



FEDERAL ELECTION COMMISSION

Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *EO*

DATE: August 17, 1998

SUBJECT: P-MUR 354 -First GC's Report

The attached is submitted as an Agenda document for the
Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE

☒

NON-SENSITIVE

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72 Hour TALLY VOTE

☒

24 Hour TALLY VOTE

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24 Hour NO OBJECTION

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INFORMATION

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DISTRIBUTION

COMPLIANCE

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Open/Closed Letters

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MUR

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DSP

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STATUS SHEETS

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Litigation

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RATING SHEETS

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AUDIT MATTERS

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LITIGATION

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ADVISORY OPINIONS

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REGULATIONS

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OTHER

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FEDERAL ELECTION COMMISSION

999 E Street, N.W.
Washington, D.C. 20463

Aug 17 1 02 PM '98

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

Pre-MUR: 354

DATE REFERRAL RECEIVED: 9/18/97

DATE ACTIVATED: 2/12/98

STAFF MEMBER: Tamara K. Kapper

SOURCE: INTERNALLY GENERATED

RESPONDENTS: DNC Services Corporation/Democratic National Committee and Carol Pensky, as treasurer
Howard M. Glicken, National Finance Board, DNC
Hamilton Bank, N.A.
Eduardo A. Masferrer, Chairman, Hamilton Bank, N.A.
Maria F. Diaz, Senior Vice President, Finance,
Hamilton Bank, N.A.

RELEVANT STATUTES: 2 U.S.C. § 441b(a)
11 C.F.R. § 114.2

INTERNAL REPORTS CHECKED: Referral Materials
Disclosure Reports

FEDERAL AGENCIES CHECKED: Comptroller of the Currency

I. GENERATION OF MATTER

This matter was generated by a referral from the Comptroller of the Currency, ("OCC"), an agency of the United States Department of the Treasury. According to the attached referral materials, the OCC's review of the 1996 financial transactions of Hamilton Bank, N.A., Miami, Florida, ("Bank") disclosed a payment to the DNC Services Corporation/Democratic National Committee and Carol Pensky, as treasurer, ("DNC") which appears to violate 2 U.S.C. § 441b(a). Attachment 1. According to the referral materials, Hamilton Bank, N.A. is a national bank headquartered in Miami, Florida.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

The Federal Election Campaign Act of 1971, as amended, ("the Act") prohibits a national bank from making any contribution or expenditure in connection with any election to any political office. 2 U.S.C. § 441b(a). Section 441b(a) also prohibits any political committee or other person from knowingly accepting or receiving any contribution from a national bank, or any officer or director of a national bank to consent to any contribution or expenditure by the national bank. *See also* 11 C.F.R. § 114.2(a). The Act defines a contribution as 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).

A donation made to a national party committee for a building fund is not considered a contribution or an expenditure, if it is specifically designated to defray any cost incurred for the construction or purchase of any office facility which is not acquired for the purpose of influencing the election of any candidate in any particular election for a Federal office. 11 C.F.R. § 100.7(b)(12) and 11 C.F.R. § 114.1(a)(2)(ix). Thus, building fund donations are not considered contributions and are not subject to any limits or prohibitions of the Act. However, donations to building funds shall be reported as a memo entry on Schedule A of the committee's disclosure report. 11 C.F.R. § 104.3(g).

B. The Facts

In the spring of 1997, during their normal course of reviewing the Bank's records, OCC examiners discovered that on April 26, 1996 the Bank had made a \$50,000 contribution to the DNC. According to the DNC's disclosure reports on file with the Commission, the DNC deposited the contribution from the Bank into its non-federal corporate account on April 30, 1996. Attachment 2. After the discovery of the prohibited contribution by OCC examiners, on June 16, 1997, the DNC sent the Bank a letter apologizing for "inadvertently" depositing the \$50,000 contribution into the non-federal corporate account, and stating that it would transfer the \$50,000 from that account to its Building Fund account immediately. Att. 1, p. 2. The DNC's Building Fund account disclosure report for the reporting period of January 1 through June 30, 1997, indicates that it received a \$50,000 transfer from the non-federal corporate account on June 16, 1997. Attachment 3.

