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REPORT OF THE AUDIT DIVISION
ON

The Tsongas Committee, Inc.

Approved December 16, 1994

FEDERAL ELECTION COMMISSION
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FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

REPORT OF THE AUDIT DIVISION
ON
THE TSONGAS COMMITTEE, INC.

EXECUTIVE SUMMARY

The Tsongas Committee, Inc. ("the Committee") registered with the Federal Election Commission on March 18, 1991. The Committee was the principal campaign committee of Senator Paul Tsongas, a candidate for the 1992 Democratic presidential nomination.

The audit was conducted pursuant to 26 U.S.C. §9038(a), which requires the Commission to audit committees that receive matching funds. The Committee received $3,003,981 in matching funds.

Audit findings were presented to the Committee at an exit conference held at the conclusion of audit fieldwork (August, 1992) and in an interim audit report (approved May, 1993).1/ The Committee's responses have been included in this report.

In the final audit report, the Commission made an initial determination that the Committee pay the U.S. Treasury $10,567, the amount of federal matching funds used to pay non-qualified campaign expenses. The Commission also determined that the Committee was required to pay the U.S. Treasury $64,163 in connection with the receipt of excessive contributions from individuals.

Several of the findings in the audit report related to the activities of the Committee's principal fundraiser, Nicholas Rizzo, who was convicted of embezzling thousands of dollars in funds contributed or loaned to benefit the Tsongas Presidential effort.2/ Most of the funds were deposited into an account

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1/ Following the decision by the D.C. Court of Appeals, in FEC v. NRA Political Victory Fund, et al., (No. 91-5360, slip op. at 2), that the composition of the Federal Election Commission violated the Constitution's separation of powers, the Commission reconstituted itself on October 26, 1993, and ratified its earlier approval of the Interim Report on November 9, 1993.

2/ Mr. Rizzo is currently serving a 52-month sentence in a federal penitentiary.

opened by Mr. Rizzo in the Committee's name with a bank in Andover, Massachusetts. Net deposits to the Andover Account totaled about $720,000. While most of the money was diverted to Mr. Rizzo's personal use, some Committee expenses were paid from the account. The account activity was never disclosed in Committee reports.

The audit report found that Mr. Rizzo, who had authority to arrange fundraisers and collect money on the Committee's behalf, was an agent of the Committee. The funds he collected constituted contributions to the Committee, subject to the limits and disclosure requirements of the Federal Election Campaign Act. The report also concluded that the Andover Account was a Committee account rather than a personal account of Mr. Rizzo.

The Committee disagreed with these findings, contending that Mr. Rizzo was not acting as a Committee agent when he collected the funds, that the funds collected were not contributions, and that the Andover Account was not a Committee account. Based on these arguments, the Committee objected to the Commission's recommendation that the Committee refund the excessive amounts (see below). The Commission was not persuaded by the arguments.

Excessive Loans from Individuals - 2 U.S.C. §441a(a), 11 CFR §110.1(b)(6), and 11 CFR §100.7(a)(1)(iii). Loans from individuals, like other forms of contributions, are subject to a $1,000 per candidate, per election limit. The audit report found that Mr. Rizzo, acting as an agent of the Committee received a total of $790,750 in excessive loans from eight individuals. (The funds were deposited in the Andover Account or in Mr. Rizzo's personal or business accounts.) He refunded $65,000 on the loans. The interim audit report recommended that the Committee refund the remaining $725,750 in excessive amounts to the donors. For the reasons given above, the Committee objected to this recommendation. The Committee also disputed the report's conclusion that the loans had to be disclosed in the Committee's reports but the Commission did not find the arguments persuasive.

Excessive Contributions from Individuals and Partnership - 2 U.S.C. §441a(a) and 11 CFR §110.1(e). The Commission determined that the Committee was required to make a $64,163 payment to the U.S. Treasury, the amount of excessive contributions the Committee received. Of that amount, $29,314 had been collected by Mr. Rizzo and deposited in the Andover Account. The Committee disputed that portion of the payment, contending that those funds were not contributions. The Committee also objected to another portion of the payment -- $21,500 in excessive contributions made by a partnership. (A partnership, like an individual, has a $1,000 contribution limit.) The contributions were made by checks drawn on the partnership's account. The Committee argued that the

contributions actually represented donations from the individuals partners rather than from the partnership, but the Commission did not find the argument persuasive.

Excessive Contributions Resulting from Staff Advances and State Offices - 2 U.S.C. §441a(a), 11 CFR §116.3, and 11 CFR §116.5. A payment by an individual from his or her personal funds for campaign-related costs is a contribution subject to the $1,000 limitation unless exempted from the definition of a contribution at 11 CFR 100.7(b)(8) or reimbursed within specific time frames. The interim audit report questioned whether funds advanced by four individuals resulted in contributions that exceeded limits by $60,844. The report also questioned whether the Committee had accepted excessive contributions totaling $13,591 in the form of credit extended outside the normal course of business by a law partnership that ran the Committee's New York State office. The Committee, however, provided no documentation to refute the excessive nature of these advances and extensions of credit.

Misstatement of Financial Activity - 2 U.S.C. §434(b). On disclosure reports, the Committee misstated its financial activity. The Committee's filed amended disclosure reports that materially corrected the misstatement for calendar year 1992. The remaining misstatement for calendar year 1991 was due to the failure to report activity from the disputed bank account opened by Mr. Rizzo.

Apparent Excessive Press and U.S. Secret Service Reimbursements - 11 CFR §9034.6(a), 11 CFR §9034.6(b), and 11 CFR §9034.6(d). A committee that provides travel-related services to the Press and U.S. Secret Service may charge for the services and accept the resulting reimbursements. The Commission determined that the committee had overcharged the Press $15,162 for travel-related services and consequently had to make refunds to the travelers who had overpaid. The Commission also determined that the Committee had overcharged the Secret Service $4,471 for travel and had to refund this amount.

Apparent Non-Qualified Campaign Expenses - 26 U.S.C. §9032(9), 11 CFR §9038.2(b)(2), 11 CFR §9038.2(b)(3), and 11 CFR §9033.11(a),(b), and (c). The audit report identified $693,212 paid from the Andover Account for expenses that were not related to the campaign or that lacked required documentation. The report also found that the Committee spent $74,531 in payments related to attendance at the Democratic National Convention (also considered non-qualified campaign expenses). The Commission made an initial determination that the Committee repay $10,567 to the U.S. Treasury. The amount represented the amount of federal matching funds used to pay the non-qualified expenses. However, the Commission declined to seek repayment for the payments from the Andover Account.

REPORT OF THE AUDIT DIVISION
ON
THE TSONGAS COMMITTEE, INC.

I. Background

A. Audit Authority

This report is based on an audit of The Tsongas Committee, Inc. (the Committee). The audit is mandated by Section 9038(a) of Title 26 of the United States Code. That section states that "after each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under section 9037." Also Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

In addition to examining the receipt and use of Federal funds, the audit seeks to determine if the campaign has materially complied with the limitations, prohibitions and disclosure requirements of the Federal Election Campaign Act of 1971, as amended.

B. Audit Coverage

The audit covered the period from the Committee's inception, March 7, 1991, through July 31, 1992. During this period, the Committee's disclosure reports reflect an opening cash balance of $-0-, total receipts of $9,534,576, total disbursements of $9,069,137, and a closing cash balance of $197,122.1/ In addition, a limited review of the Committee's transactions and disclosure reports filed through June 30, 1994, was conducted for purposes of determining the Committee's remaining matching fund entitlement based on its financial position.

1/ Does not foot due to Committee math errors and the filing of a 1991 comprehensive amendment which did not carry forward to the 1992 reports. The amendment was filed to conform with results of the audit (see Finding III.B.).

C. Campaign Organization

The Committee registered with the Federal Election Commission on March 18, 1991. The Treasurer of the Committee during the period covered by the audit was S. George Kokinos who is also the current Treasurer. The Committee's offices are in Boston, Massachusetts.

To manage its financial activity, the campaign maintained five bank accounts at various times. In addition, the Committee advised the Audit staff of two previously undisclosed bank accounts (see Section II.). From the seven accounts, the Committee issued approximately 3,300 checks in payment for goods and services. Also, the Committee received approximately 46,000 contributions from roughly 33,000 individuals totaling $5,090,777. The Committee did not accept contributions from political committees. However, a small amount from other political organizations were accepted.

In addition, the campaign received $3,003,981 in matching funds from the United States Treasury. This amount represents 21.75% of the $13,810,000 maximum entitlement that any candidate could receive. The candidate was determined eligible to receive matching funds on November 20, 1991. The campaign made a total of 15 matching funds requests totaling $3,114,397. The Commission certified 96.46% of the requested amount. For matching fund purposes, the Commission determined that Senator Tsongas' candidacy ended March 19, 1992. This determination was based on a public statement by the Candidate.

Attachment 1 to this report is a copy of the Commission's most recent Report on Financial Activity for this campaign. The amounts are as reported to the Commission by the Committee.

D. Audit Scope and Procedures

In addition to a review of the Committee's expenditures to determine the qualified and non-qualified campaign expenses incurred by the campaign, the audit covered the following general categories:

1. The campaign's compliance with statutory limitations with respect to the receipt of contributions or loans (see Finding III.A.);

2. the campaign's compliance with the statutory requirements regarding the receipt of contributions from prohibited sources, such as those from corporations or labor organizations;

3. proper disclosure of contributions from individuals, political committees and other entities, to include

the itemization of contributions when required, as well as, the completeness and accuracy of the information disclosed;

4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed;

5. proper disclosure of campaign debts and obligations;

6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (see Finding III.B.);

7. adequate recordkeeping for campaign transactions (see Findings III.A. and IV.C.);

8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by the campaign to disclose its financial condition and establish continuing matching fund entitlement (see Finding IV.D.);

9. the campaign's compliance with spending limitations; and

10. other audit procedures that were deemed necessary in the situation including an extensive investigation of the activities of the Committee's principal fundraiser (see Section II.).

Unless specifically discussed below, no material non-compliance with Statutory and Regulatory requirements was detected.

As part of the Commission's standard audit process, an inventory of the Committee's records was conducted prior to the beginning of fieldwork to determine if the records were materially complete and in an auditable state. The inventory indicated that some records were not complete and the Committee was provided 30 days to obtain the necessary materials. At the end of the 30 days, the records were judged sufficiently complete.

An extensive review was conducted relative to a bank account maintained in Andover, Massachusetts (see Section II.). This report is based on the information received and reviewed by the Audit staff.

II. Background - Undisclosed Bank Accounts and Related Matters

On June 17, and July 10, 1992, Counsel for the Tsongas Committee met with staff members from the Commission to discuss two previously undisclosed bank accounts that the Committee had

discovered. The first was located in Andover, Massachusetts and the second was located in New Braunfels, Texas. With respect to the Andover Account, an extensive investigation has been conducted by the Commission. The information presented below is a summary of that investigation.

A. Andover Savings Bank

The account at the Andover Savings Bank ("Andover Account")2/ was maintained by Nicholas Rizzo, the Committee's principal fundraiser and national finance committee chairman. Mr. Rizzo had been involved in Senator Tsongas' political career since 1974 and had also worked in a fundraising capacity for the presidential campaigns of President Carter and Walter Mondale. In addition, he has worked for the Democratic National Committee and has raised funds for other political candidates. Mr. Rizzo was considered to be one of the top three campaign officials along with the Candidate and Dennis Kanin, the campaign manager. In addition, it appears that no one was responsible for supervising Mr. Rizzo. Mr. Rizzo was paid a monthly consulting fee either directly or through a consulting firm of which he was president, Benco Consulting and Marketing Co. Inc. ("Benco"). The Committee stated that there was no written agreement between the Committee and Mr. Rizzo for his consulting services.

As discussed below, Mr. Rizzo opened a bank account in the Committee's name, deposited contributions including large loans from individuals, and made some campaign expenses. In addition, Mr. Rizzo solicited loans from individuals which were deposited into his personal or business accounts. The Audit staff believes that Mr. Rizzo conducted all of this activity as an agent of the Committee. Thus, the Committee is deemed liable for the activity and the Andover Account is considered an account of the Committee. The basis for these determinations is contained in the facts and conclusion contained below.

Although the Committee's main office in Boston was responsible for the daily running of the campaign, in the early parts of the campaign, up until about year end 1991, many aspects of the Committee's financial activity were handled out of Mr. Rizzo's office in Andover. Mr. Rizzo was authorized to incur, approve for payment, and pay Committee expenses. His daughter, who worked in Mr. Rizzo's Andover office, was a signatory on the Committee's accounts maintained at Bay Bank.3/ Committee personnel in Boston became concerned with the lack of

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2/ The Committee's other accounts, with the exception of the Texas Account were maintained at Bay Bank. Early in the campaign, Mr. Rizzo also had control of the Bay Bank operating account.

3/ Other signatories include the Committee's Treasurer, Campaign Manager, and Business Manager.

control and coordination between the two offices and after several attempts to remedy the situation, the Boston office was able to gain control of the Committee's finances in early 1992.

Mr. Rizzo had authority to solicit, receive and process contributions. Early in the campaign, the Committee's contributions were received at a post office box in Andover and Mr. Rizzo processed the contribution checks. Later, moneys received in Andover were brought to the Boston office for processing. Eventually, the Committee opened a post office box in Boston and stopped using the box in Andover and gained complete control over contributions received through the mail. However, Mr. Rizzo still handled certain Committee contributions.

In early March, 1991, Mr. Rizzo opened an account with his social security number at the Andover Savings Bank in the name of The Tsongas Committee. This account was not disclosed on the Committee's statement of organization and the receipts and disbursements from the account were not reported (see Finding III.B.). According to Mr. Rizzo, this account was opened subsequent to a series of meetings held to discuss the possibility of Senator Tsongas running for President. Mr. Rizzo apparently suggested creating an exploratory account which could be used in part to pay for printing of the candidate's position paper, "A Call to Economic Arms." Mr. Kanin believes that the Committee may have decided not to open an exploratory account. Mr. Rizzo states that he used his social security number because the Committee had not yet applied for a taxpayer identification number but also noted that he used the legal address of the Committee. He further stated that he intended the Andover Account to be an exploratory account and that he never intended the account to be a personal account.

However, the Andover Account was opened simultaneously with the Committee's authorized account at Bay Bank and only days before the Committee filed its Statement of Organization with the Commission. Thus, it was not possible for the campaign to engage in "testing the waters" or exploratory activities.

As discussed below, Mr. Rizzo deposited contributions and loans from individuals into the Andover Account. These contributions and loans were intended and purported to be for the benefit of the Committee. Mr. Rizzo used these moneys to make payments to himself or payments for personal expenses as well as a small number of campaign-related disbursements. This activity continued from March, 1991, until January, 1992.

1. Receipts

Net deposits into the Andover Account through April 20, 1992, total $719,309. The source of all but $15,572 has been identified. The copies of checks that were available and which were legible, indicated that the checks were deposited

into the Andover Account and made payable to the Committee or the Candidate. Committee Counsel stated that, in some cases, the contributions appeared to be from known Committee fundraising efforts but were deposited into the Andover Account by Mr. Rizzo rather than being forwarded to the Committee's treasurer. Utilizing the records provided by the Committee and other records obtained via subpoena, the Audit staff created a computer file containing contributions totaling $189,737. Of this amount, at least a portion of a name could be associated with $178,561.

In addition to the loans discussed below, 42 contributors were identified who had, either within the Andover Account or when their contributions in the Andover Account were combined with contributions deposited in the Committee's other accounts, made excessive contributions (see Finding III.A.). The excessive amount totals $29,314 which is approximately 16% of the known contributions from individuals deposited in the Andover Account.

Included among contributions deposited in the Andover Account were over 100 money orders, most of which were in sequential order. According to Mr. Rizzo, Mr. Kanin called him at one point about receipts from a Greek American fundraising event in New York. Mr. Rizzo stated that Mr. Kanin informed him that there were a large number of cashier's checks made out to the Committee that could not be deposited into the Committee's main operating account. Mr. Rizzo further stated that he suggested that Mr. Kanin send him the money and he would take care of it. Mr. Rizzo said that he received checks totaling between $25,000 and $30,000 and he deposited them in the Andover Account. Mr. Rizzo is the only person to give testimony concerning this matter. The Audit staff did note that on June 22, 1991, 136 money orders, most of which were in sequential order, totaling $4,700 were deposited into the Andover Account. Most of the names appear to be of Greek origin and the addresses on the money orders are in the New York area. There is no further information available pertaining to this subject.

