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Via Hand-Delivery

Mark D. Shonkwiler, Esq.
Assistant General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: **MUR 5440—Democratic National Committee**

Dear Mr. Shonkwiler:

Further to your letter of October 22, 2004, this will respond on behalf of our clients, DNC Services Corporation/Democratic National Committee (the "DNC") and Andrew Tobias, as Treasurer, to the Commission's notification dated September 30, 2004, that the Complaint in the above-referenced MUR "indicates that the" DNC "may have violated sections of the Federal Election Campaign Act of 1971, as amended ('the Act')."

For three reasons, the Commission should find no reason to believe that the DNC has violated the Act or the Commission's regulations and should dismiss the case and close the file as to the DNC. *First*, the Complaint does not name the DNC as a respondent; therefore, under the Commission's rules, either the Complaint is defective for not having identified as a respondent a party that is alleged to have committed a violation, or the Commission must conclude that the Complaint simply contains no such allegation. *Second*, the Act requires the Commission to notify "any person alleged in a complaint to have committed a violation," and to send such notice within five days after receipt of the complaint. 2 U.S.C.§437g(a)(1). The Commission failed to send any such notice, in this case, for nearly six months. *Third*, the Complaint does not set forth any facts whatsoever that would establish any violation, by the DNC, of the Act or the Commission's rules.

I. The Complaint Does Not Identify the DNC as a Respondent

The Complaint, filed by the Republican National Committee and Bush-Cheney '04, specifically names forty-six respondents. (Complaint, Attachment P). The DNC is conspicuously *absent* from this list. Certainly, if the RNC or Bush-Cheney '04 intended to allege facts that would establish a violation of the Act by the DNC, the DNC would have been named as a respondent.

The Commission's rules clearly require that a complaint "clearly identify as a respondent each person or entity who is alleged to have committed a violation." 11 C.F.R. §111.4(d)(1). The Commission's rules further require that "[i]f a complaint does not comply with the requirements of 11 C.F.R. §111.4, the General Counsel shall so notify the complainant...that *no action shall be taken on the basis of that complaint.*" *Id.* §111.5(b)(emphasis added). The Commission's rules "require substantial compliance with the technical requirements for complaints before going forward with the FEC enforcement process based upon a particular complaint." *Federal Election Comm'n v. Franklin*, 718 F. Supp. 1272, 1278 (E.D. Va. 1989).

In this case, the RNC-Bush/Cheney Complaint does *not* clearly identify the DNC as a respondent. Indeed, counsel for the RNC contacted DNC counsel, by telephone, on the day the Complaint was filed, to inform the DNC specifically that the DNC was *not* being named as a respondent in this Complaint. In these circumstances, it must be the case either that (i) the Complaint does not clearly identify the DNC as a respondent because the DNC is not alleged to have committed a violation; or (ii) the Complaint is defective under section 111.4 because it does not clearly identify the DNC as a respondent even though the DNC is alleged to have committed a violation.

In the former case—if the DNC is not alleged to have committed a violation—clearly the Complaint must be dismissed, as to the DNC. In the latter case--if the Complaint "does not comply with the requirements of 11 CFR 111.4" because it does not clearly identify the DNC as a respondent even though the DNC is alleged to have committed a violation—the Commission's rules (§111.5(b)) require that "no action be taken" on the basis of the Complaint against the DNC. In either case then, the Complaint *must* be dismissed, as to the DNC.

These requirements of the statute and the Commission's rules are not mere technicalities. "In addition to protecting the due process rights of respondents, the notice and opportunity to respond requirements of section 437g(a) operate as a check on the investigatory power of the FEC." *FEC v. Franklin, supra*, 718 F. Supp. at 1277. The FEC has "no such roving statutory functions" to conduct investigations and "mere 'official curiosity' will not suffice as the basis for FEC investigations...." *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d 380, 387-88

(D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981). The Commission has no authority whatsoever to launch an investigation of the DNC based on a complaint which specifically and intentionally does not identify the DNC as a respondent.

II. The Commission Failed to Notify the DNC of the Complaint as Required by the Act

The Act unambiguously provides that, "Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed...a violation." 2 U.S.C. §437g(a)(1). This requirement is reinforced by the Commission's own regulations. 11 C.F.R. §111.5(a).

In this case, the Commission failed to notify the DNC about the Complaint for nearly *six months* after the Commission had received the Complaint. The Commission's letter of September 30, 2004 merely states that, "the complaint was not sent to you earlier due to administrative oversight." It is impossible to understand, however, what sort of "administrative oversight" could lead the Commission to overlook, for six months, the purported need to identify the DNC as a respondent in a major case brought by the Republican National Committee and the Republican presidential campaign.

