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FIRST GENERAL COUNSEL'S REPORT

CELA

MUR: 6497

DATE COMPLAINT FILED: 9/2/2011

LAST RESPONSE RECEIVED: 02/16/2012

DATE ACTIVATED: 1/24/2012

EXPIRATION OF SOL: 10/15/2011 – 7/15/2016

COMPLAINANT:

Lloyd Smith as Executive Director of the
Missouri Republican State Committee

RESPONDENTS:

McCaskill for Missouri 2012 and Michelle Sherod,
in her official capacity as treasurer
McCaskill for Missouri and Michelle Sherod, in her
official capacity as treasurer
Claire McCaskill

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)
28 U.S.C. § 2462
11 C.F.R. § 104.3
11 C.F.R. § 111.43

INTERNAL REPORTS CHECKED:

Disclosure Reports

I. INTRODUCTION

a portion of MUR 6497 concern McCaskill for Missouri and
Michelle Sherod in her official capacity as treasurer ("2006 Committee"). The 2006 Committee
amended various disclosure reports from the 2006 election cycle on July 15, 2011, disclosing the

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1 omission of \$298,729.45 in receipts and \$313,211.03 in disbursements from the original reports.
2 Respondents do not dispute that their failure to report this activity violated the Federal Election
3 Campaign Act of 1971, as amended (the "Act"), but argue that these violations do not merit
4 enforcement action and that the original omissions fall outside the applicable statute of
5 limitations.

6 The remaining portion of the MUR 6497 Complaint alleges that Senator Claire McCaskill
7 and her 2012 principal campaign committee, McCaskill for Missouri 2012 and Michelle Sherod
8 in her official capacity as treasurer ("2012 Committee"), violated the Act by failing to report in-
9 kind contributions relating to the Senator's use of a non-commercial aircraft for two "political"
10 trips in March and May 2007. Respondents limited their response to asserting that the
11 Complaint's characterization of the trips as "political" fails to allege that the travel was
12 undertaken on behalf of the 2012 Committee. *See* MUR 6497 Resp. (Oct. 27, 2011); *see also*
13 Supp. Resp. (Feb. 17, 2012).

14 As set forth below, we recommend that the Commission
15 dismiss the allegations in MUR 6497 that the 2006 Committee violated
16 2 U.S.C. § 434(b) by failing to accurately report its receipts and disbursements in various
17 disclosure reports and send a cautionary letter; and find no reason to believe that McCaskill
18 violated the Act. We also recommend that the Commission dismiss the allegations that the 2012
19 Committee and McCaskill violated 2 U.S.C. § 434(b) by failing to report the costs of two 2007
20 flights on non-commercial aircraft as in-kind contributions.

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II. FACTUAL AND LEGAL ANALYSIS

A. 2006 Committee's Reporting

McCaskill was a successful candidate for U.S. Senate in Missouri in 2006 and is running for re-election in 2012. The 2006 Committee filed its Statement of Organization on September 20, 2005, and has filed disclosure reports with the Commission since that date. It has filed two reports requesting termination, on July 15, 2011, and October 14, 2011.

As summarized in the chart below, on July 15, 2011, the 2006 Committee amended five of its disclosure reports from the 2006 election cycle to disclose previously unreported receipts of \$298,729.45 and previously unreported disbursements of \$313,211.03.

Report	Date of Amendment	Amount of Increased Receipts	Amount of Increased Disbursements	Total Increased Activity
2006 Oct. Quarterly	July 15, 2011	\$16,860.57	N/A	\$16,860.57
2006 12 Day Pre-General	July 15, 2011	N/A	\$7,552.84	\$7,552.84
2006 30 Day Post-General	July 15, 2011	\$256,521.75	\$305,658.19	\$562,179.94
2006 Year-End	July 15, 2011	\$11,444.91	N/A	\$11,444.91
2007 April Quarterly	July 15, 2011	\$13,902.22	N/A	\$13,902.22
	TOTAL	\$298,729.45	\$313,211.03	\$611,940.48

