

FEDERAL ELECTION COMMISSION

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Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

AUDIT REFFERAL: # 99-10

AUDIT REFERRAL DATE: June 30, 1999

DATE ACTIVATED: July 29, 1999

STAFF MEMBER: Susan L. Kay

SOURCE: AUDIT REFERRAL

RESPONDENTS: Kemp for Vice President and Kirk L. Clinkenbeard, as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(8)
2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(f)
26 U.S.C. § 9007(a)
26 U.S.C. § 9003(b)(2)
11 C.F.R. § 9003.3(a)
11 C.F.R. § 103.3(a)
11 C.F.R. § 110.1(b)(1)
11 C.F.R. § 110.1(b)(2)
11 C.F.R. § 110.1(b)(3)
11 C.F.R. § 110.1(b)(5)
11 C.F.R. § 113.1(e)
11 C.F.R. § 113.2(c)

INTERNAL REPORTS CHECKED: Audit Documents

FEDERAL AGENCIES CHECKED: None

I. GENERATION OF MATTER

This matter was generated by an audit of Kemp for Vice President ("KVP" or "the Committee"). The Audit Division's referral materials are attached. See Attachment 1.

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II. FACTUAL AND LEGAL ANALYSIS

A. Applicable Law

The Federal Election Campaign Act of 1971, as amended (the "Act"), provides that no person may make contributions to any candidate and his or her authorized political committee with respect to any election for Federal office which, in the aggregate, exceed \$1,000. 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(b)(1). Furthermore, no candidate or political committee may knowingly accept any contribution or make any expenditure in violation of the provisions of 2 U.S.C. § 441a. 2 U.S.C. § 441a(f). The Act defines "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).

In the case of a contribution not designated in writing for a particular election, *with respect to any election* means the next election for that Federal office after the contribution is made. 11 C.F.R. § 110.1(b)(2)(ii). In the case of a contribution designated in writing by a contributor for a particular election, *with respect to any election* means the election so designated. 11 C.F.R. § 110.1(b)(2)(i).

A contribution designated in writing for a particular election, but made after that election, shall be made only to the extent that the contribution does not exceed net debts outstanding from such election. 11 C.F.R. § 110.1(b)(3)(i). To the extent that such contribution exceeds net debt outstanding, the candidate or the candidate's authorized political committee shall return or deposit the contribution within ten days from the date of the treasurer's receipt of the contribution as provided by 11 C.F.R. § 103.3(a), and if deposited, then within sixty days from the date of the treasurer's receipt, the treasurer shall refund the contribution, obtain a written

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redesignation or obtain a written reattribution. 11 C.F.R. § 110.1(b)(3)(i). If the candidate is not a candidate in the general election, all contributions made to the general election shall be either returned or refunded to the contributors or redesignated in accordance with 11 C.F.R.

§ 110.1(b)(5). 11 C.F.R. § 110.1(b)(3)(i).

In order to determine whether there are net debts outstanding from a particular election, the treasurer of the candidate's authorized committee shall calculate net debts outstanding as of the date of the election. 11 C.F.R. § 110.1(b)(3)(ii). Net debts outstanding means 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 and, if the candidate's authorized committee terminates or if the candidate will not be a candidate for the next election, estimated necessary costs associated with termination of political activity, such as the costs of complying with the post-election requirements of the Act and other necessary administrative costs associated with winding down the campaign, including office space rentals, staff salaries and office supplies; less, available cash on hand and amounts owed to the committee. 11 C.F.R. § 110.1(b)(3)(ii). The amount of net debts outstanding shall be adjusted as additional funds are received and expenditures are made. 11 C.F.R. § 110.1(b)(3)(iii).

Excess campaign funds are amounts that a committee receives as contributions that are in excess of any amount needed to defray campaign expenditures. 11 C.F.R. § 113.1(e). Excess campaign funds and funds donated may be transferred without limit to any national, state or local committee of any political party. 11 C.F.R. § 113.2(c).

