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**FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463**

FIRST GENERAL COUNSEL'S REPORT

**RAD REFERRAL: 11L-07
DATE OF REFERRAL: 4/8/11
DATE OF NOTIFICATION: 4/12/11
LAST RESPONSE RECEIVED: 6/1/11
DATE ACTIVATED: 6/1/11**

**EXPIRATION OF SOL: Earliest 5/25/15 -
Latest 9/25/15**

SOURCE: Internally Generated

**RESPONDENTS: Republican National Committee and Anthony
W. Parker, in his official capacity as treasurer**

**RELEVANT STATUTES
AND REGULATIONS: 2 U.S.C. § 434(b)(8)
11 C.F.R. § 104.3(d)
11 C.F.R. § 104.11(b)**

INTERNAL REPORTS CHECKED: Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Reports Analysis Division ("RAD") referred the Republican National Committee and Anthony W. Parker, in his official capacity as treasurer ("Committee"), to the Office of the General Counsel ("OGC") for potential violations in connection with its failure to disclose and itemize \$9,232,930 in newly incurred debts on its monthly reports for May-September 2010. The Committee subsequently amended the reports between July 2010 and March 2011.

Pursuant to the Commission's *Agency Procedure for Notice to Respondent in Non-Complaint Generated Matters*, dated August 4, 2009, OGC notified the Committee of the RAD

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1 Referral ("Referral"). In response to the notification, the Committee did not dispute that it failed
2 to accurately report the newly incurred debts on its original reports.

3 The Committee states that its self-initiated internal review revealed that some of the
4 reported debt figures were incorrect and that it took proactive and prompt action to amend the
5 reports. Response at 1. The Committee further asserts that because it satisfied the
6 Commission's "best efforts" standard, a finding of no reason to believe is the appropriate
7 disposition. *Id.* The Committee, however, does not provide any explanation for how it exercised
8 "best efforts" prior to its failure to report the newly incurred debt on the original reports. The
9 Committee also requests that the matter be assigned to the Alternative Dispute Resolution Office
10 ("ADR") if the Commission concludes that further action is warranted. *Id.*

11 Based on the available information, we recommend that the Commission open a Matter
12 Under Review and find reason to believe that the Republican National Committee and Anthony
13 W. Parker, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(8) and 11 C.F.R.
14 §§ 104.3(d) and 104.11(b) by failing to disclose and itemize all newly incurred debts on its
15 original monthly reports for May-September 2010.

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18 **II. FACTUAL AND LEGAL ANALYSIS**

19 **A. Factual Summary**

20 The Committee failed to disclose newly incurred debts totaling \$9,323,930 on its original
21 May-September 2010 monthly reports. *See* Referral. The Committee, in response to RAD's
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Requests for Additional Information ("RFAs") with respect to the May-September 2010

Monthly Reports, stated in part:¹

"The additional debts listed on Line 10 of the Summary Page of our amended reports were discovered during a self-initiated internal review process, which was undertaken in connection with the arrival of a new Chief of Staff and Finance Director. The review included an evaluation of invoices received and paid by the Republican National Committee (RNC) to ensure the legitimacy of billings and accuracy of the RNC's reports to the FEC. As a result of these good-faith efforts, and in compliance with FEC reporting regulations, we amended our reports appropriately. These efforts have also resulted in new processes to prevent similar issues from arising in the future, and should any additional information be found to warrant further amended existing reports, we will do so accordingly."

The charts below provide the relevant details of the Committee's original monthly report filings and the amended monthly report filings.²

2010 May Monthly Reports

	Original 2010 May Monthly Report received 5/20/10	Amended 2010 May Monthly Report, Received 7/20/10	Actual Increase in Net Debt Incurred
Amount Incurred This Period (Schedule D)	\$0.00	\$3,322,813.47	\$3,322,813.47

¹ On July 30th, August 10th, November 3rd, November 12th, and December 14th, 2010, RAD sent RFAs to the Committee seeking clarification regarding the additional debts on its amended filings that were not disclosed on its original May-September monthly reports. The Committee, in response to the RFAs, submitted the same response to RAD on September 3rd, December 8th, December 15th, 2010 and January 18, 2011, respectively. In addition, RAD had several different conversations with Committee representatives with regard to the RFAs, including inquiries as to the correct method of reporting debt since the Committee frequently pays off debt to a vendor while also incurring additional debt. RAD advised that the debt and debt payments be reported as they actually occur. Subsequently, the Committee representative was advised that RAD would be reviewing all amendments for increased activity and including them in a single referral.