Also, loans were negotiated from eight individuals. The loans total $794,000, of which $514,000 was deposited into the Andover Account. (See Finding III.A.) The remainder was deposited into either personal or business accounts of Mr. Rizzo. The lenders, dates, and amounts are shown on Attachment II. Only one of the loans, $20,000 from Michael Spinelli, has been repaid. A portion of two other loans, $15,000 to Roger Trudeau and $30,000 to William Berg, have also been repaid. The unpaid balance is $729,000. Each individual and information about their loans will be discussed in detail below.

a. Larry Ansin4/

The first loan solicited by Mr. Rizzo was a $100,000 check received from Mr. Ansin in March 1991 and deposited into the Andover Account on March 11, 1991. In early March, 1991, a meeting was held at Senator Tsongas' home which included Senator Tsongas, Mr. Rizzo, Mr. Kanin, and Mr. Ansin. According to Mr. Rizzo, Mr. Ansin approached him while in the kitchen and said that he would like to help the campaign. Mr. Rizzo told him that the Committee could use a loan to help get the campaign started. Mr. Rizzo further states that he went and got Senator Tsongas and Mr. Kanin5/ and brought them into the kitchen to thank Mr. Ansin. Mr. Kanin apparently asked if the loan could be used to print "A Call to Economic Arms, " and Mr. Rizzo responded that it could. Mr. Rizzo states that Senator Tsongas and Mr. Kanin were aware of the amount of the loan.

Mr. Kanin also recalls a discussion of a loan from Mr. Ansin at the same meeting. He testified that Mr. Rizzo told Senator Tsongas and himself that he had arranged to receive a loan from Mr. Ansin for the books. Mr. Kanin states that he asked Mr. Rizzo if this could be done and Mr. Rizzo responded yes and that he had talked to someone at the FEC. He further states that Mr. Rizzo said that he had procured a loan from Mr. Ansin and that Mr. Ansin was coming over to attend the meeting. Mr. Rizzo further stated that Mr. Ansin was embarrassed that he couldn't do more and asked Senator Tsongas and Mr. Kanin to just say thanks. Mr. Kanin said that he considered Mr. Rizzo the expert on the FEC and that they never had any more discussion on the propriety of the loan. Mr. Kanin testified that there had been a discussion of opening an exploratory account at some point but he thought a decision was made not to have one. He says that it was his understanding that Mr. Ansin was to make a loan to pay for books as an exploratory expense. Mr. Kanin stated that he never knew that a check had been written to the campaign and he assumed that the check would be made payable to the printer. Finally, he stated that he doesn't remember knowing the amount of the loan but he did know that it would exceed $1,000.

Further, Mr. Kanin wrote a recollection of events surrounding the March, 1991, Ansin loan in a memorandum to file dated January 28, 1992, after discovery of the Andover Account. It states, in part, that "Nick reminded me that he had deposited a large loan from Larry Ansin in this account -- which was used to print 'A Call to Economic Arms.'" In addition, the

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4/ Mr. Ansin was a friend and business associate of Senator Tsongas. Mr. Ansin is now deceased.

5/ Mr. Kanin was a long time associate of Senator Tsongas, had managed his campaigns since 1974, and is a law partner of Senator Tsongas.

memorandum states that Mr. Kanin relayed his knowledge of the situation to an attorney hired to investigate the matter. In the memorandum Mr. Kanin writes, "I told him that in March when Nick arranged the Ansin loan, he had told me that the campaign was permitted to set up what he then called a 'soft money' account, that it could accept loans from an individual in excess of $1,000 for certain prescribed purposes (and that the printing of Paul's book qualified) and that he had called and gotten confirmation of all this from the staff at the FEC. He also had asked me not to publicize Larry's loan because Larry wanted to protect his privacy to the extent permitted by law. Nick said he had been involved in similar transactions in other presidential campaigns, that no one understood the FEC rules as well as he did and that, again, he had checked this arrangement out with the staff and obtained their approval. At the time, I did not give it a second thought because everything Nick said about his knowledge of the FEC rules and his frequent communications with the FEC staff and commissioners fit with what I had seen Nick do in the past."6/

Finally, Senator Tsongas was asked about his knowledge of the loan from Mr. Ansin. He said he remembers a discussion of having an exploratory committee during a meeting at his house. He stated that a discussion of Mr. Ansin paying for the book may have happened in the discussion of the exploratory committee but he does not recall.

Mr. Rizzo went to Mr. Ansin's office within a few days and picked up a $100,000 check dated March 10, 1991. The check was made payable to the Tsongas Committee and was deposited into the Andover Account. According to Mr. Rizzo, Mr. Ansin did not request a promissory note but expected to be repaid by the end of June or July, 1991. Mr. Rizzo states that he told Mr. Ansin in June, 1991, that the money could not be repaid at that time and was told not to worry about it. Mr. Ansin was never repaid. It is possible that part of this money was used to print "A Call to Economic Arms." Mr. Rizzo did pay a printing company from the Andover Account on a check dated August 19, 1991, from his personal account on a check dated August 1, 1991, and from his Benco, Inc. account on a check dated August 9, 1991.

The Committee has not provided a specific response to its knowledge concerning the loan from Mr. Ansin. It is apparent that Mr. Kanin and Mr. Tsongas knew that Mr. Ansin was making a loan in excess of $1,000. Although it seems

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6/ Mr. Rizzo and others stated that Mr. Rizzo had talked to individuals at the FEC and gained approval for his actions. It is noted that Commission documents concerning contacts with Mr. Rizzo do not make any reference to his receiving any information related to receiving loans from individuals.

that they relied upon Mr. Rizzo concerning the propriety of the transaction, this does not preclude the Committee from having liability for this loan.

b. Roger Trudeau

The next loan solicited by Mr. Rizzo was received from Roger Trudeau. Mr. Trudeau was an ardent supporter of Senator Tsongas who worked as a volunteer for the Committee and organized a few fundraisers on behalf of the Committee. Mr. Trudeau also organized a draft committee after Senator Tsongas suspended his campaign.

In early August, 1991, Mr. Rizzo apparently told Mr. Kanin that the Committee could accept loans exceeding $1,000 for "soft money" expenses such as polling or research or related activities and asked if he knew anyone who could make such a contribution. Mr. Kanin did not but another Committee employee suggested that Mr. Trudeau might be able to provide funds without the employee knowing the reason for the inquiry.

It appears that Mr. Rizzo then arranged a meeting with Mr. Trudeau for August 7, 1991 at the Meridien Hotel in Boston. Mr. Kanin also agreed to attend the meeting. According to Mr. Rizzo, someone else arranged the meeting and when he arrived Mr. Trudeau informed him that he was ready to make the loan. However, other accounts concerning the meeting seem to contradict Mr. Rizzo's recollection.

According to Mr. Trudeau, he arrived first at the meeting followed by Mr. Rizzo. He said that Mr. Kanin arrived later but was present for most of the substantive conversation concerning the loan. Mr. Rizzo apparently told Mr. Trudeau that a big bill for back taxes had come from the IRS7/ and that the Committee also had a payroll coming due. He was further told that the Committee only had the money to pay one or the other and if either did not get paid the newspapers would find out and it would hurt Senator Tsongas' credibility. Mr. Trudeau was informed that the Committee needed $60,000. At some point, Mr. Trudeau asked how such a loan would be handled by the FEC and Mr. Rizzo instructed Mr. Trudeau that the loan should be made out to Benco and then Mr. Rizzo could reimburse the Committee for payments made to Benco and show this as a refund of moneys paid to Benco. Mr. Trudeau stated that Mr. Kanin did not do much talking but was very much a part of the meeting. Mr. Trudeau said that he mentioned that he lacked money for the loan but knew of other individuals who might be able to help.

7/ The Audit staff does not know if the Committee received a big bill from the IRS. It is noted that the Committee used an accounting firm at the beginning of the campaign but Mr. Kanin had them relieved of duties after they had fallen behind on paying the Committee's payroll taxes.

Mr. Trudeau said that Mr. Kanin spoke up and said no, it should be kept quiet because the Committee could not risk word getting out that the Committee was in financial trouble. Finally, Mr. Trudeau stated that if Mr. Kanin had not been involved in the meeting, he would have never made the loan.

Mr. Kanin stated that Mr. Rizzo asked him to make an appearance at the lunch. He said that he was a little late and after he arrived it seemed that the substance of the discussion was over. He said that at one point Mr. Trudeau asked if the loan was okay and he told him that if Mr. Rizzo checked it out and said that it was okay, then it was okay. Mr. Kanin further stated that the money was to go for polling and research and that the loan was to be for more than $1,000.

Mr. Kanin stated that he went back to the office after lunch and asked one of the staff members if a soft money account was legitimate and was informed by her that such an account was contrary to the regulations. Two Committee employees also recall this conversation. Mr. Kanin further stated that he called Mr. Rizzo that afternoon to tell him what he found out and Mr. Rizzo responded that campaigns used to be able to do that. Mr. Kanin said that Mr. Rizzo said that he would talk to Mr. Trudeau and take care of it and from that time on Mr. Kanin assumed that there was no loan. He said that he had a number of subsequent conversations with Mr. Trudeau and that Mr. Trudeau never mentioned the loan to him.

Mr. Rizzo procured two loan checks both dated August 7, 1991, totaling $60,000, from Mr. Trudeau. These checks were made payable to Benco although Mr. Trudeau understood that the Committee would benefit from the money and insure that he was repaid. On September 10, 1991, Mr. Rizzo visited Mr. Trudeau's office to pick up proceeds from a fundraiser which Mr. Trudeau had organized. Mr. Rizzo received two more loan checks totaling $20,000 which were once again made out to Benco but intended to benefit the Committee. In January, 1992, Mr. Trudeau began calling Mr. Rizzo seeking repayment. Mr. Trudeau stated that Mr. Rizzo always had a story why repayment had not been made and assured him that his loans were part of the Committee's debt. On February 13, 1992, Mr. Trudeau did receive a check from Mr. Rizzo in the amount of $15,000 which left an unpaid balance of $65,000.

c. Elkin McCallum

The next lender approached by Mr. Rizzo was Mr. Elkin McCallum. Mr. McCallum had business contacts in North Carolina and had helped the Committee qualify for matching funds by raising money in North Carolina. In addition, Mr. McCallum planned a fundraiser to be held in North Carolina in November,

1991. On August 12, 1991, Mr. Steven Joncas8/ arranged a meeting between Mr. McCallum and Mr. Rizzo to introduce them and to thank Mr. McCallum for his help in North Carolina. Before leaving, Mr. Rizzo asked Mr. McCallum if he could return in the afternoon for a private discussion.

When Mr. Rizzo returned that afternoon, he told Mr. McCallum that the campaign was having trouble raising money and that it needed a short term loan until it qualified for matching funds. Mr. McCallum agreed to make the loan. Mr. McCallum stated that he was aware that the contribution limitation was $1,000 and asked if the loan was legal. Mr. Rizzo apparently informed him that Larry Ansin9/ had made a loan and that the loan would be deposited into an exploratory fund which was separate from the regular campaign accounts and would make the loan legal. Mr. McCallum wrote a check payable to the Committee for $100,000 the following day.

Mr. Rizzo again visited Mr. McCallum's office on October 21, 1991 to discuss the fundraising event in North Carolina. They then went to Mr. McCallum's residence. Mr. McCallum stated that while they were at his home Mr. Rizzo told him that the campaign was still short of funds and asked if he would loan an additional $50,000 in exploratory funds. Mr. Rizzo stated that Mr. McCallum informed him that he was not going to be able to hold the fundraiser and asked how much money the campaign had intended to raise. Mr. Rizzo testified that he told Mr. McCallum that they had expected about $50,000 and that Mr. McCallum said that he would write a check for $50,000 which Mr. Rizzo could take as a loan for the Committee. In any case, Mr. McCallum wrote a $50,000 check made payable to the Committee and gave it to Mr. Rizzo.

In February, 1992, after the Committee had begun investigating the Andover Account, Mr. Rizzo telephoned Mr. McCallum and requested an additional loan for $100,000. Mr. Rizzo explained that the Committee needed the money to pay for advertising for the upcoming New Hampshire primary. Mr. Rizzo further stated that Mr. McCallum had reached his limit on loans to an exploratory account but that Mr. Rizzo had not and Mr. McCallum should therefore make the check out to him and he would forward it to the Committee. Mr. McCallum wrote a $100,000 check dated February 10, 1992, and made payable to Mr. Rizzo. Mr. McCallum has not received repayment for any of the loans which he made.

8/ Mr. Joncas was a friend of Mr. Rizzo and a volunteer who sometimes traveled with him. He also was a friend and former business partner of Senator Tsongas who had worked on his U.S. Senate staff. Mr. Joncas reported to Mr. Rizzo and worked out of the Andover office.

9/ Mr. Ansin and Mr. McCallum were former business partners.

According to Mr. McCallum, Mr. Rizzo approached him after the New Hampshire primary and asked for a personal loan in the amount of $250,000. Mr. Rizzo told Mr. McCallum that the IRS was going to conduct an audit of his profit sharing plan but that he had borrowed money from the plan to make a loan to the Committee and now he needed to replace the money prior to the audit. Mr. McCallum said that he refused to make this loan because he didn't want to become involved in Mr. Rizzo's business dealings.

Mr. Rizzo has stated that no one else on the Committee knew of his soliciting these loans from Mr. McCallum. Mr. McCallum stated that Mr. Rizzo told him that the only three people from the Committee who were aware of the loans were Senator Tsongas, Mr. Kanin, and himself. He further stated that he never talked to anyone from the Committee other than Mr. Rizzo about his loans until after information about Mr. Rizzo's activities started to become known.

d. Anastasios Kalogianis

The fourth lender approached by Mr. Rizzo was Anastasios Kalogianis. Mr. Kalogianis was a long-time friend and supporter of Senator Tsongas. On September 8, 1991, Mr. Kalogianis, Mr. Rizzo, and Senator Tsongas attended a picnic at St. Constantine's Greek Orthodox Church. According to Mr. Kalogianis, while at the picnic, Mr. Rizzo and Senator Tsongas expressed a need for money and he agreed to loan the Committee $50,000. He said that his intention was to donate $1,000 and to loan the additional $49,000 to the Committee in the course of a year. Mr. Kalogianis further stated that Mr. Rizzo told him that since it was a loan, the rules and regulations did not apply. Mr. Rizzo told him that the money was needed for advertising.

Senator Tsongas remembers attending the picnic but does not recall speaking with Mr. Kalogianis. He said that he definitely did not discuss a $49,000 loan from Mr. Kalogianis. Senator Tsongas testified that this picnic occurred at a time when he was in the process of making two loans to the Committee and would certainly remember a discussion about a loan since it had been hard for him to make a decision to loan the campaign money from a sale of stock set aside for his daughter's college education. In addition, Senator Tsongas was at the picnic approximately thirty minutes. While there he made a speech and was approached by numerous supporters which would have made it difficult to have a substantive discussion with anyone.10/ Mr. Rizzo recalls speaking with Mr. Kalogianis at the picnic and stated that Mr. Kalogianis expressed a desire to help

10/ This is corroborated by the Treasurer of the Committee who was a volunteer cook at the picnic.

the campaign but does not recall a discussion of a loan or large contribution to the Committee.

In any case, Mr. Rizzo visited Mr. Kalogianis's office the next day and arranged to receive the loan from Mr. Kalogianis. At this meeting, Mr. Rizzo received a $1,000 contribution and a $10,000 loan check. Over the next few weeks, Mr. Rizzo visited Mr. Kalogianis on several occasions and received the balance of the $49,000. Mr. Kalogianis wrote a $15,000 check on September 25, 1991, and an additional $24,000 check on October 3, 1991. All three checks were made payable to the Committee.

In early December, 1991, Mr. Rizzo visited Mr. Kalogianis to procure an additional $100,000 in loans. Mr. Rizzo stated that he didn't remember much discussion about this loan but may have informed Mr. Kalogianis that the money was needed for advertising. According to Mr. Kalogianis, Mr. Rizzo told him that the Committee had written checks for television but did not have enough money to cover the checks and that it would be an embarrassment to the Committee. Mr. Kalogianis wrote a $35,000 check dated December 4, 1991, and a $65,000 check dated December 6, 1991. Both checks were made payable to the Committee.

In the latter part of January, 1992, Mr. Rizzo approached Mr. Kalogianis to obtain an additional loan of $100,000. Mr. Kalogianis stated that Mr. Rizzo told him that he had written personal checks for advertising to stay on the air in New Hampshire. Mr. Rizzo further told Mr. Kalogianis that he would receive a personal loan in two days to cover the checks but they were going to bounce before he received the loan. He asked Mr. Kalogianis to make the check out to him personally because he did not have time to go to the Boston office and get a check made out to him to cover the checks he had written. It also appears that Mr. Rizzo may have told Mr. Kalogianis that he could not make any more loans to the Committee because he had already reached his limit. However, it is clear that Mr. Kalogianis intended that the money would benefit the Committee. Mr. Kalogianis wrote a check to Mr. Rizzo for $100,000 on January 27, 1992, which is the same date that Mr. Rizzo wrote a $42,000 check to the Committee and met with the lawyer from Washington D.C. after discovery by the Committee of the Andover Account. Mr. Kalogianis has not received any repayment relative to the $249,000 in loans.

