FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, D.C. 20463

SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR: 5316
DATE COMPLAINT FILED: October 8, 2002
DATE OF NOTIFICATION: October 15, 2002
DATE ACTIVATED: May 8, 2003

EXPIRATION OF STATUTE OF LIMITATIONS:
September 30, 2007

COMPLAINANT:	Alex N. Vogel, General Counsel National Republican Senatorial Committee
RESPONDENT:	Torricelli for U.S. Senate, Inc. and Timothy Sean Jackson, as treasurer[1]
RELEVANT STATUTE AND REGULATIONS:	2 U.C.C. § 439a 11 C.F.R. § 102.9(e) 11 C.F.R. § 110.1(b)(3)(i)(C)
INTERNAL REPORTS CHECKED:	Federal Disclosure Reports
FEDERAL AGENCIES CHECKED:	None

I. INTRODUCTION

On September 30, 2002, then-Senator Robert Torricelli ("Torricelli") of New Jersey, who had won nomination for re-election in an earlier primary election, withdrew from the general election campaign. Given his withdrawal, the issue in this matter is whether the Federal Election Campaign Act, as amended ("the Act"), or the Commission's regulations required Torricelli's principal campaign committee, Torricelli for U.S. Senate, Inc. ("the Committee"), to return funds

[1] Mr. Jackson replaced former treasurer Michael J. Perrucci.

raised for his general election prior to his withdrawal.[2] The complaint contended that the Committee was exploring ways either to become the authorized committee of candidate Frank Lautenberg or to ensure in some other manner that all of its cash on hand was used, either directly or indirectly, to benefit Lautenberg's candidacy. It alleged that this would violate 11 C.F.R. §§ 102.9(e) and 110.1(b)(3)(i)(C), which in the complainant's view required the Committee to refund all of its cash to contributors. *See generally* Complaint at 1-4. The Committee's response disagreed and maintained that the Committee could use "excess campaign funds" in compliance with 2 U.S.C. § 439a. As events transpired, the Torricelli committee did not attempt to become a Lautenberg authorized committee, and engaged in no wholesale transfers of funds to either Lautenberg's committee or any national or state party committee.[3] Thus, we treat these allegations as moot. This report deals with the remaining allegation concerning the Torricelli committee's supposed obligation to make refunds. As discussed below, this Report concludes that the Committee was not required to refund contributions received for Torricelli's general election race.[4]

II. DISCUSSION

The complaint in this matter stated that Torricelli, because of his withdrawal from the New Jersey Senate race, "will under no circumstances be a 'candidate' in [the general] election."

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[2] According to the disclosure reports, the Committee received no contributions after Torricelli's withdrawal.

[3] Prior to enactment of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), a candidate's excess campaign funds could be transferred without limitation to national, State, and local political party committees. BCRA eliminated the word "excess" from 2 U.S.C. § 439a (*see* footnote 6, *supra*) but otherwise continued to permit candidates to transfer funds without limitation to these party committees. 2 U.S.C. § 439a(a)(4).

[4] The complaint in this matter also requested that the Commission issue a Policy Statement notifying all authorized committees that they must return contributions to their contributors if the candidate is not a candidate in the election for which the funds were given. Additionally, the complaint requested that the Commission seek an injunction or other relief to ensure that the Committee did not transfer its funds to any other committee, rather than returning the funds to contributors. The Commission, however, rejected those requests because the complaint's request for a Policy Statement did not conform to the Administrative Procedure Act, and because 2 U.S.C. § 437g(a)(6) provides that the Commission may seek civil actions for relief, including injunctive relief, only at the end of the administrative enforcement process.

Drawing on that assumption, the complaint relies on excerpted language in 11 C.F.R. §§ 102.9(e) and 110.1(b)(3)(i)(C) to the effect that candidates who are not candidates in the general election shall refund, redesignate or reattribute contributions made for the general election. In pertinent part, 11 C.F.R. § 102.9(e) states:

> . . . If the candidate, or his or her authorized committee(s), receives contributions prior to the date of the primary election, which contributions are designated in writing by the contributor for use in connection with the general election, such candidate or such committee(s) shall use an acceptable accounting method to distinguish between contributions received for the primary election and contributions received for the general election . . . *If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, or redesignated in accordance with 11 C.F.R. 110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 C.F.R. 110.1(k)(3).*

(emphasis added).

11 C.F.R. § 110.1(b)(3)(i) requires that, with respect to "[a] contribution designated in writing for a particular election, but made after that election . . . to the extent that such contribution exceeds net debts outstanding, the candidate or the candidate's authorized political committee shall return or deposit the contribution within ten days . . ." 11 C.F.R. § 110.1(b)(3)(i)(C) goes on to state that *"if the candidate is not a candidate in the general election, all contributions made for the general election shall either be returned or refunded to the contributors or redesignated in accordance with 11 C.F.R. 110.1(b)(5) or reattributed in accordance with 11 C.F.R. 110.1(k)(3), as appropriate."* (emphasis added).

