



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20543

In the Matter of)	
)	
Republican National Committee and)	MUR 4250
Alec Pointevint, as treasurer)	
Haley R. Barbour)	

Statement of Reasons

Chairman Darryl R. Wold and
Commissioners Lee Ann Elliott and David Mason

We write to state our reasons for voting on November 18, 1999 not to approve the recommendation of the General Counsel that the Commission find probable cause to believe that the respondents in this matter, the Republican National Committee ("RNC"), its treasurer, Alex Pointevint, and its former chairman, Haley R. Barbour, violated 2 U.S.C. § 441e, the prohibition in the Federal Election Campaign Act (the "Act") against receiving foreign contributions, and that they did so knowingly and willfully.¹

¹ This matter initially came to the Commission on August 23, 1995 by means of a complaint filed by the Democratic National Committee against the Republican National Committee and the National Policy Forum ("NPF"). The Commission's General Counsel concluded that NPF had no identity separate from the RNC, and that NPF's fund-raising and activities therefore should be attributed to and reported by the RNC. The General Counsel recommended that the Commission find reason to believe that the RNC had violated 2 U.S.C. §§ 434(a)(1), 441a(f), and 441b, and 11 C.F.R. §§ 102.5(a)(1) and 106.5(g)(1), for failing to report the activity conducted through NPF, for accepting excessive and prohibited funds for federal election purposes through NPF, and for failing to properly allocate funds expended through NPF for allocable activity, respectively. On June 17, 1997, the Commission determined not to adopt the General Counsel's reason to believe recommendation on these violations, by votes of three in favor of the recommendations and one opposed, thus lacking the requisite four votes in favor. (One Commissioner at that time was recused in this matter and there was one vacancy.) Because two of the three of us who sign this statement of reasons were not members of the Commission at that time, this statement does not address that determination by the Commission.

Before the Commission voted on those recommendations, however, the General Counsel's office circulated a memorandum to the Commission on May 8, 1997 adding a recommendation that the Commission internally generate a reason to believe finding that the RNC had violated 2 U.S.C. § 441e, based on news

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Our decision was based on our conclusion that, as a matter of law, the RNC did not receive a "contribution" as a result of the transactions that were the subject of this matter, so the respondents did not violate § 441e's prohibition against receiving contributions from a foreign national.

I.

We do not dispute the General Counsel's description of the essential facts in this matter. It appears that in May, 1993 the RNC's chairman, Haley Barbour, and two other officials of the RNC, founded the National Policy Forum ("NPF"), a nonprofit, issue-oriented organization, incorporated in the District of Columbia. Between May, 1993 and September, 1994, the RNC, through its nonfederal account (the Republican National State Elections account ("RNSEC")), loaned NPF a total of \$2,345,000 to finance NPF's operations. The loans were documented by a written promissory note and reported as loans by the RNSEC on its filings with the FEC. By September, 1994, NPF had repaid only \$200,000, leaving a balance due of \$2,145,000.

By September, 1994, Barbour and other officials of the RNC and NPF were anxious to have NPF raise enough money to repay the loans, so that the RNSEC account would have the funds available during the 1994 campaigns. They eventually reached an agreement with Ambrose Young, a citizen of Hong Kong, pursuant to which his company, Young Brothers Development, Ltd. - Hong Kong ("YBD-Hong Kong"), incorporated in Hong Kong, would provide \$2,100,000 in collateral through its wholly-owned United States subsidiary to secure a loan from Signet Bank to NPF. The collateral for that loan was thus from a foreign national.

accounts that NPF had received a bank loan secured by foreign collateral and then had used a portion of the proceeds of that loan to repay an earlier loan from the RNC's non-federal account. (On April 29, 1997, after the news accounts were published, and after the General Counsel's office had reviewed those news accounts, the Democratic National Committee attempted to amend its complaint against the RNC and NPF, but that amendment was not accepted because it failed to comply with the statutory requirements for a proper complaint. See General Counsel's memorandum to the Commission dated May 8, 1997, p. 1, fn. 1. On May 13, 1997, the DNC submitted an amendment to its complaint, apparently proper in form, adding an allegation that the RNC received foreign contributions through NPF.) In a separate vote on June 17, 1997, the Commission approved the General Counsel's recommendation that it find reason to believe that the RNC violated § 441e, by the affirmative vote of the four Commissioners participating. It is that reason to believe determination that eventually led to the General Counsel's recommendation at issue here, that the Commission now find probable cause to believe that the RNC violated § 441e. The General Counsel's probable cause recommendation, however, is based on a legal theory that differs somewhat from the theory initially advanced in support of the reason to believe recommendation. In light of the Commission's earlier determinations not to find reason to believe on the violations that were premised on NPF being a part of the RNC, the General Counsel's probable cause analysis properly abandoned that theory, and assumed that NPF and the RNC were two separate legal entities, even though closely related. This statement addresses only the Commission's determination on November 18, 1999, by a vote of three to three, not to find probable cause that the RNC and the other respondents violated § 441e.

On October 17, 1994 Signet Bank funded the loan by disbursing \$2,100,000 to NPF. On October 20, 1994 NPF used \$1,600,000 of the loan proceeds to repay the equivalent portion of the loan from the RNC². The repayment was deposited in the RNC's RNSEC account.

II.

Based on these facts, the General Counsel's probable cause brief recommended that the Commission find probable cause to believe that the RNC, its treasurer, and its former chairman had knowingly and willfully violated § 441e's prohibition against soliciting and receiving a contribution from a foreign national in connection with a federal election.

We respectfully disagreed that those respondents had violated § 441e, as a matter of simple application of the language of the statute.

A.