Mr. Kalogianis believes that Senator Tsongas knew about all his loans because Senator Tsongas would tell him thank you when they would meet at campaign events. Mr. Kalogianis did state that he met and talked to the candidate on four occasions during the campaign but that they were never able to have a private talk because there were always a lot of people around. In addition, it appears that Mr. Rizzo sent a letter to Mr. Kalogianis which was signed with Senator Tsongas' name. Mr.

Kalogianis further stated that the only loan which he discussed with Senator Tsongas was the one discussed at the picnic. However, as stated above, it is doubtful that a loan was discussed at that time.

It is the Audit staff's opinion that Senator Tsongas was not aware of the loans from Mr. Kalogianis. Mr. Kalogianis's account of the discussion at the picnic is contradicted by others who attended the picnic. In addition, Mr. Rizzo stated that he did not think Senator Tsongas was aware of any of Mr. Kalogianis's loans.

e. Peter Caloyeras

The next lender solicited by Mr. Rizzo was Peter Caloyeras, a California businessman and long-time friend of Mr. Rizzo and supporter of Senator Tsongas. The loan was requested in September, 1991, while Mr. Rizzo and others from the Committee were in Los Angeles. Mr. Rizzo met Mr. Caloyeras at the Biltmore Hotel on September 21, 1991.

According to Mr. Caloyeras, Mr. Rizzo solicited a $10,000 loan that would be repaid when the Committee received matching funds. Mr. Caloyeras agreed to make the loan and stated that he mailed Mr. Rizzo a check dated September 23, 1991. This check was made payable to the Committee and was deposited into the Andover Account on September 27, 1991.

Mr. Rizzo stated that he solicited the loan over the phone and that Mr. Caloyeras drove over to the hotel and handed him an envelope with a check in it. Mr. Rizzo further stated that Mr. Kanin knew that he was going to receive money from Mr. Caloyeras. Mr. Rizzo said that the question had arisen about how the bill was going to be paid at the Biltmore and that he told Mr. Kanin that he expected to get money from Mr. Caloyeras which would cover the bill. Mr. Kanin stated that Mr. Rizzo told him that money was coming in from Mr. Caloyeras but never knew that it was to be in the form of a loan. He further stated that he assumed that the money never arrived. Mr. Rizzo did state that he had no reason to believe that anyone associated with the campaign besides himself was aware of the loan from Mr. Caloyeras. Mr. Caloyeras has not received any repayments for his loan.

f. Michael Spinelli

Mr. Rizzo also approached Michael Spinelli who has known Senator Tsongas for more than 30 years. Mr. Spinelli and Mr. Rizzo first met in June, 1991, when Mr. Rizzo asked Mr. Spinelli to write to friends outside of Massachusetts and ask them to contribute in order for Senator Tsongas to qualify for matching funds. The next time the two met was October 10, 1991, at a fundraiser hosted by Mr. Trudeau. Mr. Rizzo stated that Mr. Spinelli told him that if there was

anything he could do he would be willing. Mr. Rizzo met with Mr. Spinelli the next day and solicited a loan.

Mr. Spinelli stated that he was told by Mr. Rizzo that the Committee needed $100,000 for a television buy but thus far had only raised $68,000. Mr. Spinelli said that he told Mr. Rizzo that he would have to think about it and over the next few days Mr. Rizzo called him on several occasions. Mr. Spinelli agreed to meet again with Mr. Rizzo on October 15, 1991 at which time he told him that he might be able to come up with $20,000. He further stated that Mr. Rizzo told him that it was absolutely legal. Mr. Rizzo also told Mr. Spinelli that the Committee was the debtor but that he would personally guarantee the loan with a promissory note and that he would be repaid after receipt of matching funds. Mr. Rizzo returned to Mr. Spinelli's office on October 16, 1991, and picked up a check for $20,000 made payable to the Committee and deposited into the Andover Account. Mr. Spinelli stated that he kept "bugging" Mr. Rizzo about receiving a note for the loan. He further said that he never received the note but was repaid by Mr. Rizzo on December 6, 1991, which is the date Mr. Rizzo deposited a loan check from Anastasios Kalogianis. Finally, Mr. Spinelli said that no one else from the Committee ever discussed the loan with him and Mr. Rizzo also stated that he did not believe anyone else from the Committee was aware of Mr. Spinelli's loan.

g. Thomas Kelley

The seventh lender solicited by Mr. Rizzo was Thomas Kelley who lived in Portsmouth, New Hampshire. Mr. Rizzo stated that he met on October 22, 1991 with Steven Griswold who was Mr. Kelley's superior at work. According to Mr. Rizzo, he asked Mr. Griswold to loan the Committee $25,000 and Mr. Griswold made a telephone call. A few minutes later, Mr. Kelley entered the room and was introduced to Mr. Rizzo. Mr. Rizzo further stated that Mr. Kelley asked who to make the check payable to and wrote a check on his personal checking account. The check was for $25,000 made payable to the Committee and was deposited by Mr. Rizzo in the Andover Account.

In Mr. Kelley's testimony, he states that he was introduced to Mr. Rizzo by Steven Griswold in October, 1991. He further stated that Mr. Rizzo said that he would personally guarantee that the Committee would repay him by the end of January, 1992, upon the receipt of matching funds. Mr. Kelley was never repaid for his loan. Further, it does not appear that anyone else on the Committee was aware of Mr. Kelley's loan.

h. William Berg

The final lender solicited by Mr. Rizzo was William Berg who was a business associate of Mr. Rizzo. Mr. Berg stated that in December, 1991, Mr. Rizzo told him that the Committee needed a $60,000 loan for a media buy. He further

testified that he asked Mr. Rizzo if the loan was legitimate and was told that Mr. Rizzo would never do anything that was not legal and that could hurt the campaign. Mr. Berg wrote a $60,000 check made payable to the Committee which was deposited on December 4, 1991, in the Andover Account. Mr. Berg also insisted on a note from the Committee which was provided by Mr. Rizzo. In the early part of 1992, Mr. Berg told Mr. Rizzo that he needed to be repaid for the loan. Mr. Rizzo told him that he could get half at that time and repaid $30,000 of the loan. The remainder has not been repaid. Finally, Mr. Rizzo stated that no one else associated with the Committee knew of the loan from Mr. Berg.

2. Disbursements

Checks written from the Andover Account through January 27, 1992, total $718,259. After that date the only known disbursements are the charges for copies of statements, research, and service charges. Attachment III shows the disposition of the funds in the account. Briefly, $483,600 was paid by Mr. Rizzo to himself and another $137,615 to Benco, Mr. Rizzo's consulting firm. Records obtained consist only of canceled checks, bank statements, and Committee worksheets. In addition, $50,004 was paid to banks. Committee Counsel states that it is his understanding that these payments represent Mr. Rizzo's personal debts. The Commission has received responses to subpoenas from the banks. Information obtained indicates that these payments were related to debts in the name of Mr. Rizzo or Benco.

Of the $47,040 that remains, $19,663 was paid to Sullivan Brothers, a printer utilized by the Committee. According to an account reconciliation provided by the Committee, and confirmed in response to a subpoena issued to the vendor, this amount was applied to the Committee's account. An additional $3,243 was paid to travel agencies for apparent campaign travel, $1,472 to a hotel for apparent campaign expenses, and $668 to a campaign employee. Two payments totaling $10,000 were paid to an individual who, in response to a Commission subpoena, states that the checks were repayments of loans made to Mr. Rizzo and his wife personally. The remaining $11,994 do not appear to be campaign related and include payments to Mr. Rizzo's attorney and for gambling debts.

3. Investigation of the Andover Account

On January 25, 1992, three Committee employees, including Mr. Kanin, had a discussion about known contributors who did not appear in the Committee's database. At that time, one of the individuals pointed out a contributor which she knew had been solicited again after making a contribution. The Committee had a copy of that check and upon examination, the Committee realized the check had been deposited in an account at Andover Bank. Mr. Kanin called Mr. Rizzo to ask about the

account and was apparently told that it was the location of the campaign's exploratory account and that some checks had been put into the account but that the account had been closed out. At that time, the Committee did not consider the problem difficult to resolve if Mr. Rizzo sent documentation for the account and FEC disclosure reports were amended. The next day, it was decided to get someone from outside the campaign to look at the situation and investigate the matter fully.

The Committee contacted an attorney from Washington D.C. and had him come to Boston on January 27, 1992, to investigate the matter. After meeting with the attorney, Mr. Rizzo indicated that he would gather the records relative to this account and provide them to the Committee. At that time, Committee officials did not realize the magnitude of activity. This was during the primary season and Committee officials did not take much action concerning the account. They apparently thought that the attorney was gathering the information. After Senator Tsongas suspended his campaign, the Committee realized that the records had not been provided and wanted the information before commencement of the FEC audit. Initially, Mr. Rizzo had informed the Committee that no records of the receipts or disbursements were available for the account. The Committee stated that according to Mr. Rizzo, his accountant had discarded all records of the account near year end 1991.

According to the Committee Treasurer, Mr. Rizzo provided photocopies of a group of checks in April, 1992, totaling about $20,000 which was purported to represent the contributions deposited in the account. Mr. Kokinos was not satisfied with these copies and proceeded to contact Andover Savings Bank and as Committee Treasurer was able to obtain copies of the bank statements at which time the Committee realized the volume of activity. After a June, 1992 meeting with Committee officials, Mr. Rizzo met the Committee Treasurer in Andover and handed him a box of records. The Committee obtained microfiche copies of the bank statements, canceled checks, and most deposits for the account. These records were not complete but did establish the majority of the receipts and disbursements. Copies of the records received were provided to the Audit staff. Further, as part of the audit and ongoing investigation of the Committee, the Commission issued subpoenas to and conducted depositions of a number of individuals and other entities known or believed to have information concerning Mr. Rizzo's activities. Included among the material subpoenaed directly from the bank was all available records for the Andover Account. Finally, in late 1992, the U.S. Attorney's office in Boston initiated an investigation in which the Commission cooperated. As a result of that investigation, on October 13, 1993, Mr. Rizzo pled guilty to 26 counts of criminal activity and was sentenced to 52 months in federal prison for his activities.

4. Committee Payments to Benco, Nicholas Rizzo, and Steve Joncas

The Committee and the Audit staff also reviewed payments that were made by the Committee to either Benco or Mr. Rizzo. Attachments IV and V are schedules of those payments. Of the $189,743 paid to Benco and Mr. Rizzo, $42,000 has been recovered and $35,118 is considered a receivable from Mr. Rizzo. The $42,000 was paid to Mr. Rizzo on January 2, 1992, on a check signed by his daughter, and was documented only by a check request form that had been approved by Mr. Rizzo. When the Committee learned that the check had been written, they informed Rizzo that they needed the money back immediately because checks had been written which might have bounced. After numerous telephone calls requesting documentation for the disbursement, Mr. Rizzo refunded the amount by check drawn on Mr. Rizzo's account dated January 27, 1992, the date Mr. Rizzo received a loan from Mr. Kalogianis. The other amount ($35,118) is detailed on Attachment VI. It results from a review of Mr. Rizzo's file and the identification of amounts that the Committee paid more than once and some amounts that do not appear to be campaign related expenses.

A portion of the amount that was paid more than once was submitted on expense vouchers that were in the name of Mr. Steve Joncas. During part of the campaign, Mr. Joncas worked on some fundraising efforts with Mr. Rizzo. The Committee issued 12 checks to Mr. Joncas totaling $15,849. Only three were actually received by Mr. Joncas. The others were cashed by Mr. Rizzo. According to Mr. Joncas, he was aware of only the first three. A review of the documentation shows that many of the expenses appear to be Mr. Rizzo's legitimate campaign expenses. Vouchers were filled out in the name of Mr. Joncas and his name signed to them. Committee checks were then issued to Mr. Joncas, but endorsed and cashed by Mr. Rizzo. As noted on Attachment VI, some of the expenses were either duplicates of those paid to Mr. Rizzo at other times or were personal expenses of Mr. Rizzo. Expenses that were duplicated on the Joncas vouchers or were unexplained are included in the $35,118 duplicate and non-campaign related figure shown above. The Committee could offer no explanation as to why anyone would seek reimbursement of legitimate campaign expenses in this fashion.

According to Mr. Rizzo, the Committee did not want to issue reimbursement and advance checks to him after the discovery of the Andover Account. Mr. Rizzo further stated that since Mr. Joncas would be traveling with him, he suggested having the checks made payable to Mr. Joncas but that he would control the funds. Mr. Rizzo stated that it was the Committee's idea to do things this way and that Mr. Joncas knew from the

outset he would be doing this. However, testimony by Mr. Joncas and a Committee official seem to contradict Mr. Rizzo's testimony.

The duplicate and non campaign related payments discussed above are considered non-qualified campaign expenses (see Finding IV.C.).

5. Outstanding Expense Voucher

In the spring of 1992, Mr. Rizzo submitted a request for reimbursement that totals $82,634. The expenses were incurred between May of 1991 and February of 1992. The documentation for these expenses include copies of canceled checks drawn on an account held in Mr. Rizzo's name. A review of the request shows a total of $21,333 that are duplicates of previous requests or were paid from the Andover Account. Included in the remaining amount are two checks made payable to Sullivan Brothers totaling $31,754. The account reconciliation for the vendor shows these payments credited to the Committee's account. The remaining items range from payments to individuals, caterers, and hotels. With the exception of $8,379 paid to three individuals, the Committee believes that the non-duplicative expenses are legitimate campaign expenses. When the value of these legitimate campaign expenses are set off against the duplicate payments noted above, a net amount is an account payable to Mr. Rizzo.

However, the Committee considers the amount payable an offset to amounts owed by Mr. Rizzo for contributions deposited into the Andover Account and misappropriated by Mr. Rizzo.

6. Treatment of the Andover Account

At the exit conference, the Audit staff informed the Committee that we would recommend that the Andover Account be considered a Committee account. This recommendation was based on the fact that the Committee's name appeared on the account, that Mr. Rizzo's position with the campaign was principal fundraiser, that some Committee expenses were paid from the account, that most deposits to the account were checks made payable to the Committee, and that during most of the period that the account was active Mr. Rizzo had control of some or all the Committee's other accounts.

In response to the exit conference, the Committee submitted the following written explanation:

> "It is the position of the Tsongas Committee that the account opened in its name at the Andover Bank and the activity in that account were unauthorized. Although the Committee does not contest that Nick Rizzo was its agent for purposes

of fundraising, Mr. Rizzo's activities in opening a bank account, diverting contributions to that account, making campaign and personal expenditures from that account, and obtaining loans from supporters clearly exceeded the scope of any agency conferred upon him.

"As support for this position, the Committee would show:

(1) The Committee treasurer, S. George Kokinos, and other Committee employees had no knowledge of the existence of the account or its activity until after all activity had transpired.

(2) Although the account was opened in the Committee's name, it was opened with a taxpayer identification number believed to be that of Mr. Rizzo. The use of the Committee name was not intended to facilitate the transaction of Committee business, but as the means to divert funds that could come to Mr. Rizzo bearing the Committee's name.

(3) During the same time that Mr. Rizzo made deposits to the Andover account, he forwarded other contributions to the treasurer, as required by law, negating any possible misunderstanding about how funds were to be handled.

(4) No legitimate interest of the Committee was served by maintenance of the Andover account. In addition to exposing the Committee to substantial liabilities, the use of this account deprived the Committee of substantial amounts of matching funds during critical periods of the campaign. In addition, the unreported and unrecorded contributions risked antagonizing a large number of supporters whose donations went unacknowledged. The Audit Staff's contribution analysis demonstrates that the amount of excessive contributions 'facilitated' by the Andover account was relatively small.

(5) The vast majority of the funds deposited into the Andover account were withdrawn and used for non Committee business.

(6) The Committee expects that Mr. Rizzo will confirm to the Commission that he commingled personal and Committee deposits in the account and that the 'loans' which comprised the bulk of the account activity were intended to be his personal obligations, and not Committee obligations.

(7) Upon hearing of the otherwise covert Andover account activity, the Committee promptly reported its knowledge to the Commission and requested a full investigation, irrespective of the resulting legal exposure to itself and its principal fundraiser.

