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SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5100
DATE COMPLAINT FILED: 9/22/00
DATE OF NOTIFICATION: 9/28/00
DATE ACTIVATED: 11/14/00

EXPIRATION OF STATUTE OF LIMITATIONS: 01/01/04

STAFF MEMBER: Michael E. Scurry

COMPLAINANT:	National Republican Congressional Committee Donald F. McGahn, II, General Counsel
RESPONDENTS:	McCallion for Congress and Darrell L. Paster, as treasurer
RELEVANT STATUTES:	2 U.S.C. § 431(8)(B)(xv) 2 U.S.C. § 434(a) 2 U.S.C. § 434(a)(2)(A)(i) 2 U.S.C. § 434(a)(6)(A) 2 U.S.C. § 441b 2 U.S.C. § 441c 2 U.S.C. § 441e 26 U.S.C. § 9002(6) 11 C.F.R. § 100.2(a) 11 C.F.R. § 100.2(c)(5) 11 C.F.R. § 100.7(b)(11) 11 C.F.R. § 101.2(a) 11 C.F.R. § 104.5 11 C.F.R. § 104.5(a)(1)(i) 11 C.F.R. § 104.5(f)
INTERNAL REPORTS CHECKED:	Disclosure Reports
FEDERAL AGENCIES CHECKED:	None

I. GENERATION OF MATTER

This matter was initiated by a complaint filed on September 22, 2000, by the National Republican Congressional Committee, by and through its General Counsel, Donald F. McGahn, II ("Complainant"). Complainant filed an amendment to the complaint on September 26, 2000. Complainant alleges that McCallion for Congress ("the Committee"), and Darrell L. Paster, as treasurer (collectively "Respondents"), failed to file the Committee's 2000 Pre-Primary Election Report. Complainant also alleges the failure to file 48-Hour Notices prior to the 2000 Primary Election and possible acceptance of prohibited contributions by the Committee through unsecured loans to the candidate. Further, the Complainant alleges that the Committee's failure to file its Pre-Primary Election Report indicated a knowing and willful violation by the Respondents.

Respondents were notified of the complaint on September 28, 2000. Respondents were notified of the amendment to the complaint on October 4, 2000. A response was submitted on behalf of Respondents on October 27, 2000, disputing the allegations contained in the complaint. The Committee is the principal campaign committee of Kenneth McCallion. McCallion sought election to the House of Representatives for the 22nd district of New York in the 2000 general election. McCallion received the nomination as the unopposed candidate representing the Democratic Party. McCallion, however, lost the 2000 general election with 32% of the vote.

II. FACTUAL AND LEGAL ANALYSIS

A. The Law

The Federal Election Campaign Act of 1971, as amended (the "Act"), requires that the principal campaign committee of a candidate for the House of Representatives, in a calendar year during which there is a regularly scheduled election for which such candidate is seeking election,

file a pre-election report prior to any election where such candidate is seeking election or nomination for election. 2 U.S.C. § 434(a)(2)(A)(i). This pre-election report must be filed no later than the "12th day before (or posted by registered or certified mail no later than the 15th day before)" such election, and must be complete as of the 20th day before such election. *Id.*

Pursuant to 2 U.S.C. § 441b, it is unlawful for corporations, national banks, and labor organizations to make a contribution or expenditure in connection with any election for Federal Office. It is unlawful for any government contractors to make any contribution to any committee or candidate for public office. 2 U.S.C. § 441c. Furthermore, 2 U.S.C. § 441e provides that it is unlawful for any foreign national to make any contribution in connection with any primary election.

The Act requires notification by a principal campaign committee of contributions received within 48 hours of an election. *See* 2 U.S.C. § 434(a)(6)(A). If any contribution of $1,000 or more is received by any authorized committee of a candidate after the 20th day, but more than 48 hours, before 12:01 a.m. of the day of the election, the principal campaign committee of that candidate shall notify the Commission, the Secretary of the Senate and the Secretary of State, as appropriate, within 48 hours of receipt of the contribution. *See* 11 C.F.R. § 104.5(f).

