IN AND BEFORE THE

FEDERAL ELECTION COMMISSION

IN RE:

Gallagher for Senate and Kenneth Lancaster, in his official capacity as Treasurer, Respondent	)	**MUR 5709**

Respondent's Response to Reason to Believe Finding

This Matter Under Review 5709 ("the MUR") arises from an amendment to the July 2004 Quarterly FEC Report ("the Report") of Respondent Gallagher for Senate Committee ("the Committee").[1]

The Office of General Counsel ("OGC") of the Federal Election Commission ("FEC" or "the Commission") has issued its Factual and Legal Analysis in the MUR which essentially states that there were three (3) disbursements made by the Committee in June, 2004, which were inadvertently omitted from the Report. The OGC has advised that the response provided to the Reports Analysis Division on October 5, 2004, regarding the omission from and subsequent amendment to the Report were 'insufficient' and resulted in this referral to the OGC, which has initiated this MUR nearly eighteen months *after* the facts at issue in the MUR.

First, it should be noted that the error in the Report was discovered and remedied by the Committee *sua sponte*. The error was unintentional. See *Affidavits of Patti Thompson, Richard Pinsky, Kenneth Lancaster,* attached to this Response, which collectively set forth the verified facts of how the mistake was made and how it was corrected by the individuals involved with the Committee.

The explanation regarding *how* the error occurred is quite simple: at the time of the filing of the Report, the records of the Committee's receipts and disbursements were maintained manually in hard copy files, with disbursements files by vendor. FEC reports were prepared by hand, manually retrieving and entering information from the files. The particular file containing the information regarding the three (3) wire transfers was not kept with the vendor files but rather with bank files. See Affidavit of Patti Thompson, paragraphs 8 and 9.

A few weeks after the Report was filed by the Committee, Ms. Thompson discovered the folder with the three (3) wire transfer documents and realized that those disbursements had been

[1] Kenneth Lancaster has been named in the MUR in his official capacity as Treasurer of the Committee

inadvertently omitted from the Report. Immediately upon discovery, Ms. Thompson advised Cleta Mitchell, counsel to the Committee, Mr. Lancaster, the Committee treasurer, and Mr. Pinsky, the General Consultant to the Committee.

Steps were immediately instituted to begin preparation of amendment(s) to the Report, as well as Mr. Lancaster's insistence that a bookkeeper be hired by the Committee to reconcile the FEC Reports to the Committee's bank accounts in order to insure that no other errors or omissions existed and/or, if necessary, to prepare all necessary amendments to be filed simultaneously. See *Affidavits of Kenneth Lancaster, Patti Thompson and Richard Pinsky.*

The Report was amended on September 9, 2004, and disclosed the previously omitted disbursements. The amendment was filed less than thirty (30) days following the discovery of the error. Disclosure of the mistake was purely voluntary on the part of the Committee and the treasurer. The FEC did *not* discover the mistake nor is it likely the Commission would ever have discovered the mistake absent the self-reporting and self-correction by the Committee and the treasurer of the error.

The Committee and, in particular, its treasurer, Mr. Lancaster, took all necessary steps to insure that the information was properly disclosed to the Commission.

Argument

I. The Committee should not be punished for voluntarily disclosing its error to the Commission.

It is impossible for the Commission to audit every political committee and every report filed by every political committee every year. The Commission *must* rely, therefore, on voluntary compliance with the Act in order for the regulatory process involving campaigns and reporting to function. In that regard, the Commission and Commissioners have historically recognized that the reporting functions under FECA are, essentially, a *voluntary* compliance system. See Heritage Foundation Lecture #732, February 13, 2002 by (then) FEC Chairman David M. Mason, "*Campaign Finance Reform: Broad, Vague, and Unenforceable*":

> "...let me remind you that the federal income tax system is voluntary. What is meant by a "voluntary" tax system is not that paying is voluntary, but that each taxpayer keeps his own records and calculates his own taxes, rather than having the IRS do so. Every regulatory and police agency relies on voluntary compliance in this sense. In fact, most political parties, PACs, candidates, corporations, and unions are resigned if nothing else to complying with whatever laws Congress writes and whatever regulations the FEC imposes. As an agency, we spend a significant portion of our budget on publications and seminars aimed simply at *informing* these groups what the law requires." (emphasis added)

Voluntary compliance by the regulated community is absolutely essential for the Commission to

be able to do its job properly. Such a voluntary system presupposes that filers be authorized and encouraged to self-monitor and self-report mistakes, without fear of reprisal or penalty.

Numerous federal agencies have established elaborate and formal systems for encouraging and *rewarding* self-reporting and self-monitoring. For instance, in 1995 the Environmental Protection Agency ("EPA") issued its Final Policy Statement on "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations", 60 FR 66706, December 22, 1995, in which the EPA established a *formal* process for encouraging and rewarding self-reporting of violations. Since the effective date of the policy ten years ago (January 22, 1996), the EPA has waived civil penalties in numerous cases in which companies self-reported violations involving mistakes or omissions in reporting, such as failure to properly disclose presence of chemicals on a site (*see* 2003 WL 23674761 (EPA), saying, "This is a great example of how the EPA supports industries that identify and correct violations."). The EPA in 2003 waived $1.4 million in fines against eleven companies for failure to submit proper Toxic Inventory Forms, failure to file accidental release(s) of hazardous chemicals reports, and similar reporting violations (*see* 2003 WL 23573751 (EPA)). In fact, the Environmental Protection Agency has issued numerous public statements in the past decade relying on the voluntary monitoring and self-reporting policy as a means of *enhancing* enforcement.