"As described in correspondence provided to the Commission, the Committee has served demand letters on Mr. Rizzo requesting that he forward all contributions that he was obligated to forward but instead diverted to the Andover account. If funds are ever received, the Committee intends to make immediate disposition of the funds as required or permitted by applicable law and to report their source and disposition to the Commission.

"As previously stated, all Committee personnel and records can be made available to the Commission to discuss any aspect of this matter. The Committee respectfully submits that, prior to the completion of its investigation into the Andover account, it is premature for the Audit Staff to assign responsibility for the account to the Committee. The basis for the Audit Staff's conclusion -- the account name, the agency relationship, and the payee on the deposits -- is equally consistent with a plan to divert Committee funds as it is with Committee responsibility."

In the interim audit report, it was concluded that the Andover Account was an account of the Committee, the activity in the account was required to be reported on disclosure reports and the Committee was liable for the activity in the account.

In response to the interim audit report, the Committee provided the following:

"The Audit staff continues to disregard the obvious fact that the Andover account was an element in a complex scheme to defraud and treats it as if it were merely an overlooked branch of the Committee's operating bank accounts. It is now beyond dispute that this was not the case. In an elaborate criminal scheme, Mr. Rizzo duped numerous campaign supporters by telling them that he was acting on behalf of the campaign or appearing to do so, when in fact he was pursuing a personal scheme to defraud them and the Committee. He deposited intended campaign contributions and fraudulently-obtained loans in this secret account concealed from the Committee, withdrew virtually all of the funds for his own use, and frustrated the efforts of the Committee and federal enforcement agents to investigate. This type of fraud was hardly invented by

Mr. Rizzo...and is not new to the FEC. What is new, however, is the Audit staff's attribution of this fraudulent activity to the Committee.

"Mr. Rizzo's guilty plea pertained to, among others, five counts of mail fraud...involving a scheme 'to obtain money and property from the Committee, numerous individuals who attempted to make campaign contributions to the Committee, and several individuals who attempted to make substantial loans to the Committee.'...Under 'Means, Methods, and Objectives of the Scheme' the indictment states that:

> 'It was part of the scheme that on March 8, 1991, defendant Rizzo, without the knowledge or authorization of other members of the Committee, opened a checking account at the Andover Bank (hereinafter 'the undisclosed Andover Committee account') under the name, 'The Tsongas Committee.' Defendant Rizzo opened the account with his own social security number rather than the employer identification number of the Committee. Thereafter, at all times material to this Indictment, defendant Rizzo alone had signature authority on the account. On March 11, 1991, the Committee opened a checking account at Bay Bank Middlesex in Andover, Massachusetts. Defendant Rizzo did not have signature authority on this account, which was the Committee's regular operating account during 1991 and 1992.'

"The indictment also noted that 'as part of his effort to conceal his activity, defendant Rizzo failed or caused others to fail to forward contributions...and to properly account for contributions to the Committee. Defendant Rizzo also commingled campaign and personal funds and failed to properly deposit contributions.'...

"As detailed in the superseding indictment and in the presentation of the Assistant United States Attorney at the sentencing, the Andover account opened by Mr. Rizzo in the name of the Committee was an instrumentality devised by Mr. Rizzo to defraud contributors to the Committee and the Committee itself. With minor exception, the funds went to repay personal loans and obligations of Mr. Rizzo, including substantial payments to bookies and casinos.

"Contrary to the established facts underlying Mr. Rizzo's conviction -- admissions that he certainly did not make lightly, the Audit Staff's position seems to be

that the Andover account opened by Mr. Rizzo was not a fraud or artifice, but rather a Committee account, that all deposits into that account were contributions received by the Committee, and that all expenditures from that account were expenditures made by the Committee. The Committee strenuously disagrees. As the guilty plea and hearing transcript confirm, the existence of the Andover account was not known to or authorized by any Committee personnel...Mr. Rizzo, and not the Committee treasurer, had signatory authority. Mr. Rizzo had full knowledge of the Committee's authorized account, and there can be no doubt that Mr. Rizzo was aware of the proper channels for the deposit of contributions and making of expenditures. Indeed, throughout the entire time that contributions were diverted to the Andover account, other contributions were forwarded properly to the treasurer by Mr. Rizzo."

The Committee further states that the "Andover account is not an account of the Committee" for the following reasons:

"It is undeniable that the account bore the Committee's name (although not its taxpayer identification number) and that contributions and other checks payable to the Committee were deposited into the account. These facts, however, do not require a conclusion that the account was a Committee account. Rather, as the indictment describes, the scheme by which Mr. Rizzo sought to parlay his experience and position as a fundraiser into a personal profiteering enterprise required him to open an account in the Committee's name. Such an artifice was the only way that contributions intended to the Committee could be converted to his own use. As the federal prosecutor correctly noted, 'in addition to the size and the arena in which the fraud occurred, the method which Mr. Rizzo used, aggravated a little bit in a way that justifies 52 months, in the sense that he was using the name of Mr. Tsongas. He was using the name of the Committee.

"Indeed, the Audit staff itself admits elsewhere in the Interim Audit Report that the Andover account was not a Committee account. In commentary to the NOCO statement, the Audit staff identifies as a receivable from Mr. Rizzo an 'amount consisting of receipts into the account which were never forwarded to the Committee.' Thus, the Audit staff, at least in this section of the report, agrees with the Committee's analysis of what transpired.

"The Committee does not contend that FECA is irrelevant to the Andover account, or that no audit findings relating to the account are proper. Rather, the Committee's consistent position has been that Mr.

Rizzo violated the FECA and regulations by failing to forward contributions to the treasurer within ten days of his receipt and by failing to provide the required contributor identifying information. Accordingly, the Committee sent Mr. Rizzo a letter on July 13, 1992, demanding that he forward all such contributions to the treasurer. As of the date of this response, no payment has been made by Rizzo and the Committee considers the amount due to be uncollectible.

"The Committee's approach to the Andover account -- demanding that the diverted contributions be forwarded to the treasurer -- parallels the approach approved by the Commission in MUR 1402. MUR 1402 concerned strikingly similar actions, although on a less grand scale, by a fundraiser for then-Representative Jim Wright. Like Mr. Rizzo, the Wright fundraiser came into possession of various contribution checks from a post office box as well as from a committee fundraising event. Like Mr. Rizzo, without knowledge of the Wright committee, she opened up a bank account in the Wright committee's name, deposited the contribution checks, and then withdrew the funds for her personal use. The Wright committee, like the Tsongas Committee, sought restitution. Unlike the Tsongas Committee, the Wright committee fortunately received payment from the fundraising agent of an amount equivalent to the diverted contributions. The Wright committee was permitted to retain the repaid contributions and was instructed by the Commission to attribute the contributions to the original contributors.

"In MUR 1402, the Commission perceived the violation to be a failure to forward contributions by the committee agent. There is absolutely no suggestion that the Commission deemed the errant bank account to be a Wright committee account merely because it bore the committee's name or because committee-intended contributions were deposited into it. There was no suggestion that the Wright committee was obligated to amend its reports to reflect activity in the unauthorized account.

"The Committee acknowledges that MUR 1402 did not appear to involve the disbursement of any funds from the unauthorized account for apparent campaign-related purposes, while approximately three percent of the disbursements from Mr. Rizzo's secret account apparently were campaign-related. The Committee submits that this distinction does not alter the proper analysis or the characterization of the account. The relatively de minimus amount of campaign disbursements does not undermine the conclusion that the overall purpose of the account was not campaign-related, but rather to

personally benefit Mr. Rizzo. As the Committee has previously expressed, it recognizes that the payments by Mr. Rizzo from funds other than those contained in the Committee's accounts may constitute an impermissible advance by Mr. Rizzo to the Committee. The Committee, in its correspondence with Mr. Rizzo, has recognized that it has an obligation to repay this amount to him.

"For these reasons, it is the Committee's position that it never received the $29,314 in alleged excessive contributions deposited into the Andover account. If these contributions had been forwarded to the treasurer in compliance with FECA, they would have been refunded in a timely manner to the contributors.

"Accepting the Committee's position in this regard does no harm to the Commission's historical and prospective treatment of undisclosed depositories. Where an undisclosed account is opened through ignorance or oversight by persons associated with a campaign for the purpose of conducting the campaign's business, then the Commission should require the committee in question to adopt the account in its entirety, report its activity to the Commission, and bear any penalties associated with untimely disclosure. The Texans for Tsongas account was just such an account and the Committee has treated it in that manner. There is no policy reason, however, to require the same treatment of an account opened not to further the business of a campaign, but to defraud it. In that case, the proper course is to require the committee to seek the return of the diverted contributions and report the fraudulent activity to enforcement officials. That is what the Committee has done here."

7. Conclusion

a. Mr. Rizzo was a Committee Agent

Contrary to the Committee's assertion, the evidence revealed in this matter provides ample basis to hold the Committee responsible for Mr. Rizzo's actions. While is is clear that Mr. Rizzo embezzled funds, the evidence indicates that Mr. Rizzo was one of the three most powerful people in the Committee with virtually unbridled authority to solicit and process contributions and make financial decisions. Mr. Rizzo also had the authority to arrange fundraisers and collect money on the Committee's behalf. The Committee exerted no control over Mr. Rizzo's actions, which allowed him to victimize both the individual lenders and the Committee. Moreover, Senator Tsongas and/or Mr. Kanin appear to have had knowledge of or been involved in at least two of the loan transactions although Mr. Rizzo certainly had no authority to

convert such loans to personal use. Therefore the solicitation of such loans does not appear to be outside the scope of Mr. Rizzo's authority.

Section 109.1(b)(5) of Title 11 of the Code of Federal Regulations defines the term agent as any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or means any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

Thus, an agent, for expenditure purposes, is an individual who either has authority to make expenditures on behalf of a campaign or occupies a position that parties would reasonably believe to confer such authority. A committee is responsible for its agent's actions even if the agent acts negligently, and contrary to express instructions. In every case where a committee violates the FECA, there ultimately is a committee official who authorized, conducted or participated in the prohibited event.

The Commission's application of agency principles is consistent with settled principles of agency law. The Restatement of Agency11/ defines an agent as one who exercises the actual or apparent authority of a principal. The Restatement provides that a principal's responsibility for his agent's conduct may derive either: (1) from an express or implied grant of authority from the principal to the agent; or (2) from actions taken by the principal that reasonably cause a third party to believe that the principal has empowered the agent to act on his behalf.

Where a principal grants an agent express or implied authority, the principal generally is responsible for the agent's acts within the scope of his authority. The conduct of an agent is within the scope of his authority if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.

When an agent acts within the scope of his authority, a principal cannot escape responsibility on the grounds that he lacked knowledge of the agent's actions or that the

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11/ Black's Law Dictionary defines a Restatement as "A series of volumes authored by the American Law Institute that tell what the law in a general area is, how it is changing, and what direction the authors (who are leading legal scholars in each field covered) think the change should take... the various Restatements have been a formidable force in shaping the disciplines of law covered."

agent's actions were unauthorized, tortious, or even unlawful. Even if an agent does not enjoy express or implied authority, however, a principal may be liable for the actions of his agent on the basis of apparent authority. An agent is imbued with apparent authority where the principal has held the agent out as having such authority or has permitted the agent to represent that he has such authority, so that a reasonable person would believe the agent to have such authority.

Apparent authority commonly exists when a principal appoints an agent to a position with generally recognized duties or responsibilities. A principal may be held liable based on apparent authority although his agent's acts are unauthorized. Similarly, a principal may be held liable for his agent's illegal acts, such as fraud, when he places an employee in a position to commit those acts. Unlike express or implied authority cases, moreover, a principal is not relieved of liability simply because an agent with apparent authority acts for his own benefit. Even if the agent committed fraud, the principal is liable provided the agent acted within his apparent authority.

The facts noted above demonstrate that Mr. Rizzo was the Committee's agent with actual and apparent authority to solicit and accept contributions, make expenditures, and conduct diverse financial transaction for the Committee. He functioned as the Committee's principal fundraiser, had broad authority over most aspects of the Committee's financial activity, and operated with a great deal of independence. Moreover, Mr. Rizzo occupied a position, and had a history with the candidate, that would lead third parties to believe that he had authority to solicit contributions.

Contrary to the Committee's contentions, Rizzo's solicitations of loans totaling $794,000 from eight individuals were clearly within the scope of his authority as the Committee fundraiser. Loans are contributions and Mr. Rizzo had broad authority to solicit contributions. The Committee's contention that Rizzo could not have authority to solicit these contributions because they were excessive is without merit. Doubtless in most cases where a campaign official accepts an excessive or prohibited contribution, the official was not expressly authorized to do so. Under the Committee's reasoning, no committee would ever be responsible for any violations by its agents. Indeed, it is not even clear whether Mr. Rizzo was not authorized to accept excessive contributions. The evidence reveals that Mr. Kanin and Senator Tsongas were involved with Mr. Rizzo in the solicitation of certain excessive loans. The Committee cannot escape liability for the conduct of its agent that was well within the scope of his authority.

b. Andover Account Was a Committee Account

The Andover Account was established as a Committee account although Senator Tsongas and Mr. Kanin do not appear to

have had actual knowledge of the account. Mr. Rizzo stated that it was true that Senator Tsongas and Mr. Kanin did not know that an account existed at the Andover Bank but must have known that an account had been opened. However, he does state that they were aware that he was spending money on behalf of the Committee which he did not personally have and must have wondered where that money came from. He further stated that "I certainly would not go out and tell Paul Tsongas and Dennis Kanin about the [Ansin] transaction if I wanted to keep it a secret. Why would I go out and bring them in? It doesn't make sense." In addition, he stated the following: "They were with me when the campaign was still in its formative stage, when Larry Ansin agreed to lend the Committee, not lend Nick Rizzo, lend the Committee a hundred thousand dollars. My question is -- you know, where did they think that money was going? That Larry showed up with little buckets of cash or something? That's ridiculous. He wrote a check and he wrote it to the committee. Where did they think that check went? They knew it didn't go into the main account."

The evidence supports the conclusion that the Andover Account was an account of the Committee. The Andover Account was opened in the name of the Committee, and for all practical purposes, it functioned as a Committee account. Contribution checks made payable to the Committee were deposited into the Andover Account and legitimate Committee expenses were paid from the Andover Account. Also, it appears that the Committee intended to acknowledge the Andover Account and considered it to be a Committee account until the Committee received the complete account records.

It is reasonable to conclude that opening the Andover Account was within the scope of Mr. Rizzo's authority as an agent of the Committee. When Mr. Rizzo opened the Andover Account, he had virtually unlimited authority over the Committee's finances. He was involved in opening the Committee's operating account at Bay Bank and controlled the checkbook for that account. Since Mr. Rizzo exercised broad authority over virtually every Committee financial transaction, including opening accounts, he had authority to open the Andover Account on behalf of the Committee.

With respect to MUR 1402, the Audit staff notes that the Commission did not make a determination that this account was not an account of the committee. In that case, the funds were recovered and the Committee made whole. Although the Committee states that there was no suggestion that the Wright committee was obligated to amend its reports, it is noted that the Committee stated in its notification to the Commission that "we believe a proper resolution of this matter would be for the Committee to accept the $9,000 restitution but report the contributions that should have been deposited in the Committee account. The Committee's reports will then balance and accurately reflect the actual state of the Committee's finances [emphasis not in original.]" The committee was then notified that "the Commission

believes that, as you proposed, attribution of the subject funds to the proper contributors is the appropriate course of action in this matter." It does not appear that the individual in that case had broad authority over the committee's financial transactions, as Mr. Rizzo did. Given the Committee's contemporaneous knowledge of some of the transactions that were processed through the Andover Account, the involvement of public funds in this campaign, and Mr. Rizzo's position in the campaign, this MUR is not relevant. Further, the Commission did make a determination about the account being a Wright committee account by endorsing that committee's treatment of the account.

While the existence of the Andover Account may have enabled Mr. Rizzo to embezzle Committee funds, the Audit staff does not believe that the Andover Account was a mere instrumentality of a criminal scheme. We cannot conclude that Mr. Rizzo originally intended the Andover Account to be his secret account. Mr. Rizzo contends that he opened the Andover Account as a Committee exploratory account, not his own personal account. The Committee contends that Mr. Rizzo intended the account to be a personal account because the account was opened with his social security number. Mr. Rizzo claims that he used the social security number because the Committee had not yet received a taxpayer identification number and that this was the only way he could open the account. Mr. Rizzo used the legal address of the Committee for the account, and claims that he made no attempt to hide the account from the Committee. In addition, Mr. Rizzo discussed the possibility of opening an exploratory account with Mr. Kanin and Senator Tsongas in early March, 1991. There is no doubt that Mr. Rizzo embezzled Committee funds from the Andover Account, but Mr. Rizzo's misdeeds do not transform the character of the Andover Account.

