



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 6, 1999

Mr. Kirk L. Clinkenbeard, Treasurer
Kemp for Vice-President
2201 Wisconsin Avenue NW #320
Washington, DC 20007

RE: MUR 4947

Dear Mr. Clinkenbeard:

On November 9, 1999, the Federal Election Commission found that there is reason to believe that Kemp for Vice President ("Committee") and you, as treasurer, violated 2 U.S.C §441a and 11 C.F.R. § 110.1(b)(3)(i), provisions of the Federal Election Campaign Act of 1971, as amended ("the Act") and the Code of Federal Regulations. The Factual and Legal Analysis, which formed a basis for the Commission's findings, 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 your 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.

In order to expedite the resolution of this matter, the Commission has also decided to offer to enter into negotiations directed towards reaching a conciliation agreement in settlement of this matter prior to a finding of probable cause to believe. Enclosed is a conciliation agreement that the Commission has approved.

If you are interested in expediting the resolution of this matter by pursuing preprobable cause conciliation, and if you agree with the provisions of the enclosed agreement, please sign and return the agreement, along with the civil penalty, to the Commission. In light of the fact that conciliation negotiations, prior to a finding of probable cause to believe, are limited to a maximum of 30 days, you should respond to this notification as soon as possible.

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.

If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such

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counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

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 investigation to be made public.

For your information, we have attached a brief description of the Commission's procedures for handling possible violations of the Act. If you have any questions, please contact Susan Kay, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Scott E. Thomas
Chairman

Enclosures

Factual and Legal Analysis

Procedures

Designation of Counsel Form

Conciliation Agreement

cc: candidate

21-04-405-1404

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

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

AUDIT REFERRAL: MUR 4947

I. GENERATION OF MATTER

This matter was generated by an audit of Kemp for Vice President ("KVP" or "the Committee").

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). The Act provides that no person shall make contributions to the political committees established and maintained by a national party, which are not the authorized political committees of any candidate, in any calendar year which, in the aggregate, exceed \$20,000. 2 U.S.C. § 441a(a)(1)(B). 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

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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 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

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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 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

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.

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.

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.

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.

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.

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* Affidavit of Kirk L. Clinkenbeard dated October 24, 1998. 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 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).

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).

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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 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

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.

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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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. Reg.* 761 (January 9, 1987). Therefore, there is reason to believe that Kemp for Vice-President and Kirk L. Clinkenbeard, as treasurer violated 2 U.S.C. § 441a and 11 C.F.R. § 110.1(b)(3)(i).

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