According to the referral material, the Bank's contribution to the DNC was the result of a solicitation letter dated April 1, 1996, from Howard M. Glicken, Director of the National Finance Board of the DNC. The letter was sent to Eduardo A. Masferrer, Chairman of Hamilton Bank N.A., at the Bank's address and conveyed to him the cost and benefits of becoming a trustee member of the DNC. Att. 1, pps. 3-4. The solicitation letter, which was written on DNC letterhead and signed by Mr. Glicken, details all the various privileges and advantages that trustee members receive upon contributing \$50,000, which include, among other things, dinner with the President and "preferential treatment for appointments to Boards and Commissions." The letter also references conversations previously held between Mr. Masferrer and Mr. Charles Dusseau, the former Florida Secretary of Commerce, regarding the purchase of a trustee membership in the DNC.

After receiving solicitations from Mr. Glicken and Mr. Dusseau, it appears that Mr. Masferrer planned to use Bank funds for the contribution to the DNC, because a Bank purchase requisition form was prepared on April 18, 1996 for the purchase of a DNC trustee membership in the amount of \$50,000, and that he instructed the Bank's Deputy General Counsel, Armin G. Seifart, to determine whether the Bank could make a contribution to the DNC. Att. 1, pps. 5 and 6, respectively. Mr. Seifart appears to have then sought outside counsel and an instruction from the DNC's general counsel regarding the legality of the contribution. Att. 1, pps. 7-12. On April 24, 1996, Mr. Seifart received a letter from the DNC's General Counsel, Joseph E. Sandler, advising him that "...it is lawful for the Democratic National Committee to accept a contribution to its Building Fund account from a national bank." Att. 1, pps. 13-15. The letter went on to inform the Bank that checks to the Building Fund should be made payable to "DNC--Building Fund."

Maria F. Diaz, Senior Vice President for Finance for the Bank, has stated in response to OCC inquiries that she personally spoke to the DNC's general counsel and other DNC representatives, and was told that the only permissible contribution the Bank could make to the DNC was to its Building Fund. Att. 1, p. 16.

On April 26, 1996, the Bank issued a check to the DNC in the amount of \$50,000 and designated it for the purchase of an annual trustee membership, not for the Building Fund. Att. 1, p. 17. The Bank's purchase requisition form that authorized the making of the contribution also stated that the purpose of the disbursement was the purchase of an annual trustee membership. This internal document was signed by both Mr. Masferrer and Ms. Diaz and was dated April 26, 1996. Att. 1, p. 5.

Several months later, on November 15, 1996, the DNC sent Mr. Masferrer a letter thanking him for his "generous support" and informing him that his support helped them to "carry out such key campaign components such as polling, media and get out the vote operations." Att. 1, p. 19. There is no evidence in hand that the Bank responded to this letter, asking that the donation go into the Building Fund.

C. The Analysis

1. Eduardo A. Masferrer, Chairman, and
Maria F. Diaz, Senior Vice President, Finance, of Hamilton Bank, N.A.

Pursuant to 2 U.S.C. § 441b(a) it is unlawful for any officer or director of any national bank to consent to any contribution or expenditure by the national bank to any political campaign committee. The attached documents indicate that both Mr. Masferrer and Ms. Diaz were informed by two (2) different sources, their outside counsel and the DNC, that the Bank was prohibited from making a contribution to the DNC, but could make a donation to the DNC's Building Fund. It is also clear that Mr. Masferrer and Ms. Diaz were also advised by the DNC to designate the contribution to the Building Fund; however, this advice was not followed. Ms. Diaz's explanation for this error is that "the documentation (our purchase order) prepared in house was not updated to reflect this research and unfortunately the check is not clear on the 'Building Fund' designation."

