FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

BEFORE THE FEDERAL ELECTION COMMISSION

SENSITIVE

In the Matter of	)	
	)	
Matt Brown for U.S. Senate and James Vincent, in his official capacity as Treasurer,	)	
	)	
Democratic Party of Hawaii and Yurkio J. Sugimura, in her official capacity as Treasurer,	)	
	)	**MUR 5732**
Maine Democratic State Committee and Belly I. Johnson, in her official capacity as Treasurer,	)	
	)	
Massachusetts Democratic State Committee-Federal and Mary Jane Powell in her official capacity as Treasurer,	)	
	)	
Richard L. Bready,	)	
	)	
John M. Connors	)	

STATEMENT OF REASONS OF VICE CHAIRMAN DAVID M. MASON

The Hawaii and Rhode Island Republican Parties filed the complaint in this matter, alleging that the Matt Brown for U.S. Senate Committee ("Brown Committee") arranged for donors to contribute to the Democratic State Parties of Hawaii, Maine, and Massachusetts (collectively, "the state parties" or "the state party committees") in January 2006 as part of an effort to circumvent the contribution limits set forth in the Federal Election Campaign Act ("FECA" or "the Act"). The Complainants suggest that the Respondents violated the Act by either: (1) earmarking their contributions for the Brown Committee under 2 U.S.C. § 441(a)(8) and 11 C.F.R. § 110.6; (2) making their contributions with the knowledge that the State Parties would use the funds to support the Brown Committee under 2 U.S.C. § 441a and 11 C.F.R. § 110.1(h); or (3) making contributions in the name of another under 2 U.S.C. § 441f. The Commission voted 4-1 to accept the Office of General Counsel's recommendations to find no reason to believe the Respondents violated the Act. I write separately to provide my rationale in support of finding of a reason to believe that potentially excessive contributions exist.

Applicable Law

Relevant to this discussion are the contribution limitations that were in place during the 2006 election cycle. Pursuant to the Act, individual donors could contribute a maximum of $2,100 per election to a federal candidate and $10,000 per year to a party committee's federal account. *See* 2

U.S.C. § 441a(a)(1)(A) and (D). The federal account of a state party committee may contribute up to $5,000 per election to the authorized committee of a federal candidate. *See* 2 U.S.C. § 441a(a)(2)(A). An individual may contribute up to $10,000 per year to the federal account of a state party committee and up to $10,000 per year to a state party's non-federal account. *See* 2 U.S.C. § 441i(e)(1).

The Act provides that "all contributions made by a person, either directly or indirectly, on behalf of a particular candidate, including contributions which are in any way earmarked or otherwise directed through an intermediary or conduit to such candidate shall be treated as contributions from such person to such candidate." 2 U.S.C. § 441a(a)(8). At issue in this matter is whether the Brown Committee arranged for its donors to circumvent the contribution limits in the Act by making contributions on behalf of Brown through the state party committees.

Analysis

Excessive Contributions

When an individual makes a contribution to a candidate, even when it is done through an intermediary or conduit, it is considered a contribution from that individual to the candidate. One manner by which this occurs is through earmarking. The term "earmarked" includes any "designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to or expended on behalf of, a clearly identified candidate's authorized committee." 11 C.F.R. § 110.6(b)(1).

The Commission has determined that funds are considered "earmarked" when there is clearly documented evidence of acts by donors that resulted in their funds being used by the recipient committee for expenditures on behalf of a particular federal campaign. In earlier matters, the Commission has found reason to believe that funds donated to a state committee were earmarked for a federal candidate when checks included memo lines with the name of, or some reference to, the federal candidate. *See* MUR 4831/5274 (Nixon).

The Commission has rejected investigating allegations of earmarking unsupported by evidence or where only weak circumstantial evidence existed. In *Perry*, allegations of earmarking alone did not substantiate finding a reason to believe a violation of the Act had occurred. *See* MUR 5125. In *Democratic Party of New Mexico*, suspicious timing alone, without any indication in the record that contributors directed, controlled, or took action to earmark their contributions, was insufficient to find reason to believe a violation occurred. *See* MUR 4643.

In other instances, the Commission has examined the unique circumstances and timing of contributions to determine whether excessive contributions were present. For example, the First General Counsel's Report ("OGCR") in MUR 4633, *Triad Management Services, Inc.*, examined the "proximity in timing" of contributions and the "opportunity for the PACs to have agreed to make a contribution" to a federal candidate in its consideration of earmarking and excessive contributions. *See* MUR 4633 OGCR at 43-45.

More recently, in deciding the *Liffrig* matter (MUR 5678), the Commission found no reason to believe that excessive contributions were made. However, there are sufficient factual differences to support a finding of reason to believe here. *Liffrig* involved a situation where there was but one contributor who contributed money to Bully PAC. In this matter, there is a pattern of contributions from different contributors flowing through three state party committees. Further, in *Liffrig*, Bully PAC was active in making contributions in past election cycles in North Dakota.[1] Here, the state parties had not made contributions to candidates in contested primaries in other states.[2] What's more, *Liffrig* involved the application of the Commission's prosecutorial discretion due to the financial circumstances of Liffrig for Senate. While the standard I propose might trigger a closer look at the Liffrig matter than the Commission conducted, these distinctions might well justify a different result.

