SENSITIVE

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Daniel W. Hynes	)	MUR 5744
Hynes for Senate, and Jeffrey C. Wagner,	)	
in his official capacity as treasurer	)	

STATEMENT OF REASONS OF CHAIRMAN MICHAEL E. TONER, VICE CHAIRMAN ROBERT D. LENHARD AND COMMISSIONERS DAVID M. MASON AND HANS A. von SPAKOVSKY

The matter arises from a referral by the Commission's Reports Analysis Division ("RAD") to the Office of General Counsel ("OGC"). We write to explain our reasons for supporting a motion to delete from the proposed conciliation agreement a reference to the respondent-candidate's personal liability for a civil penalty.[1]

I. BACKGROUND

Daniel Hynes ran for the United States Senate in a 2004 primary.[2] One of his opponents, Blair Hull, spent enough of his own money to trigger increased contribution limits for other candidates in the same primary under the so-called "Millionaire's Amendment," 2 U.S.C. § 441a(i) (2002).[3] Both Hynes and Hull lost in the primary, which ended their candidacies. However, to pay its debts, the Hynes committee followed its counsels' advice and continued raising money under increased "Millionaire's Amendment" contribution limits after Hull's candidacy had ended.[4] There is no contention that any other candidate in the same primary triggered the amendment.

In this matter there is insufficient[5] basis to conclude that the candidate knowingly and willfully violated the amendment's contribution limits. Nevertheless, the proposed conciliation agreement

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[1] Voting affirmatively were Chairman Toner, Vice Chairman Lenhard, and Commissioners Mason and von Spakovsky. Voting negatively were Commissioners Walther and Weintraub.

[2] General Counsel's Report #2 at 1 ("Second GCR") at 1 (Oct. 13, 2006).

[3] First General Counsel's Report at 3 ("First GCR") (May 1, 2006). Section 441a(i) is for Senate candidates. The Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.*, has a separate "Millionaire's Amendment" for House candidates. *Id.* § 441a-1 (2002).

[4] First GCR at 3-4; Second GCR Attach. 2-3.

[5] Although it suffices to note that there is insufficient basis for such a finding, it is worth observing, out of fairness to the candidate, that there is *no* basis to conclude he knowingly and willfully violated the "Millionaire's Amendment" contribution limits.

would require that all respondents pay a civil penalty.[6] This would include Hynes – a "non-millionaire" candidate – in his personal capacity.

II. DISCUSSION

FECA's "Millionaire's Amendment" provides:

> A candidate and a candidate's authorized committee shall not accept any contribution and a party shall not make any expenditure under the increased limit after the date on which an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate.

2 U.S.C. § 441a(i)(2)(B) (provision for Senate candidates).[7] Thus, FECA prohibited Hynes from continuing to raise money under increased "Millionaire's Amendment" contribution limits after the candidacy of Hull, the only "millionaire," had ended.

The next issue is whether "non-millionaire" candidates may be personally liable for a civil penalty when there is insufficient basis to conclude that they knowingly and willfully violated "Millionaire's Amendment" contribution limits. Whether the result would be different if "non-millionaire" candidates knowingly and willfully violated the "Millionaire's Amendment" contribution limits is not before the Commission in this matter.

The amendment does apply to both "non-millionaires" and their campaigns. Neither may "accept any contribution ... under the increased limit after ... an opposing candidate ceases to be a candidate to the extent that the amount of such increased limit is attributable to such an opposing candidate." *Id.*[8] Nor may they accept contributions under increased limits until receiving proper notice. *See id.* § 441a(i)(2)(A)(i).[9] However, under FECA generally, congressional candidates who receive contributions for their campaigns do so as agents of their authorized committees. *See id.* § 432(e)(2) (2004).

It is worth emphasizing that this general FECA provision applies when congressional candidates *receive* contributions for their campaigns, *see* 2 U.S.C. § 432(e)(2), which is what "non-millionaires" do under the Millionaire's Amendment. They receive contributions. They do not make them. *See* 2 U.S.C. § 441a(i) (provisions for Senate candidates).[10] Moreover, Section 432(e)(2), along with other provisions relating to treasurers, *see id.* § 434(a), (c), (d) (2004), have led the Commission generally to exclude candidate personal liability. *See FEC v. Gus Savage for Congress '82 Comm.,*

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[6] Second GCR Attach. 1at ¶ VI.2.

[7] *See also* 2 U.S.C. § 441a-1(a)(3)(B) (identical text for House candidates).

[8] *See also id.*

[9] *See also id.* § 441a-1(a)(3)(A)(i) (similar text for House candidates).