"Knowing and willful" actions are those that are "taken with full knowledge of all the facts and a recognition that the action is prohibited by law." 122 Cong. Rec. H3778 (daily ed. May 3, 1976). The knowing and willful standard requires knowledge that one is violating the law. *FEC v. John A. Dramesi for Congress Comm.*, 640 F. Supp. 985 (D.N.J. 1986). A knowing and willful violation may be established by "proof that the defendant acted deliberately and with knowledge that the representation was false." *U.S. v. Hopkins,* 916 F.2d. 207, 214-15 (5th Cir.

1990). A knowing and willful violation may be inferred "from the defendants' elaborate scheme for disguising" their actions and their "deliberate convey[ance of] information they knew to be false to the Federal Election Commission." *Id.* "It has long been recognized that 'efforts at concealment [may] be reasonably explainable only in terms of motivation to evade' lawful obligations." *Id.* at 214, *citing Ingram v. United States*, 360 U.S. 672, 679 (1959).

B. The Complaint

Complainant asserts Respondents violated the Act and Commission regulations by: failing to file a Pre-Primary Election Report, thereby implying knowing and willful conduct; failing to file 48-Hour Notices; and accepting prohibited contributions through unsecured loans to the candidate.

1. Failure to File a Pre-Primary Election Report Implying Knowing and Willful Conduct

According to the complaint, Respondents did not file a Pre-Primary Election Report as required by the Act. The complaint asserts that after notification by the Commission of this failure to file, Respondents refused on the grounds that the Committee did not engage in fundraising for the primary election and the candidate's name did not appear on the primary ballot. The complaint asserts that the failure by the Committee to file its Pre-Primary Election Report indicates that the Respondents were "knowingly and willfully denying the public its right to know."

2. Failure to File 48-Hour Notices

The complaint also alleges that the Committee failed to file 48-Hour Notices prior to the primary election. It appears that the complaint based this allegation solely on the fact that the Committee did not file any 48-Hour Notices prior to the primary election.

3. Acceptance of Prohibited Contributions Through Unsecured Loans to the Committee

The complaint further alleges that the Committee's failure to file the Pre-Primary Election Report precludes the public from knowing the source of funds received by the Committee. According to the complaint, the public would not know if the Committee received personal funds, corporate funds, union funds, or foreign nation money. The complaint alleges that the candidate's unsecured loans and subsequent personal loans to the committee could have resulted in prohibited contributions to the Committee.

C. The Response

By letter dated October 27, 2000, Respondents filed a response to Complainant's allegations. Respondents state that there is no good faith basis for the Complainant to continue to pursue this complaint.

1. Pre-Primary Election Report

In response to the allegation that the Committee did not file a Pre-Primary Election Report, Respondents state that the Committee did not engage in fundraising for a primary election and the candidate did not appear on the ballot in the primary election, which occurred on September 12, 2000. Respondents state that they acted in complete good faith in not filing a Pre-Primary Election Report, and that statements made in the public media attributed to a Commission spokesperson justified this understanding.

2. Unsecured Loan/Prohibited Contributions

In response to the allegation that the Committee accepted personal loans from the candidate, which could have consisted of unsecured loans from a prohibited source, the Respondents state that the candidate has substantial current income from his partnership draw at his law firm. Additionally, the Respondents state that this draw amounted to ; in 1999 and may exceed that amount in 2000. Further, the Respondents point out that the candidate arranged his personal finances so that he was able to loan the Committee money from his then-current cash flow.

Finally, Respondents state that the candidate could draw upon $50,000 in unsecured lines of credit maintained with MBNA America of Wilmington, Delaware. The response also states that this line of credit has been available to the candidate since 1995.

3. 48-Hour Notices

Respondents did not address the allegation of failure to file 48-Hour Notices in the response.

