



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

APR 02 2003

Marc Elias, Esq.  
Perkins & Coie, LLP  
607 Fourteenth Street, NW  
Washington, DC 20005

Re: MUR 4935 (Friends on Noach Dear '93)

Dear Mr. Elias:

Based on a complaint filed with the Federal Election Commission on October 13, 1999, the Commission, on July 25, 2000, found that there was reason to believe that your clients, Friends of Noach Dear '93 and Abraham Roth, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) and 11 C.F.R. § 110.1(b)(1). The Commission also instituted an investigation in this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that the above-referenced violations have occurred.

The Commission may or may not approve the General Counsel's recommendations. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe the violations have occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.



**BEFORE THE FEDERAL ELECTION COMMISSION**

In the Matter of )  
 )  
Friends of Noach Dear '93 and ) MUR 4935  
Abraham Roth, as Treasurer )

**GENERAL COUNSEL'S BRIEF**

**I. STATEMENT OF THE CASE**

On July 25, 2000, based on information from a complaint, the Commission found reason to believe that Friends of Noach Dear '93 ("Friends of Dear") and Abraham Roth, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive contribution to Dear 2000, Inc. ("Dear 2000").

**II. ANALYSIS**

The Commission's regulations state that funds received and payments made solely for the purpose of determining whether an individual should become a candidate are not contributions. 11 C.F.R. §§ 100.7(b)(1) and 100.8(b)(1). However, if the individual subsequently becomes a candidate, any funds received are contributions and any payments made are expenditures subject to reporting requirements of the Act. 11 C.F.R. § 101.3. The individual is required to retain records of the names of each contributor, the dates of receipt and amounts of all contributions received and all expenditures made in connection with determining whether he or she should become a candidate. *Id.* Such contributions and expenditures must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received. *Id.*

The purchase of opinion poll results by a candidate or a candidate's authorized political committee or agent is an expenditure by the candidate or a potential expenditure under 11 C.F.R.

§ 100.8(b)(1). 11 C.F.R. § 106.4(a). Additionally, if a political committee or other person not authorized by a candidate to make expenditures purchases such poll results and a candidate, a candidate's authorized political committee, agent, or another unauthorized political committee subsequently accepts the poll results, an in-kind contribution by the purchaser to the candidate or other political committee and an expenditure by the candidate or other political committee results. 11 C.F.R. § 106.4(b). If an individual uses such poll results to decide whether to become a candidate, a contribution or expenditure does not exist until he or she becomes a candidate. 11 C.F.R. §§ 100.7(b)(1) and 100.8(b)(1).

In 1999, Noach Dear was a city council member in New York City and his campaign committee for this office was Friends of Dear. On December 21, 1999, Mr. Dear filed a Statement of Candidacy with the Commission for the 2000 election cycle and named Dear 2000, Inc. as his principal campaign committee. The federal office sought by Mr. Dear was Representative for the 9<sup>th</sup> Congressional District of New York.

On June 28, 1999, prior to Mr. Dear's filing as a candidate with the Commission, Friends of Dear paid \$20,000 to polling firm Penn, Schoen and Berland for certain polling expenditures. The payment related to a poll of residents within the 9<sup>th</sup> Congressional District of New York, some of whom, according to the complainant, resided outside of Mr. Dear's city council district. The Commission obtained a copy of the questions used in the poll. Included among the questions are requests for opinions on the performance of Representative Anthony Weiner, the incumbent 9<sup>th</sup> Congressional District representative in the United States Congress. Some questions seek to compare the leadership qualities and personal characteristics of Noach Dear and Anthony Weiner. Additionally, the poll asks questions about legislative issues pending

before the United States Congress. In furtherance of this investigation, a deposition was taken of Abraham Roth, the treasurer for both Dear 2000 and Friends of Dear. Mr. Roth acknowledged that Dear 2000 used the poll results. In fact, after news reports about the poll surfaced and a complaint was filed with the Commission, Penn, Schoen and Berland returned the \$20,000 payment to Friends of Dear and eventually was paid \$40,000, on January 11, 2000, by Dear 2000. Dear 2000 reported the expenditure to Penn, Schoen and Berland on its April 2000 Quarterly Report.

Upon Mr. Dear's declaration of candidacy for federal office on December 21, 1999, any funds he received or spent in connection with determining whether to become a candidate became a contribution or expenditure, respectively. 11 C.F.R. § 101.3. This included any poll purchased by or accepted by Mr. Dear or his authorized political committee. 11 C.F.R. § 106.4. Although Friends of Dear is not a "political committee" under the Act, to the extent that it engaged in activities intending to influence Mr. Dear's candidacy for federal office, it is viewed as having made an in-kind contribution to his federal campaign. 2 U.S.C. § 431(8). *See also* Advisory Opinion 1985-38. Thus, the poll purchased by Friends of Dear in June 1999 became a reportable in-kind contribution to Dear 2000 when Mr. Dear became a candidate for federal office in December 1999. 11 C.F.R. § 106.4. *See also* Advisory Opinion 1998-18. As the amount paid for the poll was \$20,000, this was an excessive in-kind contribution to Dear 2000 for the 2000 election cycle. 2 U.S.C. § 441a(a)(1)(A) and 11 C.F.R. § 110.9(a). The fact the payment was refunded by the vendor and eventually paid and reported by Dear 2000 does not extinguish the violations. Moreover, these remedial actions took place only after news reports about the poll were published and a complaint was filed with the Commission.

Based on the foregoing, this Office is prepared to recommend that the Commission find probable cause to believe that Friends of Noach Dear '93 and Abraham Roth, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive contribution to Dear 2000 when it paid for the poll.

**III. GENERAL COUNSEL'S RECOMMENDATION**

Find probable cause to believe that Friends of Noach Dear '93 and Abraham Roth, as treasurer, violated 2 U.S.C. § 441a(a)(1)(A) and 11 C.F.R. § 110.1(b)(1) by making an excessive contribution.

4/2/03  
Date

Jan 7. Norton  
Lawrence H. Norton  
General Counsel

Gregory R. Baker  
Gregory R. Baker  
Acting Associate General Counsel

Peter G. Blumberg  
Peter G. Blumberg  
Acting Assistant General Counsel

Delbert K. Rigsby  
Delbert K. Rigsby  
Attorney

Danita C. Lee  
Attorney