Whatever the nature of the transaction between YBD-Hong Kong, Signet Bank, and NPF, it is clear that what the RNC received from NPF was the repayment of a loan. The repayment of a loan is not a "contribution" as that term is used in § 441e.

Section 441e makes it unlawful "for a foreign national directly or through any other person to make any contribution . . . in connection with an election to any political office . . . or for any person to solicit, accept, or receive any such contribution from a foreign national." Thus, the nature of the transfer to the recipient must be a "contribution" for there to be a violation by the recipient.

The Act, in 2 U.S.C. 431(S)(A), defines "contribution" as including "(i) any gift, subscription, loan, advance, or deposit of money or anything of value . . ." The Commission's regulations do not expand that essential definition that is applicable to this case. (See 11 C.F.R. § 100.7(a)(1)).³

² The loan agreement between Signet Bank and NPF provided, in the "Use of Proceeds" section, that \$1,600,000 of the proceeds would be used to repay a loan from the RNC, \$200,000 would be used to pay other accounts payable, and the balance would be used by NPF for working capital.

³ Section 431(S)(B)(vii) in a sense limits and expands the definition of "loan" by providing that a loan made by certain lending institutions under specified conditions is not itself a loan, but that it shall be considered a loan by each guarantor. The Commission's regulations provide that the term "loan" includes "a guarantee, endorsement, and any other form of security." (11 C.F.R. § 100.7(a)(1)(i).) Thus, the posting of collateral by YBD-Hong Kong to secure the loan made by Signet Bank to NPF could arguably fall within the definition of "contribution" if that loan had been made "in connection with an election to any political office." The loan, however, was made to NPF, and not to the RNC, and neither NPF nor YBD-Hong Kong were subjects of the General Counsel's recommendations to find probable cause.

Thus, the question is whether a repayment of a loan falls within the definition of "contribution" in § 431(8)(A)(i). A straightforward reading of that section makes it apparent that it does not, because a repayment of a loan is neither a gift, nor a subscription, nor a loan, nor an advance, nor a deposit, within the dictionary meaning of any of those words. The General Counsel's brief does not suggest that those words have any meaning in the Act other than their dictionary definition. Thus, we cannot find that the RNC received a "contribution" under the simple and literal reading of the provisions of the Act that prohibit receiving a "contribution" from a foreign national.

Our General Counsel did present an argument to the Commissioners that the definition of "contribution" in § 431(8)(A)(i) is not limited to the categories listed of a "gift, subscription, loan, advance, or deposit," but is also "money or anything of value," however transmitted. Thus, he argued, the repayment of the loan was something of value, so constituted a contribution. We rejected that argument, because it is a fundamental misreading of the statutory language. The only proper construction of § 431(8)(A)(i) is that the first terms used, "gift, subscription, loan, advance, or deposit," list the modes of transfer that will make a transfer a "contribution." The next phrase, "of money or anything of value," necessarily describes what must be transferred by one of those modes to constitute a contribution. The General Counsel's reading of the statute to include "anything of value" as a contribution, no matter how transferred, not only would make the provision grammatically defective, but would expand the definition to mean any transfer at all, even for full and fair consideration (such as a vendor transferring printed material or broadcast time to a campaign in return for payment of its fair market value). We could not accept that reading of the statute.

Our conclusion that the RNC did not receive a "contribution" is reinforced by the Commission's regulations, which explicitly recognize that the repayment of a loan is not a contribution. In the context of a loan made by a political committee, the regulations provide that "[r]epayment of the principal amount of such loan to such political committee shall not be a contribution by the debtor to the lender committee." (11 C.F.R. § 100.7(a)(1)(i)(E).) While that section of the regulations applies by its terms to a "political committee," which does not include the RNC's RNSEC account (see 2 U.S.C. § 431(4) and 11 CFR §§ 100.5, 102.5(a)(1)(i)), it is nevertheless instructive in the instant case because it plainly recognizes that a repayment of a loan is not a "contribution" under the statutory definition of that term. Indeed, since the Act generally treats the making of a loan to a political committee as a contribution, it would be difficult to claim simultaneously that loan repayments are contributions.⁴

⁴ It is a matter of some puzzlement that the General Counsel's probable cause brief nowhere directly addresses what we think is this obvious issue in this matter: How a repayment of a loan can be construed to be a contribution. That brief and other legal arguments submitted to the Commission, appear to rely instead on other theories to get around this obvious issue. (See part III of this Statement.)

B.

We note that § 100.7(a)(1)(i)(E) of our regulations also requires that the repayment of a loan made by a political committee may not be made with funds that a political committee is not permitted to receive as contributions, including from foreign nationals, corporations, or labor organizations. That limitation, however, is applicable by its own terms only to a "political committee," which as noted above does not include the RNSEC account.

In addition, at least one purpose of 11 C.F.R. § 100.7(a)(1)(i)(E) appears to be to prevent federal political committees from circumventing the Act's contribution limitations by explicitly applying those limitations to loans made by such committees. Because disbursements by non-federal political committees are not limited by the Act, there would be no point in applying this regulatory restriction to non-federal committees.