² As indicated, the Committee filed its initial amendments from 28 to 90 days after the newly incurred debt should have been originally reported.

2010 June Monthly Reports

	Original 2010 June Monthly Report received 6/20/10	Amended 2010 June Monthly Report, Received 7/26/10	Amended 2010 June Monthly Report, Received 10/18/10	Actual Increase in New Debt Incurred
Amount Incurred This Period (Schedule D)	\$760,141.03	\$2,135,039.39	\$3,055,522.71	

2010 July Monthly Reports

	Original 2010 July Monthly Report received 7/20/10	Amended 2010 July Monthly Report, Received 10/18/10	Amended 2010 July Monthly Reports, Received 12/15/10 and 2/25/11	New Debt Reported on Original July Report but Removed from Amendment	Actual Increase in New Debt Incurred
Amount Incurred This Period (Schedule D)	\$361,969.08	\$2,128,893.51	\$2,121,141.89	\$175.00	

2010 August Monthly Reports

	Original 2010 August Monthly Report received 8/20/10	Amended 2010 August Monthly Report, Received 10/18/10	Amended 2010 August Monthly Reports, Received 12/15/10 and 3/4/11	Actual Increase in New Debt Incurred
Amount Incurred This Period (Schedule D)	\$67,500.00	\$1,114,967.63	\$1,107,215.41	

2010 September Monthly Reports

	Original 2010 September Monthly Report received 9/20/10	Amended 2010 September Monthly Reports, Received 10/18/10, 1/18/11, and 3/11/11	New Debts Reported on Original September Monthly Report but Removed From All Amendments	Actual Increase in New Debt Incurred
Amount Incurred This Period (Schedule D)	\$204,227.83	\$943,693.09	\$50,315.23	

1. Best Efforts Defense

The Committee asserts that its corrective actions qualify for the treatment under the Commission's Best Efforts Policy Statement under which committees are not held liable if they undertook best efforts to ensure compliance prior to the violations. The Committee claims that it

1 has satisfied the "best efforts" standards by taking the time to evaluate and determine the
2 accuracy and legitimacy of purported debts owed by it prior to reporting any such debts to the
3 Commission once it determined through its self-initiated review that such action was necessary.
4 Response at 7-8. The Committee also states that its amendments included an additional 279 debt
5 entries disclosed on Schedule D which represents a mere 0.4% of the 65,524 itemized
6 transactions duly disclosed on its original May-September 2010 monthly reports. *Id.* at 8. The
7 Committee states that the additional debts, while seemingly large when viewed in isolation,
8 purportedly represent only 2.2% of the Committee's total activity for the 2009-2010 election
9 cycle.³ *Id.*

10 2. Transfer to ADR

11 In the alternative, the Committee argues that the Commission should assign the matter to
12 ADR. Response at 9. The Committee maintains that this matter involves "highly technical and
13 vague debt reporting requirements, many of which have not been defined with any specificity in
14 either the Act or regulations" and the Commission has issued little or no guidance to reporting
15 committees in recent decades.⁴ *Id.*

16 In support of its argument for ADR handling, the Committee refers to several matters
17 involving an increase in debts on a political committee's amended reports that were either

³ The Committee states that it calculated this debt increase figure by dividing the increase in debt by the total of the RNC's total receipts and disbursements for the 2009-2010 cycle. Response at 3 and footnote 3. The cycle total was calculated using data on Column B of Lines 6(c) and 7 of the most recent amendments to its 2009 and 2010 Year End Reports. *Id.*

