McDermott
Will & Emery

Boston Brussels Chicago Dusseldorf London Los Angeles Miami Milan
Munich New York Orange County Rome San Diego Silicon Valley Washington, D C

Bobbie Burchfield
Attorney at Law
bburchfield@mwe com
202 756 8003

January 11, 2005

BY HAND DELIVERY

Mark Goodin, Esquire
Office of General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Matter Under Review No. 5628

Dear Mr. Goodin:

I am writing to respond to the Federal Election Commission Chairman's letter informing my client, Mr. Mitchell Becker, about the Commission's proposal for a conciliation agreement in Matter Under Review Number 5628. Although the letter is dated December 22, 2004, my office did not receive it until December 28, 2004. The delay in delivery was likely caused by the Christmas holiday.

After reviewing the conciliation agreement proposal and the Commission's factual and legal analysis with my client, we discovered various factual inaccuracies and unwarranted legal assumptions.

FACTUAL BACKGROUND

Mr. Becker is a past employee of AMEC Construction Management, Inc., formerly known as Morse Diesel International, Inc. Before he left the company in 1994, my client served as Chief Counsel for AMEC. In 1998, Mr. Becker returned to AMEC as a senior executive. however, he did not begin serving as AMEC's Chief Executive Officer until 2001. None of the conduct alleged in the factual and legal analysis occurred during Mr. Becker's tenure as CEO.

In October 2003, AMEC notified the Commission that it appeared to have violated the Federal Election Campaign Act by reimbursing employees an approximate sum of $17,000 for their contributions to federal election campaigns during 1998 to 2000. (Factual and Legal Analysis at 1) Although the events occurred before Mr. Becker became CEO of AMEC,

the Commission has alleged that he "directed or actively participated in AMEC's disguised corporate reimbursement scheme." (Analysis at 3) Moreover, Mr. Becker is accused of consenting to $2,000 in reimbursements for his contribution to a federal campaign sometime between October 15, 1998, and December 22, 1999. (Analysis at 2-3) The Commission also suggests that Mr. Becker offered to reimburse an employee's contribution in 2002, (Analysis at 2), but Mr. Becker vigorously denies that allegation.

Based upon these allegations, the Commission claims that Mr. Becker: (1) knowingly and willfully consented to a corporate reimbursement for a contribution, (2) knowingly and willfully assisted in making contributions in the name of another, and (3) knowingly and willfully permitted his name to be used to effect a contribution in the name of another.

Even if the Commission's allegations were accurate, the law would not support a civil penalty, much less a finding of knowing and willful misconduct.

DISCUSSION

I. The Commission's Claims are Time-Barred by the Federal Statute of Limitations.

Because the Federal Election Campaign Act does not contain an internal statute of limitations for civil claims, the omnibus five-year statute of limitations found in 28 U.S.C. § 2462 applies to any enforcement action in which the Commission pursues a civil penalty. *See Federal Election Commission v Williams*, 104 F.3d 237, 239-40 (9th Cir. 1996), *cert. denied*, 522 U.S. 1015 (1997); *Federal Election Commission v. Christian Coalition*, 965 F. Supp. 66, 69 (D.D.C. 1997); *Federal Election Commission v. National Right to Work Committee, Inc.*, 916 F. Supp. 10, 13 (D.D.C. 1996); *Federal Election Commission v. National Republican Senatorial Committee*, 877 F. Supp. 15, 17 (D.D.C. 1995). A claim "accrues" when the events at issue first occur or when the alleged violation is committed, not when the circumstances are first reported to the Commission. *See Christian Coalition*, 965 F. Supp. at 70; *National Right to Work Committee*, 916 F. Supp. at 13; *National Republican Senatorial Committee*, 877 F. Supp. at 19-20. Administrative procedures do not toll the statute of limitations. *See National Right to Work Committee*, 916 F. Supp. at 14; *National Republican Senatorial Committee*, 877 F. Supp. at 20.

In its factual and legal analysis, the Commission alleges that Mr. Becker accepted $2,000 in reimbursements from AMEC for political contributions. (Analysis at 2-3.) The violation allegedly occurred between October 15, 1998, and December 22, 1999, which is beyond the Federal Government's 5-year statute of limitations. (Analysis at 2-3.) The Commission also claims that Mr. Becker "appears" to have offered to reimburse an employee's contribution in 2002. (Analysis at 2.) As indicated, Mr. Becker denies that he offered to reimburse any AMEC employee. Moreover, an "offer" to reimburse is not a violation; no actual reimbursement transaction in 2002 is alleged and no violation could have occurred in 2002. Without an

allegation that Mr. Becker violated the Act during the last 5 years, all of the Commission's claims are time-barred pursuant to 28 U.S.C. § 2462.

II. The Commission Improperly Alleges Knowing and Willful Violations of the Federal Election Campaign Act.

The Federal Election Campaign Act enables the Commission to impose civil penalties upon parties who allegedly commit knowing and willful violations of *federal election laws*. *See* 2 U.S.C. § 437g(a)(5)(B); 11 C.F.R. § 111.24(a)(2). According to a controlling decision by the District of Columbia Circuit, an individual commits a knowing and willful violation of a federal election law when his behavior is "equivalent to a knowing, conscious, and deliberate flaunting of the Act." *A.F.L.-C.I.O v. Federal Election Commission*, 628 F.2d 97, 101 (D.C. Cir. 1980) (internal citation omitted). To paraphrase, the individual must have *specific knowledge* that his actions are unlawful.

A.F.L -C.I.O. v. Federal Election Commission describes the proper "knowing and willful" standard that the Commission must apply in this matter. The Second and Fifth Circuit cases cited in the Commission's factual and legal analysis are inapplicable because they involve federal criminal charges of fraud and false statements pursuant to 18 U.S.C. § 1001, a statute that is not at issue in M.U.R. 5628. *See United States v. Whab*, 355 F.3d 155, 157-58 (2d Cir. 2004); *United States v. Hopkins*, 916 F.2d 207, 214 (5th Cir. 1990).

In terms of knowing and willful violations, the difference between federal criminal law and federal election law is significant. The federal criminal fraud and false statement statute requires a prosecutor to present sufficient evidence that an individual "acted with the purpose to do something the law forbids, and with an awareness of the generally unlawful nature of his actions," but it does not require proof that the individual *specifically knew* the conduct was criminal. *See Whab*, 355 F.3d at 160, 161. Although the government is free from showing actual knowledge in false statement charges, it must meet a higher intent standard for federal election law violations. The Supreme Court has noted that the meaning of the term "willfully" often depends upon the context of the statute. *See Bryan v. United States*, 524 U.S. 184, 191 (1998). In these circumstances, the Commission must cite facts proving the respondent acted with an awareness of the federal election laws at issue. *See A.F.L.-C.I.O.*, 628 F.2d at 101. Finally, regardless of whether the Commission is able to prove that Mr. Becker made an offer to reimburse an employee in 2002, which he strongly denies, the Act does not penalize an individual for *offering* to reimburse a contribution.

Sincerely,

Bobby R. Burchfield