D. Analysis

1. Pre-Primary Election Report

The Act requires the principal campaign committee of a candidate for the House of Representatives, in an election year in which the candidate is seeking election or nomination for election, to file a pre-election report prior to any election where such candidate is seeking election or nomination for election. 2 U.S.C. § 434(a)(2)(A)(i).[1] In this case the issue centers on

[1] The regulations also provide that a pre-election report is required before any primary election where a candidate seeks election. *See* 11 C.F.R. § 104.5(a)(1)(i). The Act uses "seeking election, or nomination for election," while the regulation uses "seeks election." Although the regulations use different language, the definition of election contained within the regulations evidences no distinction. Specifically, 11 C.F.R § 100.2(a) defines election as the

whether McCallion sought nomination for election in the primary. In deciding whether McCallion sought the nomination for election in the New York primary New York law has been construed.[2] New York law states, "All persons designated for uncontested offices or positions at a primary election shall be deemed nominated or elected thereto, as the case may be, without balloting." N.Y. Elec. Law § 6-160(2) (Consol. 2000). Pursuant to New York law McCallion was nominated without balloting. The fact that he was designated for the position of candidate necessitates the conclusion he was a candidate for party nomination, and thus sought the nomination for election in the primary. *See* 2 U.S.C. § 434(a)(2)(A)(i). Further, the Commission has stated that designation under New York law is a part of the primary election process. *See* AO 1986-17. Therefore, since designation is part of the primary election process, McCallion must be considered a candidate involved in the primary election process. As a candidate involved in the primary election process, McCallion sought nomination for election in the primary and received the nomination for election without balloting.[3] Consequently, the Committee was required to file a Pre-Primary Election Report under 2 U.S.C. § 434(a)(2)(A)(i).

The regulations define when a primary election is deemed to occur. Specifically, with respect to a "major party candidate,"[4] who is unopposed for nomination within that candidate's party and who is certified to appear as that party's nominee in the general election, the primary

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"process by which individuals, whether opposed or unopposed, seek nomination for election, or election, to Federal office."

[2] The Commission has stated that whether an event is an election is determined by an analysis of relevant state law. AO 1992-25.

[3] The campaign guide also addresses the pre-primary reporting requirement. The April 1999 Campaign Guide for Congressional Candidates and Committees at page 36 states, "A pre-primary report must be filed before the *election* in which the candidate seeks nomination" (italics in original to denote special definition). Election is then defined in the definition appendix as: "Any one of several processes by which an individual seeks nomination for election, or election, to federal office." This includes a primary election. McCallion sought and received the nomination for election to the federal office of Representative.

[4] The term "major party" is defined in 26 U.S.C. § 9002(6) as a political party whose presidential candidate in the preceding presidential election received 25% or more of the popular vote.

election is considered to have occurred on the date that the primary election was held by the candidate's party in that State. *See* 11 C.F.R. § 100.2(c)(5). In this case McCallion, a Democrat, was a "major party candidate." McCallion was unopposed for nomination and was certified as the party's nominee in the general election. Therefore, the primary election should be considered to have occurred for McCallion on September 12, 2000. Consequently, the Committee should have filed a Pre-Primary Election Report by August 31, 2000.[5]

Unopposed candidates, whose names do not appear on the primary ballot, have a separate contribution limitation for the primary election. *See* AO 1986-19. The only way to determine if a candidate took advantage of the separate limitation is through an analysis of the Pre-Primary Election Report. The reporting requirements of the Act and regulations do not require fundraising geared towards the primary election to trigger the pre-primary reporting requirement.[6] Thus, post-election claims by the Committee that it did not raise or spend money for the primary, but rather only for the general election, does not negate its reporting requirement. In this case a Non-Filer Notice was sent to the Committee on September 1, 2000, noting that it failed to file a 12 Day Pre-Primary Election Report for the period July 1, 2000 through August 23, 2000. To date, the Committee has still not filed its report.