Although our General Counsel did not raise it in the probable cause brief, he did take the position in front of the Commission that § 100.7(a)(1)(i)(E)'s limitations on permissible sources of repayment of a loan to a political committee are applicable to the repayment of the loan in this case because that regulation "clearly contemplates the potential for the indirect influx of prohibited funds to committees through the repayment of pre-existing debts." (General Counsel's Memorandum to the Commission, November 3, 1999, p. 2.) We do not agree that a provision in our regulations that the Commission has specifically worded to apply only to a federal committee (a "political committee" in the term of art used in the Act) can blithely be applied to a non-federal committee. The General Counsel did not provide any Commission precedent or other authority for doing so. This provision applies significant and complex limitations to the making and repayment of loans by federal committees in ways which are not obvious in the statute. If the Commission did wish to apply similar restrictions to loans by non-federal committees, due process at least would require us to do so by explicit regulation. We are further persuaded that if the proposition were so simple, the General Counsel would have raised it in the probable cause brief as a straightforward basis for finding a violation, in contrast to the comparatively complex arguments relied on in the probable cause brief for reaching the result that the secured loan to NPF was a contribution to the RNC. The probable cause brief, however, does not even raise the argument that subsection (E) of § 100.7(a)(1)(i) of the regulations is applicable to this case.

C.

Our General Counsel also suggested to the Commission that if § 100.7(a)(1)(i)(E) of the regulations is not applicable to this matter because the RNSEC account is not a political committee, then respondents cannot take advantage of what he characterized as the "permissive provision" of this section that provides that "repayment of such loan . . . is not a contribution." (General Counsel's Memorandum to the Commission, November 3, 1999, p. 2, fn. 2.) We note that suggestion only because it rests on a fundamental misconception of the statute defining "contribution," and we reject it for that reason. As

noted above, § 431(8)(A)(i) specifically lists the categories of transactions that constitute a "contribution." We believe that the meaning of "contribution" under the Act is limited to the categories set out in the definition of that term in the Act. The regulations, in § 100.7(a)(1)(i)(E), simply recognize that limitation – they do not create an exception to a broader meaning of the term "contribution."⁵

D.

Lastly, in this portion of this statement, we note that we do not accept the RNC's contention that the repayment of the loan was not a contribution because it was not made to a "hard money" account. The RNC argues in its response brief that the term "contribution" as used in § 441e is governed by the phrase in § 431(8)(A)(i) "for the purpose of influencing any election for Federal office." The RNC relies in part for this position on the district court's decision in *U.S. v. Trie* (D.D.C. 1998) 23 F.Supp.2d 55.

We agree instead with the contrary position that has long been taken by the Commission, that § 441e incorporates the definition of "contribution" in § 431(8), but as applied by the literal language of § 441e to any elective office, and not limited to elections to Federal office as referred to in § 431(8)(A)(i). (See 11 C.F.R. § 110.4(a), applying the foreign national prohibition to elections for "any local, State, or Federal public office.") The basis for the Commission's position was explained in Advisory Opinion 1987-25 [CCH ¶ 5903], which relied on the legislative history of § 441e from its origin in 18 U.S.C. § 613, as part of the Foreign Agents Registration Act of 1938, to the 1976 repeal of that section and amendment of the Federal Election Campaign Act to include the foreign national prohibition as section 441e of that Act. The Commission concluded that by amending the Act, Congress intended the limited definition of "contribution" in the Act to govern the use of that term in § 441e, but to retain the aspect of § 441e that applies the foreign national prohibition to all elections for public office in this country.

In *U.S. v. Kanchanalak*, 1999 WL 798065 (D.C.Cir. 1999), the court of appeals upheld the FEC's interpretation of the application of 441e to all elections for public office, as expressed in § 110.4(a) of our regulations and in Advisory Opinion 1987-25, as a reasonable interpretation of legislative intent in light of what the court found was ambiguity in the legislative history and literal language of the statutory scheme. We believe that after the court of appeals decision in *Kanchanalak*, we cannot rely on the district court's decision on this issue in *Trie*. We believe that the Commission's previous interpretation, upheld in *Kanchanalak*, is correct and we reject the RNC's argument to the contrary.

⁵ There would have been no point to "creating" an exception to a definition of "contribution" that otherwise would have included the repayment of loans, in § 100.7(a)(1)(i)(E) of the regulations, and then turning around in that same subsection and prohibiting repayment from the sources that are prohibited from making contributions. For that reason also, we cannot read subsection (E) as a "permissive provision" that creates an exception to the definition of "contribution," but read it as simply recognizing that the statutory definition of "contribution" does not include the repayment of a loan.

III.

In reaching our conclusion that the RNC did not receive a contribution as required by the literal language of § 441e, we also rejected the various theories advanced by our General Counsel and other Commissioners to find nevertheless that the respondents violated the foreign national prohibition. These other theories all have the common element of treating two legally distinct transactions involved here – the secured loan from Signet Bank to NPF, and NPF's repayment of the earlier loan it had received from the RNSEC account, as one transaction.

It is apparent that each of these two transactions, standing alone, would have been perfectly legal under the Act. There is no prohibition against NPF accepting a bank loan, secured by foreign collateral, because NPF's purposes and activities, as far as we know from the facts presented to us by the General Counsel, did not include influencing the election of any candidate⁶. And, as we have pointed out above, there is no prohibition against the RNSEC account accepting a repayment from NPF of a loan that it previously made to NPF, no matter what the source of the funds, because the repayment of a loan is not a contribution under the Act. We cannot agree with any of the various theories advanced for disregarding the separate nature of each of these transactions, to find that, taken together, they constitute a violation of § 441e by the RNC. Further, doing so would be contrary to the Commission's decisions in previous enforcement actions.

A.

The General Counsel's principal argument for finding a violation by the RNC appears to be that because the parties' purpose in YBD-Hong Kong providing the collateral for the bank loan to NPF was to enable NPF to repay the loan from the RNC, the legally distinct nature of each transaction should be disregarded and the two transactions looked at as one. In that view, YBD-Hong Kong's posting of collateral would be a contribution to the RNC through another person and therefore prohibited by the literal language of § 441e.

