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February 27, 2006

Lawrence H. Norton, General Counsel
Federal Election Commission
999 E Street NW
Washington, DC 20463

Re: MURs 5422 and 5680 - Opposing Brief of Respondents Texans for Henry Cuellar Congressional Campaign and Rosendo Carranco, in his official capacity as treasurer,

Dear Mr. Norton:

This law firm and the undersigned attorneys represent the above respondents in both the subject MURs. This letter constitutes the respondents' brief in opposition to the General Counsel's brief sent to us by letter dated January 30, 2006, which recommends that the Federal Election Commission find probable cause to believe that the respondents have violated the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. 431 *et seq.* (2005), and Commission regulations.

In summary, respondents oppose the General Counsel's recommendation to find probable cause in MURs 5422 and 5680.

A. The General Counsel's brief as to MUR 5422 does not establish a violation of 2 U.S.C. 434(b) because the bank loan disclosures made by the respondents included all the loan information required by sections 434(b)(3)(E) and 434(b)(8), the only statutory provisions governing bank loan disclosure.

The statute gives the Commission authority to determine "that there is probable cause to believe that any person has committed . . . a violation of this Act [2 U.S.C. 431 *et seq.*] . . ." 2 U.S.C. 437g(a)(4)(A)(i). The General Counsel's brief asserts a violation of 2 U.S.C. 434(b) by the respondent committee for failing to timely file an FEC form disclosing information regarding a $200,000 bank loan made to the committee by the International Bank of Commerce in Laredo, Texas, on February 3, 2004.

Section 434(b) contains only two subsections prescribing the disclosure, via reports filed with and made public by the FEC, of each bank loan made to a political committee. Subsection 434(b)(3)(E) requires that the full name and address of a bank lender be disclosed, along with the date and amount of the loan and the identification of any endorser or guarantor of the loan. Subsection 434(b)(8) requires disclosure of the amount and nature of each outstanding debt and obligation owed by a political committee.

The respondent committee was in full and timely compliance with the foregoing statutory provisions in that it completely and correctly disclosed the bank lender's name and address, the date and amount of the loan, and indicated that no person was an endorser or guarantor on the loan. In addition, the committee disclosed the original due date (with subsequent extensions) for the loan, the interest rate and its status as a secured loan. All these disclosures were made on the committee's initial (as amended one day later) report covering the period when the loan was made to the committee; that is, the 12-day pre-primary report due before the March 9, 2004, Congressional primary election in Texas.

The Commission's authority to determine probable cause to believe a violation has occurred is explicitly limited to violations "of this Act," such as 2 U.S.C. 434(b), and does not extend to "violations" of Commission regulations. This is particularly so where, as here, the regulation adds burdens and obligations beyond those explicitly set forth in the statute and where the Commission seeks to enforce compliance with those non-statutory burdens by assessing a civil penalty, even though respondents have complied with the underlying statutory provisions. (See discussion of the regulation in section B, hereafter.) Because we have shown that no statutory violations of 2 U.S.C. 434(b)(3)(E) & (b)(8) occurred in MUR 5422, the Commission should determine that there is no probable cause to believe any violation of the Act occurred in this matter.

Without offering any legal basis to support its apparent position, the General Counsel's brief seemingly assumes that a failure to file a Commission form that is purportedly required by a Commission regulation is a "violation" of that regulation, and further that such a "violation" is tantamount or equivalent to a violation of the statutory

provision that the regulation purports to implement. We are not aware of any reported decision wherein any Federal court has held that a violation of the FEC bank loan disclosure regulation (cited below) was actionable as a statutory violation of the Act.

B. To the extent the General Counsel's brief in MUR 5422 alleges a violation of Commission regulations at 11 C.F.R. 104.3(d), which requires the filing of specified paper documents for bank loans, that regulation may not be applied to a Congressional candidate's committee since it is required to make all disclosure filings by electronic means exclusively, pursuant to 2 U.S.C. 434(a)(11)(A) & (11)(C). The General Counsel's brief also fails to recognize the "best efforts" of respondents to comply with the electronic filing aspect of the cited regulation during a period when Commission's own system was defective.

