



FEDERAL ELECTION COMMISSION

WASHINGTON D.C. 20463

AUG 16 2004

CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Ms. Kara Davis

Orem, Utah 84097

RE MUR 5333

Dear Ms. Davis:

On June 30, 2004, the Federal Election Commission found that there is reason to believe you violated 2 U.S.C. § 441f, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, 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.

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.

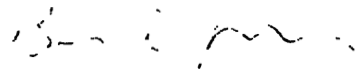
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If you intend to be represented by counsel in this matter, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other 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 Mark Allen, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Bradley A. Smith
Chairman

Enclosures
Factual and Legal Analysis
Procedures
Designation of Counsel Form

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FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Kara Davis MUR 5333

I. GENERATION OF MATTER

This matter was generated based on information ascertained by the Federal Election Commission ("the Commission") in the normal course of carrying out its supervisory responsibilities See 2 U S C § 437g(a)(2)

II. FACTUAL AND LEGAL ANALYSIS

A. Available factual information

Kara Davis contributed \$1,000 to John Swallow for Congress ("Committee") on March 31, 2002. The available information indicates that Kara Davis's contribution was made by a check drawn on the account of Winterfox, LLC ("Winterfox") The Winterfox check was attributed to Kara Davis and several other persons, as set forth in the chart below. Winterfox is a limited liability company ("LLC") identified in public records as an active LLC organized in Utah.

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterfox, LLC	3/28/02	\$5,000	Kara Davis, Evan Bybee, Tamra Bybee, Taige Bybee, Nicaïl Bybee ¹

Winterfox wrote a \$5,000 check to the Committee dated March 28, 2002, signed by Evan Bybee, with a memo line reading "From Evan, Tamra, Taige, Kara, Nicaïl \$1000 ea," i e , Kara

¹ The Committee disclosed the receipt of \$1,000 each from Kara Davis and each Bybee on March 31, 2002, designated for the Republican party convention

Davis and the four Bybees The Committee sent a letter to Winterfox, dated April 4, 2002, expressing thanks for the contribution and then stating

The strict Federal Election Commission regulations [prohibit] making contributions on behalf of someone else to federal election campaigns We must refund this money to you within thirty (30) days unless you can establish in writing that the contribution came from personal funds of a corporate drawing account, such as a draw against salary, wages, dividends, etc Please confirm that such was indeed the case with this check by signing below....

The letter provides fields for the signature, occupation, employer and date of Kara Davis and each Bybee The completed fields contain signatures, occupations and employers for all five individuals dated April 10 and 11, 2002 One of the five, Tamra Bybee, listed Winterfox as her employer, Taige Bybee and Nicail Bybee listed other entities; and Evan Bybee and Kara Davis listed "self" The Committee did not disclose Winterfox as the employer of any of the five individuals

B. Law on contributions by LLCs, corporations and partnerships

The Commission's regulations establish two possible treatments for contributions by business entities that are recognized as limited liability companies under the laws of the State in which they are established. 11 C F R. § 110 1(g)(1) The treatment depends on how the firm elects to file with the Internal Revenue Service ("IRS"). *Id* at 110.1(g)(2). If the contribution is from an LLC filing with the IRS as a partnership pursuant to 26 C.F R § 301 7701-3, or from one that fails to make an election, it shall be treated as a contribution from a partnership pursuant to 11 C F.R § 110 1(e) *Id* If the contribution is from an LLC electing to file with the IRS as a corporation, the contribution is prohibited 2 U.S C § 441b(a) and 11 C F R § 110 1(g)(3) An LLC that makes a contribution pursuant to this provision shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution.

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1 11 C.F.R. § 110.1(g)(5).

2 The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits
3 corporations from making contributions in connection with any election and prohibits any
4 candidate or political committee from knowingly accepting or receiving any such contributions
5 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any
6 corporation from consenting to any contribution by the corporation. The Commission has
7 recognized, however, limited circumstances in which a corporate employee may make a
8 contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing
9 account established to permit an employee to draw against her salary, profits or other
10 compensation. See *Campaign Guide for Congressional Candidates and Committees* (2002),
11 page 21; *FEC Record*, September 1978, page 1.² Contributions may not be made from the
12 general treasury fund of corporations. See 2 U.S.C. § 441b(a), cf. *FEC v. Massachusetts Citizens*
13 *for Life*, 479 U.S. 238, 241 (1986).

14 A contribution by a partnership shall be attributed to the partnership and to each partner
15 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions
16 which shall be provided by the partnership to the political committee or candidate, or 2) by
17 agreement of the partners, as long as only the profits of the partners to whom the contribution is
18 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses
19 increased) in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e). A
20 contribution by a partnership shall not exceed the Act's limitations on contributions, and no

² The only place in the Act or the Commission's regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. See 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a “non-repayable corporate drawing account of the individual contributor.” *Id.* See also Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

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portion of such contribution may be made from the profits of a corporation that is a partner *Id*

C. Analysis of contributions

Winterfox, an LLC, wrote a \$5,000 contribution check to the Committee. Winterfox attributed this amount to Kara Davis and several other persons. No contribution was attributed to the LLC itself. The threshold question regarding LLC contributions is whether the LLC is to be treated as a corporation or as a partnership, which depends on whether the LLC elected federal income tax treatment as a corporation. *See* 11 C F R § 110 1(g) The available information does not indicate whether Winterfox elected tax treatment as a corporation.

The Winterfox check on its face attributes the contributions among several individuals, but it does not appear that the LLC affirmed to the Committee that it is eligible as an entity to make the contributions in the first place *See* 11 C F R. § 110 1(g)(5) Instead, the Committee's letter in response to the Winterfox contribution check invites the attributed individual contributors to categorize the contributions as coming from "personal funds of a corporate drawing account, such as a draw against salary, wages, dividends, etc " Each individual contributor appeared to agree with this categorization by signing in the space provided. While the Commission permits contributions from corporate employees drawn on nonrepayable corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such accounts. First, the check appears to be drawn on the general treasury account of an LLC, no account name is indicated on the checks relating to a possible nonrepayable drawing account Second, the attributed individual contributors may not even be employees of the LLC As noted above, only a single attributed contributor listed Winterfox as her employer

There appear to be contributions made in the name of another whether Winterfox was treated as a corporation or as a partnership The Act prohibits contributions made in the name of

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1 another person and prohibits a person from knowingly permitting her name to be used to effect
2 such a contribution *See* 2 U.S.C § 441f If Winterfox was treated as a corporation, then it made
3 contributions in the names of the various individuals to whom the contribution was attributed. If
4 Winterfox was treated as a partnership, then the attributed partners made contributions in the
5 names of the other individuals who are not partners In addition, the various attributed individual
6 contributors may have knowingly permitted their names to be used to effect the Winterfox
7 contribution on their behalf *See* 2 U S C § 441f Therefore, there is reason to believe that Kara
8 Davis violated 2 U.S.C § 441f

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