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VIA HAND DELIVERY

Jose M. Rodriguez, Esq.
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 4884 (Marvin Rosen and Greenberg Traurig)

Dear Mr. Rodriguez:

This letter is submitted on behalf of Marvin Rosen and Greenberg Traurig (collectively "Respondents") in response to the General Counsel's Factual and Legal Analysis (hereinafter "Analysis") in this MUR. Respondents first received notification of the Commission's questions in this Matter over five years after the donations at issue by Future Tech International, Inc. ("Future Tech"). The Commission therefore is time-barred from pursuing this matter. Because Matters dismissed by the Commission are made public, however, Respondents have nevertheless determined that a more complete response is necessary to set the record straight and to demonstrate that Greenberg Traurig and Mr. Rosen did not violate the Federal Election Campaign Act of 1971, as amended ("FECA").

BACKGROUND

The Analysis states that Future Tech, founded in 1988, is a domestic corporation that does "approximately $251,261,000 in annual sales." Analysis at 4. Based in Florida, Future Tech distributes technology products to, and provides extensive training in, Latin American countries. During March of 1994, Mr. Jimenez was Chairman of the Board and Chief Executive Officer of Future Tech, and a national of the Republic of the Philippines. See id. He obtained U.S. permanent resident status in July of 1994. Id.

According to the Analysis, Future Tech made four donations to the Democratic National Committee's ("DNC") non-federal account when Mr. Jimenez was still a foreign national: (1) May 10, 1993 ($5,000); (2) May 10, 1993 ($5,000); (3) March 24, 1994 ($50,000); and (4) March 24, 1994 ($50,000). The Analysis notes that "although Future Tech does not disclose the

law firm's identity in connection with the political contributions," "[i]nternal DNC contribution documents . . . identify Mr. Marvin Rosen . . . as the solicitor of Future Tech's two $50,000 contributions to the DNC in 1994." Id. at 5. The Analysis does not suggest that Respondents have any connection with the May, 1993 donations.

ARGUMENT

I. The Statute of Limitations Bars Further Action

The Commission is time-barred from pursuing this matter. The two $50,000 contributions made on March 24, 1994, form the entire basis of this MUR. The letter informing Respondents of this matter was dated March 25, 1999. Thus, five years and one day had elapsed before the Commission notified Respondents that it had reason to believe that Respondents had violated 2 U.S.C. § 441e.

FECA does not contain a statute of limitations, but rather is subject to a default statute of limitations, 28 U.S.C. § 2462, for the bringing of actions for civil penalties. FEC v. Williams, 104 F.3d 237, 239-40 (9th Cir. 1996), cert. denied 118 S. Ct. 600 (1997); FEC v. National Republican Senatorial Comm., 877 F. Supp. 15, 19-20 (D.D.C. 1995) ("NRSC"); FEC v. National Right to Work Comm., Inc., 916 F. Supp. 10, 13 (D.D.C. 1996) ("NRWC"). Section 2462 provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

The courts have "specifically h[e]ld that § 2462 applies to FEC actions for the assessment of civil penalties, and that the limitations period begins to run at the time the alleged offense is committed." Williams, 104 F.3d at 240 (citing NRSC and NRWC).[1] "If . . . a claim were not to

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[1] The FEC's integral three-year statute of limitations period for criminal actions, 2 U.S.C. § 455, has also been held to run from the date on which the violation occurred. United States v. Hankin, 607 F.2d 611, 615 (3d Cir. 1979); United States v. Wild, 551 F.2d 418 (D.C. Cir.), cert. denied, 431 U.S. 916 (1977).

'accrue' until the FEC formally and officially chose to act upon it at any stage, then a respondent could theoretically remain exposed to punishment in perpetuity – a Damoclean dilemma of alarming proportions for a politically active organization . . . ." NRWC, 916 F. Supp. at 14.[2]

In Williams, the FEC made several arguments to avoid having its suit dismissed as untimely. The Ninth Circuit rejected two of the FEC's arguments and deemed the third to be irrelevant. First, the FEC argued that § 2462 "is not applicable to suits to impose penalties; that by its terms it applies only to suits to enforce penalties that have previously been imposed." The Ninth Circuit, however, rejected the FEC's contention stating that "for the purposes of § 2462, "enforcement" comprises "assessment." Williams, 104 F.3d at 240.

