

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Republicans for Choice Political Action Committee) MUR 5173
and Ann E. W. Stone, as treasurer)
)

GENERAL COUNSEL'S BRIEF

I. STATEMENT OF THE CASE

On February 13, 2001, the Federal Election Commission ("the Commission") found reason to believe that the Republicans for Choice Political Action Committee, and Ann E. W. Stone, as treasurer (the "Committee") violated

2 U.S.C. § 441b(a) by knowingly accepting prohibited contributions in the form of forgiveness of debts from three corporate vendors, Ann E. W. Stone and Associates, Inc. ("ASA"), Saturn Corporation ("Saturn") and Diversified Data Processing & Consulting, Inc. dba Diversified Data & Communications, Inc. ("Diversified").

¹ This matter was generated from a Commission audit of the Committee undertaken in accordance with 2 U.S.C. § 438(b). See 2 U.S.C. § 437g(a)(2). The audit covered the period from January 1, 1995 through December 31, 1996. The Commission approved the Final Audit Report on December 2, 1999.

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The Committee responded to the Commission's reason to believe findings on April 6, 2001 and April 18, 2001.² This Office requested additional information from the Committee by letter dated May 3, 2001, and the Committee responded on May 17, 2001.

This Office is also prepared to recommend

that the Commission find no probable cause to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting contributions in the form of forgiveness of debts from Saturn and Diversified and that the Commission take no further action with respect to the Committee's acceptance of contributions in the form of forgiveness of debts from ASA.

² The Committee did not respond timely. By letter dated March 15, 2001 but received March 20, 2001, the day after its response was due, the Committee requested an extension of time to respond until April 20, 2001. This Office offered to grant the extension on the condition that the Committee consent to toll the statute of limitations and extend time to institute a civil law enforcement suit for 32 days, the length of the requested extension. The Committee, however, would not sign a tolling agreement. The Commission then considered and denied the Committee's extension request. On April 5, 2001, this Office informed the Committee that any response would be considered late-submitted and may not be considered, and that this Office was moving on to the next stage of the enforcement process. By letter dated April 6, 2001, the Committee addressed the Commission's denial of its extension of time request and the reason to believe findings concerning the vendor forgiveness of Committee debts.

II. ANALYSIS

A. LAW

1. Contributions

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455 ("the Act") provides that a contribution includes any gift, subscription, loan, advance, 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)(A); 11 C.F.R. § 100.7(a)(1). "Anything of value" includes all in-kind contributions. 11 C.F.R. § 100.7(a)(1)(iii).

A loan includes a guarantee, endorsement, and any other form of security. 11 C.F.R. § 100.7(a)(1)(i). A loan which exceeds the contribution limitations shall be unlawful whether or not it is repaid. *Id.* A loan is a contribution at the time it is made and is a contribution to the extent that it remains unpaid. 11 C.F.R. § 100.7(a)(1)(i)(B). However, a loan of money by a state bank, federally chartered depository institution, or a depository institution where the accounts are insured by the Federal Deposit Insurance Corporation or the National Credit Union Association and made in the ordinary course of business are not considered contributions as long as certain conditions are met. 2 U.S.C. § 431(8)(B)(vii); 11 C.F.R. § 100.7(b)(11).

No person shall make contributions to any political committee in any calendar year which, in the aggregate, exceed \$5,000. 2 U.S.C. § 441a(a)(1)(C). No political committee shall knowingly accept any contribution that violates the contribution limitations. 2 U.S.C. § 441a(f).

Corporations are prohibited from making contributions in connection with a federal election. 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(b). No candidate, political committee or other person shall knowingly accept or receive a prohibited contribution. *Id.* A prohibited

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contribution includes "any direct or indirect payment, distribution, loan, advance, deposit, or gift of money, or any services or anything of value." 2 U.S.C. § 441b(b)(2).

2. Extension of Credit and Debt Settlement

The extension of credit by any person is a contribution unless the credit is extended in the ordinary course of the person's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation. 11 C.F.R.