To be sure, failure to notify a respondent within five days of the Commission's receipt of a Complaint may not bar the Commission from proceeding in the absence of a showing of bad faith. *FEC v. Franklin, supra*, 718 F. Supp. at 1277. It must be the case, however, that a court will "not give the Commission free reign to disregard the notice provision," *Equal Opportunity Employment Comm'n v. Burlington Northern, Inc.*, 644 F.2d 717, 720 (8th Cir. 1981). *See Equal Opportunity Employment Comm'n v. Liberty Loan Corp.*, 584 F.2d 853 (8th Cir. 1978)(EEOC action barred by delay which was inordinately long and unexplained). Just as "failure of timely notice may preclude an EEOC action if either willfulness or bad faith on the part of the agency or substantial prejudice to the employer is shown," *Burlington Northern, Inc., supra,* 644 F.2d at 721, so too should such a showing preclude the FEC from proceeding after failing to meet its own statutory notice requirement.

The FEC's six-month delay in notifying the DNC that—contrary to the plain language and intent of the Complaint itself--the Commission considers the DNC to be a respondent, may well have prejudiced the DNC's ability to defend itself in this matter. The DNC was not on notice to preserve or gather exculpatory materials and other information. Further, the OGC had before it in October 2004 exactly the same Complaint as it had before it in April 2004. It is difficult to understand what legitimate explanation there might be for the Commission's failure to notify the DNC for six months that the Commission considers the DNC to be a respondent in this case.

For this reason, too, the Complaint must be dismissed as to the DNC.

III. The Complaint Does Not State Any Violation by the DNC of the Act or the Commission's Rules

The Complaint does not set forth *any* facts whatsoever that would, if proven, establish any violation by the DNC of the Act or Commission's rules. The Complaint does not, anywhere in its 67 pages or hundreds of pages of exhibits, *ever* charge that the DNC unlawfully coordinated with any of the "section 527" organizations that are the focus of the Complaint. Nor does the Complaint contain any facts that would indicate any such unlawful coordination.

The Complaint does charge that certain individuals alleged to be involved with various "section 527" organizations have roles or positions with the DNC, or with the "Democratic Party," creating "ties that demonstrate impermissible coordination with the Kerry campaign and the Democratic party...." (Complaint, p. 28). The alleged "key individual leaders of the Democratic soft money conspiracy" identified by the Complaint (p. 29) include:

(1) Harold Ickes, who is said to "control[]" The Media Fund, and who "is a member of the Democratic National Committee's Executive Committee, which by definition, coordinated with the Presidential campaign and therefore is an agent of the Kerry campaign who learns of the plans and needs of the campaign." (Complaint p. 29).

(2) Governor Bill Richardson, said to be "vice president of one soft money 527 broadcast advertisement group called Voices for Working Families and another soft money 527 broadcast advertisement group aimed particularly at Hispanic voters in Arizona, Florida, New Mexico and Nevada called Moving America Forward." (*Id.* p. 31). The Complaint notes that Richardson is "the chair of the Democratic National Convention." (*Id.*)

(3) Linda Chavez-Thompson, currently the vice chair of the DNC and said to be "treasurer of the soft money 527 Voices for Working Families." (*Id.* pp. 32-33).

(4) Minyon Moore, former chief operating officer of the DNC, said by the Complaint to be "a member of ACT [America Coming Together]'s Executive Committee." (*Id.* p. 31).

Under the Commission's rules, a communication by a "section 527" organization is unlawfully coordinated with a political party committee when the communication

meets (i) a "content" standard and (ii) a "conduct" standard. 11 C.F.R. §109.21(a). [1] Assuming for the sake of argument that the "content" standard has been met by various communications paid for by one or more of the section 527 groups mentioned above, the issue presented is whether the Complaint in this MUR states any facts that could show that the "conduct" standard has been met.

The Complaint does *not* set forth any such facts, as to any of the individuals identified above:

Harold Ickes. With respect to Mr. Ickes, the Complaint alleges that he is a member of the DNC Executive Committee "which, by definition, coordinates with the Presidential campaign and therefore is an agent of the Kerry campaign who learns of the plans and needs of the campaign." (Complaint p. 29). The Complaint further alleges that Ickes would know that the Kerry campaign would need financial assistance after the primaries "based on his active participation in the activities of the DNC...." (*Id.* p. 54). Further, the Complaint charges, "[i]t defies credibility that the plans he [Ickes] is now executing with soft dollars from the Media Fund were not discussed as a 'need' or 'project' by the DNC's Executive Committee during this election cycle, or that he is not 'using' information he learned from his DNC position as part of his soft money Section 527 political committee activities." (*Id.* p. 59).

To the extent that the Complaint is suggesting that Ickes is an "agent" of the DNC within the meaning of the second prong of the "conduct" standard, 11 C.F.R. §109.21(d)(2), the suggestion is absurd. An "agent", for purposes of the coordination regulations, is someone who has actual authority to request or suggest that a paid public communication be created, produced or distributed; to make or authorize such a communication; to create, produce or distribute such a communication on behalf of the party committee; or to be materially involved in decisions regarding the content, audience, media outlet, size or frequency, etc. of the communication. 11 C.F.R. §109.3(a).