According to the complaint, because language in the regulations required that the Committee refund contributions received for the general election race if Torricelli was not a candidate in that election, the Committee could not use these funds as "excess campaign funds" pursuant to 2 U.S.C. § 439a. The Committee disputed this assertion.

In a situation identical to Senator Torricelli's, the Commission determined that 11 C.F.R. §§ 102.9(e) and 110.1(b)(3)(i)(C) did not apply because the withdrawn candidate had in fact been a "candidate in the general election" for part of the general election campaign. In Advisory Opinion 1994-31, Representative Dean Gallo had won nomination in a primary election and later withdrew from the general election. The Commission advised that the Gallo Committee could retain general election contributions made before and after the primary and before the candidate's withdrawal from the general election race to pay for any general election expenditures, reasoning that although Representative Gallo would not be a candidate on the date of the general election, he had campaigned for some period as a general election candidate and had incurred expenses in that capacity.[5] AO 1994-31 further stated that, pursuant to prevailing law, Representative Gallo's excess campaign funds could be contributed to tax-exempt organizations described in section 170(c) of Title 26 or could be used for any other lawful purpose (but could not be converted to personal use).[6] This was consistent with the Commission's earlier Advisory Opinion 1988-41.

In AO 1988-41, then-Representative Stratton withdrew from the primary election four days after he filed for reelection. While the Commission said that any contributions designated for the general election had to be returned pursuant to 11 C.F.R. §§ 102.9(e)(2) and 110.1(b)(3)(i) because Stratton was not a candidate in the general election, it also said that his committee "need not return

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[5] In contrast, advisory opinions required refunds when individuals did not participate at all in a particular election for which they had received contributions; in such cases, committees were required to refund all contributions designated for that election. *See* AO 2003-18 (committee of former Federal officeholder who failed to qualify for general election was not allowed to retain general election contributions); *see also* AOs 1992-15, 1986-17, and 1986-12.

[6] BCRA significantly altered 2 U.S.C. § 439a. In particular, the phrases "contributions that are in excess of any amount necessary to defray his expenditures" and "other lawful purpose" have been deleted. Accordingly, the text of 11 C.F.R. § 113.1(e), which defined "excess campaign funds," has been deleted. 11 C.F.R. § 113.2(d), which described "other lawful purpose" has also been removed. As the Explanation and Justification for post-BCRA 11 C.F.R. § 113.2 states, "campaign funds may be used only for the enumerated purposes identified in paragraphs (a), (b) and (c) of section 113.2, and [] this listing is exhaustive." Explanation and Justification, Final Rules on Personal Use of Campaign Funds, 67 FR 76970 at 76975 (Dec. 13, 2002). However, these changes do not affect the analysis and conclusions in this Report.

unspent primary election-related contributions to the donors," because he had been a candidate, albeit briefly, in that election. The Commission advised that the Stratton Committee could use such funds for purposes consistent with 2 U.S.C. § 439a, including using the funds to pay for primary expenses and applying any excess campaign funds to expenses incurred in the remaining months of Stratton's term as Representative.

In this matter, Senator Torricelli had been a candidate for the general election for several months preceding his withdrawal from the race. Thus, the Committee, consistent with AOs 1994-31 and 1988-41, was not required to refund its excess campaign funds pursuant to 11 C.F.R. §§ 102.9(e) and 110.1(b)(3)(i)(C). Since the complaint made no allegation that the Committee has used campaign funds for any purposes that violated the Act and the prospective speculated uses did not occur or were within the categories of permitted uses under 2 U.S.C. § 439a, this Report does not address the Committee's disposition of its campaign funds.[7] *Cf.* Statement of Reasons in MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, issued December 21, 2000) ("Absent personal knowledge, the Complaint, at a minimum, should have made a sufficiently specific allegation . . . so as to warrant a focused investigation that can prove or disprove the charge.")

Based on the above, this Office recommends that the Commission find no reason to believe that Torricelli for U.S. Senate, Inc. and Timothy Sean Jackson, as treasurer, violated 11 C.F.R.

[7] Even so, this Office has reviewed the Committee's 2002 Year End and subsequent disclosure reports, and has not discovered any disbursements that are obviously impermissible.

§§ 102.9(e) and 110.1(b)(3)(i)(C).

III. RECOMMENDATIONS

1. Find no reason to believe that Torricelli for U.S. Senate, Inc. and Timothy Sean Jackson, as treasurer, violated 11 C.F.R. §§ 102.9(e) and 110.1(b)(3)(i)(C).

2. Approve the appropriate letters.

3. Close the file.

Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh
Associate General Counsel
for Enforcement

2/6/04
Date

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