U.S.C. § 441b(a).[9]

[9] For purposes of 2 U.S.C. § 441b, a "contribution or expenditure" is defined as including any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business). 2 U.S.C. § 441b(b)(2).

The extension of credit by any person to a candidate's authorized political committee is also a contribution, unless the credit is extended in the ordinary course of the person's business. 11 C.F.R. § 100.7(a)(4). The terms of any credit extended must be substantially similar to extensions of credit to the creditors' nonpolitical debtors that are of similar size and risk of obligation. 11 C.F.R. § 116.3(a). In determining whether credit was extended by a commercial vendor in the ordinary course of the vendor's business, the Commission will examine the vendor's established procedures and past practice in approving credit, the usual and normal practice in the vendor's industry, and whether the vendor received prompt payments in the past from the candidate or the candidate's authorized committee. *See* 11 C.F.R. § 116.3(c).

In addition, a commercial vendor must pursue collection of an outstanding debt from a political committee in a commercially reasonable manner; otherwise, a contribution will result. 11 C.F.R. § 100.7(a)(4). To settle or forgive a debt owed by an ongoing committee without making a contribution, the vendor must file with the Commission its intention to settle or forgive the debt. 11 C.F.R. § 116.8. The Commission will determine if forgiveness or settlement of a debt owed to a commercial vendor is "commercially reasonable" based on factors such as whether the debtor committee has made reasonable efforts to raise the funds to pay back the debt, 11 C.F.R. § 116.4(d)(2), and whether the vendor has made similar efforts to collect the debt as it would a nonpolitical debt, such as by withholding additional goods or services until payment on the debt is made, referring the debt to a debt collection agency, or commencing litigation. *See* 11 C.F.R. § 116.4(d)(3).

2. Relevant Facts

The first committee reported that by the end of 1993, it had incurred an $8,500 debt to Goldman Associates of Boston, Massachusetts for "communications consulting." According to

the Dun & Bradstreet ("D&B") business information database, Goldman Associates is engaged in the business of "communications consult[ing] specializing in political and governmental consulting, representing congressmen, senators, and private sector clients." The business reportedly "[a]dvises clients on free and paid media." The D&B report indicates that Goldman Associates' usual payment arrangement as of March 5, 1999, was that "a one time retainer is paid up front and additional payments are due on the first of the month for services;" it is unknown at this time whether Goldman Associates' usual payment arrangement was the same or different in 1993 and 1994. Michael Goldman is listed as the "owner" of Goldman Associates, and no other partners or shareholders are listed. The D&B report does not indicate that the business is incorporated, and the Tierney response indicates that Goldman Associates is unincorporated. Response at 2.

The first committee reported incurring an additional $15,800 in debt to Goldman Associates in 1994, and reported $4,800 in payments on the outstanding debt in 1994, leaving at year's end a reported debt of $19,500. As best the transactions can be reconstructed, and assuming that payments were applied to the debt that had been outstanding the longest, $15,200 of the first committee's 1994 year-end debt to Goldman Associates apparently had been outstanding for at least 90 days, and $3,700 apparently had been outstanding for more than one year.[10]

[10] The length of time any portion of the $19,500 had been outstanding is slightly conjectural, due to discrepancies in the first committee's Schedules D. During most of 1994, the first committee apparently did not understand that the ending balance of a given debt on the Schedule D of one reporting period is supposed to match the beginning balance of the same debt on the Schedule D for the next reporting period. This problem persisted until RAD sent an RFAI concerning this problem as it pertained to the first committee's 1994 Pre-General Report. However, the amounts reported by the first committee as "Incurred This Period," when added to the accumulated prior balances, equal each report's ending balance. Accordingly, the lengths of time the first committee's debts have been outstanding can be estimated with some confidence.

On or before September 20, 1994, which was the date of the primary election, the first committee incurred a debt of $579.66 to H & C Service Corp. of Salem, Massachusetts, d/b/a Hawthorne Hotel, for a "Primary Night Party." Between October 19, 1994 and November 28, 1994, the first committee reported incurring an additional debt to H & C Service Corp. of $480.65, resulting in an outstanding balance of $1,060.31. Through the 1998 Year End Report, the first committee reported that balance as outstanding.

After his defeat in the general election, and throughout 1995, the first committee remained Tierney's only authorized committee. The first committee filed quarterly reports for the first two quarters of 1995. By June 30, 1995, the first committee reported reducing its debt to Goldman Associates from $19,500 to $15,000, all of which by this time had apparently been outstanding for between five and 15 months. The first committee had reduced its total reported outstanding debt to $98,060.31: $82,000 reported as owed to the candidate; $15,000 reported as owed to Goldman Associates, and $1,060.31 reported as owed to H & C Service Corp. As noted, all of these debts were reported as still outstanding on the first committee's 1998 Year End Report, which was the last report it filed.