The Facts Compel a Finding of Reason to Believe

In this matter, the Commission must determine whether the contributions in question were given to the state parties in return for their contributions to the Brown Committee. The first point of examination looks to the contributions themselves and corresponding communications for designations, instructions, or encumbrances (earmarking) to make this determination.

The OGCR explains that there were no cover letters or instructions accompanying the checks or credit card transactions from contributors detailing how their contributions should have been used. *See* OGCR at 8. Further, the cancelled checks at issue reveal that there were no designations, instructions or encumbrances located on them. *Id.* Finally, Respondent Brown averred in his declaration that he never suggested that a donor's contributions be earmarked or designate how such contributions would be used. *Id.*

It is at this point that the majority ends its analysis of the issue. However, another relevant inquiry exists – namely, whether there was an oral agreement in place to provide for excessive contributions. Adopting a narrow analysis that overlooks oral communications may preclude the Commission from ever demonstrating that an oral agreement existed concerning the making of excessive contributions. Indeed, the Act addresses contributions made "on behalf of a particular candidate, *including* contributions which are in any way earmarked . . . ." *See* 2 U.S.C. § 441a(a)(8) (emphasis added). By focusing exclusively on the earmarking analysis the Commission reads the "including" phrase, which is most naturally read as additive or, at a minimum, descriptive of only some categories covered, as restrictive. The Commission reads the phrase as if it covered "contributions made on behalf of a candidate <u>and</u> earmarked to such candidate." The statute is not so restrictive.

The timing of the contributions is a relevant factor in this matter. Sometime between late December 2005 and early January 2006, Brown and his staff contacted three individuals who had already contributed to the Brown Committee and encouraged them to contribute to the three state parties. During the last week of 2005, the Brown Committee received $25,000 in primary and general election contributions from the Democratic State Parties of Hawaii, Massachusetts, and Maine.

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[1] For example, in 2002, Bully PAC contributed to the Clayburgh for Congress Committee and John Swallow for Congress, Inc. *See* Federal Election Commission, Transaction Query by Committee, http://query.nictusa.com/cgi-bin/com_supopp/C00381715/ (all websites visited May 2, 2007).

[2] The Maine Democratic State Committee did make one out-of-state contribution to the Missouri Democratic State Committee in 1998. *See* Federal Election Commission, Transaction Query by Committee, http://query nictusa.com/cgi-bin/com_supopp/C00179408/

In factual circumstances like this, the Commission should apply a broader analysis, examining the unique circumstances presented along with the timing of the contributions made to determine if an excessive contribution has been made. In *Triad*, the Commission relied on the proximity of timing of contributions when concluding that excessive contributions had been made. This is not to say that a coincidence of timing alone is sufficient to conclude that a violation has occurred. However, suspicious coincidences in timing along with other factors may be sufficient to open an investigation to assess whether a violation has occurred – the purpose of an RTB finding. Here, in addition to suspiciously coincidental timing, was the virtually unprecedented action of several state party committees making contributions to a candidate in a contested primary in a different state. Indeed, not one of the three state parties involved had ever made a single contribution to any candidate not appearing on the ballot in its own state prior to the remarkably magnetic Mr. Brown.[3] Accordingly, the timing of contributions and unique facts present a sufficient basis to find reason to believe in this matter.

The allegation here focused on what agreement may have existed between the state parties and Brown. Consequently, it is wholly appropriate to ask the question that remains unanswered: what agreement or commitment, if any, existed between Brown and the state committees? The absence of an answer to this question provides the Commission with a basis to support further investigation in this matter. Evidence of an excessive contribution may find its home in an understanding or verbal agreement not presently before the Commission.

The declarations in this matter glaringly fail to address the key question at hand – whether a verbal agreement existed that would demonstrate the contributions were excessive under the Act. Because that question remains unanswered, and because of the unique facts and timing found here, there is sufficient reason to believe a violation may have occurred. Further investigation would clarify this point, enabling the Commission to resolve the matter.

By finding no reason to believe, the resulting precedent establishes a pattern that could license blatant circumvention of the law. So long as political actors established an earmarking or excessive contribution scheme through a verbal agreement, many similar situations may escape the investigatory reach of the Commission. In such instances, the Commission should proceed to examine the unique circumstances and timing as relevant considerations in deciding whether there is reason to believe that a violation may have occurred.

May 10, 2007

David M. Mason
Vice Chairman

[3] Contribution data is made available through the Federal Election Commission's Transaction Query by Committee database and reflects reporting back to 1997
http://www.fec.gov/finance/disclosure/norcomsea.shtml