The General Counsel's probable cause brief describes the violation in those terms: "The express purpose of the loan guarantee was to allow the RNC to recoup funds loaned to the NPF in time for their use in the 1994 elections. This purpose is reflected not only in various individuals' testimony, but also in the numerous communications . . .," "the loan transaction was for the benefit of, and orchestrated by, the RNC;" "the collateral provided [from YBD-Hong Kong] constituted a contribution for the full amount of the loan proceeds transferred to the RNC;" and "by accepting the proceeds of a loan it knew to be guaranteed with foreign national funds, the RNC violated the Act's prohibition on foreign national contributions." Probable Cause Brief at 34-35. According to the General Counsel, that purpose of the various parties turned the transactions into a violation by the RNC.

⁶ The General Counsel did not advance the theory that NPF itself was a "political committee" under the Act, at any stage of this matter, and did not offer any facts that would have supported that status.

The General Counsel's probable cause brief does not cite any authority, or provide any reasoning under the Act, in support of its theory that the purpose of the parties is sufficient grounds to ignore the two distinct transactions, each permissible in its own right, and find in both of them taken together a violation of § 441e. Indeed, Commission precedent seems to point in the opposite direction. (*See infra* section III, D.) We do not agree that the Commission can simply ignore the fact that NPF's payment to the RNSEC account was a repayment of an earlier loan, and not a contribution, and therefore not prohibited by § 441e.

Further, the General Counsel's analysis (and some of the Commission discussion) suffers from failing to address the reality that Haley Barbour was, at all relevant periods, an officer of the RNC and a board member of NPF, a legally separate entity.⁷ While dual roles such as this can create legal questions, we see no justification for simply ignoring the NPF's legally independent status and Barbour's dual roles, as we perceive the General Counsel has done in charging that the loan guarantee was orchestrated by the RNC. If the General Counsel did wish to demonstrate that the NPF was not legally separate from the RNC, or that Barbour was acting contrary to his responsibilities as an NPF director in soliciting and securing the loan guarantee, a far stronger case would need to be presented than the rather conclusory assertion in the probable cause brief.

B.

The General Counsel also argued to the Commission that NPF's repayment of the earlier loans from the RNC could be disregarded as a separate transaction because the loans were not *bona fide*. In making this argument, it should first be noted, Counsel did not dispute that the RNC had actually transferred money to NPF in the amount of the loans, and Counsel acknowledged that the loans were documented by a promissory note and were reported by the RNC on reports filed with the Commission as loans made to NPF.

The General Counsel argued that the loans were not *bona fide* because they were not commercially reasonable because NPF could not qualify for a commercial loan based on its own ability to repay. Counsel did not cite any authority, however, for the proposition that a loan is not *bona fide* just because it is not commercially reasonable. In the commercial context, loans are frequently made between private parties that are not commercially reasonable in the sense that a financial institution would make them on an unsecured basis, but they are nevertheless legally enforceable and treated as loans for tax and other purposes. They are *bona fide* in every sense of the term. Candidates make loans to their campaign committees that a commercial lender would not make on an unsecured basis, because the prospects for repayment are too uncertain, but the Commission routinely treats these as *bona fide* by permitting the committee to repay the loan to the candidate without treating that repayment as the personal use of campaign funds.

⁷ During Commission discussion the General Counsel initially responded to a question on this point with the apparently flippant assertion that the NPF was a "wholly owned subsidiary" of the RNC, but subsequently noted that his office was, in fact, treating the two organizations as legally separate entities.

Counsel also argued to the Commission that the loans were not *bona fide* because the RNC had no reasonable expectation of repayment. That argument is refuted by the documentation of the loans with a promissory note and RNC's reporting of the loans; by the fact that NPF did repay \$200,000 of the loans prior to receiving the loan from Signet Bank; and by the efforts of the RNC's officers to find sources of funds for NPF that would enable NPF to repay the loans. The fact of the matter is that the RNC appears to have anticipated receiving repayment of the loans to NPF from the time it made the first one.

We conclude that the payment from NPF to the RNC should be treated as what it appears on its face to be – the repayment of a loan – because the initial loans from RNC to NPF appear to be *bona fide* in every sense of the term.

C.

One Commissioner suggested that the “step-transaction doctrine,” used by the Internal Revenue Service in applying the Internal Revenue Code, could be used in this case to disregard the separate transactions and treat the secured loan from YBD-Hong Kong to NPF as a contribution made directly to the RNSEC.⁸ That doctrine has been developed under the Internal Revenue Code to achieve the intended purposes of that Code and to prevent the use of artificial steps in a transaction to avoid the intended effect of particular provisions of the Code. The step-transaction doctrine actually has three different tests that may be used to determine if a series of seemingly separate transactions should nevertheless be treated as only one transaction, and taxed according to its substance, and not according to the tax consequences that would otherwise result from recognizing various steps taken along the way. Applied to the present case, the doctrine would permit the Commission to disregard the separate nature of two of the legally distinct transactions involved here: the secured loan from YBD-Hong Kong and Signet Bank to NPF; and NPF's use of the proceeds in part to repay an earlier loan from the RNSEC account. The doctrine would instead treat those transactions as one, in which YBD-Hong Kong posted collateral for a loan directly to the RNSEC account, with the result that the RNC accepted a prohibited contribution from a foreign national.