Although Ms. Diaz argues that the Bank intended the contribution to be used for the Building Fund, this Office is not persuaded for four (4) reasons. First, the solicitation letter that Mr. Masferrer received from Mr. Glicker fails to mention the DNC's Building Fund, but, rather, specifically discusses the advantages of becoming a trustee member of the DNC. Second, the designation on the Bank check was very clear, as was the supporting documentation; the \$50,000

in Bank funds was specifically designated for the purchase of an annual trustee membership for its chairman, Mr. Masferrer, not for the Building Fund. Third, according to DNC records, as a result of the Bank's contribution to the DNC, Mr. Masferrer was credited with having made the contribution and subsequently was listed as a Trustee member and major supporter.

Attachment 4. And fourth, after Mr. Masferrer received a thank you letter from the DNC on November 15, 1996, no action was taken by the Bank to rectify any error reflected in the letter.

This Office believes that Mr. Masferrer and Ms. Diaz knowingly and willfully violated 2 U.S.C. § 441b(a) because Mr. Masferrer apparently sought the benefits that the \$50,000 trustee membership to the DNC would buy him and was not interested in making a donation to the DNC's Building Fund because such a donation would not yield him the same benefits. It is clear from the supporting documentation that Mr. Masferrer and Ms. Diaz disregarded the law concerning the illegality of using Bank funds for the purpose of making a contribution to the DNC, and proceeded (against the DNC's and their own counsels' advice) to purchase a trustee membership for Mr. Masferrer.

The Act expressly prohibits any officer or director of a national bank from consenting to a contribution or expenditure by the national bank to any political committee, and both Mr. Masferrer and Ms. Diaz were explicitly told by two different sources of legal counsel that the Bank was prohibited from making a contribution to any political committee including the DNC. Therefore, this Office recommends that the Commission find reason to believe that Eduardo A. Masferrer and Maria F. Diaz of Hamilton Bank, N.A., knowingly and willfully violated 2 U.S.C. § 441b(a).

2. Hamilton Bank, N.A.

The Hamilton Bank, N.A., is a national bank and is prohibited from making contributions or expenditures in connection with any election to any political office. 2 U.S.C. § 441b(a). As stated above, the only exception to this prohibition is that a national bank may make a donation to a national party committee for its building fund as long as the office facility is not acquired for the purpose of influencing the election of any federal candidate. 11 C.F.R. §§ 100.7(b)(12) and 114.1(a)(2)(ix). On April 26, 1996, the Bank made a \$50,000 contribution to the DNC which was designated for the purchase of an annual trustee membership for its chairman, Mr. Masferrer, not for the Building Fund. Therefore, since Bank funds were used in making the contribution to the DNC after senior ranking Bank officers were advised that this activity was prohibited by the law, this Office recommends that the Commission find reason to believe that Hamilton Bank, N.A., knowingly and willfully violated 2 U.S.C. § 441b(a).¹

3. The DNC and Howard M. Glicken, DNC National Finance Board Director

Pursuant to 2 U.S.C. § 441b(a) it is unlawful for a political committee or other person knowingly to accept or receive a contribution from a national bank. According to the DNC's non-federal corporate account disclosure reports, on April 30, 1996 it received a \$50,000 contribution from Hamilton Bank. The contribution appears to have been used on behalf of a Federal candidate and for Federal election party activities, because on November 15, 1996, the DNC sent Mr. Masferrer a letter thanking him for the contribution and noting that his support

¹ In light of the DNC's treatment of the contribution in its internal records as having come from Mr. Masferrer, this Office would normally make a recommendation against the Bank for violating 2 U.S.C. § 441f. However, 2 U.S.C. § 441f, which prohibits contributions in the name of another, is not applicable in this case because the Bank's contribution to the DNC was deposited into its corporate non-federal account as opposed to its Federal account. Section 441f does not apply to contributions in the name of another which are deposited into non-federal accounts.

helped "President Clinton's reelection campaign and the Democratic Party" to carry out key campaign components such as polling, media and get out the vote operations. Att. 1, p. 19.

As a result of the OCC examiners' inquiries into the contribution, on June 16, 1997, in a letter to Ms. Diaz, the DNC explained that the contribution was inadvertently deposited into its non-federal corporate account and that DNC staff were responsible for the error, not the Bank.