⁴ The Committee asserts that neither the Act nor regulations define the terms "debt" or "incurred" within the meaning of the provisions. Response at 6; *see also* 11 C.F.R. §§ 104.3(d), 104.11(a), 104.14(d). It further notes that the Explanation and Justification for debt reporting regulations issued by the Commission in 1990 states that a previous version of the regulation required debts to be reported "as of the time of the transaction," but indicates that the language of the regulation was being modified at that time to require reporting "as of the date the debts are incurred." *Id.*; *see also* Explanation and Justification for Debts Owed by Candidates and Political Committees, 55 Fed. Reg. 26378, 26385 (June 27, 1990).

1 assigned to ADR or transferred to ADR by the Commission.⁵ Response at 9. The Committee
2 acknowledges that the majority of these cited matters were handled by ADR prior to the
3 Commission's promulgation of the Best Efforts Policy Statement.⁶ *Id.* The Committee contends
4 that the debt increase percentages for the cited ADR matters are comparable to its own debt
5 increase percentage of 2.2%, and in some instances two to three times larger than its own debt
6 increase.⁷ Response at 9; *see also* footnote 4.

7 **B. Legal Analysis**

8 The Federal Election Campaign Act of 1971, as amended ("The Act") provides that all
9 national committees of a political party shall file monthly reports in all calendar years which
10 shall be filed no later than the 20th day after the last day of the month and shall be complete as of
11 the last day of the month. 2 U.S.C. § 434(a)(4)(B). The Act also provides that each report
12 required to be filed by the treasurer of a political committee must contain the amount and nature
13 of outstanding debts and obligations owed by or to such political committee. 2 U.S.C.
14 § 434(b)(8); *see also* 11 C.F.R. § 104.3(d). Further, section 104.11(b) of the Commission's

⁵ The cited matters are ADR 251 (Libertarian National Committee), ADR 261 (Mike Thompson for Congress), ADR 263 (Walcher for Congress), ADR 289 (Melissa Bean for Congress), ADR 296 (Porter for Congress), ADR 324 (Democratic Executive Committee of Florida), ADR 366 (Michigan Republican Party), ADR 387 (Hastert for Congress), ADR 408 (Matt Brown for U.S. Senate), ADR 434 (Ned Lamont for Senate), ADR 472 (Oberweis for Congress), ADR 503 (Alaskans for Begich), and ADR 504 (Washington State Democratic Central Committee). Response at 9 and footnote 4.

⁶ The Committee notes that only six of the thirteen cited ADR matters (#s 387, 408, 434, 472, 503 and 504) were assigned to ADR after the implementation of the Best Efforts Policy statement. In addition, six of the thirteen cited matters (ADR #s 261, 263, 289, 296, 324 and 366) were transferred to ADR by the Commission. *Id.* Seven of these cited ADR matters involved six figure increases in debt, including #s 263 (\$100k), 324 (\$106k), 366 (\$147k), 387 (\$146k), 408 (\$149k), 472 (\$218k), and 503 (\$309k).

⁷ The Committee, in calculating the debt increase percentages for the cited ADR matters, states that it divided the increase in debt by the sum of the respondent's total receipts and disbursements for the relevant election cycle. For unauthorized committees, cycle totals were calculated using data on Column B of Lines 6(c) and 7 of the most recent amendments to Year End Reports covering that election cycle. For authorized committees, cycle totals were calculated using data in Column B of lines 16 and 23 of the Post-Election Detailed Summary Page for that election cycle. If the increase in activity occurred on a report covering an election cycle in which the candidate was not a participant, data from the last report of that election cycle was used. *Id.*

1 regulations states the following regarding when the debt information should be disclosed on an