Mr. Kanin and Senator Tsongas claim to have relied on Mr. Rizzo to determine what was legal in relation to campaign finance law and the loans from Mr. Ansin and Mr. Trudeau. Mr. Rizzo was placed in a position of trust and given almost unbridled authority to conduct business for and on behalf of the Committee. Mr. Kanin and Senator Tsongas appear to have known of the transaction with Mr. Ansin; this would seem to provide Mr. Rizzo the dominion to solicit loans on the Committee's behalf. Their reliance on Mr. Rizzo, not a legal expert, does not shelter the Committee from liability based on Mr. Rizzo's activity.

B. Victoria Bank & Trust

In addition, the Committee informed the Audit staff of an account opened in Texas by the chairman for Texans for Tsongas ("Texas Account"). During the period open, this account conducted $12,057 in receipts activity and $11,980 in disbursement activity. The Committee provided documentation to support all receipts and disbursements. The Audit staff did not identify any prohibited contributions and identified excessive contributions from two individuals. The excessive portion of these contributions total

$1,100 (see Finding III.A.). Committee representatives have amended the Statement of Organization to disclose this account.

The recommendations relating to the activity in these accounts is discussed further in Findings III.A., III.B., IV.C., and IV.D. below.

III. Findings and Recommendations - Non Repayment Matters

A. Apparent Excessive Contributions

Section 441a(a) of Title 2 of the United States Code states, in relevant part, that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal Office which, in the aggregate, exceed $1,000.

Section 441a(f) of Title 2 of the United States Code states that no candidate or political committee shall knowingly accept any contribution or make any expenditure in violation of the provisions of this section. No officer or employee of a political committee shall knowingly accept a contribution made for the benefit or use of a candidate, or knowingly make any expenditure on behalf of a candidate, in violation of any limitation imposed on contributions and expenditures under this section.

Section 110.1(b)(6) of Title 11 of the Code of Federal Regulations states, in part, that a contribution shall be considered to be made when the contributor relinquishes control over the contribution. A contributor shall be considered to relinquish control over the contribution when it is delivered by the contributor to the candidate, to the political committee, or to an agent of the political committee. A contribution that is mailed to the candidate, or to the political committee, or to an agent of the political committee, shall be considered to be made on the date of the postmark.

Section 110.1(e) of Title 11 of the Code of Federal Regulations states, in part, that a contribution by a partnership should be attributed to the partnership and each partner, and that a contribution by a partnership shall not exceed the limitations on contribution in 11 CFR 110.1(b).

Section 100.7(a)(1)(iii) of Title 11 of the Code of Federal Regulations states that the term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value. The term "anything of value" includes all in-kind contributions. Unless specifically exempted under 11 CFR §100.7(b), the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution.

Section 110.1(k) of Title 11 of the Code of Federal Regulations states, in part, that any contribution made by more than one person, except for contribution made by a partnership, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A contribution made by more than one person that does not indicate the amount to be attributed to each contributor shall be attributed equally to each contributor. If a contribution to a candidate on its face or when aggregated with other contributions from the same contributor exceeds the limitations on contributions, the treasurer may ask the contributor whether the contribution was intended to be a joint contribution by more than one person. A contribution shall be considered to be reattributed to another contributor if the treasurer of the recipient political committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution; and within sixty days from the date of the treasurer's receipt of the contribution, the contributors provide the treasurer with a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

Section 103.3(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that contributions which exceed the contribution limitation may be deposited into a campaign depository. If any such contribution is deposited, the treasurer may request redesignation or reattribution of the contribution by the contributor in accordance with 11 CFR §§110.1(b) and 110.1(k), as appropriate. If a redesignation or reattribution is not obtained, the treasurer shall, within 60 days of the treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 103.3(b)(4) of Title 11 of the Code of Federal Regulations states, in part, that any contribution which appears to be illegal and which is deposited into a campaign depository shall not be used for any disbursements by the political committee until the contribution has been determined to be legal. The political committee must either establish a separate account in a campaign depository for such contributions or maintain sufficient funds to make all such refunds.

Sections 110.4(b)(1)(i) and (2) of Title 11 of the Code of Federal Regulations state, in part, that no person shall make a contribution in the name of another. Examples of contributions in the name of another include giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made. Making a contribution of money or

anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

Section 432(c) of Title 2 of the United State Code, states, in part, that the treasurer of a political committee shall keep an account of all contributions received by or on behalf of such political committee, the name and address of any person who makes any contribution in excess of $50, together with the date and amount of such contribution by any person; and the identification of any person who makes a contribution or contributions aggregating more than $200 during a calendar year, together with the date and amount of any such contribution.

Section 104.14(b) of Title 11 of the Code of Federal Regulations states, in part, that each political committee required to file any report under this subchapter shall maintain records relevant to such reports, including bank records, with respect to the matters required to be reported including vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information from which the filed reports may be verified, explained, clarified, and checked for accuracy and completeness.

1. Loans From Individuals

As noted in Section II.1.a., loans from eight individuals were negotiated by Mr. Rizzo. These individuals made 16 loans totaling $794,000 (see Attachment II). Four of the 16 loans, totaling $280,000, were deposited into accounts of Mr. Rizzo and the remainder was deposited into the Andover Account. As noted previously, only three of the loans have been completely or partially repaid.

Furthermore, four of the eight individuals who made loans to the Committee made additional $1,000 contributions to the Committee. Another lender made contributions totaling $750. Therefore, it appears that the Committee has received excessive contributions from eight individuals totaling $790,750 ($794,000 in loans - $3,250 in available contribution limitations).

In the interim audit report, the Audit staff recommended that the Committee provide information to show that the aforementioned transactions did not constitute impermissible excessive contributions totaling $790,750. Absent such showing, it was recommended that the Committee repay these individuals $725,750 ($790,750 - $65,000 previously repaid).

If funds were not available to make such repayments, it was recommended that the Committee disclose the amounts as loans owed by the Committee on Schedule C-P.

In response to the interim audit report, Counsel for the Committee states that the loans solicited by Mr. Rizzo are not Committee obligations for the following reasons:

> "Regarding the sizable loans obtained by Mr. Rizzo from various individuals, the superseding indictment charged that 'defendant Rizzo fraudulently obtained loans in the amount of $794,000 which he falsely represented to the individual lenders would be to the benefit of the Committee.' Mr. Rizzo has consistently stated that these loans were intended to be his individual and personal obligations. (Rizzo states 'they were loans that were made that I told each of the individuals that I would be responsible for, and I still feel I am responsible for, the repayment'). His attorney stated to the sentencing court that Mr. Rizzo 'knew [the loans] could never be used for the Tsongas campaign.' Apparently he also told the Commission the same under oath. In imputing these loans to the Tsongas Committee, the Audit staff apparently has rejected these admissions without explanation.
>
> "Mr. Rizzo was acting beyond the scope of any conceivable agency in soliciting such loans for the Committee. Acts within the scope of an agent's employment include only those 'acts done on behalf of a corporation and directly related to the performance of the type of duties the employee has general authority to perform.' Mr. Rizzo had no actual authority to solicit loans from contributors in the name of the Tsongas Committee, nor could he be held even to have apparent authority to do so, since such solicitations are in direct violation of federal election law. Moreover, the sentencing transcript details the bizarre web of deception employed by Mr. Rizzo in securing these loans. Mr. Rizzo was engaged in activity planned by him for his own benefit when he solicited the loans, both the Committee and the lenders were victimized by this activity, and he thus clearly was acting outside the scope of his agency. ('The reasons he wanted the money are also aggravating factors. He basically chose to victimize Paul Tsongas' friends so that he could pay his own friends at the bank').
>
> "Because Mr. Rizzo was not acting within the scope of his agency in soliciting the illegal loans, the Committee never 'received' the proceeds of the loans and, needless to say, never deposited the loans into a Committee account. For this reason, it is the Committee's position that it did

not receive 'excessive contributions' in the amount of the loans. More significantly, and in full accord with the Committee's position, the federal court has ordered Mr. Rizzo to repay these loans to the lenders, and not to the Committee. It is inappropriate for the Audit staff to expect the Committee to receive the loan proceeds from Mr. Rizzo or to repay them to the lenders.

"Although the Committee strongly believes that its position is correct with respect to all of the loans, it even more emphatically takes issue with the Audit staff's conclusion that checks made out to Mr. Rizzo personally or to his business are somehow contributions to the Committee. No suggestion is made that these loans were somehow in-kind contributions or payment of Committee obligations to Mr. Rizzo. Nor is there any basis to find a political contribution solely because of the purported contributor's intent if the contribution did not get delivered to a political committee, to a committee's agent acting within the scope of agency, or otherwise used by the recipient for purpose regulated by FECA. By way of illustration, if a Tsongas supporter announced on a street corner that she intended to contribute $50 in cash to the candidate, and she then was mugged and her wallet stolen, she has not thereby made a political contribution merely because her money was taken in response to a stated desire to assist a candidate."

The Audit staff does not find the Committee's arguments to be persuasive. As noted previously at Section II.A.7.a., Mr. Rizzo is considered an agent of the Committee. Contrary to the Committee's contentions, Mr. Rizzo's receipt of the loan checks from the lenders constituted receipt by the Committee because Mr. Rizzo was a Committee agent with authority to accept contributions. It is immaterial that Mr. Rizzo converted most of the contributions for his personal use. Rather than interrupting the conveyance of the contributions to the Committee, Mr. Rizzo embezzled the funds after he had accepted them as an agent of the Committee.

In addition, it appears that Mr. Kanin and Senator Tsongas were aware of at least one of the loans and Mr. Kanin appears to have been involved in the soliciting of another loan. This would indicate that Mr. Rizzo had been given the authority to solicit loans on the Committee's behalf and was not outside the scope of his agency. Although the Committee was not aware of all the loans, solicitation of loans does appear to be in Mr. Rizzo's dominion as an agent of the Committee. With respect to the loans which were not made payable to the Committee, it appears that Mr. Kanin was at least initially involved in the solicitation of one

of the Trudeau loans and the evidence indicates that Mr. Rizzo solicited all of these loans on behalf of the Committee even though the money was not forwarded to the Committee's main operating account.

Regardless of Mr. Rizzo's recent statements concerning his perceived personal liability to repay the loans, testimony from each of the lenders establishes that the clear understanding when the loans were made was that the money was for the benefit of the Committee. As noted above, Mr. Rizzo solicited each loan ostensibly on behalf of the Committee, and the lenders relied on his authority. It is unlikely that the lenders, many of whom did not know Mr. Rizzo, would make personal loans to him of such magnitude.

With respect to the loans not made payable to the Committee, the clear intent was to loan the Committee funds by routing it through another individual (Mr. Rizzo) in an apparent attempt at circumventing contribution limitations as they were explained by Mr. Rizzo. Also, the Committee's analogy is not on point. If the same individual had given the $50 to a well recognized fundraising agent of the Committee, and that agent misappropriated the funds, the contributor has made a contribution, and the Committee through its agent received the contribution in accordance with 11 CFR §110.1(b)(6) even though the funds were stolen prior to the Committee having access to them.

Therefore it is concluded that the loans from the eight individuals constitute excessive contributions to the Committee, solicited by Committee agents and received on behalf of the Committee by a Committee agent. Such loans are required to be disclosed as (1) contributions on Schedule A-P, (2) debts owed on Schedule C-P, and (3) when repaid, as loan repayments on Schedules B-P and C-P.

2. Excessive Contributions from Individuals

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to determine the amount of excessive contributions received by the Committee. That letter states, in part, "Commission regulations provide committees with 30 days in which to refund contributions which appear to be prohibited, and 60 days in which to seek the reattributions, redesignation or refund of excessive contributions. 11 CFR 103.3(b)(1), (2), and (3). Contributions resolved by committees outside these time periods will not be considered mitigated violations. The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. After this deadline, the Commission will request that all unresolved prohibited or excessive contributions be paid to the United States Treasury."

Our review of contributions from individuals identified apparent unresolved excessive contributions totaling $71,525. This amount was derived from a comprehensive review of the two undisclosed bank accounts (see Section II.); an extensive review of contribution checks from a partnership; comprehensive reviews of selected coded transactions from the Committee's receipts data base; and a sample review of the remaining contributions from individuals. At or subsequent to the exit conference, the Committee was provided with various schedules detailing the apparent excessive contributions, as well as relevant check copies from the sample review. The following is a summary of this excessive amount.

Recap of Excessive Contributions

Type of Review	Total amount of excessive contributions
Texas Account	$ 1,100
Andover Account	29,314
Partnership Contribution	21,500
"Refund" Coded Contributions: Not Refunded or Not Cleared Through Bank	1,330
Untimely refunded contributions	7,312
Excessive Contributors on Data Base	1,550
Dollar Value Projection of errors from the sample	9,419
Total Amount of Unresolved Excessive Contributions Payable to the United States Treasury	$71,525

In the interim audit report, the Audit staff recommended that the Committee:

- Provide evidence that the contributions in question are not excessive;

- In regard to the two refunded checks written by the Committee which had not cleared the bank, provide evidence of these funds clearing the bank (i.e., copies of the front and back of the negotiated refund checks);

- With respect to the contributions drawn on the partnership account, provide evidence regarding the partnership's

payment structure to show that the funds contributed were within exclusive control of the individual partners;

° Absent any evidence that demonstrates that the above mentioned contributions are not excessive, make a payment to the United States Treasury in the amount of $71,525.

The discussion of each area of excessive contributions and the Committee's response to the interim audit report concerning each follows.

a. Comprehensive Reviews

i. Undisclosed Bank Accounts

As discussed above, two undisclosed bank accounts were reviewed during the audit. Our review of the Texas Account identified 2 excessive contributions totaling $1,100. The review of the Andover Account identified 42 contributors (in addition to the lenders discussed above) who exceeded the contribution limitation. The excessive portions of these contributions total $29,314. Therefore, the total amount of apparent excessive contributions from the two undisclosed bank accounts is $30,414 [$29,314 + $1,100].

The Committee stated that it would recognize the Texas Account and file an amended statement of organization. As discussed in Section II., the Committee disavows the Andover Account. However, it has demanded that Mr. Rizzo forward the amount of contributions from individuals. Therefore it appears that the Committee had acknowledged these contributions as Committee funds.

In response to the interim audit report, Counsel for the Committee states that the Committee does not contest the finding that $1,100 of excessive contributions were made to the Committee's Texas Account. It is also noted that the Committee has filed an amended Statement of Organization to recognize the Texas Account.

With respect to the Andover Account, Counsel for the Committee states in response to the interim audit report that the Andover Account is not an account of the Committee. The Committee does not contend that the Federal Election Campaign Act ("FECA") is irrelevant to the Andover Account. The Committee acknowledges that 2 U.S.C. §432(b) and 11 CFR §102.8 were violated by Mr. Rizzo with respect to forwarding contributions and contributor identifying information to the treasurer within ten days of his receipt.

The Committee has sent a letter to Mr. Rizzo demanding that he forward the amount of all contributions to the treasurer. Counsel states that to date no payment has been received and that the Committee considers the amount to be

uncollectible. Counsel further states that it is the Committee's position that it never received the $29,314 in alleged excessive contributions deposited into the Andover Account and that if the contributions had been forwarded to the treasurer in compliance with FECA, they would have been refunded in a timely manner to the contributors.

As discussed previously, the Audit staff's position is that the Andover Account is an account of the Committee. However, that dispute aside, the contributions from individuals deposited into the Andover Account were, for the most part, permissible contributions received by the Committee's chief fundraising agent. The fact that some of the funds were misappropriated before the Committee could apply them to a campaign purpose does not alter the fact that they were received by the Committee through its authorized fundraising agent. It also does not change the fact that a portion of the contributions were in excess of contribution limitations. It is the Audit staff's opinion that these moneys were received by the Committee and result in the excessive contributions noted above. The fact that the money was not forwarded to the Committee's main operating account does not mean that the Committee did not receive these excessive contributions.

ii. Partnership Contribution

We reviewed contributions from a Boston law firm in which the candidate is a partner. Our review identified 25 contributions totaling $22,500 made on partnership checks, all drawn from the same account. Since partnership contributions are limited to $1,000, an excessive contribution of $21,500 results.

At the exit conference, the Committee stated that they believed these contributions were made by individuals. In support of this contention, the Committee provided a letter from the executive director of the firm stating, in part:

> "... all checks drawn on accounts of [the firm] as a political contribution to the Tsongas Committee, Inc. were done so at the direction of the individual partners of the firm. These contributions are deducted from the specific Partner's net income distribution."