First, we have some reservation about importing a doctrine from tax law into the Federal Election Campaign Act. The Internal Revenue Code is a comprehensive code intended to tax all income, so it can be argued in that context that it is appropriate to focus on the substance of a transaction, and not its legal form, to determine the intended tax consequences. The Act, by contrast, imposes limited restrictions on political contributions, and those restrictions must be read narrowly and literally because they infringe by their nature on protected First Amendment rights. On the other hand, it seems appropriate to use

⁸ While the step transaction doctrine *per se* was not included in the General Counsel's brief, we note that something at least akin to this doctrine underlies the General Counsel's interpretation of the phrase in § 441e “through any other person” as having a meaning that would include YBD-Hong Kong's posting of collateral for the loan to NPF as a contribution to the RNC.

judicially-developed and generally-applicable doctrines of law, such as principles of statutory construction, in the interpretation and application of the Act.

We also have some reservation about adopting a doctrine that has not been relied on before by the Commission or the courts in applying the provisions of the FECA for the first time in an enforcement action. That procedure raises significant questions about fair notice to the regulated community and, hence, questions of due process.

We do not need to resolve those questions, however, because we do not agree that the step-transaction doctrine is applicable to the transactions in this matter.

In the tax area, the step-transaction doctrine is not automatically applied to every transaction which might fit into one of the three variations that constitute it. The application of the doctrine is triggered only when it appears that a taxpayer is resorting to an artificial structure for a transaction that puts form over substance to achieve a result not intended by the statutory scheme of the Internal Revenue Code. The statement in *Associated Wholesale Grocers, Inc. v. U.S.*, 927 F.2d 1517, 1521 (10th Cir., 1991), that "the step-transaction doctrine developed as part of the broader tax concept that substance should prevail over form," is repeated in various forms in many of the cases. It is clear from the facts of those cases that the "form" that the court refers to is form without substance. In *Gregory v. Helvering*, 293 U.S. 465 (1935), the Court described the form of the transaction designed by the taxpayer as "an operation having no business or corporate purpose -- a mere device," and "a contrivance," *Id.* at 469, and an "artifice." *Id.* at 470. The Court rejected the artificial form of the transaction because that would defeat the "plain intent" of the statute. *Id.* at 470. In *Minnesota Tea Co. v. Helvering*, 302 U.S. 609 (1938), the Court refused to give tax effect to a "transparently artificial" and unnecessary step taken by the taxpayer in an attempt to avoid an adverse tax result. In *Court Holding Company v. Commissioner*, 324 U.S. 331, at 334 (1945), the Court said that "the incidence of taxation depends on the substance of a transaction. . . . To permit the true nature of a transaction to be disguised by mere formalisms, which exist solely to alter tax liabilities, would seriously impair the effective administration of the tax policies of Congress."

That element of an artificial device, created by the taxpayer solely for the purpose of avoiding tax liabilities, is reflected in the IRS' position in Revenue Ruling 79-250, 1979-2 C.B. 156: "The substance of each of a series of steps will be recognized and the step transaction doctrine will not apply, if each such step demonstrates independent economic significance, is not subject to attack as a sham, and was undertaken for valid business purposes and not mere avoidance of taxes."

Thus, before we could apply the step-transaction doctrine here, we would need to show that the transaction in question lacked substance in at least one particular: That is, that at least one leg did not have economic significance, was a sham, or was not undertaken for valid business purposes. That does not appear to be the case in the transactions in this matter: The loan from the RNSEC to NPF, the collateral from YBD to Signet, the loan from Signet to NPF, and the repayment from NPF to the RNSEC each had economic

significance, none was a sham because each was real, and each had a valid purpose. Furthermore, neither the end result nor the specific transactions which did eventually occur could conceivably have been contemplated when the series of transactions commenced with the RNC loans to the NPF. Thus, we cannot agree that the step-transaction doctrine, even if available to the Commission, could be used to disregard the separate and legal nature of each of the transactions involved here.

We reject the use of the step-transaction doctrine for another independent reason: It has far too much uncertainty to be constitutionally applied to regulate activity protected by the First Amendment. The courts have repeatedly recognized the uncertainty of the application of the step-transaction doctrine in the tax area, stated probably most colorfully by the court in *Security Industrial Insurance Company v. U.S.*, 702 F.2d 1234, at 1244 (5th Cir., 1983):

"The types of step transactions are as varied as the choreographer's art: there are two steps, waltzes, fox trots, and even Virginia reels. As a consequence, the courts' applications of the step transaction doctrine have been enigmatic. As the Seventh Circuit observed: [¶] "The commentators have attempted to synthesize from judicial decisions several tests to determine whether the step transaction doctrine is applicable to a particular set of circumstances Unfortunately, these tests are notably abstruse -- even for such an abstruse field as tax law."

The court in *Security Industrial* applied the doctrine to the taxpayer in its case, concluding that "[o]nly if Security dances to the Codal choreography is it entitled to favorable tax treatment." *Id.* at 1251. Similarly, the court in *Kuper v. Commissioner*, 533 F.2d 152, at 159 (5th Cir., 1976), candidly stated that "we are unable to draw a single bright line separating in all instances unacceptable artifice from valid tax planning."

Yet it is a "bright line" that the First Amendment requires in informing persons what activity will be permitted and what will not, as the Court made clear in *Buckley*. The issue is whether there is a sufficiently clear test for application of the step-transaction doctrine to meet the constitutional requirement of providing a "bright line." The courts in the tax area, where the doctrine has been applied, clearly suggest not.

D.

In addition to our disagreement with the various theories that have been advanced for treating the distinct transactions in this case as one, in order to find a violation, we also believe that doing so would be inconsistent with the position taken by the Commission in at least two closely analogous situations in the past. In two now-closed MURs, the Commission took the position that two separate and distinct but sequential transactions should not be treated as one, where each was legal in its own right, but if treated as one,

would constitute a violation of the Act. The Commission took this position even though the earlier transaction in each case was taken in contemplation of the second.