Second, the FEC argued that the running of the statute of limitations was tolled during the time that Williams allegedly fraudulently concealed his illegal payments. Williams rejected this argument by quoting the District of Columbia Circuit:

> "[W]e hold that an action, suit or proceeding to assess or impose a civil penalty must be commenced within five years of the date of the violation giving rise to the penalty. We reject the discovery of violation rule [respondent] advocates as unworkable; outside the language of the statute; inconsistent with judicial interpretations of § 2462; unsupported by the discovery of injury rule adopted in

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[2] On March 31, 1998, the FEC (represented by Commissioner Scott Thomas, General Counsel Lawrence Noble, Associate Counsel Lois Lerner, and Senior Staff Attorney Jose Rodriguez) was called to testify before the House Government Reform and Oversight Committee regarding the FEC's failure to pursue allegations of FECA violations against Howard Glicken, a prominent Democratic fundraiser in Florida. House of Representatives, Gov't Reform and Oversight Comm., Comm. Hr'g, 1998 WL 144566 (March 31, 1998) ("Reform Hr'g"). Mr. Glicken allegedly had solicited a foreign national for contributions in April of 1993. The FEC's General Counsel's Report had advised not to proceed against Mr. Glicken despite having "reason to believe" that he had committed FECA violations because of "discovery complications and time constraints." Id. at 12. The Commission agreed. In answering pointed comments from Representatives questioning the propriety of not pursuing this case, Commissioner Thomas testified that "eight months before the statute of limitations run" in April of 1998 is not enough time to open up an investigation. Id. at 82. Thus, the Commissioner's testimony implicitly accepts and recognizes as authoritative the five year statute of limitations from the date of the violation.

> non-enforcement, remedial cases; and incompatible with the functions served by a statute of limitations in penalty cases."

Id. (emphasis added) (quoting 3M Co. v. Browner, 17 F.3d 1453, 1462-63 (D.C. Cir. 1994)). The court specifically rejected the discovery rule and doctrine of equitable tolling for FEC actions because "FECA's campaign finance reporting requirements are, as a matter of law, sufficient to give FEC 'notice of facts, that if investigated, would indicate the elements of a cause of action.'" Id. at 241.[3]

Finally, the FEC argued that the pendency of administrative proceedings tolled the statute of limitations for the duration of the administrative proceedings. Williams, however, did not address this argument, stating that it made "no difference" whether the statute of limitations was tolled because even aggregating all of FECA's mandatory time periods for notice and conciliation, and tolling the statute of limitations for all of these periods, "the FEC's action would still not be timely." Id. at 241. It similarly makes no difference in the instant matter whether the administrative proceedings are tolled because the statute of limitations had expired before this Matter was even brought to Respondents' attention.

In short, the Commission should immediately close the file on this matter because it is barred by the statute of limitations. As the United States District Court of Columbia stated, "it is inappropriate for a government regulator to wield the threat of an open-ended penalty. This is particularly true in cases where the ongoing threat of penalties may disrupt core First Amendment political activities." NRWC, 916 F. Supp. at 13-14 (quoting NRSC, 877 F. Supp. at 18).

II. Soft Money Donations From A United States Corporation Do Not Violate § 441e

The Analysis acknowledges that Future Tech is a domestic corporation that made soft money donations. Nevertheless, the Analysis contends that such donations may have violated § 441e. Section 441e(a) states:

> It shall be unlawful for a foreign national directly or through any other person to make any contribution of money or other thing of

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[3] FEC regulations require national political party committees to report any receipt of funds over $200, regardless of whether the funds are deemed "hard" or "soft" money. 11 C.F.R. § 104.8(a), (e).

> value, or to promise expressly or impliedly to make any such contribution, in connection with an election to any political office or in connection with any primary election, convention, or caucus held to select candidates for any political office; or for any person to solicit, accept, or receive any such contribution from a foreign national. (Emphasis added).

As explained below, Future Tech's donations did not violate § 441e because (1) as a U.S. corporation Future Tech is not prohibited from making donations, and (2) a federal district court has held that foreign national soft money donations are not prohibited under § 441e.

A. Future Tech, A United States Corporation, Made The Donations

Respondents accept the Analysis's description of Future Tech as "a Florida corporation" that "[u]nder Mr. Jimenez's control . . . has grown to approximately $251,261,000 in annual sales." Analysis at 4. During the months surrounding March of 1994, Respondents believed that Future Tech was a U.S. corporation with a non-foreign decision-maker and sufficient U.S. profits to make soft money donations. U.S. corporations are not prohibited by law or FEC regulation from making "soft money" donations to accounts of national party committees. See e.g., FEC Advisory Op. 1978-10, Fed. Election Camp. Fin. Guide (CCH) ¶ 5340; 11 C.F.R. § 104.8(e) (requiring national party committees to disclose corporate donations exceeding $200 in a calendar year).