§ 100.7(a)(4). If a creditor fails to make a commercially reasonable attempt to collect the debt, a contribution will result. *Id.*; see 11 C.F.R. §§ 116.3 and 116.4. If a debt owed by a political committee is forgiven or settled for less than the amount owed, a contribution results unless such debt is settled in accordance with the standards set forth at 11 C.F.R. §§ 116.3 and 116.4. *Id.*

A corporation in its capacity as commercial vendor³ may extend credit to a political committee or another person on behalf of a political committee provided the credit is extended in the ordinary course of the corporation's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.⁴

11 C.F.R. § 116.3(b); see also Advisory Opinion ("AO") 1979-36.⁵

³ Commercial vendors are "any persons providing goods or services to a candidate or political committee whose usual and normal business involves the sale, rental, lease or provision of those goods or services." 11 C.F.R. § 116.1(c).

⁴ Extension of credit may include, but is not limited to: (1) any agreement between the creditor and political committee that the full payment is not due until after the creditor provides goods or services to the political committee; (2) any agreement between the creditor and the political committee that the political committee will have additional time to pay the creditor beyond the previously agreed to due date; and (3) the failure of the political committee to make full payment to the creditor by a previously agreed to due date. 11 C.F.R. § 116.1(c).

⁵ In AO 1979-36, the Commission considered an extension of credit by a direct mail fundraising and marketing organization to a political committee for a direct mail fundraising campaign. The proposed agreement provided that a portion of solicited funds would be used to pay the fundraiser for the costs of operating and developing the program and that the fundraiser would incur initial expenses for the earliest fundraising materials, and would bill the committee for these amounts plus its fee. The Commission concluded that amounts expended by the fundraiser would not be contributions as long as: 1) the proposed agreement was of a type that was normal industry

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To determine if credit was extended in the ordinary course of the vendor's business, the Commission will consider (1) whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit; (2) whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and (3) whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry. 11 C.F.R. § 116.3(c).

The Commission's regulations provide procedures for debt settlement. *See* 11 C.F.R. part 116. Specifically, the regulations permit debt settlement between a political committee and a commercial vendor if the vendor has treated the debt in a commercially reasonable manner, namely, if the initial extension of credit was made in accordance with 11 C.F.R. § 116.3; the candidate or political committee has undertaken all reasonable efforts to satisfy the outstanding debt, including but not limited to, engaging in fundraising efforts, reducing overhead and administrative costs and liquidating assets; and the commercial vendor has pursued its remedies as vigorously as it would pursue its remedies against a nonpolitical debtor in similar circumstances.⁶ 11 C.F.R. § 116.4(d), *see* 11 C.F.R. §§ 116.4(b) and (c). In addition, the requirements of 11 C.F.R. §§ 116.7 or 116.8, as appropriate, including submission of information and Commission review of the debt settlement, must be satisfied. 11 C.F.R. §§ 116.4(b) and (c).

practice and contained the type of credit which was extended in the fundraiser's business with terms which were substantially similar to those given to nonpolitical and political debtors of similar risk and size of obligation; and 2) the costs charged the committee for services were at least the normal charge for those types of services.

⁶ Such remedies may include, but are not limited to: oral and written requests for payment; withholding delivery of additional goods or services until overdue debts are satisfied; imposition of additional charges or penalties for late payment; referral to a commercial debt collection service; and litigation. 11 C.F.R. § 116.4(d).

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An ongoing political committee⁷ shall not settle any outstanding debts for less than the entire amount owed, but may request a Commission determination that such debts are not payable under 11 C.F.R. § 116.9⁸ and may resolve disputed debts under 11 C.F.R. § 116.10. 11 C.F.R. § 116.2(b). A creditor may forgive the outstanding balance of a debt owed by an ongoing committee if the creditor and the ongoing committee have satisfied the requirements of 11 C.F.R. § 116.3 regarding extensions of credit by commercial vendors, the debt has been outstanding for at least 24 months, and either the creditor has exercised reasonable diligence in attempting to locate the ongoing committee and has been unable to do so; or the ongoing committee 1) does not have sufficient cash-on-hand to pay the creditor; 2) has receipts of less than \$1,000 during the previous 24 months; 3) has disbursements of less than \$1,000 during the previous 24 months; and 4) owes debts to other creditors of such magnitude that the creditor could reasonably conclude that the ongoing committee will not pay this particular debt. 11 C.F.R. § 116.8(a). A creditor that intends to forgive a debt owed by an ongoing committee shall notify the Commission by letter of its intent. 11 C.F.R. § 116.8(b).