There are sixty-one (61) members of the DNC's Executive Committee, including officials of labor organizations, of non-registered political organizations and of a wide variety of non-profit organizations and advocacy groups. *See* list of members of DNC Executive Committee, attached as Exhibit A hereto. Further, under the Charter of the Democratic Party, Article Nine, section 12, all meetings of the DNC Executive Committee must be and are open to the public; indeed they are routinely televised on C-

[1] Although the Commission's coordination rules were struck down in *Shays v. FEC*, CA No. 02-1984 (D.D.C., Oct. 19, 2004), all conduct complained of in the Complaint in this MUR took place before that decision was issued and, in any event, the Commission has made clear that its regulations remain in effect pending completion of a new rulemaking proceeding.

SPAN. Attached as Exhibits B through F, inclusive, are the full transcripts of meetings of the DNC Executive Committee during this election cycle.

None of the 61 members of the DNC Executive Committee, merely by virtue of being members of that committee, has authority to do anything relating to paid communications by the DNC. Nothing in the Charter or Bylaws of the DNC suggests the existence of any such authority (*see,* Charter and Bylaws of DNC attached as Exhibit G); no corporate resolution of DNC Services Corporation, the fiscal arm of the DNC, confers any such authority; and there are no facts set forth in the Complaint indicating the existence of any such authority. Thus, merely by virtue of being a member of the Executive Committee, Mr. Ickes is not and, during this election cycle, has never been an "agent" of the DNC within the meaning of section 109.3(a) of the Commission's regulations. Accordingly, that Mr. Ickes may have been materially involved in the decisions regarding communications of The Media Fund does *not* meet the second prong of the conduct standard under section 109.21(d)(2). For the same reason, Mr. Ickes may well have had "substantial discussions" about the communications of The Media Fund, but because he is not an "agent" of the DNC , the third prong of the "conduct" standard, section 109.21(d)(3), cannot be met either.

Finally, there is no evidence whatsoever set forth in the Complaint suggesting that Mr. Ickes actually knew anything, other than public information, of the plans, projects, needs or strategies of the DNC.

Governor Bill Richardson. Governor Bill Richardson was elected permanent Chair of the 2004 Democratic National Convention, meaning simply that he presided over the Convention proceedings. His duties, as to the Convention itself, were solely parliamentary. *See* Procedural Rules of the 2004 Democratic National Convention, sections C(3) and E, in the Report of the Rules Committee of the 2004 Democratic National Convention attached hereto as Exhibit H. Nothing about his role as permanent chair of the Convention would remotely give Governor Richardson the types of authority, described in section 109.3(a), that could make him an "agent" of the DNC for purposes of the coordination rules. Nor would any aspect of his responsibilities as permanent chair provide Governor Richardson with any non-public information about the plans, projects, strategies or needs of the DNC. Accordingly, that Governor Richardson also may have had roles in section 527 organizations would not satisfy the second or third prongs of the "conduct" standard, 11 C.F.R. §§109.21(d)(2) & (3).

Linda Chavez-Thompson. The Complaint does not allege that Ms. Chavez-Thompson was "materially involved" in or had "substantial discussions" about any communication paid for by any section 527 organization. That she may be, or may have been, treasurer of a section 527 organization does not necessarily mean that she had any such involvement or discussions. In any event, as a rule, vice chairs of the DNC are not involved in the day-to-day operations of the DNC and are not privy to any non-public

information concerning the plans, projects, strategies or needs of the DNC with respect to media, voter contact operations or any other form of public communication. Further, vice chairs of the DNC do not have, and have never had, any authority, by virtue of being vice-chair of the DNC, to do any of the things described in section 109.3(a) of the Commission's rules.

Minyon Moore. Minyon Moore was chief operating officer of the DNC during 2001 and 2002. The Complaint alleges that she is, or has been, on the executive committee of America Coming Together ("ACT"). (Complaint p. 31). There is no unlawful coordination, under the "former employee" prong, 11 C.F.R. §109.21(d)(5), unless Ms. Moore used or conveyed to ACT information about the DNC's plans, project, activities or needs that was material to ACT's communications. There is no allegation in the Complaint that she did so.

For these reasons, the Complaint does not set forth facts that, even if proven, would establish any unlawful coordination between the DNC and any of the "section 527" groups referenced in the Complaint.

CONCLUSION

For the reasons set forth above, the Commission should dismiss the Complaint and close the file, as to the DNC, without proceeding further; and, if it does proceed further, the Commission should find no reason to believe that the DNC has violated the Act or the Commission's rules and should then dismiss the case and close the file.

Respectfully submitted,

Joseph E. Sandler
Neil P. Reiff

Attorneys for Respondent DNC Services Corporation/Democratic National Committee and Andrew Tobias, as Treasurer