The General Counsel's brief concludes that pursuant to regulation 11 C.F.R. 104.3(d), respondents were required to file certain paper documents, FEC Schedule C-1, with the Commission pertaining to the bank loan described above. The loan information required on this form would have reiterated much of the data included in the disclosures made as required by 2 U.S.C. 434(b)(3)(E); it would also require a description of loan collateral, its value, and whether a security interest is perfected. In addition, the form requires handwritten signatures of the treasurer and a bank official attesting that the terms of loan are accurately stated and that in other respects the loan complies with FEC regulations governing bank loans to campaign committees. Finally, the cited regulation requires that the hand-signed form document, along with a paper copy of the relevant loan agreement, be submitted as part of a committee's report filed with the Commission.

Even if the cited regulation properly implements the bank loan requirements of the Act, 2 U.S.C. 431(8)(B)(vii), the regulation may not be applied to respondents in the manner asserted by the General Counsel's brief. Respondent is the campaign committee of a candidate for the U.S. House of Representatives and therefore is required to file all disclosure reports with the Commission in an electronic format. 2 U.S.C. 434(a)(11)(A). Accordingly, any bank loan data or documents that the Commission may lawfully require must be filed by electronic means only, and may not be filed in the form of paper documents. 2 U.S.C. 434(a)(11)(A)--(C), *see* 11 C.F.R. 104.18.

The General Counsel's brief is incorrect as a matter of law when it contends that respondents violated the Act by failing to timely file hand-signed paper documents pertaining to the subject bank loan. The Act imposes no such disclosure requirement for bank loans to a campaign committee. See discussion in A above. Similarly, the General Counsel's apparent view that the respondent's failure to comply with Commission regulations, 11 C.F.R. 104.3(d), was a separate and independent violation of the Act, is erroneous as a matter of law because the cited regulation, as applied to respondents, contravenes the mandatory electronic filing requirements of the Act which preclude respondents from filing any FEC reports via paper documents. See, *Kennedy for President Committee v. Federal Election Commission, 734 F.2d 1558, 1562 (D.C.Cir.1984)* [FEC barred from applying regulation that is invalid and unreasonable interpretation of underlying statutory provision.]

The General Counsel's brief also fails to provide a full factual account and analysis of the circumstances that explain the respondent's electronic filing of pertinent bank loan data in its FEC report at a date later than the filing due date of its pre-primary election report, February 26, 2004. As a mandatory electronic filer, respondents had to rely on the Commission's electronic system and verification process, including the technical support available from Commission staff in the Electronic Filing Office ("EFO").

Both before and after the February 26 due date, the EFO was in transition to an upgraded version of the electronic filing format and had testing protocols in place. Respondents through their FEC filing software vendor utilized the testing process, and in doing so reasonably relied in good faith on the feedback and prompts provided. The EFO's "test-filing" site, which remained available and was used by respondent's vendor just before the filing deadline, failed to display an alert or flag that an electronic filing of the FEC Form C-1 was required with respect to the bank loan; the same bank loan that was fully disclosed in the timely electronic filing of the FEC Form C. When RAD reviewed the respondent's report, it noted that the electronic filing of the C-1 was not included and sent a notice dated March 16, 2004, requesting a response by April 15, 2004. Respondents submitted the electronic filing of the C-1 on April 27, 2004, some 12 days after the response date given by RAD.

Respondent's counsel submit that the foregoing explanation makes a compelling case for the Commission to determine that respondents exerted "best efforts" to make a timely and complete electronic filing of the cited pre-primary report, but were impeded in doing so because of an episodic and temporary defect in the Commission's electronic filing procedures. 2 U.S.C. 432(i) [Filed reports considered in compliance with the Act when treasurer shows best efforts to submit information required to be included in reports filed with Commission.] Indeed, one Federal court has held that "best efforts" of a political committee and its agents should be considered by the Commission in the context of delayed filing of electronic reports where the delay was the result of technical errors. *Lovely v. Federal Election Commission, 307 F.Supp.2d 294, 300 (D.Mass. 2004)* [FEC position that "best efforts" does not apply to filing of reports conflicts with plain statutory language, and FEC cannot dismiss its application by asserting that filing of reports is governed by "strict liability" standard.]

For the reasons discussed above, the General Counsel's brief is contrary to law when it contends that respondents violated the Act by failing to timely file paper documents, with handwritten signatures, pertaining to the described bank loan. Any such filings by respondents could only be required in an electronic format, utilizing some form of an electronic signature. Respondents made best efforts to comply with the Commission's electronic filing method for reporting the bank loan data, but were unable to do so in a timely manner solely because of the temporary defects of the Commission's electronic system before the due date for the filing of its FEC report.