⁷ An "ongoing committee" is any political committee that has not terminated and does not qualify as a terminating committee. 11 C.F.R. § 116.1(b). See 11 C.F.R. § 116.1(a) (definition of terminating committee).

⁸ A political committee may request that the Commission determine that a debt owed to a creditor is not payable for purposes of the Act if the debt has been outstanding for at least 24 months, the requirements of 11 C.F.R. § 116.9(b) or (c), as appropriate, have been satisfied and the creditor has gone out of business and no other entity has a right to be paid the amount owed; or the political committee has exercised reasonable diligence in attempting to locate the creditor and has been unable to do so. 11 C.F.R. § 116.9(a). The ongoing political committee shall make this request in writing, demonstrating that the requirements of 11 C.F.R. §§ 116.3 and 116.9(a) are satisfied, and shall continue to disclose the debt until the Commission has reviewed the request and determined that the debt is not payable. 11 C.F.R. §§ 116.9(c) and (d).

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F. REPORTING OF DEBTS AS "ADJUSTED BY VENDOR"

Based on the Committee's response and other information obtained in the course of this Office's investigation, it appears that the Committee failed to properly report its debts and obligations when it filed amended debt schedules for 1995 and 1996 in August 1999 that disclosed that debts owed to 11 vendors were "Adjusted by

²⁰ Although the April 2001 amendment includes occupation and name of employer information for some contributors that the Committee had formerly reported as information requested, the Committee has not corrected the errors identified by the audit review. The Committee submitted a letter dated April 19, 2001 with the amendments stating that its original solicitation includes "a clear and conspicuous request for the contributor information and informs the contributor of the requirements of federal law for the reporting of such information," and that it makes follow-up written and telephone requests for the information. Attached to the letter were form examples of a solicitation response card, a follow-up letter and a telephone log.

It appears that the Committee submitted this letter and attachments in an effort to demonstrate that it made best efforts to obtain the occupation and name of employer information. See 2 U.S.C. § 432(i); 11 C.F.R. § 104.7(b). When the treasurer of a political committee shows that best efforts have been made to obtain, maintain and submit the information required by the Act, any report shall be considered in compliance with the Act. 2 U.S.C. § 432(i); 11 C.F.R. § 104.7. The regulations provide guidance on best efforts to obtain identification from contributors. See 11 C.F.R. § 104.7(b). However, best efforts are irrelevant where, as here, the Committee obtained the necessary information but failed to disclose it on its reports. The Committee has never explained why it failed to disclose occupation and name of employer information that was available in its records.

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Vendor" when no adjustments actually occurred. The Committee's amended debt schedules for 1995 and 1996 filed in August 1999 included annotations stating that a total of \$223,590 in debts owed to 11 vendors were "Adjusted by Vendor."²¹ The 1995 amended schedules stated that one debt of \$1,060, owed to Gannon, McCarthy, Mason, Ltd. ("Gannon") was "vendor adjusted." The 1996 amended schedules stated that the following debts were "Adjusted by Vendor:" ASA (\$92,393.60); Saturn (\$40,910.58); Diversified (\$18,400); Valley Press (\$53,866.85); Direct Approach (\$5,828.01); The Widmeyer Group (\$3,082.50); Palmer Technical Services (\$4,441.65); Touch Tone Marketing (\$876.30); Chicago Telemarketing (\$910.02) and Larry McCarthy (\$1,820).