B. Audit Referral

Jack Kemp was nominated as the vice-presidential candidate at the Republican National Convention ("the Convention") on August 14, 1996. The Committee appears to have obtained

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sufficient funds to pay all of its obligations by September 30, 1996. After that time, primarily during the months of October and November, KVP received additional contributions totaling \$104,668. The Audit Division's review of KVP's contribution records revealed contributions in excess of KVP's net debt in the amount of \$100,000.¹ On October 31, 1996, KVP transferred \$100,000 to the National Republican Senatorial Committee ("NRSC").² In response to the End of Fieldwork Conference, the Committee described this transaction as a transfer of excess funds.³

The disclosure reports filed after the Convention reflect surplus funds and the continued acceptance of contributions after the Convention. Additional contributions were accepted even after the transfer to the NRSC. KVP's October 15 Quarterly Report, (7/29/96-9/30/96) was signed by the Committee's treasurer and reflects a closing cash on hand of \$109,474 and debts and obligations owed by KVP of \$45,722. According to this report, KVP had a surplus of \$63,752 (\$109,474-\$45,722). The Pre-General Election Report (10/1/96-10/16/96), also signed by the treasurer, showed contributions of \$56,430 and an ending cash balance of \$142,896, with debts and obligations totaling \$28,983. The resulting surplus was \$113,913 (\$142,896-\$28,983). From October 17 through November 18, 1996, the date of the last deposit into KVP's bank account, KVP accepted an additional \$71,255 of contributions. On October 30, 1996, the day before the transfer was made, KVP deposited contributions of \$21,325 and an additional \$1,500 on the day of the transfer to the NRSC. In addition, a total of \$6,500 of contributions was deposited after KVP transferred \$100,000 to the NRSC.

¹ The Audit staff prepared a net debt analysis for KVP based on disbursements of \$395,547 and receipts of \$500,215. This analysis includes receipts and disbursements reported by the Committee through March 31, 1998.

² The Audit Division's review of the reports filed by KVP indicates that additional winding down costs have been incurred and paid. The Audit Division included \$4,668 (the difference between the \$104,668 received in excess of net debt and the \$100,000 transferred) as winding down costs. Therefore, according to the Audit staff's calculation, the amount of contributions received after no net debt existed is equal to the transfer to the NRSC.

³ The Committee appears to have first characterized the funds at issue as excess campaign funds in response to the End of Fieldwork Conference on April 21, 1998.

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The Committee originally told the Audit staff that the treasurer had not kept track of KVP's debt position and that no workpapers were available for review. However, at an end of fieldwork conference on April 21, 1998, counsel for the Committee stated that although workpapers were not prepared, the treasurer had kept a continuous running balance of KVP's debt position. He further stated that, due to estimates that continued to come in, he was uncertain how much KVP would need to retire its debt. *See Attachment 1 at 3.*

In the Exit Conference Memorandum, the Audit staff recommended that KVP provide evidence demonstrating that the contributions raised in excess of its net debt were properly received and retained, and that \$100,000 was properly transferred to the NRSC. Absent such a demonstration, the Audit staff recommended that KVP seek a refund in the amount of \$100,000 from the NRSC and pay \$104,668 to the United States Treasury representing contributions received in excess of its net debts.

In response to the Exit Conference Memorandum, the Committee treasurer stated that the initial budget for KVP was estimated to be approximately \$250,000 and this estimate was adjusted up to \$350,000 after arrival at the Convention and establishing a schedule for Secretary Kemp's activities in San Diego. *See Attachment 2.* The treasurer indicated that after the Convention he estimated that the Committee would need to raise in excess of \$500,000 to cover its costs. *Id.* The treasurer further stated:

... We had to operate on guesstimates of actual expenditures, and were legally responsible for all costs actually incurred on behalf of Jack Kemp at the Convention prior to his nomination, whether or not they were authorized and budgeted in advance. At no time in 1996 did I intentionally raise any contributions for Kemp for Vice President Committee beyond my reasonable expectations of what our budget would require. My goal in post-Convention fundraising was to ensure that the Committee did not end with a debt, in the face of uncertain and ever-increasing estimates of costs incurred. Based on our estimates of over \$500,000 in expenses, we continued to accept contributions into

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October. It was only towards the end of that month as all of the final bills were accounted for, that it became clear that the Committee's bills would not be as high as we had feared, thereby leaving the Committee with some excess funds already on hand. *Id.*

C. Analysis

Section 441a(a)(1)(A) of the Act limits the amount that may be contributed "with respect to any election for Federal office." 2 U.S.C. § 441a(a)(1)(A). Funds given to a candidate after an election is over cannot meet the Act's requirements that contributions be made with respect to and for the purpose of influencing that election unless they could be used to retire outstanding debts from that election.⁴ See 11 C.F.R. § 110.1(b)(3); see also Explanation and Justification for 11 C.F.R. § 110.1(b)(3), 52 *Fed.Reg.* 761 (January 9, 1987).