This Office believes that both the DNC and the Bank are responsible for the violation. DNC staff should have ascertained the legality of the contribution because the check was from a national bank, especially after the Bank designated the check for the purchase of an annual trustee membership. In addition, any error on the part of either respondent should not have occurred because the DNC's General Counsel had faxed the Bank's officers instructions about how it could contribute to the DNC six (6) days prior to the receipt of the prohibited contribution. Thus, the DNC through its General Counsel had prior knowledge that the contribution was coming from a source that could only make a contribution to the Building Fund.

In regard to Mr. Glicken's solicitation letter to the Mr. Masferrer, a review of the letter leaves unclear whether Mr. Glicken was soliciting Mr. Masferrer personally, or the Bank, or both. While the letter boasts of many personal benefits that Mr. Masferrer could derive from his purchase of a trustee membership, the letter also states "there are a number of possibilities we can discuss in person, regarding benefits in relation to Hamilton Bank's Latin American activities, which include State Department, Commerce Department, White House (McClarty), Treasury, Exim Bank, IDB, OPIC and others." *Id.*, pps. 3-4.

As the Commission is aware, Mr. Glicken has a history of soliciting both lawful and unlawful contributions from both lawful and unlawful sources on behalf of Federal candidates and committees. For example, the investigation in MUR 4638 revealed information implicating

Mr. Glicken in the solicitation of approximately \$88,000 in contributions from Mr. Thomas Kramer, a foreign national, including a \$20,000 contribution to the Democratic Senatorial Campaign Committee made in the name of Mr. Kramer's secretary.

Although the solicitation of a national bank in itself is not a violation of the Act,² section 441b(a) prohibits any political committee or any agent of such committee from accepting a contribution from a national bank, except for a national party committee which may accept a donation to its building fund. 11 C.F.R. § 100.7(b)(12) and 11 C.F.R. § 114.1(a)(2)(ix). Thus, Mr. Glicken's involvement in obtaining the \$50,000 contribution from the Bank on behalf of the DNC carries potential liability. When soliciting the contribution, Mr. Glicken represented himself as an agent of the DNC. If Mr. Glicken received the Bank's check himself, he should have ascertained the legality of the contribution, especially after the Bank designated the check for the purchase of an annual trustee membership. To the extent that he was involved in the acceptance and receipt of the Bank contribution, Mr. Glicken would have violated 2 U.S.C. § 441b(a) by accepting and receiving the contribution on behalf of the DNC.

In light of the above, this Office recommends that the Commission find reason to believe that DNC Services Corporation/Democratic National Committee and Carol Pensky, as treasurer, knowingly and willfully violated 2 U.S.C. § 441b(a). This Office also recommends that the Commission find reason to believe Howard M. Glicken violated 2 U.S.C. § 441b(a) by his involvement in the contribution by Hamilton Bank, N.A. to the DNC.

² Unlike Section 441e which explicitly prohibits the solicitation of a foreign national, 2 U.S.C. § 441b(a) does not prohibit the solicitation of a contribution from a national bank. However, 2 U.S.C. § 441b(a) explicitly prohibits the acceptance of a contribution from a national bank except for the building fund of a national party committee. Mr. Masferrer is apparently a U.S. citizen. See Attachment 4, p. 1.

III. OTHER PARTICIPANT AND PROPOSED DISCOVERY

The solicitation letter signed by Mr. Glicken that Mr. Masferrer received from the DNC clearly seeks a \$50,000 contribution from him and/or Hamilton Bank, N.A. for the purchase of an annual trustee membership, not for the DNC's Building Fund. As stated above, the letter refers to conversations between Mr. Masferrer and Charles Dusseau about a contribution to the DNC. It is unclear how the Bank's contribution was transmitted to the DNC, i.e., whether it came through the mail or was hand delivered to one of the DNC solicitors; thus, the attached interrogatories seek information from Hamilton Bank and Mr. Glicken regarding the transmittal of the contribution and Mr. Dusseau's role in the Bank's contribution to the DNC. Given the need for additional information concerning Mr. Dusseau's possible role in receipt of the prohibited contribution, this Office makes no recommendations in connection with him at this time, pending the completion of an investigation.