Initially, the Commission found reason to believe that the Committee received prohibited contributions in the form of debt forgiveness from three corporations, ASA, Saturn, and Diversified. This finding was based on the annotations on the Committee's amended reports, other Committee reports, and other available information from the audit including schedules of accounts payable and a small number of vendor documents.²² There was no available evidence indicating that these debts were properly settled under the Commission's regulations; for example, the vendors had not notified the Commission that they intended to forgive the debts. See 11 C.F.R. §§ 116.2, 116.3, 116.4, 116.8.

²¹ The Commission's audit revealed that the Committee had disclosed only the federal portion of its debts, and the Interim Audit Report recommended that the Committee file amended reports disclosing both the federal and non-federal portions of its debts and obligations. The Committee filed comprehensive amended reports for 1995 and 1996 on August 16, 1999 (1995) and August 20, 1999 (1996). The Committee filed additional amendments to its 1996 summary pages and Schedules D on August 25, 1999 and October 28, 1999.

²² Specifically, the Committee provided schedules of accounts payable as of December 23, 1994 and January 1, 1997 which list invoice dates, amounts and, in some cases, the purported federal and non-federal share of expenditures. In addition, the Committee's vendor documents included some invoices, letters to vendors from the Committee, and contracts.

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It appears that the Committee failed to properly report debts and obligations it owed to 11 vendors on its 1995 and 1996 amended debt schedules filed in 1999 by reporting adjustments by the vendors that had not actually occurred. The Committee admits that it reported adjustments by vendors that the vendors actually did not make. The Committee contends that it placed the annotations "Adjusted by Vendor" on the amended schedules "in error." Specifically, in its April 6, 2001 letter to the Commission, the Committee asserts that Huckaby, Davis & Associates ("Huckaby"),

which prepared those amended Schedules D, has reported to us that they made those entries in error due to what has now turned out to be a misinterpretation by them of the desires expressed by the Commission's audit staff. Those amended Schedules D were prepared by [Huckaby] after consulting with the Commission's audit staff and in a good faith belief that the "Adjusted by Vendor" entries would conform to recommendations from the audit staff. However, in fact no adjustments were made by the vendors in question and there has been no forgiveness of debt by the three vendors.

The Committee's April 18, 2001 letter reiterated that the "error was due to a misunderstanding which arose when personnel of the accounting firm, which assisted the Committee, discussed with the Commission's audit staff the recommendations" in the Interim Audit Report and that "[i]n fact, no adjustments in the debts due those three corporate vendors were made or agreed to by any of the three corporate vendors" or by the Committee.²³

²³ The debt finding in the Interim Audit Report addressed the Committee's failure to disclose the non-federal portion of shared debts; however, at no time prior to the filing of the 1999 amendments did any member of the Commission's Audit staff discuss with anyone associated with the Committee any debt being "Adjusted by Vendor."

In response to a request from this Office for additional information concerning the alleged misunderstanding and the apparent extensions of credit, the Committee provided a memorandum dated May 16, 2001 from Lisa Lisker of Huckaby.²⁴ Ms. Lisker states that Huckaby advised the Committee in the preparation of comprehensive amendments for 1995 and 1996 "in response to and in accordance with our understanding of the findings and recommendations of" the Audit staff. She continues that for the Debts and Obligations schedules, Huckaby recommended the Committee use the ending balances from its 1994 year-end report, which could not be confirmed from the Committee's records. She states:

Then, using information compiled by [Committee] staff (from existing files as well as through vendor contacts), we arrived at ending balances for each vendor for 1995 and 1996. [The Committee] then figured the appropriate amounts for the "Amount Incurred this Period" and "Amount Paid this Period" columns of the Schedules D.

In some cases, the "Amount Incurred this Period" resulted in a negative number. These were noted as being "Adjusted by Vendor." This notation was never meant to indicate any type of debt settlement with the vendors. It simply meant that ending balances due each vendor had been confirmed to the best of our abilities, based on [the Committee's] records and on information provided by vendors.