2 FEC report:

3 A debt or obligation, including a loan, written contract, written promise, or
4 written agreement to make an expenditure, the amount of which is \$500 or
5 less, shall be reported as of the time payment is made or not later than 60
6 days after such obligation is incurred, whichever comes first. A debt or
7 obligation, including a loan, written contract, written promise, or written
8 agreement to make an expenditure, the amount of which is over \$500 shall
9 be reported as of the date on which the debt or obligation is incurred except
10 that any obligation incurred for rent, salary, or other regularly reoccurring
11 administrative expense, shall not be reported as a debt before the payment
12 due date. See 11 C.F.R. § 116.6. If the exact amount of a debt or obligation
13 is not known, the report shall state that the amount reported is an estimate.
14 Once the exact amount is determined, the political committee shall either
15 amend the report(s) containing the estimate or indicate the correct amount
16 on the report for the reporting period in which such amount is determined.

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18 11 C.F.R. § 104.11(b).

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20 In addition, the Act provides that "when the treasurer of a political committee shows that
21 best efforts have been used to obtain, maintain, and submit the information required by this Act
22 for the political committee, any report or any records of such committee shall be considered in
23 compliance with this Act" 2 U.S.C. § 432(i); and 11 C.F.R. § 104.7(a). The Commission,
24 in its Best Efforts Policy Statement, noted that it would consider the best efforts of a committee
25 under 2 U.S.C. § 432(i) when reviewing all violations of recordkeeping and reporting
26 requirements of the Act, whether arising in its traditional enforcement docket, audits, or the ADR
27 program.⁸ See *Statement of Policy Regarding Treasurers' Best Efforts to Obtain, Maintain, and*
28 *Submit Information as Required by the Federal Election Campaign Act*, 72 Fed. Reg. 31438,
29 31440 (June 7, 2007) ("Best Efforts Policy Statement").

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⁸ The Committee refers to *Lovely v. FEC*, 307 F. Supp.2d 294 (D. Mass. 2004) for the proposition that the Commission is required as a matter of law to consider whether the treasurer of a political committee used best efforts to file the political committee's FEC reports in a timely manner. Response at 2-3.

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1 **1. Best Efforts Defense**

2 While the focus of the Committee's "best efforts" defense argument rests entirely on the
3 steps taken during its "self-initiated internal review" to determine the accuracy of its newly
4 incurred debt figures, the Response makes no mention of the efforts and actions employed by its
5 treasurer, in particular, to ensure the timely disclosure of its newly incurred debts during the time
6 of the original monthly report filings. The Commission specifically noted that it would take into
7 consideration the following factors in determining whether the "best efforts" defense standards
8 have been satisfied: 1) whether the committee at the time of its failure took relevant precautions
9 to prevent a reporting failure; 2) whether the committee had trained staff responsible for
10 obtaining, maintaining, and submitting campaign finance information in the Act as well as the
11 committee's procedures, recordkeeping systems, and filing systems; 3) whether the reporting
12 failure was the result of unforeseen circumstances beyond the control of the committee; and
13 4) whether, upon discovering the failure, the committee took all reasonable additional steps to
14 expeditiously file any unfiled reports and correct any inaccurate report.⁹ 72 Fed. Reg. at 31440.

15 As indicated in the Commission's policy statement, the "best efforts" defense addresses
16 actions taken to avoid reporting errors and omissions and incomplete recordkeeping. In applying
17 the defense, the Commission has required that more specific proactive efforts be undertaken by a
18 committee prior to the occurrence of a filing lapse than has been demonstrated by the committee
19 in this matter. While the Response speaks in detail of the Committee's prompt and corrective
20 actions taken upon discovering the reporting failures, it is silent as to whether the Committee

⁹ The Best Efforts Policy Statement also provides that the Commission will generally conclude that a committee has not met the best efforts standards if its reporting failure is a 1) result of the unavailability, inexperience, illness, negligence or error of committee staff, agents, etc.; 2) the failure of its computer system; 3) delays caused by committee vendors or contractors; 4) failure on the part of the Committee to know the recordkeeping and filing requirements of the Act; or 5) failure to use Commission-or-vendor provided software properly. *Id.*

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1 employed trained staff who took the relevant precautions in obtaining, maintaining, and
2 submitting reporting information on its original monthly reports. In addition, the Committee
3 makes no assertion that the reporting failures were the result of any unforeseen circumstances.
4 As a result, the available information does not support the Committee's argument that it has met
5 and exceeded the Commission's "best efforts" standards.