When it filed the amendments, the 2006 Committee simultaneously requested termination. In response to the 2006 Committee's request for termination, the Reports Analysis Division ("RAD") informed the 2006 Committee's treasurer that the request for termination would not be granted, and advised the treasurer to provide a detailed explanation for the large amount of increased activity disclosed by the amendments. In response, the 2006 Committee submitted a Miscellaneous Document (Form 99) explaining that, as a first-time Senate campaign spending over \$11.5 million, it faced compliance challenges that were compounded by the

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1 unexpected death of the Committee's compliance director in July 2006. *See* Form 99 (July 29,
2 2011). Respondents also explained that a large portion of the unreported contributions was the
3 result of technical errors: a number of bundled contributions were coded in such a way that they
4 were not properly imported into the reports, and a large portion of the unreported disbursements
5 was the result of an inadvertently omitted wire transfer for a media buy. *Id.*

6 The 2006 Committee's apparent failure to properly disclose its activity

7 On September 2, 2011, the Commission received the Complaint in MUR 6497,
8 alleging, *inter alia*, that the 2006 Committee failed to account for contributions totaling
9 approximately \$277,000 during the 2006 election cycle.

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11
12
13 Respondents restate the information they submitted in the
14 July 29, 2011, Form 99, *see supra* p. 3, regarding the death of their compliance director and a
15 technical error relating to certain bundled contributions.

16 Respondents also argue that the Commission should dismiss the reporting violations for several
17 reasons: (1) the 2006 Committee filed the self-correcting amendments on its own volition; (2) the
18 previously undisclosed receipts and disbursements constituted less than a ten percent increase in
19 activity; and (3) any violations arising from the 2006 Reports are time-barred under 28 U.S.C.
20 § 2462. *See id.* at 3-4; *see also* MUR 6497 Resp. at 3.

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1 The Act requires committee treasurers to file reports of receipts and disbursements in
2 accordance with the provisions of 2 U.S.C. § 434. *See* 2 U.S.C. § 434(a)(1); 11 C.F.R.
3 § 104.1(a). These reports must include, *inter alia*, the total amount of receipts and
4 disbursements. *See* 2 U.S.C. § 434(b); 11 C.F.R. § 104.3. Committees are also required to
5 disclose itemized breakdowns of receipts and disbursements and disclose the name and address
6 of each person who has made any contribution or received any disbursement in an aggregate
7 amount or value in excess of \$200 within the calendar year, together with the date and amount of
8 any such contribution or disbursement. *See* 2 U.S.C. § 434(b)(2)-(6); 11 C.F.R. § 104.3(a)(3)-
9 (4), (b)(2), (b)(4). In addition to complete and accurate disclosure of receipts and disbursements,
10 the Act also requires accurate disclosure of the amount of cash on hand at the beginning and end
11 of the reporting period. *See* 2 U.S.C. § 434(b)(1); 11 C.F.R. § 104.3(a)(1).

12 The 2006 Committee did not comply with the Act's reporting requirements when it failed
13 to disclose an aggregate of \$298,729.45 in receipts and \$313,211.03 in disbursements on its
14 original 2006 reports filed with the Commission. But the initial obligation to report the 2006
15 cycle receipts and disbursements is now outside the five-year statute of limitations period. *See*
16 28 U.S.C. § 2462. Accordingly, we recommend that the Commission

17 dismiss the allegations in MUR 6497 that the 2006 Committee
18 violated 2 U.S.C. § 434(b) by failing to accurately disclose its receipts and disbursements, and
19 send the Committee a cautionary letter.²

² By definition, the 2006 Committee's misstated receipts and disbursements resulted in misstatements in the cash on hand reported on all disclosure reports filed between October 2006, when the discrepancy began, and July 2011, when the reports were amended.

As there is no information in the record to suggest that McCaskill had any personal responsibility for the 2006 Committee's apparent reporting violations, we also recommend that the Commission find no reason to believe that McCaskill violated 2 U.S.C. § 434(b).