The Committee also provided 23 additional documentation letters from the individuals to support the assertion that the contributions are drawn on the partnership account but represent the contributor's personal funds. However, the regulations state that a contribution by a partner on a partnership check shall be attributed to the partnership and to the partner. Since all the contributions are drawn on partnership

checks from the same account, the contributions must be attributed to the partnership, as well as each individual partner, which results in an excessive contribution from the partnership.

In response to the interim audit report, the Committee provided a letter from the Executive Director of the law firm as clarification of the firm's payment structure. This letter states, in part, that "all checks drawn...as political contributions to the Tsongas Committee, Inc. were done so at the written direction of the individual partners of the firm who chose to make contributions. These contributions were deducted from the specific Partner's individual net income distribution.

"Throughout the fiscal year the law firm distributes only eighty percent of the profits earned by the equity partners. Twenty percent is held back and is distributed at the end of the fiscal year. Accordingly, the law firm held funds allocable to each equity partner from which specific political contributions were made. One semi-retired Partner, who was paid one hundred percent of his fixed compensation monthly, contributed $500 which was deducted from a year end bonus."

Further, Committee Counsel states that since the early days of the Commission, contributions from "non-repayable drawing accounts" have been recognized as lawful individual contributions.12/ The Committee thus contends that the contributions in question were not contributions "by a partnership."

The Notice referred to by the Committee dealt with funds contributed from corporate non-reimbursable drawing accounts. The Regulations make a distinction between corporate and partnership contributions and the respective treatment. In addition, the Committee response refers to written direction by the individual partners. However, documentation to support these written authorizations was not provided to support this contention. Also, the response does not clarify whether the partnership places any restrictions on partners' deductions from the firm accounts or whether the net income distributions are ever repayable to the partnership. Finally, there is no indication given that the partners are able to draw against the 20% in profits that are held back by the partnership prior to the end of the year.

The Committee has not provided evidence to demonstrate that the funds contributed were within the exclusive control of the individual partners. Although the contributions should be attributed to the individual partners, the regulations call for the contributions to also be attributed to

12/ The Committee refers to the Notice to All Candidates and Committees (Aug. 28, 1978).

the partnership which results in the excessive contribution noted above.

iii. Selected Codes on the Committee's Receipts Database

The Committee's receipts database utilized a coding system with respect to contributions from individuals. A "P" coded contribution indicated the contribution was for the primary election. A "B" coded contribution indicated an insufficient funds check was written by a contributor. An "R" coded contribution was to indicate a refund was warranted. However, as noted below, refunds were not made for all of the "R" coded transactions.

A review was performed on the "R" coded contributions. It was determined that the contributions were coded "R" because they resulted in either excessive or prohibited contributions. Our review was designed to determine if the contribution refunds were made and if so, made timely. The review identified 34 contributions totaling $8,642 which on their face or in the aggregate exceeded the $1,000 contribution limitation.

Included among these 34 contributions are 27 totaling $7,312 that the Committee refunded on June 17 and 18, 1992. None of these 27 refunds were made timely. As noted above, the Commission's letter dated June 2, 1992, stated, in part, "The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility [May 18, 1992] or after the date of receipt of this letter [June 8, 1992], whichever is later."

After being informed of this matter, the Committee provided the following response:

> "The committee interpretation of untimely refunds was the later of 60 days following a date of candidate's ineligibility or 60 days after the receipt of the letter. In this context the subject refunds were timely. After review of the letter with Mr. Swearingen, I understand our interpretation was based on a misleading explanation of the time limits in the June 2 letter. I feel and hope the committee will not be found in violation of this regulation based on the misinterpretation of this misleading letter."

These contributions are included among those requiring a payment to the U.S. Treasury.

The remaining 7 excessive contributions coded "R" include 5 for which refund checks were not issued by the Committee, and 2 where refund checks were issued but had not

cleared the bank as of July 31, 1992. The excessive portions of these contributions total $1,330.

In addition to the "R" codes, the Audit staff identified 6 contributors on the receipts database which exceeded the contribution limitation by $1,550. These contributors were identified by totaling contributions for all individuals and identifying those contributors whose contributions totaled more than $1,000.

In response to the interim audit report, Counsel for the Committee stated the Committee does not contest the six excessive contributions which were identified from the receipts data base. With respect to the seven excessive contributions coded "R", the Committee provided a photocopy of a canceled refund check of $50 which had been issued on June 17, 1992 but was not negotiated until after completion of fieldwork. Counsel states that subject to modification for this item, the Committee does not contest the remaining excessives coded "R" but not refunded. Although the Audit staff agrees that the excessive contribution has been refunded, it is noted that the refund check was issued after the Committee's receipt of the letter from the Commission dated June 2, 1992. Therefore, the amount of this excessive contribution ($50) would still be payable to the U.S. Treasury along with the 27 items totaling $7,312 which are previously noted.

With respect to the excessive contributions which were refunded by the Committee after receipt of the June 2, 1992 letter, Counsel for the Committee in response to the interim audit report stated that the Committee contested these excessive contributions for three reasons. First, the Committee claims that it was confused by the following wording in the letter:

> "The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later."

The Committee further states that it reasonably interpreted this letter to mean that untimely refunds would not be recognized more than 60 days following the later of the date of ineligibility or the date of receipt of the letter [August 5, 1992] and accordingly certain refunds were made on June 17 and 18. The Committee submits that given these unique circumstances, these refunds should not be disregarded as the Audit staff proposes.

Second, the Committee submits that it should not be required to pay these amounts twice -- once to the contributors and once again to the Treasury. The Committee

contends that, although the Commission may choose at its discretion not to consider the refunds as a mitigating factor in any ensuing enforcement proceeding, requiring a dollar-for-dollar payment to the Treasury is purely punitive and inconsistent with both the established enforcement process for FECA violations and the enumerated bases for a repayment finding.13/

Finally, the Committee submits that even if the Commission possessed the statutory authority to perform an "end-run around" the enforcement process and assess such a penalty in the context of the audit process, it is inappropriate to invoke such a new principle in an informal letter to a committee, rather than through recognized rulemaking channels.

In the Audit staff's opinion, the Committee's interpretation of the Commission's June 2, 1992, letter does not comport with the published regulations. The Committee is arguing that a reasonable reading of the Commission's letter would allow the Committee 60 days beyond the receipt of the letter to timely refund contributions which, according to the plain language of the regulation, should have been refunded before the letter was mailed. The Audit staff did not consider this a reasonable reading of the Commission's letter.

With respect to the contention that they should not be required to pay the amounts twice, the Committee chose to make the refunds after being notified by the Commission that such refunds would not be recognized. Thus, it was the Committee's choice "to pay the amount twice."

The Committee also argues that it is inappropriate to invoke a new principle in an informal letter to the Committee rather than through rulemaking channels. Agencies are required to comply with the Administrative Procedures Act's notice and comment provisions for "legislative rules" it issues. However, an exemption from these requirements is created for "interpretive rules, general statements of policy, or rules of agency organization, procedure or practice." An agency makes a general policy statement if the announcement either acts prospectively or leaves the agency and its decision-makers free to exercise discretion. The 1992 letter to presidential committees falls within the interpretive rule exemption. It does not substantially alter the Committee's rights or interests. Rather, it is interpreting a current regulation. Section 9038.1(a)(2) of

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13/ The Committee incorrectly refers to the disgorgement of these funds to the U.S. Treasury as a "repayment" which would be governed by 11 CFR §9038.2. Rather, the payment to the Treasury is the only method of removing the impermissible funds from the Committee's accounts, once the regulatory time periods recognized by the Commission have expired.

Title 11 of the Code of Federal Regulations allows the Commission to conduct examinations and audits "as it deems necessary to carry out the provisions of this subchapter."

The requirement that the Committee disgorge unlawfully retained contributions to the Treasury is not a new policy which significantly affects committees' rights or interests. A policy statement does not "alter the rights or interest of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency." American Hospital Ass'n, 834 F.2nd at 1047 (citing Batterton v. Marshall, 648 F.2d 694, 707(D.C. Cir. 1980)). The committees' rights and interests have not been affected here. Their duty with respect to illegal contributions is to redesignate, reattribute or refund these contributions within either 30 or 60 days, pursuant to 11 CFR §103.3. Therefore, the Committee has a general duty to relinquish unlawfully retained contributions. The 1992 letter does not alter this duty; it only notifies committees that all such untimely unresolved contributions must be paid to the United States Treasury.

b. Sample Review

The contributions that were not included in the comprehensive reviews discussed above were tested on a sample basis. The sample indicates that .1984% of the dollar value of the contributions or $9,419 represent excessive contributions.

In response to the interim audit report, Counsel for the Committee states that the Committee does not contest the excessive amount determined from this review.

The Committee has not complied with the recommendations contained in the interim audit report. As noted previously in regard to the specific areas, the Audit staff concluded that arguments submitted by the Committee were not persuasive and therefore a $71,525 payment to the U.S. Treasury was warranted.

Due to the Committee's apparent misunderstanding of the Commission's June 2, 1992 letter and relatively prompt action based on their interpretation of the letter, the Commission determined on December 8, 1994, that a payment to the U.S. Treasury for the 28 items totaling $7,362 which were refunded on June 17 and 18, 1992, was not required. Therefore, $64,163 ($71,525 - $7,362) remains as the total excessive contributions received by the Committee.

Recommendation #1

The Audit staff recommends that the Commission make a determination that the Committee is required to make a payment in the amount of $64,163 to the United States Treasury.

3. Excessive Contributions Resulting from Advances

During our review of the Committee's expense reimbursements to campaign staff we noted expenses incurred on behalf of the Committee in excess of the $1,000 contribution limitation. The excessive portions of the contributions total $76,435. In order to calculate the amount of a contribution resulting from an advance made by an individual on behalf of the Committee, payments made by the Committee were applied against those expenses aggregating in excess of $1,000 that had been incurred the earliest. Where there was no amount remaining payable, we considered the last payment to be the refund of the direct contribution.

a. Staff Advances

Section 116.5(b) of Title 11 of the Code of Federal Regulations states that the payment by an individual from his or her personal funds, including a personal credit card, for the costs incurred in providing goods or services to, or obtaining goods or services that are used by or on behalf of, a candidate or a political committee is a contribution unless the payment is exempted from the definition of contribution under 11 CFR §100.7(b)(8). If the payment is not exempted under 11 CFR §100.7(b)(8), it shall be considered a contribution by the individual unless the payment is for the individual's transportation expenses incurred while traveling on behalf of a candidate or political committee of a political party or for usual and normal subsistence expenses incurred by an individual other than a volunteer, while traveling on behalf of a candidate or political committee of a political party; and the individual is reimbursed within sixty days after the closing date of the billing statement on which the charges first appear if the payment was made using a personal credit card, or within thirty days after the date on which the expenses were incurred if a personal credit card was not used. For purposes of this section, the closing date shall be the date indicated on the billing statement which serves as the cutoff date for determining which charges are included on that billing statement. In addition, "subsistence expenses" include only expenses related to a particular individual traveling on committee business, such as food or lodging.

With respect to advances made by Committee staff, four individuals advanced funds on behalf of the Committee (see Attachment VII) resulting in excessive contributions totaling $60,844.14/ The expenses incurred were for travel and subsistence and campaign related goods and services. The average number of

14/ This amount was adjusted for a $1,000 exemption under 11 CFR §100.7(b)(8) for two of the individuals for which the regulation was applicable.

days outstanding before reimbursement ranged between 11 days and 236 days.

Included in the excessive amount noted above is $32,658 charged on a campaign official's credit card in July, 1992, and reimbursed on July 27,1992. The expenses were related to campaign staff's stay at the Sheraton Hotel/Towers during the 1992 Democratic Convention in New York (see Finding IV.C.).

According to the Committee its travel agent, American Express Travel Management Services, would have added a 10% commission to the cost of the lodging as a fee for its services. In order to save the commission fee the Committee made its arrangements through the DNC and charged the rooms using a campaign official's credit card. The Committee stated that the convention lodging also included the lodging of the campaign official who made the advance, and that the Committee thought since a credit card was used the reimbursement had to be made in 60 days. The Committee stated it made the reimbursement in a timely manner 10 days after the charge was incurred.

An individual associated with the Texas campaign advanced funds totaling $15,892, to open Tsongas for President offices in Texas. The resultant excessive contribution totals $14,892. We were unable to determine, based upon the documentation available, the dates these expenses were incurred. However, the Committee reimbursed these expenses in full on February 27, 1992.

The Committee had stated that it "will adopt the account out of which all expenditures were paid," apparently a reference to the Texas account, and notes that no excessive contribution exists. However, the expenses were not paid out of the Texas account but were paid by and reimbursed prior to opening the account discussed at Section II.

The Committee was made aware of this matter during field work and at the exit conference. Schedules detailing the individuals and amounts considered excessive contributions were provided to the Committee.

The Committee responded that for the most part the advances in question were not submitted for payment in a timely manner, but once submitted were paid in a timely manner. The Committee stated that its reimbursement policy provided that no reimbursement would be made without complete and proper documentation. In addition the Committee contends that in most cases it was not aware of the advances made by these individuals until the request for payment was made. The Committee submitted schedules detailing what it felt were the excessive contributions.

Since the expenses in question were for either travel and subsistence not reimbursed in 30 or 60 days as appropriate or campaign related expenses and were in excess of the

$1,000 contribution limitation the expenses constitute excessive contributions.

With respect to the convention related expenses, the Committee notes:

> "The Goldman expenses represented, in part, 'usual and normal subsistence expenses incurred by an individual, other than a volunteer, while traveling on behalf of a candidate' See 11 CFR 116.5(b)(1). The Audit staff apparently takes the position that such expenses, to be exempt from the contribution definition, must be the expenses of the individual advancing the funds. The Committee disagrees with this interpretation. This phrase uses the phrase 'expenses incurred by an [emphasis in original] individual.' A previous clause in the same section refers to 'the individual's transportation expenses.' This distinction in phrasing indicates that different treatment was intended for subsistence expenses. At a minimum, this inconsistent phrasing creates an ambiguity and provides a good-faith basis for the Committee's position.
>
> In any event, the proposed advance by Mr. Goldman was presented to and expressly approved by members of the audit staff prior to the payment in question. The Commission now may not reverse its position to the Committee's detriment."

The Audit staff believes the Regulations are quite clear with respect to what is considered a contribution under 11 CFR §116.5, which states if the payment is not exempted under 11 CFR §100.7(b)(8), it shall be considered a contribution. The exception is for travel and subsistence expenses incurred by an individual for that individual's travel and subsistence. With the exception of Mr. Goldman's lodging, which has not been identified, the expenses are considered a contribution.

Although the Audit staff was aware that the Committee was attending the convention, no "approval" of any transactions the Committee was contemplating or in fact had made ever occurred. The Audit staff did, however, inform the Committee that any expenditures made in relation to the convention would be considered non-qualified campaign expenses. With respect to the reimbursement, the Audit staff was unaware of the transactions (payment by credit card and reimbursement of the expenses) until after the fact.

In the interim audit report, the Audit staff recommended that the Committee provide evidence to support that

the staff advances noted above were not excessive contributions. In response to the interim audit report, Counsel for the Committee addressed each of the four individuals noted as having made excessive contributions as a result of advances of funds.

For the first individual, the Committee contends that the expenses were reimbursed promptly and well within the Commission's time limit for the refund of all forms of excessive contributions as set forward in 11 CFR §103.3. The Committee submits that there is no justification for treating a "contribution" resulting from an advance more strictly than other forms of excessive contributions and denying a political committee a reasonable opportunity to cure the potential violation by refund or reimbursement.

For the second and third individuals, the Committee responds that it reimbursed expenses submitted by these individuals in an exceedingly prompt matter after being presented with a properly documented request. The Committee contends that the Audit staff disregarded the date that the reimbursement request was submitted for reimbursement and has drawn the conclusion of excessive contributions from the date on which, unknown to the Committee, expenses appear to have been incurred. The Committee further states that "in accordance with Committee reimbursement procedures, no reimbursement was made until complete and proper documentation of expenses was provided."

With respect to the fourth individual, the Committee submitted an affidavit of the Business Manager which states, in part, that he became aware that certain Tsongas supporters in Texas had made advance payments for various campaign-related expenditures. Although he had not authorized the expenditures, he authorized reimbursement to be made promptly upon learning of the advances and within ten days of receiving notification of the expenditures. The Committee again states that this reimbursement was within the time limits governing the refund of excessive contributions as set forth at 11 CFR §103.3.