[10] *See also id.* § 441a-1 (provisions for House candidates).

606 F. Supp. 541, 546-47 (N.D. Ill. 1985).[11] It would indeed be odd for a FECA provision intended to help "non-millionaires" be the very provision that subjected them to potential personal liability for FECA violations, even where the candidates sought legal advice and the violations were inadvertent.

By contrast, "millionaire" candidates may be personally liable under the "Millionaire's Amendment" even without a finding of a knowing and willful violation. *See, e.g., In re Broyhill,* Matter Under Review ("MUR") 5648, Second GCR at 8-11 (F.E.C. March 1, 2006).[12] The amendment, after all, imposes notification requirements on "millionaire" candidates that do not apply to their committees:

> (iii) *Initial notification*
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> Not later than 24 hours after a candidate described in clause (ii) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of 2 times the threshold amount in connection with any election, *the candidate* shall file a notification with
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> (I) the Commission; and
> (II) each candidate in the same election.
>
> (iv) *Additional notification*
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> After a candidate files an initial notification under clause (iii), *the candidate* shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceed[s] $10,000 with
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> (I) the Commission; and
> (II) each candidate in the same election.
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> Such notification shall be filed not later than 24 hours after the expenditure is made.

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[11] The court stated that under FECA,

> candidates for federal offices are completely shielded from liability for their own campaign's recordkeeping transgressions. This is so despite the fact that the candidate himself plays an important role in soliciting campaign finances. Congress has set up an artful scheme whereby all of the financial activities of a campaign are controlled and reported by the candidate's authorized committee. The candidate is free to receive contributions and make expenditures, but he does so only as an agent of the authorized campaign committee. 2 U.S.C. § 432(e)(2); 1979 U.S. CODE CONG. & AD. NEWS 2860, 2861. In other words, the statute enables candidates to solicit campaign funds, without being held responsible for any irregularities in reporting such funds, even though the irregularities are engaged in for the benefit of the candidate. Liability, instead, filters through the candidate to his amorphous campaign committee, or, more precisely, to the committee's treasurer, who is legally responsible for any violations of the [Federal Election Campaign] Act. It is the treasurer, and not the candidate, who becomes the named defendant in federal court, and subjected to the imposition of penalties ranging from substantial fines to imprisonment. 2 U.S.C. § 437g(d). It occurs to the court that in this regard, the [Federal Election Campaign] Act is perhaps the most ingeniously unfair piece of legislation ever enacted by Congress.

606 F. Supp. at 546-47 (footnote omitted).

[12] *Available at* http://eqs.sdrdc.com/eqsdocs/00005571.pdf (all Internet sites visited Nov. 3, 2006).

2 U.S.C. § 434(a)(6)(B)(iii)-(iv) (2004) (emphasis added) (provisions for Senate candidates).[13] Personal liability attaches to the reporting requirements because the candidate is reporting personal financial spending, not committee spending.

It is true that a conciliation agreement in another matter made all respondents, including a "non-millionaire" candidate, liable for a civil penalty when there was no knowing and willful violation by this candidate. *See In re Brad Smith for Congress,* MUR 5488, Conciliation Agreement at 7 ¶ VI (F.E.C. July 12, 2005).[14] In retrospect, the Commission decided this matter incorrectly. The candidate should not have been liable, an error mitigated somewhat by the joint liability of the candidate and committee. *See id.*

III. CONCLUSION

For the foregoing reasons, we voted to delete from the proposed conciliation agreement a reference to the respondent-candidate's personal liability for a civil penalty.

December 19, 2006

Michael E. Toner,
Chairman

Robert D. Lenhard
Vice Chairman

David M. Mason
Commissioner

Hans A. von Spakovsky
Commissioner

[13] FECA has similar text for House candidates:

> (C) *Initial notification*
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> Not later than 24 hours after a candidate described in subparagraph (B) makes or obligates to make an aggregate amount of expenditures from personal funds in excess of $350,000 in connection with any election, *the candidate* shall file a notification.
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> (D) *Additional notification*
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> After a candidate files an initial notification under subparagraph (C), *the candidate* shall file an additional notification each time expenditures from personal funds are made or obligated to be made in an aggregate amount that exceeds $10,000. Such notification shall be filed not later than 24 hours after the expenditure is made.

2 U.S.C. § 441a-1(b)(1)(C)-(D) (emphasis added) (similar text for House candidates).

[14] *Available at* http://eqs.sdrdc.com/eqsdocs/00004507.pdf.