B. 2012 Committee's Non-Commercial Flights

The second allegation in the MUR 6497 Complaint involves McCaskill's 2012 Committee.³ Complainant alleges that McCaskill and her 2012 Committee failed to report in-kind contributions resulting from two non-commercial flights for political events that the Senator took on an aircraft she co-owned with her husband. Compl. at 2. Complainant cites several newspaper articles reporting that, in early 2011, McCaskill reimbursed the Treasury Department in the amount of \$88,000 for 89 flights on her aircraft that had been inappropriately billed to her Senate account as official business. See Compl., Ex. B. Following this reimbursement, the 2012 Committee amended several of its disclosure reports to reflect some of these reimbursed non-commercial flights as in-kind contributions from the Senator to her campaign. See Compl., Ex. A; see also Amended 2008 Year-End, 2009 July Quarterly, and 2009 Year-End Reports. Complainant alleges, however, that two additional reimbursed flights should have been disclosed as in-kind contributions: a March 3, 2007, flight to Hannibal, Missouri; and a May 19, 2007, flight to Kansas City, Missouri. A news article attached to the Complaint identifies the March 3, 2007, flight as a "purely political round trip," for McCaskill to attend the local Democratic Party's annual "Hannibal Days" and give a speech in recollection of dying former Senator Tom Eagleton. Ben Smith, *McCaskill Billed, Repaid Taxpayers for Political Flights*, POLITICO, Mar. 10, 2011. Another article attached to the Complaint refers to a 2007 flight to attend "Democratic events" in Kansas City. Scott Wong, *GOP to McCaskill: Release "Damn*

³ The Senator filed her Statement of Candidacy for re-election on the same day that the 2012 Committee filed its Statement of Organization: January 8, 2007. See FEC Forms 1 and 2.

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1 *Records*, "POLITICO, Mar. 22, 2011. In response to this allegation, Respondents did not
2 specifically address whether the two flights were taken in connection with McCaskill's 2012
3 campaign. Instead, they stated only that "the Complaint's factual allegations do not support its
4 legal conclusion" and that the Complaint "does not allege that the two trips were taken 'on behalf
5 of' the 2012 Committee." MUR 6497 Resp. at 1-2.⁴

6 As noted above, the Act requires political committees to file reports disclosing the total
7 amount of all receipts in a reporting period, including contributions from the candidate to her
8 authorized committee. 2 U.S.C. § 434(b)(2)(B). A contribution is any gift, subscription, loan,
9 advance, or anything of value made by any person for the purpose of influencing any election for
10 federal office. 2 U.S.C. § 431(8)(a)(1). Commission regulations define "anything of value" to
11 include in-kind contributions: the provision of goods or services without charge or at a charge
12 that is less than the usual and normal charge. 11 C.F.R. § 100.52(d)(1). Commission regulations
13 further provide that a candidate is a "campaign traveler," in the context of use of non-commercial
14 travel, when traveling in connection with an election for Federal office. 11 C.F.R.
15 § 100.93(a)(3)(i)(A).⁵ The unreimbursed value of transportation provided to a campaign
16 traveler, including the value of transportation on an aircraft owned or leased by the candidate,

⁴ We invited Respondents to clarify whether McCaskill had engaged in any campaign activity on these trips. See Letter from Kathleen Guith, Acting Associate General Counsel, FEC, to Marc Elias, Counsel, Perkins Coie (Feb. 6, 2012). In response, Respondents stated: "The complaint asserts that McCaskill for Missouri 2012 (the 'Committee') should have reported as in-kind contributions certain payments that Senator McCaskill made for political travel in 2007. But it fails to allege that this travel was made on behalf of Senator McCaskill's campaign, nor does it include any evidence to suggest that it was." Supp. Resp. (Feb. 17, 2012).