Finally, the Committee takes issue with the Audit staff's view that "to avoid the receipt of an excessive contribution, alleged expenses must be 'reimbursed' by a committee in the absence of both knowledge of the expenses and sufficient documentation from the alleged advancing party to substantiate the amount and campaign nexus of the expenditures. In addition to constituting frightfully unsound financial management practices, such an approach is bound to run afoul of the Commission's requirements for documentation of expenses as set forth at 11 C.F.R. §9033.1(b)." The Committee further submits that it should be given a reasonable opportunity to refund allegedly excessive advances after being presented with appropriate documentation of such expenditures.

The Committee has not complied with the interim audit report recommendation. Arguments submitted

questioning the Audit staff's treatment of advances made by Committee staff are not persuasive. The Regulations provide committees with a time frame for reimbursing advances made by committee personnel for their travel and subsistence expenses. These types of contributions are specifically addressed in the Regulations as having their own set of time frames. Section 103.3 of Title 11 of the Code of Federal Regulations provides time frames for committees to correspond with contributors and remedy excessive contributions through redesignation or reattribution. These remedies are not applicable for expenses regulated by 11 CFR §116.5.

Further, the Explanation and Justification for 11 CFR §116.5, 55 Fed. Reg. 26382 (June 27, 1989) states, in part, that "an in-kind contribution will result if an individual pays the transportation or subsistence expenses of others or pays other types of campaign expenses, such as the costs of meeting rooms or telephone services, regardless of how long reimbursement, if any takes." Thus, the Regulations do not provide for an individual to advance funds for any amount of time for campaign expenses other than for personal travel and subsistence. The Regulations require committees to form strong internal controls in order to comply. Not allowing committee personnel to advance funds for expenses other than travel and subsistence and requiring proper documentation for travel and subsistence would not constitute unsound financial management. By making clear to Committee personnel that they can not incur expenses on behalf of the campaign except for personal travel and subsistence, the campaign would have even more careful control over its finances. In the cases of an individual's personal travel and subsistence, the Regulations provide a reasonable time period for the Committee to receive proper documentation pursuant to 11 CFR §9033.11(b) and to make reimbursement without a contribution occurring. In addition, the Committee is not insulated from responsibility for complying with 11 CFR §116.5 simply because staff did not submit vouchers timely. This is another case where strong internal controls and policies should prevent this situation from occurring.

b. Advances Made by State Offices

Section 116.3(a) of Title 11 of the Code of Regulations states that a commercial vendor that is not a corporation may extend credit to a candidate, a political committee or another person on behalf of a candidate or political committee. An extension of credit will not be considered a contribution to the candidate or political committee provided that the credit is extended in the ordinary course of the commercial vendor's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.

The Committee established an office in New York to collect the required signatures for placement on the New

York primary ballot. The New York office was administered by J. Armenakis, and was housed in the basement of Mr. Armenakis' law firm, Armenakis & Armenakis ("Armenakis"). In addition to Mr. Armenakis, two other paid Committee representatives worked on the New York campaign; everyone else worked on a volunteer basis. According to the Committee, it was recommended that the Committee obtain 20,000 signatures; however, approximately 13,000 to 14,000 were collected which caused the Lenora B. Fulani for President campaign to challenge the number of signatures in court.

A review of Committee records indicates that the New York campaign was funded by Committee payments for services rendered. The checks were made payable to either Mr. Armenakis or the law firm. Based upon documentation available, Armenakis incurred numerous expenses on behalf of the Committee for goods and services. In total, Armenakis provided the Committee with documentation to support expenses totaling $45,411.

Our review of the disbursement requests submitted to the Committee by Armenakis to support the expenses incurred and the payments made by the Committee indicated that Armenakis exceeded the $1,000 contribution limitation on different occasions by amounts ranging from $2,980 to $22,611. The average number of days outstanding range from 2 to 112.

For these expenses, the Committee paid Armenakis a total of $31,416, leaving an apparent balance of $13,995 that remains unpaid and results in a $12,995 excessive contribution. Included in the amount is $6,000 which Armenakis notes in a memo to the Committee "N.Y. Telephone called today to advise us that the latest bill (Jan. 25 - Feb. 24.) will be over $6,000)." Armenakis has not submitted a phone bill to the Committee for reimbursement.

With respect to the outstanding balance owed to Armenakis the Committee contends that it has paid Armenakis in full and that both parties agreed to the amount paid by the Committee. The Committee stated that it had disqualified the amount noted as payable since the expenses were not campaign related or not sufficiently documented. With respect to the $6,000 phone bill the Committee stated that Armenakis was submitting for payment 95% of the law firm's phone bill, and the Committee refused to pay the law firm's phone bill.

With respect to the contributions arising from advances made by Armenakis, the Committee stated that Armenakis was not advanced money but was funded on a reimbursement basis. The Committee stated that Armenakis kept asking for additional funds but the Committee refused to advance funds until adequate documentation was provided to support that the expenses were qualified campaign expenses.

In addition to the the petition drive, Armenakis provided legal services in connection with the defense

of the petition challenge. Armenakis billed the Committee $15,596 for the legal services plus travel expenses for the attorney who appeared in court. According to a campaign official, Armenakis also donated legal services in connection to the petition defense. Given that the legal services provided are not FECA compliance related services and therefore can not be donated, an apparent contribution to the Committee in the amount of the normal charge for such services occurred. However, no records were provided that indicate the value of the donated services.

In regard to the $15,596 billed for legal services, $596 still remains unpaid. The Committee maintains that Armenakis was paid in full which results in a $596 in-kind contribution from Armenakis. This in-kind contribution, when added to the $13,995 outstanding balance noted above, results in a total outstanding balance of $14,591 and a remaining excessive contribution of $13,591.

During the period covered by this activity, it appears that Armenakis was comprised of two partners, James and Diana Armenakis.15/ In accordance with 11 CFR §110.1(e), the excessive contribution would also be an excessive contribution from each partner. Neither of the partners made an individual contribution to the Committee. Absent evidence to the contrary, it appears that each of the partners made an excessive in-kind contribution of $6,295.50 [(1/2 x $14,591 outstanding balance) - $1,000 individual contribution limitation].

In addition to the $6,000 telephone charge mentioned above, the expenses which the Committee states comprise the unpaid balance include charges for per diem, travel and food for volunteers ($2,041), office expenses (copying, postage, supplies, shipping)($2,046), catering ($800), payments, mostly to one individual with no recorded purpose ($3,552) and miscellaneous expenses ($150).

The Committee had no comment regarding this matter at the exit conference. Subsequent to the exit conference, the Committee provided the Audit staff an invoice from Armenakis dated September 2, 1992 for "legal services, consulting and campaign related activities as negotiated by David Goldman." The accompanying correspondence states that the invoice "supersedes all invoices previously sent." However, the original invoices clearly establish that Armenakis incurred and paid expenses in connection with its work on behalf of the campaign which remain unpaid and which have not been the subject of a debt settlement pursuant to 11 CFR 116.2. Therefore, the Committee has received an apparent excessive contribution totaling $13,591 from the partnership and a $6,295.50 excessive contribution from each partner.

15/ The source of this information is the Martindale-Hubbell Law Directory published in April, 1992.

In the interim audit report the Audit staff recommended that the Committee provide the following:

- evidence supporting that the $14,591 noted above is not payable to Armenakis, and $13,591 is not an excessive contribution, or evidence that the Committee has paid the amount due Armenakis (front and back of the canceled check); and

- evidence that the Committee did not receive a $6,295.50 excessive contribution from each partner of the law firm; and

- an explanation regarding any services volunteered by Armenakis with respect to the legal defense of the Lenora B. Fulani for President challenge and a billing statement prepared by Armenakis detailing the services provided and the cost of such services.

In response to the interim audit report, Counsel for the Committee states:

"It is the Committee's position -- and that of the law firm -- that the law firm has been paid in full. The reimbursement request submitted by the law firm contained charges for expenses that were not discernibly campaign-related or did not reflect a rational allocation of overhead items, such as telephone charges, between the campaign and the ongoing business of the law firm.18/

[Footnote 18] - "As the Interim Report notes, the expenses disallowed by the Committee included approximately $3,500 of payments to an individual with no recorded purpose. Interim Report Page 23.

"After being advised that the Committee considered certain of the documentation unacceptable, the law firm sent a revised invoice, dated September 2, 1992 reducing the amount sought for reimbursement. The Audit staff apparently concludes that the reduction in the amount sought represents a subsidy to the Committee by the law firm. Rather, the reduction was a recognition that the original request was inappropriate. Commission regulations recognize that a creditor and a political committee are entitled to agree on a revaluation of a disputed obligation without a political contribution by the creditor resulting. See 11 C.F.R. §116.10. The Audit staff does not set forth any justification for disregarding the arms-length resolution of this disputed debt, nor

identify any particular allegedly unreimbursed expense that it considers to be campaign-related.

"The Committee is unaware of the basis of the reference by the Audit staff to alleged legal services volunteered by the New York law firm and, thus, is unable to respond to this issue. The Committee notes, however, that even if such services were volunteered, Commission advisory opinions provide substantial latitude for the donation of legal services by law firm partners without a contribution resulting. See Advisory Opinion Nos. 1979-58, 1980-107. Although the Committee did encourage the provision of volunteer services, it did so with the expectation that any volunteer attorneys would assist the campaign in a manner consistent with their other professional and employment obligations and in accordance with the FECA and regulations."

The Committee has not complied with the recommendation contained in the interim audit report. The Committee's response does not contain adequate documentation and explanations to demonstrate that an excessive contribution did not occur. The Committee has not provide a persuasive argument that the expenses submitted were not campaign related. Armenakis ran the New York campaign and naturally incurred expenses on the Committee's behalf. The Audit staff believes that the original invoices submitted by the firm indicates that expenses were incurred without receiving full reimbursement. It is further noted that the invoice from Armenakis which supposedly supersedes all other invoices is dated subsequent to the conclusion of audit fieldwork during which the Committee was notified of this apparent excessive contribution. The Committee stated that the original documentation was insufficient and the payment was reduced accordingly. However, the Committee did not address specifically the $6,000 in telephone charges, the $2,041 in per diem, travel and food for volunteers, the $2,046 in office expenses, the $800 for catering, the $3,552 with no recorded purpose, or the $150 in miscellaneous charges which the Committee did not pay. No information was provided to demonstrate that the items were not expended on behalf of the Committee which results in an in-kind contribution by the law firm.

The Audit staff regrets that Committee representatives do not recall the conversation concerning the apparent donation of legal services. The Advisory Opinions noted by the Committee relate to law partners working for a campaign and continuing to be paid by its firm. They do not address the donation of legal services. The donation of legal services is regulated by 11 CFR §100.7(b)(14). As noted previously, the legal services apparently provided by Armenakis would not be considered exempt activity under that regulation.

B. Misstatement of Financial Activity

Section 434(b) of Title 2 of the United States Code states, in relevant part, that each report shall disclose the amount of cash on hand at the beginning of the reporting period and the total amount of all receipts and disbursements received or made during the reporting period and the calendar year.

The Audit staff's reconciliation of the committee bank accounts to its disclosure reports filed from inception through April 30, 1992, indicated a material misstatement of financial activity in both 1991 and 1992. The differences are discussed below.

1991

For 1991, reported receipts were understated by $705,779; reported disbursements were understated by $860,917; and reported ending cash was overstated by $155,138.

The misstatement of receipts occurred primarily as a result of the Committee not reporting $710,662 in loans, contributions from individuals and other receipts deposited into the Andover Account (see Section II.); and a reconciling item totaling $4,883.

The misstatement of disbursements was primarily the result of unreported disbursements from the Andover Account of $709,118; varied unreported disbursements from the operating, payroll, and advertising accounts totaling $98,519; unreported payroll for the 4th quarter totaling $55,779; disbursements reported either incorrectly or not supported by check or other debit advice totaling $2,302; and a reconciling item totaling $197.

1992

Through April 30, 1992, reported receipts were understated by $371,382; reported disbursements were understated by $607,367; and reported ending cash on hand was overstated by $391,123.

As discussed at Finding IV.B., the Committee utilized American Express Travel Management Services ("Amex") as their travel agent. Amex arranged chartered aircraft and ground transportation for the Committee, and billed the Press and U.S. Secret Service for their transportation and other costs associated with their travel. The Committee was generally billed for the cost of the trip plus 10% and any amounts received from the Press and Secret Service as reimbursement were credited to the Committee's account. This procedure understated both the Committee's receipts and disbursements by the amount recovered from the Press and Secret Service. Also, the schedules A-P which should have identified the Press organizations and Secret Service

that were the source of the receipts and schedules B-P which should have disclosed the payee of the disbursements were not filed. As of April 30, 1992, the Press and Secret Service had paid $306,75816/ to Amex for charter services which had been credited to the Committee's account.

The remaining misstatement of receipts occurred as a result of not reporting a $42,000 return of funds from Mr. Rizzo in January of 1992 (see Section II.); not reporting the deposits of contributions into both the Andover Account ($8,647) and the Texas account ($10,241); improperly reporting $4,300 in NSF contributor checks; and the unreported receipt of contributions, and refunds and rebates totaling $8,036.

The remaining misstatement of disbursements was primarily the result of unreported disbursements from the operating account totaling $103,912; unreported March disbursements made from the advertising account totaling $405,728; March payroll not reported totaling $32,177; other unreported disbursements from the advertising and payroll accounts totaling $24,001; service charges not reported totaling $7,969; incorrectly reporting the amount of checks on the disclosure reports totaling $283,869 (net), which includes a check for $30,005 being reported as $300,005; unreported disbursements from the Andover Account totaling $9,896; an unreported payment to Mr. Rizzo of $42,000; unreported disbursements from the Texas account of $10,045; duplicate reporting of expenditures totaling $74,056; checks written in 1991 and reported in 1992 totaling $75,748; April, 1992 checks totaling $54,273 and reported in May, 1992; addition errors in the Committee's March 1992 disclosure report totaling $27,475; unreported wire transfers of $57,761; the improper reporting of checks that have been voided in the amount of $44,099; and a reconciling item of $3,144.

The Committee was provided with schedules detailing the misstatements during audit fieldwork, and again at the exit conference. In response the Committee provided an amendment for 1991, which materially corrected the misstatement except for the Andover Account and was received on September 14, 1992. The Committee also provided an amendment for 1992 on January 21, 1993 which materially corrected the misstatement.17/

16/ Amounts received from the Press and the Secret Service between May 1, and July 2, 1992, total $129,967. As with the earlier transactions the associated receipts and expenditures were not reported by the Committee although the amounts relating to the earlier period were included on amended disclosure reports.

17/ The Committee did not disclose the activity from the Andover Account. However, the activity in the account for 1992 was limited and the reports were materially corrected without reporting the activity.

In the interim audit report, the Audit staff recommended that the Committee amend its 1991 reports to include the activity from the Andover Account.

In response to the interim audit report, Counsel for the Committee states:

> "The Interim Report recommends that the Committee amend its 1991 reports 'to include the activity from the Andover Account.' The Audit staff's recommendation is not specific as to the manner in which the 'activity' is to be included. The Committee is prepared to submit a comprehensive amendment to its 1991, 1992, and 1993 reports to reflect a receivable from Nicholas Rizzo in the amount of the contribution checks (other than loans) that he failed to forward to the Treasurer. The amendment will contain as an exhibit the list of contributors and amounts of contributions so that there is full public disclosure of the intended financial supporters of the presidential candidacy of Paul Tsongas.
>
> "The proposed amendment also will contain a descriptive footnote with the following text:
>
> > This figure represents amounts due to the Committee from Nicholas A. Rizzo, former fundraising consultant to the Committee. This amount is calculated to include contributions intended for the Committee received by Mr. Rizzo during 1991 and 1992, but not forwarded to the Committee as required by applicable law. A schedule of the contributions comprising this amount, compiled by the Audit staff of the Federal Election Commission, is attached as Exhibit 1 to this report. Mr. Rizzo has been ordered to make restitution of these funds to the Committee as part of a sentence imposed by the United States District Court for the District of Massachusetts.
>
> This reporting treatment is fully consistent with the disposition in U.S. v. Rizzo, in which Mr. Rizzo admitted that he 'failed to forward or caused others to fail to forward contributions...and failed to properly deposit contributions.'
>
> "The amendment also would reflect an 'other disbursement' denoting that the Rizzo receivable is not collectible. This entry will carry the following explanatory footnote:

This figure represents amounts due to the Committee from Nicholas A. Rizzo that the Committee has concluded, in the exercise of its considered judgment, are uncollectible. Despite numerous requests and demands on Mr. Rizzo since July of 1992, he has not provided any payment or reasonable prospect of full or partial payment. Information received by the Committee, as well as representations by Mr. Rizzo's counsel to the federal court in U.S. v. Rizzo indicates that Mr. Rizzo is without the means to make this repayment.