C. In MUR 5680, respondents do not contest the facts that they failed to include an expenditure (for media services) of $100,000 to Campaign Group, Inc., in the FEC report due 12 days prior to the November 2004 general election. Respondents do, however, oppose a probable cause determination by the Commission at this time given the tainted procedural history of this matter and MUR 5422, as well as MUR 5401.

The General Counsel's brief (page 5, lines 11--17) correctly summarizes the facts as to the respondents delayed disclosure, in reports filed with the Commission, of a $100,000 expenditure made to Campaign Group, Inc. for media services on October 7, 2004. The brief fails, however, to recognize several relevant circumstances and prejudicial procedural developments that have heretofore precluded settlement of MUR 5680 and that, if presently rectified, would facilitate a prompt resolution of the case, without need for the Commission to make a determination of probable cause that a violation occurred.

This matter was instigated through a referral to the Office of General Counsel from the Commission's Reports Analysis Division ("RAD") some time after July 7, 2005, and before September 12, 2005. On the latter date the Commission found reason to believe a violation had occurred with respect to the delayed disclosure of the cited media expenditure.

Counsel for respondents respectfully submits that the Commission should decline to determine probable cause in MUR 5680, and should instead refer this matter to the ADR program where Commission mediators could consider it in the same manner as other cases with very comparable and similar facts involving late or non-disclosure of campaign expenditures. See discussion in section D, below.

In providing this summary, respondents counsel emphasize that the legal analysis and arguments made in sections A through C above represent their position in response to the General Counsel's probable cause brief. Furthermore, respondents counsel make no admissions as to any violations of the Act in the subject matters.

Re MUR 5680: Alleged violation of expenditure reporting provisions for failure to timely disclose a single $100,000 media services expenditure that was made to vendor by wire transfer, instead of through the regular check-writing procedure, and thus overlooked by inexperienced campaign staff until a 2004 year-end review of bank account records was concluded.

1) Under the Administrative Fines ("AF") rules, if the respondents had failed to file any report for the period when the wire transfer expenditure was made, the civil penalty amount assessed would have been approximately $7,500, given the total level of financial activity by respondents in that period. 11 C.F.R. 111.43(b)(2). In this case respondents timely reported all contributions received and all other expenditures made, which represented about 50% of its actual total expenditures.

2) AF 1214--failure to file report that should have included $779,000 of total receipts and expenditures, not election sensitive. Administrative fine under AF program of $11,000

3) ADR 261--failure to include $65,000 expenditure, made via wire transfer, in election sensitive report with amendment giving payee name and purpose description filed about 100 days late; penalty $2,500.

4) ADR 268--failure to include $83,000 expenditure, made via wire transfer, in election sensitive report with amendment filed about 42 days late; penalty $2,000.

5) MUR 5225--failure to disclose $721,895 of in-kind contributions and parallel expenditures for costs of campaign fundraising event with total cost of $1,240,972; penalty $35,000.

Re MUR 5422: Alleged violation of FEC bank loan regulation requiring both electronic and paper document filing of bank loan ($200,000) data signed by campaign treasurer and bank officer.

6) MUR 5198--failure to make any pre-election disclosure of bank loan data for loans of $4,600,000 to Senate campaign, which FEC concluded were lawfully obtained by candidate using personal assets as bank loan collateral; no penalty, with admonition letter to make proper disclosure of bank loans in future.

7) MUR 5623--failure to make pre-election disclosure of $400,000 in bank loans and late filings (112 days late) of two special disclosure reports required by recent BCRA Millionaires' Amendment rules that apply to expenditures of personal funds over $350,000 in House campaign; penalty $40,000 with no specified allocation for each of the multiple violations.

Re MUR 5401: OGC investigation determined no evidence of a violation of the FEC disclaimer rules for respondent's automated telephone campaign that targeted less than 500 recipients within any 30-day period with same campaign message. The closing of this matter may be recommended in a separate internal memorandum submitted to the Commission by the General Counsel, but this disposition is not mentioned in the General Counsel's brief on probable cause. Nor do respondents have any other official notice from OGC confirming the status of MUR 5401.

For the reasons discussed above, counsel for the respondent respectfully request that the Commission make no determination of probable cause that violations occurred in these matters.

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By: _____
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