6 Therefore, we conclude that the Committee has not satisfied the standards set forth by the
7 Commission in its Best Efforts Policy Statement. The IAD Referral notes that the Committee
8 failed to report and properly itemize newly incurred debts totaling \$9,232,950 on its original
9 May-September 2010 monthly reports, respectively. Accordingly, the Committee has violated
10 2 U.S.C. § 434(b)(8) and 11 C.F.R. §§ 104.3(d) and 104.11(b) with respect to its failure to
11 properly report and itemize the newly incurred debts on original May-September monthly
12 reports.

13 2. Transfer to ADR

14 The Commission has established criteria for whether a matter is better suited for handling
15 by ADR rather than by OGC.

1 The Committee argues that the level of activity in the present matter is comparable to the
2 level of activity in the cited ADR matters that were either assigned to or transferred by the
3 Commission to ADR.

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14 Therefore, the Committee's method of comparing the debt increase percentages for the
15 reports at issue and the cited ADR matters is not consistent with the manner in which the
16 Commission analyzes the type of misreporting at issue. In calculating the debt increase
17 percentages for the cited ADR matters as well as for the present matter, the Committee compares
18 debt increases against all categories of financial activity throughout the election cycle rather than
19 just for the debts which is the financial activity category at issue in the present matter. In order
20 to accurately calculate and compare the debt increase percentages, the Committee would need to
21 look at the actual Schedules D for the cited ADR matters to determine the net debts (or newly

1 incurred debts). Instead, the Committee has utilized a calculation formula which does not result
2 in an accurate comparison for purposes of the present matter.

3 Further, none of the cited ADR matters involved the large amount of unreported newly
4 incurred debt, over \$9 million, present in this matter. Even if the percentage of its debt increase,
5 2.2%, is comparable to the percentage of debt increases in the ADR matters, the debt amounts
6 are not. The Committee's reliance on the percentage of debt increase without consideration of
7 the other relevant differences between this matter and the cited ADR matters, does not
8 appropriately account for the magnitude of the violations present in this matter. Accordingly, we
9 conclude that this matter would be more appropriately handled by OGC.

10 C. Conclusions

11 Based on the foregoing, we conclude that the Committee has not satisfied the standards
12 set forth by the Commission in its Best Efforts Policy Statement. The Committee has not
13 sufficiently demonstrated that it took the necessary proactive steps to prevent the occurrence of
14 its filing lapses. The Committee failed to report and properly itemize newly incurred debts
15 totaling \$9,232,950 on its original May-September 2010 monthly reports. We further conclude
16 that this matter would be more appropriately handled by OGC rather than by ADR based on the
17 amount of unreported debt. Accordingly, we recommend that the Commission open a Matter
18 Under Review and find reason to believe that the Republican National Committee and Anthony
19 W. Parker, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(8) and 11 C.F.R.
20 §§ 104.3(d) and 104.11(b) by failing to disclose and itemize all newly incurred debts on its
21 original monthly reports for May-September 2010.

**RR 11L-07 (RNC)
First General Counsel's Report**

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IV. RECOMMENDATIONS

1. Open a Matter Under Review.
2. Find reason to believe that Republican National Committee and Anthony W. Parker, in his official capacity as treasurer, violated 2 U.S.C. § 434(b)(8) and 11 C.F.R. §§ 104.3(d) and 104.11(b);
- 3.
4. Approve the attached Factual and Legal Analysis;
- 5.
6. Approve the appropriate letter.

Date

8-30-11

Christopher Hughey
Acting General Counsel


Kathleen M. Guith
Acting Associate General Counsel
for Enforcement


Mark D. Shonkwiler
Assistant General Counsel


Kimberly D. Hart
Attorney

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First General Counsel's Report

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