[5] The Commission has recognized that unopposed candidates and candidates whose names do not appear on the ballot have a pre-primary election reporting obligation. *See* AO 1986-19 and 1986-21. In this case the candidate was both unopposed and his name did not appear on the ballot. While the Advisory Opinions are not directly on point, the distinction here should not prevent the application of this reasoning to the present case.

[6] Neither the Act nor the regulations make a distinction between fundraising for the primary election and fundraising for the general election with respect to the obligation to file the Pre-Primary Election Report. *See* 2 U.S.C. § 434(a) and 11 C.F.R. § 104.5. The pre-primary reporting requirement recognizes this fact *See* AO 1986-31 (stating a committee participating in two elections may expend funds for either election or both elections, and need not identify the election for which an itemized operating expenditure is made). The October Quarterly Report submitted by the Committee evidences numerous receipts and expenditures that occurred during the pre-primary reporting period. The Committee should have reported this activity on the Pre-Primary Election Report.

Based on all of the facts set forth above this Office recommends that the Commission find that there is reason to believe McCallion for Congress and Darrell L. Paster, as treasurer, violated the pre-primary election reporting requirement. Although, the Committee received prior notices concerning the requirement to file a Pre-Primary Election Report, the Commission did not publish the Committee as a non-filer after these notifications.[7] It appears that the Respondents did not recognize that their actions were prohibited by law. Moreover, there is no evidence to suggest that the Respondents knowingly or willfully violated the Act. In light of the circumstances herein and consistent with the Commission's direction,[8] this Office recommends that the Commission exercise its prosecutorial discretion and find reason to believe the Respondents violated the Act, admonish the Respondents, and take no further action with respect to the Committee's failure to file a Pre-Primary Election Report.

2. 48-Hour Notices

The complaint alleges that the Committee failed to file 48-Hour Notices, apparently based on the fact that the Committee did not file any 48-Hour Notices prior to the primary election. After reviewing the October Quarterly Report it does not appear that there is any violation of the 48-hour notification requirement, even though the response does not address this issue. The 48-Hour Notices were required for any contribution exceeding $1,000 received between August 24 and September 9, 2000. *See* 2 U.S.C. § 434(a)(6)(A). The October Quarterly Report, however,

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[7] On August 7, 2000, Prior Notice was sent to the Committee. The Prior Notice stated that principal campaign committees of congressional candidates, including unopposed candidates, who seek nomination in the primary must file a Pre-Primary Election Report. On September 1, 2000, a Non-Filer Notice for the 2000 Pre-Primary Election Report was sent to the Committee via mailgram.

[8] During the October 11, 2000 Executive Session, the Commission discussed this matter at length. The Commission had voted to publish the Committee as a non-filer, but based on the Committee's response the Reports Analysis Division did not publish the Committee. The amendment to the complaint in this matter refers to press articles, which state that the Commission agreed that the Committee did not have to file a pre-primary report. The Commission discussed the possibility of corrective Press Office action during the October 11th meeting, but decided

discloses no such contributions. Since the Committee does not report having received contributions exceeding $1,000 during the 48-hour notice period, it did not have to file any 48-Hour Notices. Thus, there is no reason to believe the Committee violated the 48-hour notification reporting requirement provided in 2 U.S.C. § 434(a)(6)(A).

3. Unsecured Loans/Prohibited Contributions

The complaint speculates that personal loans made by the candidate to the Committee may have included prohibited contributions under 2 U.S.C. §§ 441b, 441c, or 441e. Specifically, the complaint questions the source of the personal loans made by the candidate. The complaint alleges two unsecured loans to the candidate could have resulted in prohibited contributions to the Committee. It is noted that there are two unsecured loans on McCallion's Financial Disclosure Statement, and the Committee's response admits McCallion maintained a $50,000 unsecured line of credit with MBNA America. The unsecured line of credit has been available to McCallion since 1995. The Committee stated that McCallion loaned $31,000 to the Committee, an amount exceeding the value of any bank accounts reported by him on his Financial Disclosure Statement. There is no information, however, that suggests any prohibited contributions were part of this loan amount. Rather, the Committee has denied the allegation in the complaint and has stated that McCallion loaned the Committee assets from his cash flow as a partner in his law firm, where he received over from the partnership in 1999. The unsupported allegation of the complaint does not rise to the level of reason to believe. Thus, there is no reason to believe the Committee accepted prohibited contributions in violation of 2 U.S.C. §§ 441c or 441e.