Other federal agencies have likewise adopted similar policies, ranging from the Securities and Exchange Commission, the Federal Energy Regulatory Commission, the Commodities Futures Trading Commission, among others. All have promulgated such policies in the belief that voluntary compliance and enforcement are enhanced by encouraging self-reporting of mistakes.

While the FEC should follow suit, no formal 'policy' is necessary to exercise the common sense to dismiss this MUR as a prime example of 'encouraging' rather than discouraging voluntary compliance, self-monitoring and self-reporting.

An current initiative undertaken by the Office of Management and Budget involves a program of evaluation and review of federal agencies' effectiveness in a variety of areas. The description of the "Program Assessment Rating Tool" (PART) is a standard questionnaire which asks approximately 25 questions about a program's performance and management. For each question, there is a short answer and a detailed explanation with supporting evidence. The answers determine a program's overall rating. Once each assessment is completed, a program improvement plan is developed and published regarding each federal agency and its programs.

According to the PART assessment, the Federal Election Commission's program performance reveals a "Results Not Demonstrated" rating with regard to the issue of whether the Commission "met its annual performance goals, increasing enforcement activity and promoting voluntary compliance." See www.ExpectMore.gov, Office of Management and Budget website (http://www.whitehouse.gov/omb/expectmore/summary, accessed April 14, 2006). The reason for the rating is that the Commission has not established a program of voluntary compliance which, according to OMB, undermines the enforcement capabilities of the Commission.

The instant case is a demonstrable example of the failure of the Commission to encourage voluntary compliance and reporting of errors or mistakes.

The error in this instance was a simple mistake, which the Committee with the active leadership and assistance of its treasurer, Mr. Lancaster, corrected.

II. There are *no* facts to suggest or support a finding that the Committee Treasurer in this MUR should be held liable in his personal capacity for the inadvertent omission in the Report.

According to the Commission's policy regarding personal liability of a treasurer, information must exist to indicate that certain standards have been violated, to-wit:

1) the treasurer knowingly and willfully violated the Act, or

2) the treasurer recklessly failed to fulfill duties specifically imposed by the Act, or

3) the treasurer intentionally deprived himself or herself of facts giving rise to the violation.

None of the facts of this MUR give rise to any of the tests for personal liability of the treasurer in this instance.

1. The treasurer did not 'knowingly' or 'willfully' violate the Act. The Report was 167 pages long, of which 135 pages were on Schedule B, Disbursements. Mr. Lancaster did not maintain a separate listing of all the disbursements of the Committee, nor would such a separate log or record be normal or customary among political committees. Mr. Lancaster worked carefully with the paid staff of the Committee, doing the best he could to advise and suggest systems for internal controls and records management. Ultimately, it was due to Mr. Lancaster's ongoing efforts that an automated accounting software system was purchased and installed, with the assistance of a bookkeeper recommended by Mr. Lancaster. *See Affidavits of Kenneth Lancaster, Patti Thompson and Richard Pinsky.* The Commission has no facts to suggest that the inadvertent omission of the three disbursements was anything other than a simple human error which was corrected immediately upon discovery.

2. The treasurer did NOT recklessly fail to fulfill his duties imposed by the Act. The term "reckless" is not defined in the Act or in the Commission's regulations. However, "reckless" in a common usage means "characterized by the creation of a

substantial and unjustifiable risk to the ...rights of others and by a conscious and sometimes wanton and willful disregard for or indifference to that risk that is a gross deviation from the standard of care a reasonable person would exercise in like circumstances". *Merriam-Webster's Dictionary of Law, © 1996 Merriam-Webster, Inc.* There are simply no facts to support a finding of reckless failure on the part of the treasurer to fulfill his duties. The exact opposite is true, as evidenced by the statements under oath in the *Affidavits of Kenneth Lancaster, Patti Thompson and Richard Pinsky.*

3. The treasurer did NOT intentionally deprive himself of facts giving rise to the violation. There is, again, no evidence and there are no facts to support a contention that the Committee treasurer ignored his responsibilities, that he failed to inquire about the systems and methods employed by the Committee for reporting to the FEC, or any such similar intentional deprivation of information. In fact, Mr. Lancaster, although a volunteer, made certain that he monitored the Committee's functions and offered assistance on a pro-active basis. The fact that a mistake was made in terms of omitting information that everyone concerned believed was complete at the time is not evidence of "intentional deprivation of information" . Because of Mr. Lancaster's diligence, the accounting systems were improved, the amendments were filed, the FEC reports were reconciled to the bank accounts, the FEC was advised of the error and the Committee's books and records thoroughly reviewed and finalized. The Commission did not initiate an audit of this Committee; thus, absent the pro-active efforts of the Treasurer and everyone concerned with the Committee, the Commission would never have become aware of the mistake in the first place. Those facts surely do NOT support a charge of 'intentional deprivation of facts giving rise to a violation'.

The facts are uncontroverted and the treasurer cannot be held personally liable under the Commission's Statement of Policy for Treasurers.

CONCLUSION

Accordingly, and for the reasons set forth herein, the Respondents respectfully move the dismissal of MUR 5709 and any further action related thereto.

Respectfully Submitted,

Cleta Mitchell, Esq.
Counsel for Respondent,
Gallagher for Senate,
Kenneth Lancaster in his official
capacity as treasurer

Dated: April 14, 2006