As the 1996 election campaign progressed, the second committee employed the services of both Goldman Associates and H & C Service Corp. The second committee reported disbursements to Goldman Associates totaling $6,000 between July 2 and November 4, 1996, and disbursements to the "Hawthorne Hotel," the d/b/a name of H & C Service Corp., totaling $3,782.39 on November 4 and December 31, 1996.[11]

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[11] Tierney was again nominated, receiving 85 percent of the vote in the September 17, 1996 primary election, and was elected to Congress by a margin of 360 votes out of more than 276,000 cast in the November 5, 1996 general election.

For the 1998 election cycle, Representative Tierney elected to continue the second committee's operations rather than form yet another committee. The second committee once again employed the services of both Goldman Associates and H & C Service Corp. The second committee reported disbursements to Goldman Associates totaling $14,688 between May 5 and November 6, 1998, and to H & C Service Corp. or the "Hawthorne Hotel" totaling $3,620.43 between March 5, 1997 and July 23, 1998.[12]

The second committee's 1999 Mid-Year Report reported disbursements to "Hawthorne Hotel" of $977.73 between January 1 and January 26, 1999. It reported no disbursements to Goldman Associates.

All of the first committee's $15,000 debt to Goldman Associates has now been outstanding for at least four and a half years, and some of it has been outstanding for in excess of five years. The first committee's debt of more than $1,000 to H & C Service Corp. has now been outstanding for roughly five years. None of the second committee's disbursements to Goldman Associates or to H & C Service Corp. have ever been reported as made to pay down any of the first committee's outstanding debt to these creditors. Instead, they appear to have been made in connection with the 1996 and 1998 elections.

3. Analysis

The response asserts that both Goldman Associates and H & C Service Corp. "have extended credit [to the first committee] in the ordinary course of their business on substantially similar terms to that offered to their other customers." Response at 2. However, it provides no information whatsoever to substantiate these assertions. Perhaps to the contrary, the D & B

[12] Representative Tierney was reelected in the November 3, 1998 general election, receiving 54 percent of the vote.

report for Goldman Associates states that its usual payment terms, at least at the present, involve payment of a retainer plus monthly payments that are *due* on the first of each month. Moreover, while respondents' statements are relevant to the question of whether the original extensions of credit to the first committee by the two vendors were contributions, *see* 11 C.F.R. §§ 100.7(a)(4), 116.3(a), they do not address the separate question of whether the extensions of credit became contributions over time because of the vendors' failure to make commercially reasonable attempts to collect the debts. The length of time the first committee's debts to Goldman Associates and H & C Service Corp. have been outstanding, combined with information in the response and in the second committee's disclosure reports about the ongoing business relationships between the vendors and the second committee, raises this separate question. *See* 11 C.F.R. § 100.7(a)(4).

Although the response states that "[b]oth the candidate and the debtors [sic] anticipate that all debts of the [old] committee will be paid in full," there is no indication that either vendor has made any attempt to collect the debts. Neither is there any indication that the first committee has made any payment on these debts since the second quarter of 1995, or that the second committee has ever made any payment on the debts, or that either committee has ever attempted to raise funds to pay the debts.[13] Moreover, both vendors have continued to provide services to the second committee through two election campaigns despite the outstanding debts they are owed by the first committee. *See* 11 C.F.R. § 116.4(d)(3)(ii). It therefore appears possible that the extensions of credit by both Goldman Associates and H & C Service Corp. ripened into

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[13] In fact, after the first committee raised more than enough money in the last half of 1995 and the first quarter of 1996 to pay the debts, it instead transferred all of the money to the second committee to use in connection with the 1996 campaign.

contributions due to a lack of commercially reasonable attempts by either creditor to collect what they were owed by the first committee.

Accordingly, there is reason to believe that the first committee and Roy F. Gelineau, as treasurer, violated 2 U.S.C. § 441a(f) by knowingly receiving at least $13,000 in excessive contributions in the form of extensions of credit from Michael Goldman, d/b/a Goldman Associates, which the creditor did not attempt to collect in a commercially reasonable manner. Similarly, there is reason to believe that the first committee and Gelineau, as treasurer, violated 2 U.S.C. § 441b(a) by knowingly receiving prohibited contributions from H & C Service Corp., d/b/a Hawthorne Hotel, made in the same manner.