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against it at that time. Instead, the discussion during the meeting suggested the Commission favored the approach of finding reason to believe, but taking no further action, as the appropriate remedy for the reporting violation.

The regulations provide that a loan to the candidate will be considered a loan to the authorized committee if the candidate obtains the loan in connection with his or her campaign. 11 C.F.R. §§ 101.2(a) and 100.7(b)(11). The alleged loan must have been made in connection with McCallion's campaign in order to give rise to the possibility of a prohibited contribution. *See* AO 1985-33. The complaint merely states the existence of these loans, but has not provided any evidence of the use of the loans for campaign purposes. In fact, the Respondents have noted that the line of credit has been available since 1995, which is prior to the commencement of the campaign at issue. Since there is no credible evidence that these lines of credit were used for campaign purposes, the allegation in the complaint does not rise to the level of reason to believe.

It is parenthetically noted that Congress enacted legislation, following the activity at issue in this matter, that addressed candidate loans. Specifically, the new legislation provides that "any loan of money derived from an advance on a candidate's brokerage account, credit card, home equity line of credit, or other line of credit available to the candidate" is not a contribution, provided that such loan is made in accordance with applicable law and under commercially reasonable terms and provided that the person making such loan makes loans derived from an advance on the candidate's brokerage account, credit card, home equity line of credit, or other line of credit in the normal course of the person's business. 2 U.S.C. § 431(8)(B)(xv). There is no evidence that the lines of credit at issue in this case would fail to satisfy this new statutory language, if applied. Accordingly, there is no reason to believe the Committee violated 2 U.S.C. § 441b.

Based on the above, this Office recommends that the Commission find reason to believe that McCallion for Congress and Darrell L. Paster, as treasurer, violated 2 U.S.C. § 434(a)(2)(A)(i), but take no further action, and send an admonishment letter. This Office further recommends that the Commission find no reason to believe that McCallion for Congress and Darrell L. Paster, as treasurer, violated 2 U.S.C. §§ 434(a)(6)(A), 441b, 441c, or 441e.

III. RECOMMENDATIONS

1. Find reason to believe that McCallion for Congress and Darrell L. Paster, as treasurer, violated 2 U.S.C. § 434(a)(2)(A)(i), but take no further action, and send an admonishment letter.

2. Find no reason to believe that McCallion for Congress and Darrell L. Paster, as treasurer, violated 2 U.S.C. §§ 434(a)(6)(A), 44b, 441c, or 441e.

3. Approve the appropriate letters.

4. Close the file.

Lois G. Lerner
Acting General Counsel

4/13/01
Date

BY: Abigail A. Shaine
Abigail A. Shaine
Acting Associate General Counsel

FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: April 13, 2001

SUBJECT: MUR 5100-First General Counsel's Report

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

Open Session _____ Closed Session _____

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FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Lois Lerner
Acting General Counsel

FROM Mary W. Dove/Lisa R. Davis
Office of the Commission Secretary

DATE: April 18, 2001

SUBJECT: MUR 5100 - First General Counsel's Report
dated April 13, 2001.

The above-captioned document was circulated to the Commission on **Monday, April 16, 2001.**

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

Commissioner Mason	_
Commissioner McDonald	_
Commissioner Sandstrom	**XXX**
Commissioner Smith	_
Commissioner Thomas	_
Commissioner Wold	_

This matter will be placed on the meeting agenda for

Tuesday, May 1, 2001.

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