⁵ On September 14, 2007, Congress signed into law the "Honest Leadership and Open Government Act of 2007," section 601 of Pub. L. 110-81, 121 Stat. 735, which amended the Act by prohibiting House candidates from using campaign funds for non-commercial air travel and specifying new reimbursement rates for Presidential and Senate candidates for such travel. See 2 U.S.C. § 439a(c). On November 20, 2009, the Commission approved final rules to implement the new statutory provision, though the regulations did not take effect until January 6, 2010. See Explanation and Justification, Campaign Travel, 74 Fed. Reg. 63,951, 63,951 (Dec. 7, 2009). Neither the statutory provision nor the corresponding regulations were in effect at the time of the two flights at issue in this matter; therefore, we are applying the regulations in effect prior to September 2007. See Explanation and Justification, Travel on Behalf of Candidates and Political Committees, 68 Fed. Reg. 69,583 (Dec. 15, 2003). The new regulations, however, maintain many elements of the Commission's previous travel regulations.

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1 must be reported as an in-kind contribution to the candidate or political committee on whose
2 behalf the campaign traveler traveled. 11 C.F.R. § 100.93(b)(2).

3 McCaskill was a candidate for re-election at the time of the March 3 and May 19, 2007,
4 flights, but the 2012 Committee did not reimburse any amounts in connection with the flights.

5 *See supra* fn. 3. If her travel was in connection with an election and she did not report the
6 appropriate amount as an in-kind contribution to the 2012 Committee, as alleged by
7 Complainant, it would violate the reporting provisions of the Act.

8 While the information contained in the Complaint apparently shows that McCaskill flew
9 to Hannibal and Kansas City for events that were "political," neither the Complaint nor the
10 attached press reports suggest that the trips were in connection with an election for Federal
11 office. Moreover, the 2012 Committee's disclosure reports do not indicate that the Senator
12 received contributions from contributors living in either Hannibal or Kansas City on the dates of
13 the flights.

14 We do not have enough information to make a definitive determination of whether
15 McCaskill was a campaign traveler on those flights. In order to gather the additional facts
16 necessary to make such a determination, the Commission would need to authorize an
17 investigation. We do not believe, however, that investigating this allegation is a prudent use of
18 the Commission's limited resources. *See Statement of Policy Regarding Commission Action in*
19 *Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545, 12,546 (Mar. 16,
20 2007) ("Pursuant to the exercise of its prosecutorial discretion, the Commission will dismiss a
21 matter when it does not merit further use of Commission resources, due to factors such as the
22 small amount of the alleged violation, the vagueness or weakness of the evidence, or likely
23 difficulties with an investigation.").

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McCaskill reportedly reimbursed the U.S. Treasury in the amount of \$88,000 for 89 flights, at an average cost of \$989 per flight. With only two of these flights at issue, the amount involved is likely *de minimis*, as is any potential civil penalty that would result from any failure to report in-kind contributions resulting from the flights. Further, the applicable statute of limitations has likely run for both of these flights. See 28 U.S.C. § 2462. We therefore recommend that the Commission dismiss the allegation that the 2012 Committee and McCaskill violated 2 U.S.C. § 434(b)(2) by failing to report these flights as in-kind contributions.

III. RECOMMENDATIONS

- 1.
2. Dismiss the allegations that McCaskill for Missouri and Michelle Sherod in her official capacity as treasurer violated 2 U.S.C. § 434(b) by failing to accurately disclose its receipts and disbursements, and send a cautionary letter;
3. Find no reason to believe that Claire McCaskill violated 2 U.S.C. § 434(b);
4. Dismiss the allegations that McCaskill for Missouri 2012 and Michelle Sherod in her official capacity as treasurer and Claire McCaskill violated 2 U.S.C. § 434(b) by failing to report in-kind contributions;

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5. Approve the attached Factual and Legal Analysis;
6. Approve the appropriate letters; and
7. Close the file.


Anthony Herman
General Counsel


Daniel A. Petalas
Associate General Counsel

9-25-12
Date

BY:


Kathleen Guith
Deputy Associate General Counsel


Mark Shonkwiler
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Margaret Ritzert Howell
Attorney

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