Ms. Lisker also states that revised amendments were filed deleting this notation upon notification that the Commission viewed the annotations to mean debt settlement or forgiveness and "adjustments were made in the amounts incurred and to the 1995 ending balances, to reflect, to the best that can be determined, the net amounts for each year. The ending balance for 1996 did

²⁴ Mr. Davis subsequently told a member of the Commission's Audit staff that he had not prepared the Committee's amended Schedules D for 1995 and 1996 filed in August 1999, and did not make the annotations that these debts were "Adjusted by Vendor." By letter dated May 3, 2001, this Office requested additional information from the Committee to clarify this discrepancy and to obtain additional information concerning the apparent debt forgiveness. Counsel for the Committee states, in his May 17, 2001 letter, that Mr. Davis explained that Huckaby included the annotations on the debt schedules "not to suggest there had been any forgiveness of debts, but to bring the figures in line with what that firm understood were the findings and suggestions of the Commission's Audit Division" and suggests that there is some "confusion" or misunderstanding of Mr. Davis' response.

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not change.” Finally, the Committee contends that the Commission’s Audit staff found that the Committee’s amended Debt Schedules “filed in 1999 had ‘materially disclosed the requested information’ and, as a result of their fieldwork, that there was no question of improper debt forgiveness.”²⁵

The Committee filed amended 1995 and 1996 Schedules D with its April 18, 2001 response. These amended schedules differ in several respects from the amended schedules filed by the Committee in August 1999: they do not state that the debts owed to ASA, Saturn, Diversified, or the other vendors were “Adjusted by Vendor,” and many of the figures have changed significantly.²⁶ For example, the amount listed as incurred in 1995 for ASA was reduced from \$96,231.34 on the 1999 amendments to \$3,837.74 on the 2001 amendments, the outstanding balance at the end of 1995 and the beginning of 1996 changed from \$103,192.20 to \$10,798.60, and the amount incurred in 1996 changed from “(92,393.60) Adjusted by Vendor” to \$0.00. Similarly, for Saturn the amount listed as incurred in 1995 changed from \$93,478.46 to \$52,567.88, the outstanding balance at the end of 1995 and the beginning of 1996 changed from \$96,493.50 to \$55,582.92 and the amount incurred in 1996 changed from “(40,910.58) Adjusted by Vendor” to \$0.00. Thus, the Committee changed many of the figures reported in the 1999 amendments as well as deleting or changing the annotations concerning vendor adjustments.

²⁵ It is accurate to state that the amendments filed by the Committee in 1999, as they related to the disclosure of the non-federal share of debts, were materially correct; however, the annotated entries for the 11 vendors were not considered materially correct. Moreover, the revised amendments filed in April 2001 include different numbers in some of the columns of the schedules.

²⁶ Although the debt to Gannon on the revised 1995 amendment is now annotated “Corrected by vendor” instead of “vendor adjusted,” the amount incurred, a reduction of \$1,060, has not changed. It now appears that the Committee’s report reflected a correction in the amount owed to this vendor rather than a forgiveness of the Committee’s debt.

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Other available information supports the Committee's contention that the annotations on the amendments filed in 1999 were incorrect and that no debt forgiveness occurred. In particular, several vendors, including Saturn, Diversified and Valley Press denied that they forgave any debt owed by the Committee. According to Diversified, there was no credit or reduction to the Committee's debt in 1996 and the Committee had paid the balance by August 5, 1996. In addition, documents obtained from Saturn do not reflect any debt forgiveness or adjustment of \$40,910.55; to the contrary, they indicate that Saturn made efforts to obtain payment from the Committee.²⁷ See 11 C.F.R. §§ 116.4(d)(3), 116.8(b)(3). Monthly statements Saturn sent to the Committee do not reflect any large adjustment and indicate balances owed between \$34,640.67 and \$41,896.03 in 1995 and 1996.²⁸

²⁷ For example, a letter agreement dated November 11, 1994 indicated that the Committee agreed to pay all invoices billed after October 15, 1994 within 60 days and to let Saturn rent two donor lists until Saturn had received "sufficient income to pay off the \$33,000.00 accounts receivable balance." Another letter from Saturn to the Committee dated November 15, 1995 noted the Committee's unpaid balance of \$39,190.66, and enclosed a statement listing invoices dated between 1993 and 1995, and a proposed payment agreement. In addition, a memorandum from the Committee to Saturn, dated August 2, 1996, discussed increasing the monthly payment to \$1,000 a month, and Saturn's response, dated August 5, 1996, stated that the Committee "needs to address paying us a little faster." Further, a letter from Saturn to the Committee dated March 14, 2001 enclosed an accounts receivable statement listing invoices between 1993 and 1997 and stated that the Committee owed Saturn \$30,869.42 and Saturn wanted "to work out a payment plan on this very old debt."