In MUR 4000, Fisher for Senate etc., et al., candidate Fisher sent out an invitation to a fund raising dinner to support his general election campaign for the U.S. Senate. The invitation invited guests "to join us for dinner with Richard Fisher, the Democratic nominee for the United States Senate" and "give or raise \$5,000 for Richard's campaign." The invitation continued: "Attached is an outline of the federal campaign contributions limits and the vehicles for supporting Richard's campaign." [MUR 4000, First General Counsel's Report, 1/23/96 p. 3.]⁹

The attachment explained that each individual could donate \$1,000 to the current general election campaign, and an additional \$1,000 to retire debts remaining from each of Fisher's previous three campaigns for that office, for a total of up to \$4,000. The balance was solicited for a national party committee. The solicitation added that "Fisher will match all debt retirement contributions with new personal contributions to the General Election Campaign."

A complaint pointed out that the only debts remaining from the three previous campaigns were owed to Fisher himself. Fisher was thus raising funds for committees from previous campaigns to repay himself amounts owed from those committees, and then making equivalent contributions from himself to his current campaign. The complaint alleged that contributions to retire the debts of the previous campaigns, from any individual who also made the maximum \$1,000 contribution to the current campaign, constituted excessive contributions to Fisher's current campaign, since those contributions flowed through the candidate to the present campaign.

The First General Counsel's Report concluded that the contributions were all legal, and recommended that the Commission find no reason to believe that those actions violated the Act. The Commission adopted the General Counsel's recommendation by a unanimous vote of 5-0. In support of the recommendation, the General Counsel articulated an analysis directly applicable to the sequential transactions in the present case:

"Each of these types of contributions is permitted individually under the Act, and they are not prohibited collectively. . . . Consequently, tying these two legal acts together -- legal contributions for debt retirement and legal contributions made by a candidate -- does not make either the contributions or the nexus illegal. This arrangement as such does not per se constitute 'money laundering' (a term without any specific meaning in the

⁹ Because this solicitation was addressed to individual contributors it could have been read directly as a solicitation for excessive contributions to "Richard's campaign" -- twice referred to in the singular. This reading was strengthened by the attachment's implication that all contributions, however initially directed, would flow through to the current general election campaign by means of "new" contributions from Fisher himself. That was in fact the intent and effect of the debt retirement contributions, but was rejected by the Commission as a violation of the Act.

Act) or 'illegal earmarking,' in violation of the . . . Act." [First General Counsel's Report, p. 13.]

In MUR 4314, Sherman for Congress, et al., a complaint alleged that a candidate for federal office, Brad Sherman, solicited contributions to his committee from a previous race for state office to enable that state committee to repay an earlier loan from Sherman. The complaint alleged that those funds were then included in a loan that Sherman made to his current federal committee. The complaint contended that those steps, taken together, violated the prohibition in 11 C.F.R. § 110.3(d) against the transfer of funds from a state committee to a federal committee.

The First General Counsel's Report in MUR 4314 found no violation, analyzing the sequential steps thusly:

"The repayment [to Sherman from the state committee] appears accelerated or made specifically for the candidate to use these funds for his federal campaign. Although this may give the appearance of wrongful conduct, this appears not to be a violation of the federal election laws. A candidate for Federal office may make unlimited expenditures from personal funds to his committee." [First General Counsel's Report, p. 7.]

In language directly applicable to the present case, the Report concluded that "the prohibition on the source of the funds used for repayment [of a pre-existing loan], when a nonfederal committee repays a debt to a federal committee, is not applicable when the nonfederal committee's repayment is to the candidate for federal office for a debt owed to the candidate prior to his run for federal office." (First General Counsel's Report, p. 9.)

The Report cited the Commission's earlier decision in MUR 4000, and relying in part on that decision, concluded that "there appears to be no transfer of funds from a non-federal committee to a federal committee," and thus no violation of the Act. The Report recommended that the Commission find no reason to believe that a violation had occurred, and the Commission adopted that recommendation by a unanimous vote of 5-0.

The present case cannot be distinguished from these two MURs in any legally meaningful way, and the same conclusion follows here.

The General Counsel's Report in the present case, somewhat surprisingly, did not rely on the Counsel's earlier analyses recommending against reason to believe in MURs 4000 and 4314, or make the recommendations that the Commission adopted in those MURs. Instead, in the present case the General Counsel purported to distinguish those earlier MURs on the grounds that the candidate's receipt of funds, through the permissible repayment of a loan, that could not have been contributed directly to the candidate's federal committee "essentially cured any potential taint" that might otherwise attach to those funds "because any funds to which a candidate has a legal right of access to or control over, such as repayments of personal loans, are deemed personal funds, and because a candidate may

make unlimited expenditures from personal funds, any question regarding the source of the funds is immaterial so long as the funds qualified as personal funds . . .” (General Counsel’s Report, 9/8/99, p. 19.) This does not distinguish the present case, because the same analysis applies to it: The secured loan to NPF was itself permissible and not a violation of the Act, and NPF had the right to use those funds to repay a *bona fide* loan, an act that was also permissible. The principle applied in MURs 4000 and 4314, that two permissible transactions should not be collapsed to make one impermissible one, likewise follows here.