B. A Federal District Court Has Held That Foreign Soft Money "Donations" Are Not Prohibited, So Any Direction Of Future Tech's Donations By Mr. Jimenez Would Not Violate § 441e

The Analysis contends that the nationality status of Mr. Jimenez may have made Future Tech's donations improper pursuant to § 441e(a). Even assuming arguendo that Future Tech's donations were directed by a foreign national, the § 441e prohibition is only applicable to "contributions" for federal elections. United States v. Trie, 23 F. Supp. 2d 55, 59-61 (D.D.C. 1998). Therefore, because the Analysis has not suggested that Future Tech made prohibited federal contributions, but rather only soft money donations, the Commission should have found no reason to believe that Respondents solicited prohibited foreign national contributions.

The Analysis acknowledges the Trie holding – § 441e is inapplicable to soft money donations – but states, "this lower court opinion failed to consider either the legislative history establishing the provision's broad scope or the Commission's consistent application of the

prohibition to non-federal elections." Analysis at 2 n.1. In fact, Trie did consider the legislative history and scope of § 441e. Trie considered and concluded as follows:

> The word contribution is a term of art defined by the statute, and the statutory definition applies only to elections for federal office, see 2 U.S.C. § 431(a)(8); it therefore does not encompass soft money donations. If Congress had intended Section 441e or any other provision of FECA to apply to soft money, it either could have provided an alternative definition of the term "contribution" for Section 441e, as it did for Section 441b, or it could have used the word "donation" rather than "contribution," as the regulations promulgated by the FEC do when referring to "non-federal" or "soft money" accounts. See, e.g., 2 U.S.C. § 441b (providing separate definition of contribution for purposes of that section); 11 C.F.R. § 104.8(e) ("National party committees shall disclose in a memo Schedule A information about each individual, committee, corporation, labor organization, or other entity that donates an aggregate amount in excess of $200 in a calendar year to the committee's non-federal account(s).") (emphasis added). Congress did neither in Section 441e.
>
> In the face of the clear statutory language and in the absence of any indication in the statute or legislative history that Congress intended Section 441e to apply to soft money donations, the Court concludes that Section 441e applies only to hard money "contributions." Indeed, it could not be more apparent that, with the exception of Section 441b, Congress intended the proscriptions of the Federal Election Campaign Act to apply only to "hard money" contributions.

Trie, 23 F. Supp. 2d at 60 (emphasis in second paragraph added).[4] Accordingly, because foreign nationals are not prohibited from making soft money donations, the Commission should find that Respondents did not violate § 441e.

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[4] Not only did Trie consider the plain language of the statute and the legislative history, Trie also cited the Bipartisan Campaign Reform Act of 1998 (introduced March 19, 1998 in the House of Representatives). This Act, among other things, would "amend Section 441e to specifically prohibit foreign nationals from making a 'donation of money or other thing of value.'" Trie, 23 F. Supp. 2d at 60 n.7. Trie then drew the obvious conclusion that "the House

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III. Mr. Jimenez's Citizenship Status Was Unknown To Mr. Rosen

If the Commission pursues this Matter further, Mr. Rosen is prepared to demonstrate the following: Mr. Rosen first met Mr. Jimenez in late 1993 or early 1994. He had no idea that Mr. Jimenez was a foreign national when they first met. Indeed, Mr. Rosen did not learn until several years after Mr. Jimenez obtained permanent resident alien status that Mr. Jimenez was not a United States citizen. He assumed Mr. Jimenez was a United States citizen or otherwise legally situated to participate in United States politics and that Future Tech could make soft money donations because (1) Future Tech was a U.S. corporation; (2) Mr. Jimenez was the Chief Executive Officer of Future Tech; and (3) Future Tech had made two donations totaling $10,000 to the Democratic National Committee ("DNC") at a Florida Gore event in April of 1993–almost one year before Mr. Rosen had even met Mr. Jimenez.

IV. Whether Mr. Rosen "Solicited" The March 24, 1994 Future Tech Donations

The Analysis contends there is reason to believe that Mr. Rosen solicited prohibited contributions from Future Tech and Mr. Jimenez, citing "[i]nternal DNC contribution documents" the FEC obtained from the DNC. Analysis at 5. These DNC documents and labels, while relevant, are not legally dispositive of the issue. If this Matter proceeds further, Mr. Rosen is prepared to demonstrate that his contacts with Mr. Jimenez concerning the March 21 dinner event did not constitute a "solicitation" of Mr. Jimenez's attendance at the event or Future Tech's decision to contribute, within the meaning of the federal election laws.

Sincerely,

Trevor Potter
Kirk L. Jowers

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of Representatives does not believe that Section 441e as currently drafted prohibits foreign nationals from making donations of soft money." Id.