²⁸ Moreover, even before the April 2001 amendment, it appeared that six of the corporate vendors had not in fact forgiven Committee debts based on the similarity in the amounts the Committee reported owed to those vendors

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before and after the reported adjustments and the congruence between those amounts and the Committee's schedules of accounts payable as of 1997.

Based on the information obtained from Saturn and Diversified indicating that they did not forgive the Committee's debts, it does not appear that the Committee received prohibited contributions from those vendors. Therefore, this Office recommends that the Commission find no probable cause to believe that the Committee violated 2 U.S.C. § 441b(a) by accepting prohibited contributions from those vendors. However, information is not available concerning the Committee's debt to ASA, which appears to be out of business.³¹ The apparent connection of the Committee's treasurer, Ann E. W. Stone, to ASA and the lack of available information concerning the Committee's debt to this vendor raises questions about whether the extension of credit by ASA was in the ordinary course of business and whether ASA forgave any amount of the Committee's debt.³² See 11 C.F.R. §§ 116.3 and 116.4. Because insufficient information concerning ASA's extension of credit to the Committee is available to clarify whether it was in the ordinary course of business and whether ASA forgave the Committee's debt, this Office recommends that the Commission take no further action with respect to the Committee's receipt of a prohibited contribution from this vendor.

³¹ The Committee did not provide information concerning any of the vendors; information concerning the Committee's debts was obtained from Saturn and Diversified but not from ASA.

³² Ann E. W. Stone, the treasurer of the Committee, was also the founder, President, Treasurer and registered agent of ASA. See Dun & Bradstreet Report (July 20, 2000). The Virginia State Commerce Commission terminated ASA's corporate existence as of September 1, 1997 for failure to pay the annual corporate registration fee. Information available to this Office indicates that ASA stopped conducting business in February 1997 after the Internal Revenue Service seized ASA's bank accounts. Documents reviewed during the audit indicate that in 1996, the Committee sent payments due to ASA to the Internal Revenue Service instead. According to letters from the Committee to the Reports Analysis Division, at the request of the Internal Revenue Service, the Committee's payments to ASA were made to the Internal Revenue Service in payment of ASA's debt to them.

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Therefore, this Office recommends that the Commission find no probable cause to believe that Republicans for Choice Political Action Committee and Ann E. W. Stone, as treasurer, violated 2 U.S.C. § 441b(a) by knowingly accepting prohibited contributions in the form of forgiveness of debts from Saturn Corporation and Diversified Data Processing & Consulting, Inc. dba Diversified Data & Communications, Inc. This Office also recommends that the Commission take no further action concerning the receipt by the Republicans for Choice Political Action Committee and Ann E. W. Stone, as treasurer, of prohibited contributions from Ann E. W. Stone & Associates in violation of 2 U.S.C. § 441b(a).

III. GENERAL COUNSEL'S RECOMMENDATIONS

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7. Find no probable cause to believe that Republicans for Choice Political Action Committee and Ann E. W. Stone, as treasurer, violated 2 U.S.C. § 441b(a) by knowingly accepting prohibited contributions in the form of forgiveness of debts from Saturn Corporation and Diversified Data Processing & Consulting, Inc. dba Diversified Data & Communications, Inc.; and
8. Take no further action concerning the receipt by the Republicans for Choice Political Action Committee and Ann E. W. Stone, as treasurer, of prohibited contributions from Ann E. W. Stone & Associates in violation of 2 U.S.C. § 441b(a).

3/1/02
Date


Lawrence H. Norton
General Counsel

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