During the Commission’s consideration of the present matter, the General Counsel also agreed with at least one Commissioner who suggested that another distinction between the present case and MURs 4000 and 4314 was that the donors who made the initial contributions in those cases did not know at that time that their own funds would ultimately be used to make a contribution to the candidate’s federal committee.¹⁰ The fallacy in relying on that supposed distinction, however, is that in both of those MURs the General Counsel recommended finding no reason to believe that a violation had occurred, without first conducting any factual inquiry at all into the issue of the donors’ knowledge. The Counsel’s Report did not recommend any investigation into that issue, and in fact did not even mention that potential knowledge, or lack of it, as an issue that might affect the analysis. An issue that was ignored at the reason to believe stage in those earlier MURs cannot reasonably or legitimately be raised now in an attempt to distinguish the present matter. Further, we agree that the donors’ knowledge or intention in those MURs was not relevant to the permissibility of the candidate using those funds, obtained through the repayment to him of a *bona fide* loan, for a new contribution, unlimited in amount, to his own campaign. Similarly, in the present case we do not believe that the donor’s knowledge of or intent concerning the ultimate use of the collateral has any significance to the permissibility of NPF using a portion of the secured loan for a purpose other than a contribution, in this case to repay a *bona fide* loan.

We are willing to accept the analyses in MURs 4000 and 4314 as correct, and apply them in this case.

IV.

During the Commission’s discussions of this matter, concerns were raised about the policy implications of not finding that a violation had occurred here. Those concerns are not well founded.

The facts of this case cannot be construed as an elaborate scheme to avoid the statutory prohibition against accepting contributions of foreign money. The result we reach

¹⁰ The solicitation materials at issue in MUR 4000 presented an obvious road map of how funds would flow to Fisher’s then-current campaign, suggesting to us that this claimed distinction is contrary to undisputed facts in the record in that matter. At best, it imputes blind ignorance to the donors to Fisher’s other campaign committees.

in this matter is dependent in part on the existence of the *bona fide* loan from the RNC to NPF that substantially predated any efforts to find contributions to NPF to enable it to repay that loan. Thus, one could conclude that the relationship between the RNC and NPF was a scheme to avoid the law only by ignoring the legitimate and significant activity that NPF engaged in for a year and a half prior to the 1994 loan repayment, or by adopting the fiction that the RNC knew when it began making loans to NPF that YBD-Hong Kong was waiting in the wings to guarantee repayment.

Further, this matter does not implicate the more frequently-encountered concerns about foreign money being used to influence elections through the "soft money" corridor to finance advocacy advertisements, voter guides, voter registration, get-out-the-vote or similar activities, because NPF did not engage in those activities. Indeed, it is nearly beyond dispute that NPF's activities would not normally be considered to have been for the purpose of influencing any election to any political office. (That reinforces our conclusion that there was no basis on which NPF could have been considered to be a political committee.)

Thus, the RNSEC loaned significant amounts of funds eligible to be used to influence state elections to the NPF to be used for non-election influencing activities. The RNSEC forsook use of those funds for an extended period. Eventually, after significant efforts which very nearly failed, the RNSEC secured the repayment of a portion of the loan principal. In terms of its ability to influence elections, the RNSEC did not secure any advantage from the loans and their subsequent repayment. This fundamental lack of advantage is another reason for our skepticism about the various and complex theories advanced to support the claim of a FECA violation.

Along the same lines, concerns were expressed that failure to find a violation in this case would open up the doors for avoidance of the foreign national prohibition in the future, by permitting contributions to be funneled through front groups. We respectfully disagree.

The facts of this case are truly unusual, and do not suggest the possibility of frequent replication. As we pointed out above, the key to the legal result that we reach is the earlier loan, in which the RNC disbursed its funds to NPF. Thus, to achieve the same result in another case, a committee would have to first disburse its own funds to another entity, and then find a foreign national willing to make a contribution to that other entity to repay the loan. Those steps seem to offer little incentive to a committee to intentionally engage in as a matter of fund-raising strategy. If other Commissioners fear, however, that this unusual fact pattern for some reason will be imitated in the future by political parties to avoid the foreign national prohibition, they should consider a rulemaking procedure to amend § 100.7(a)(1)(i)(E) to apply its restrictions on repayments to loans made by non-federal committees, as well as federal committees, and deal with the supposed problem that way.

Our position in this case similarly does not have implications for the enforcement of the prohibition against foreign national contributions in the case of such contributions made indirectly through another person, who in turn makes the contribution to the candidate or party committee. We would analyze that series of transfers under § 441e in the same way as we would analyze contributions in the name of another person under 2 U.S.C. § 441f. A contribution made by a foreign national that is funneled through another person, and passed along by that person as a contribution to a party or candidate committee, is a contribution in the name of another, and is a contribution made indirectly by a foreign national and is prohibited by § 441e. Stated another way, as long as the recipient committee receives a "contribution" (as opposed to repayment of a loan, or goods or services the committee paid fair value for, or some other transfer not described as a "contribution" under the Act) from a foreign national, the receipt is prohibited whether that contribution came directly to the recipient or indirectly through another person.

In this present case, however, as explained at the beginning of this statement, the RNC did not receive a "contribution" within the meaning of that term in § 441e, so it cannot be found to be in violation of the prohibition against receiving a contribution from a foreign national.

V.

We add this last section to briefly address two procedural aspects of this matter: the possible application of a statute of limitations to the Commission's prosecution of this matter; and the timeliness of this statement of reasons.

During the course of the Commission's deliberation on the merits of this matter, the issue was raised of the effect of the statute of limitations on the ability of the Commission to impose a penalty for the violations alleged by the time the Commission reached a final decision on the merits.