An election is defined in part as a "general, special, primary, or run-off election" or a "convention or caucus of a political party which has authority to nominate a candidate."⁵ 2 U.S.C. § 431(1)(A) and (B). Since Mr. Kemp was nominated as the Republican Party vice-presidential candidate on August 14, 1996, this was the "primary election" for his committee. Therefore, any contributions received after that date that were designated for the vice-presidential election should have been limited to KVP's net debts.⁶ 11 C.F.R. § 110.1(b)(3)(i). According to the Audit staff, KVP had sufficient funds to pay all obligations by September 30, 1996, but

⁴ Absent such debts, contributions to past elections would, in reality, influence future elections. Explanation and Justification for 11 C.F.R. § 110.1(b)(3), 52 *Fed.Reg.* 761 (January 9, 1987).

⁵ In the Advisory Opinion context, the Commission has concluded that the "primary election for candidates for the Democratic nomination for the Office of Vice President is considered to be the National Convention since that convention had the authority to select a nominee." Advisory Opinion 1979-43.

⁶ The contributions at issue appear to be properly designated for the vice presidential election. The contributions were designated to the Vice Pres. Convention Expense, Kemp for Vice-President and Kemp for Vice-President Committee. According to 11 C.F.R. § 110.1(b)(4)(i), contributions shall be considered to be designated in writing for a particular election if the contribution is made by a negotiable instrument which clearly indicates the particular election with respect to which the contribution was made. Therefore, these contributions appear to have been designated for the vice-presidential primary election.

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continued to receive additional contributions in the amount of \$104,668. In fact, KVP filed a Quarterly Report on October 15, 1996 that indicates it had met its obligations by September 30, 1996. Even if some uncertainty existed with respect to the amount of its debts and obligations, KVP was required to report an estimate of its debts and obligations. 11 C.F.R. § 104.11(b). The reports filed by KVP indicate that it should have known its debt position.

KVP did not refund or reattribute the contributions received in excess of net debt.

⁷ Rather, KVP characterized the remaining funds as excess campaign funds and transferred the funds to the NRSC. Excess campaign funds can be transferred to another committee without limitation. 11 C.F.R. § 113.2(c). However, excess campaign funds are amounts that a committee receives as contributions that are in excess of any amount needed to defray campaign expenditures. 11 C.F.R. § 113.1(e). Excess campaign funds can only result from contributions accepted prior to the election, because contributions made after the election that were designated for a particular election can only be accepted to the extent that the committee has net debts outstanding. *See* 11 C.F.R. § 110.1(b)(2)(i) and (ii). *See also* 11 C.F.R. § 110.1(b)(3)(i). The funds at issue in this matter were designated for a particular election, but were contributed after the election and therefore may only be used to defray the net debts outstanding from that election. 11 C.F.R. § 110.1(b)(3)(i). Thus, the remaining funds could not be transferred to the NRSC. *Compare* 11 C.F.R. § 110.1(b)(2)(i) and (ii) *with* 11 C.F.R. § 113.2(c).

The contributions that KVP received in excess of its net debt were not made with respect to Mr. Kemp's nomination. Explanation and Justification for 11 C.F.R. 110.1(b)(3), 52 *Fed.*

⁷ Since the candidate's general election committee, Dole/Kemp '96, was publicly financed, it could not accept contributions redesignated from KVP. 26 U.S.C. § 9003(b)(2). However, Dole/Kemp '96 Compliance Committee, Inc. may have been allowed to accept redesignations from KVP. *See* 11 C.F.R. § 9003.3(a).

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Reg. 761 (January 9, 1987). Therefore, the Office of General Counsel recommends that the Commission find reason to believe that Kemp for Vice-President and Kirk L. Clinkenbeard, as treasurer violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 110.1(b)(3)(i).

III. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

This Office recommends that the Commission enter into pre-probable cause conciliation with Kemp for Vice President and Kirk L. Clinkenbeard, as treasurer. This Office believes that all the information needed to establish the violations has been obtained and no investigation is necessary. Attached for the Commission's approval is the proposed conciliation agreement for KVP. Attachment 3.

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IV. RECOMMENDATIONS

1. Open a Matter Under Review.
2. Find reason to believe that Kemp for Vice President and Kirk L. Clinkenbeard, as treasurer, violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 110.1(b)(3)(i).
3. Enter into conciliation with Kemp for Vice President and Kirk L. Clinkenbeard, as treasurer prior to a finding of probable cause to believe, and approve the attached conciliation agreement.
4. Approve the attached Factual and Legal Analysis.
5. Approve the appropriate letters.

Date

10/29/99


Lawrence M. Noble
General Counsel**Attachments**

1. Audit referral materials
2. Affidavit of Kirk L. Clinkenbeard
3. Proposed Conciliation Agreement for Kemp for Vice-President and Kirk L. Clinkenbeard, as treasurer
4. Factual and Legal Analysis

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