This Office also believes that further discovery is necessary to determine whether the violations were in actuality knowing and willful, to examine more closely the Bank's explanation of how the prohibited contribution occurred, and to examine the Bank's procedures for handling disbursements of this nature. We believe that taking the sworn testimony of key individuals is the most efficient means of securing the above information. We propose to depose the following individuals: Eduardo A. Masferrer, Maria F. Diaz, Armin G. Seifart, and a yet to be identified Bank employee who directly handled the transaction at issue, i.e., cut the check, etc.

In addition, the attached interrogatories seek information from Mr. Glicken regarding his own participation in the solicitation and receipt of the contribution, the benefits to be derived by certain contributions to the DNC, the transmittal of the Bank's contribution to the DNC, and Mr. Dusseau's role in the DNC's receipt of this contribution. The attached interrogatories also

seek information from the Bank regarding its decision to make a contribution resulting in a DNC trustee membership for Mr. Masferrer, apparently contrary to counsels' advice, and information regarding the transmittal of the contribution.

Based on the foregoing, this Office recommends that the Commission approve the attached sample subpoena and the proposed interrogatories.

IV. RECOMMENDATIONS


1. Open a MUR.
2. Find reason to believe that Eduardo A. Masferrer, knowingly and willfully violated 2 U.S.C. § 441b(a).
3. Find reason to believe that Maria F. Diaz, knowingly and willfully violated 2 U.S.C. § 441b(a).
4. Find reason to believe that Hamilton Bank, N.A., knowingly and willfully violated 2 U.S.C. § 441b(a).
5. Find reason to believe that DNC Services Corporation/Democratic National Committee and Carol Pensky, as treasurer, knowingly and willfully violated 2 U.S.C. § 441b(a).
6. Find reason to believe that Howard M. Glicker violated 2 U.S.C. § 441b(a).
7. Approve the attached Factual and Legal Analyses.
8. Approve the attached proposed Subpoena for Production of Documents and Order to Submit Written Answers to Howard M. Glicker. Attachment 6.
9. Approve the attached proposed Order to Submit Written Answers to Hamilton Bank, N.A. Attachment 7.

10. Authorize the attached sample subpoena for depositions to Eduardo A. Masferrer, Maria F. Diaz, Armin G. Seifart and a yet to be determined Hamilton Bank employee.

11. Approve the appropriate letters.

Lawrence M. Noble
General Counsel

8/14/98
Date

BY: 
Lois G. Lerner
Associate General Counsel

Attachments

1. OCC Referral Material
2. DNC Non-Federal Corporate Schedule A
3. DNC Building Fund Schedule A
4. DNC Trustee Contributor Information and Lists
5. Proposed Factual & Legal Analyses (3)
6. Proposed Order to Submit Written Answers
to Hamilton Bank, N.A.
7. Proposed Subpoena for Production of Documents and
Order to Submit Written Answers to Howard M. Glick
8. Sample Subpoena for Depositions


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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: LAWRENCE M. NOBLE
GENERAL COUNSEL

FROM: MARJORIE W. EMMONS/LISA R. DAVIS 
COMMISSION SECRETARY

DATE: AUGUST 20, 1998

SUBJECT: Pre-MUR 354 - First General Counsel's Report
dated August 14, 1998.

The above-captioned document was circulated to the Commission
on Monday, August 17, 1998

Objection(s) have been received from the Commissioner(s) as
indicated by the name(s) checked below:

Commissioner Aikens	—
Commissioner Elliott	<u>XXX</u>
Commissioner Mason	—
Commissioner McDonald	<u>XXX</u>
Commissioner Sandstrom	<u>XXX</u>
Commissioner Thomas	<u>XXX</u>

This matter will be placed on the meeting agenda for

Tuesday, September 01, 1998

Please notify us who will represent your Division before the Commission on this matter.