Since the Act contains no statute of limitations on civil actions to impose monetary penalties or to seek other forms of relief for violations of the Act, it appears that the general statute of limitations in 28 U.S.C. § 2462 governs such actions. That section provides, *inter alia*, that "an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued . . ." Before the Commission is permitted to file suit for a violation, 2 U.S.C. § 437g(4) requires the Commission to first find probable cause that a violation has occurred, and to then attempt, "for a period of at least 30 days, to correct or prevent such violation by informal methods of conference, conciliation, and persuasion." Only if those attempts fail may the Commission then file suit. (Sec 2 U.S.C. § 437g(6)(A).) Given those time periods, when the General Counsel's recommendation to find probable cause was finally submitted to the Commission, it appeared that the effective last date for the Commission to find probable cause on the

activities alleged in the General Counsel's report to constitute violations, and still leave the requisite time for conciliation attempts before filing suit, was September 17, 1999.

We regarded it as very unfortunate that the General Counsel's report recommending probable cause was not completed until September 8, 1999, and was circulated to the Commissioners the next day, September 9, with a request that it be placed on the agenda on the Commission's closed meeting on September 14. That was the only closed meeting of the Commission scheduled before the September 17 effective deadline for action, and that short time frame necessitated a waiver of the Commission's rules for timely submission of documents in advance of a meeting to allow the matter to be considered.¹¹ More significantly than the Commission's internal rules, however, that short time frame allowed the Commissioners only three business days prior to the meeting in which to consider the hundreds of pages of legal arguments and supporting documentation in a case involving extensive facts and complex and somewhat unique legal issues. (See Commissioner Wold's memorandum dated September 13, 1999, made a part of the record in this matter.) In addition, one Commissioner, who had previously voted for reason to believe on the violation alleged, had already announced plans to be absent from the meeting of September 14. In these circumstances, at the meeting on September 14 the matter was ordered held over, without objection, to a subsequent meeting of the Commission to give Commissioners more time to consider the lengthy briefs and complex legal arguments in this matter. After discussion at subsequent Commission meetings, exchanges of memorandums on the legal issues between Commissioners, and additional memorandums on legal issues from the General Counsel's office, the vote on the probable cause recommendation was taken on November 18, 1999.

During the Commission's debate of this matter in meetings after September 17, there were discussions of whether the statute of limitations would preclude any further action by the Commission, or would permit some remedies but preclude others. Those issues were not resolved by the Commission.

We want to make it clear, therefore, that our decision not to find probable cause was on the merits of this matter alone and did not take into account, and made no determination of, the possible effect, or absence of effect, of any statute of limitations that might be applicable. That is to say, our decision on the merits that there was no violation of the Act was reached without regard to the possibility that a statute of limitations may

¹¹ In direct contrast to two of our colleagues' hyperbolic criticism of our failure to meet the Commission's internal schedule for issuing this Statement of Reasons (see the Statement of Reasons by Commissioners McDonald and Thomas) those Commissioners argued vigorously in favor of Commissioner McDonald's motion (which was agreed to by the Commissioners) to suspend the Commission's rules on timely submission of agenda documents in order to consider this matter on an accelerated basis. If complainants are to be considered prejudiced by the Commission's failure to meet an internal procedural deadline, respondents also could argue that they would be prejudiced by the Commission's waiver of a rule designed to ensure adequate time for the Commissioners' deliberation of a matter. We believe the better view is to regard these internal deadlines as for the benefit of the Commissioners, and not for the benefit of outside parties.

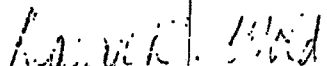
have barred the Commission from seeking any or all forms of relief in any event, and, conversely, our reaching a decision on the merits did not indicate any decision that further proceedings would not have been barred by the statute of limitations.

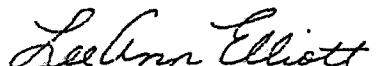
Secondly, we deal briefly with the assertion by two of the three Commissioners who voted to find probable cause that we have failed to timely file this statement of reasons, and that the result "would appear to justify a default finding" in a private action under 2 U.S.C. § 437g(a)(8) that the Commission's failure to find probable cause "was contrary to law." (Statement of Reasons by Commissioners Thomas and McDonald dated January 28, 2000, p. 23, fn. 19.) That assertion is totally without legal support.

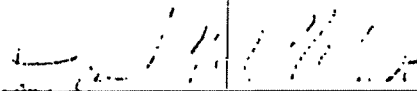
The basis for the requirement asserted by our colleagues is an internal rule of the Commission, found in 11 C.F.R. § 5.4(a)(4), which provides that "opinions of Commissioners rendered in enforcement cases" and other matters pertaining to those cases "will be made available [to the public] no later than 30 days from the date on which a respondent is notified that the Commission has voted to take no further action." That 30-day period ran in this case on December 18, 1999. It is undoubtedly good practice for Commissioners to make their opinions available by the time the case is first made available to the public, but there is nothing in the rule that would preclude a later filing of an opinion, as our colleagues themselves have done with their statement of reasons filed only a few days ago.

More importantly, there is clearly no "default" by the Commission in a § 437g(a)(8) suit for the absence of a statement of reasons within that 30-day period set by the Commission, and not by the Act. The cases cited by our colleagues requiring statements of reasons set no specific deadlines, but require the statements in order to facilitate judicial review. (*Common Cause v. FEC*, 842 F.2d 436 (D.C.Cir. 1988); *Democratic Congressional Campaign Committee v. FEC*, 831 F.2d 1131 (D.C.Cir. 1987).) The judicial remedy for the Commission's failure to explain its reasons for dismissal of a complaint is a remand to the Commission for preparation of a statement to "explain coherently the path they are taking." (*Democratic Congressional Campaign Committee v. FEC*, *supra*. 831 F.2d at p. 1133; accord, *Common Cause v. FEC*, 842 F.2d at p. 448) We trust that this statement does so.

Dated: February 11, 2000


DARRYL R. WOLD
Chairman


LEE ANN ELLIOTT *etc*
Commissioner


DAVID MASON
Commissioner