"The amendment also will reflect a further account payable to Nicholas A. Rizzo representing the excess of campaign-related expenses either paid out of the Andover account or paid by Mr. Rizzo in some other manner over the amount of such expenses previously reimbursed to Mr. Rizzo but subsequently determined to be unreimbursable. This balance, based on the figures contained in the Interim Audit Report, is $47,028.

"The Committee does not believe that the amendment should list the 'loans' received by Mr. Rizzo fraudulently obtained using the Committee's name. As noted above, the federal court in U.S. v. Rizzo directed that Mr. Rizzo repay these loans directly to the lenders and not to the Committee.

"To the extent that the Audit staff recommends that the Committee report the individual contributions to and disbursements from the Andover account in a manner as if they had been made to or from the Committee's authorized account, the Committee disagrees with the legal and factual predicate of that recommendation for the reasons outlined above."

As noted previously, the Andover Account is considered an account of the Committee and the transactions routed through the account should be reported accordingly. Further, although the individual contributions deposited into the Andover Account were misappropriated by Mr. Rizzo, they were nonetheless received by the Committee through its authorized fundraising agent. It is also noted that the amended reports described in the Committee response have not been filed.

IV. Findings and Recommendations - Repayment Issues

A. Calculation of Repayment Ratio

Section 9038(b)(2)(A) of Title 26 of the United States Code states that if the Commission determines that any amount of

any payment made to a candidate from the matching fund payment account was used for any purpose other than to defray the qualified campaign expenses with respect to which such payment was made it shall notify such candidate of the amount so used, and the candidate shall pay to the Secretary an amount equal to such amount.

Section 9038.2(b)(2)(iii) of Title 11 of Code of Federal Regulations states that the amount of any repayment sought under this section shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of matching funds certified to the candidate bears to the total amount of deposits of contributions and matching funds, as of the candidate's date of ineligibility.

Pursuant to 11 CFR §9033.5(a), the Commission determined Senator Tsongas' date of ineligibility to be March 19, 1992.

The formula and the appropriate calculation with respect to the Committee's receipt activity is as follows:

$$\frac{\text{Total Matching Funds Certified Through The Date of Ineligibility - March 19, 1992}}{\text{Total Deposits Through The Date of Ineligibility}}$$

$$\frac{\$745,741.78}{\$745,741.78 + \$4,513,881.64} = .141786$$

Thus, the repayment ratio for non-qualified campaign expenses is 14.1786%.

In response to the interim audit report, Counsel for the Committee states that "[t]he Committee agrees with the repayment ratio as calculated. The Committee does emphasize, however, that if the Audit staff persists in laboring under its erroneous impression that the Andover account is a Committee account and that expenditures from that account are subject to repayment under 26 U.S.C. §9038(b)(2)(A), then the deposits into the Andover account must be added into the denominator of the repayment formula, with the ratio reduced accordingly."

The Audit staff notes that the activity from the Andover Account was included in the determination of the repayment ratio contained in the interim audit report and above.

B. Press and U.S. Secret Service Billings

Sections 9034.6(a), (b) and (d) of Title 11 of the Code of Federal Regulations state, in part, if an authorized committee incurs expenditures for transportation, ground services and facilities (including air travel, ground transportation, housing, meals, telephone service, and typewriters) made available to media personnel, Secret Service personnel or national security staff,

such expenditures will be considered qualified campaign expenses. If reimbursement for such expenditures is received by a committee, the amount of such reimbursement for each media representative shall not exceed the media representatives pro rata share of the actual cost of the transportation and services made available. A media representative's pro rata share shall be calculated by dividing the total cost of the transportation and services by the total number of individuals to whom such transportation and services are made available. For purposes of this calculation, the total number of individuals shall include committee staff, media personnel, Secret Service personnel, national security staff and any other individuals to whom such transportation and services are made available. The total amount of reimbursements received from a media representative under this section shall not exceed the actual pro rata cost of the transportation and services made available to that media representative by more than 10%.

The Committee may deduct from the amount of expenditures subject to the overall expenditure limitation of 11 CFR 9035.1(a) the amount of reimbursements received in payment for the actual cost of transportation and services. This deduction shall not exceed the amount the committee expended for the actual cost of transportation and services provided. The committee may also deduct from the overall expenditure limitation an additional amount of reimbursements received equal to 3% of the actual cost of transportation and services provided under this section as the administrative cost to the committee of providing such services and seeking reimbursement for them. If the committee has incurred higher administrative costs in providing these services, the committee must document the total cost incurred for such services in order to deduct a higher amount of reimbursements received from the overall limitation. Amounts reimbursed that exceed the amount actually paid by the committee for transportation and services provided under paragraph (a) of this section plus the amount of administrative costs permitted by this section up to the maximum amount that may be received under paragraph (b) shall be repaid to the Treasury. Amounts paid by the committee for transportation, services and administrative costs for which no reimbursement is received will be considered qualified campaign expenses subject to the overall expenditure limitation.

For purposes of this section, "administrative costs" shall include all costs incurred by the committee for making travel arrangements and for seeking reimbursements, whether performed by committee staff or independent contractors.

1. Press Billings

The Committee utilized American Express Travel Management Services ("Amex") as their travel agent. Amex chartered six trips for the Committee which were made between February 19, and March 18, 1992. In addition to arranging the chartered aircraft, ground transportation, lodging and catering, Amex provided the following: on plane personnel to track the

Press passengers, billed the media and Secret Service for their travel, provided collection services, and applied the remittances to the Committee's account.

Amex provided for our review flight manifests, records of the air and ground costs, and in some instances catering costs associated with each trip. To the total trip cost Amex applied a 20% markup and divided this cost by the total number of Committee, Press and Secret Service passengers. The Amex personnel aboard the flight were not included in the passenger count for purposes of the pro rata calculation. This pro rata share was then billed to the Press passengers. Amex billed the Press $402,850 for the six trips taken. As of July 2, 1992, $382,058 had been collected from the Press.18/

According to the Committee, half of the 20% markup charged by Amex is part of the actual cost of the service and is therefore billable to the Press and the Amex personnel should not be included in the passenger count. The Committee provided the following written explanation regarding the Amex billings:

> "Services provided for by Amex as travel agent should be considered a charge as is usual in business practices. The Amex representative who traveled on the plane was facilitating the use of the plane for media, US Secret Service and for committee passengers. The Amex representative's role in the plane was to provide services and not as a recipient of such. Amex is not in the business of providing free services. If Amex were to be asked to pay for a % of costs, it would in effect be paying to provide free services.
>
> "Amex calculated a mark up of 10% for the media passengers.
>
> "For easy computation, Amex used a 20% figure in its workpapers. This 20% [was] comprised of a 10% commission charged by Amex to all passengers and a 10% mark up requested by the Committee charged to media. By Committee's computation, the traveling Press pro rata totals $384,073.33. The Committee 10% mark up allowed a billable

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18/ The amount which could be verified as of this date was $382,058. The Committee's disclosure reports do not disclose any subsequent receipts from the press. In the Committee's response to the exit conference, they state that they received $389,410. No documentation was provided to support this number. Therefore, the Audit staff has used $382,058 in performing its review and calculations.

amount of $422,481.14. A recovery rate of 103% yields $395,592.52. Since only $389,410.30 has been received from the Press, the Committee has not yet reached the level where it is obliged to pay the US Treasury."

The Committee also provided a letter from Amex stating that "the traveler was charged the net cost, plus a 10% commission, due to American Express, which is an industry standard, and a 10% Administrative fee as you had requested us to charge."

The Commission's regulations provide that only a 10% mark up on the actual cost of transportation and services may be billed to the Press and that the total number of passengers on the plane must be used in determining the pro rata share per passenger. The Audit staff prepared a revised Press billing by Flight/Leg number for each trip. Our review indicated that the pro rata cost of the Press for these flights totals $333,542.20. The maximum amount billable to the Press (110% of cost) totals $366,896.

Based on our review it appeared that, in most cases, Amex billed the Committee the amounts reflected on the charter manifests for the trips plus 10%. The 10% markup is considered an administrative fee paid by the Committee. Also, the pro rata cost of the Amex personnel who traveled on the aircraft is considered an administrative cost to the Committee. As a result the Committee incurred administrative costs in excess of 10% of actual costs and may collect up to the maximum billable amount (110% of cost) without incurring any repayment obligation. However, these administrative costs do not permit the Committee to bill or receive more than 110% of actual cost.

As noted above, $382,058 has been reimbursed by the Press; and based upon the total amount billed, $21,412 remained uncollected as of July 2, 1992. However, the amount received as of July 2, 1992, represents $15,162 ($382,058 - 366,896) in excess of the maximum billable amount. This amount is included on the Committee's Net Outstanding Campaign Obligations as an accounts payable to the various Press organizations the Committee over billed during the campaign.

2. U.S. Secret Service Billing

The Secret Service accompanied the Candidate on a portion of trip five and on trip six. The total amount billed for these trips was $49,129, of which the Secret Service reimbursed $49,567. Based upon the billing statement provided by Amex it appears that the Secret Service was billed the lesser of first class air fare or pro rata cost as calculated by Amex (including a 10% markup). In addition, no amount was billed for trip 6 leg 11 for which the flight manifest reflects 9 Secret Service passengers.

We prepared a schedule based upon actual transportation cost for the flights on which the manifests reflect Secret Service passengers including the flight not billed. We calculated a billable amount of $45,096 for the lesser of first class or pro rata cost. This amount is $4,471 ($49,567 - 45,096) less than the amount received from the Secret Service by the Committee. This amount ($4,471) is shown on the Committee's statement of Net Outstanding Campaign Obligations as payable to the Secret Service.

At the exit conference the Committee stated the Amex had reached an agreement with the Secret Service on the amount to be billed for the Secret Service passengers.

In the interim audit report, the Audit staff recommended that the Committee provide evidence that it did not over bill the Press. Absent such evidence the Committee should refund to the Press $15,162 and provide photocopies of the negotiated refund checks (front and back); and provide documentation to support the calculations of the amount paid to each Press organization. In addition, any amounts received after July 2, 1992, should also be refunded. With respect to the Secret Service the Committee should provide evidence that the Secret Service was not over billed or refund $4,471 to the U.S. Secret Service and provide documentation of such refund.

In response to the interim audit report, Counsel for the Committee states that the correspondence from the travel agent confirms that its ten percent commission "is an industry standard" and is part and parcel of the cost to the Committee of the travel arrangements in question. The Committee asserts that it could not have received the services without paying that commission. Further, the Committee states that the commission does not defray the Committee's administrative costs and that by preventing the Committee from charging an administrative fee, the Audit staff fails to compensate the Committee for media organizations that did not pay their full share. In addition, the Committee quotes an article in Travel Weekly magazine which it say supports the Committee's position that commissions are not an administrative fee. With respect to the U.S. Secret Service billings, the Committee states that it is their understanding that the Secret Service has agreed with the Committee's travel agent that no further refund is due.

With respect to the article in Travel Weekly, it is noted that the article describes one of the other Presidential campaigns in which a travel agency was used. The author of the article purports to explain federal law. However, even if Commission policy was influenced by articles from magazines, the quote used by the Committee does not apply to the above discussion concerning commissions or administrative costs. In addition, two distinctions can be drawn between this Committee and the one described in the article. First, the committee described in the

article paid the charters directly and the travel agent only billed and collected from the press and Secret Service. Second, the commissions paid to the travel agent were considered by the committee as an administrative expense.

The Committee's argument that the commission paid to the travel agent is part of actual cost is not persuasive. That commission represents administrative costs incurred by the Committee for the travel agent's efforts in arranging travel and seeking and collecting reimbursements from the media and Secret Service. As explained earlier, the Commission's regulations make it clear that these administrative costs cannot be converted to actual cost of the transportation provided simply by paying a vendor to provide the service rather than the Committee performing the work in house. In addition, the argument that this treatment prevents the Committee from recovering costs for press organizations that did not pay their full share is moot. The administrative allowance and the 10% allowable mark up is not intended to permit a committee to bill paying press for those who do not pay. As noted above, the Committee received in excess of the actual costs of the trips plus the 10% markup provided for in the Regulations. Finally, the Committee has continually stated that the Secret Service and Amex agreed on the amount billed to the Secret Service. However, the information provided to the Secret Service contained a 10% markup on the actual cost figures expressed as part of actual cost. There is no indication that based on actual cost figures, the Secret Service agrees with what they have been billed.

Recommendation #2

The Audit staff recommends that the Committee be required to refund the Press $15,162 and refund the Secret Service $4,471 and provide photocopies of the negotiated refund checks (front and back).

C. Apparent Non-Qualified Campaign Expenses

Section 9032(9) of Title 26 of the United States Code defines, in part, the term "qualified campaign expense" as a purchase or payment incurred by a candidate or his authorized committee made in connection with his campaign for nomination which neither the incurrence of nor payment of which constitutes a violation of any law of the United States or of the state in which the expense is incurred or paid.

Section 9038.2(b)(2) of Title 11 of the Code of Federal Regulations states, in relevant part, that the Commission may determine that amounts of any payments made to a candidate from the matching payment account were used for purposes other than to defray qualified campaign expenses. The amount of any repayment under this section shall bear the same ratio to the total amount determined to have been used for non qualified campaign expenses

as the amount of matching funds certified to the candidate bears to total deposits, as of the candidates date of ineligibility.

1. Committee Payments to Benco, Nicholas Rizzo and Steve Joncas

As noted in Section II.A., we reviewed payments made by the Committee to Benco, Nicholas Rizzo, and Steve Joncas. Of the total amount paid, $35,118 was discovered to be for either non campaign related expenses or qualified expenses which were paid more than once. This amount represents non-qualified campaign expenses. Attachment VI is a schedule detailing these payments.

Additionally, Mr. Rizzo submitted an expense voucher in the spring of 1992 which contains approximately $57,100 in qualified campaign expenses. The $35,118 noted above has been offset against the $57,100 of qualified campaign expenses. As a result, it is our opinion that the Committee has recovered the non-qualified campaign expenses. Therefore, no repayment is recommended.

2. Democratic Convention

From a review of selected disbursements, the Audit staff identified 34 payments totaling $74,531, which, based upon documentation provided by the Committee, were for expenses relating to the Candidate and Committee personnel's attendance at the Democratic National Convention held in New York City. These expenses were incurred after the date of ineligibility and therefore are non-qualified campaign expenses.

At the exit conference, Committee representatives were provided with a schedule detailing these items.

In the interim audit report, the Audit staff recommended that the Committee submit documentation which demonstrated that the expenses noted above are qualified campaign expenses. Absent such a demonstration, the interim audit report stated that the Audit staff would recommend that the Commission make an initial determination that the Committee make a pro rata repayment of $10,567 (74,531 x 14.1786%) to the U.S. Treasury pursuant to 26 U.S.C. §9038(b)(2).

In response to the interim audit report, Counsel for the Committee states that "the Committee does not contest the repayment required for disbursements relating to the Democratic Convention. Although the Committee considers that valid arguments exist that such disbursements are qualified campaign expenses, the Committee recognizes that the Commission previously has rejected these arguments in the context of other audits."

Recommendation #3

The Audit staff recommends that the Commission make an initial determination that the Committee is required to make a pro rata repayment of $10,567 ($74,531 x 14.1786%) to the U.S. Treasury pursuant to 26 U.S.C. §9038(b)(2).

3. Undocumented Expenditures

Section 9038.2(b)(3) of Title 11 of the Code of Federal Regulations states the Commission may determine that amount(s) spent by the candidate, the candidate's authorized committee(s), or agents were not documented in accordance with 11 CFR 9033.11. The amount of any repayment sought under this section shall be determined by using the formula set forth in 11 CFR 9038.2(b)(2)(iii).

Section 9033.11 (a), (b), and (c) of Title 11 of the Code of Federal Regulations states, in part, that each candidate shall have the burden of proving that disbursements made by the candidate or his authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or committee(s) are qualified campaign expenses. Documentation for qualified campaign expenses shall include, for disbursements in excess of $200, a receipted bill from the payee that states the purpose of the disbursement or, a canceled check negotiated by the payee and a bill, invoice, voucher, or contemporaneous memorandum from the candidate or committee that states the purpose of the disbursement. Where the documents specified are not available, a voucher or contemporaneous memorandum from the candidate or the committee that states the purpose of the disbursement; or if neither a receipted bill nor the supporting documentation is available, a canceled check negotiated by the payee that states the purpose of the disbursement. Where the supporting documentation required is not available, the candidate or committee may present a canceled check and collateral evidence to document the qualified campaign expense. Such collateral evidence may include but is not limited to: Evidence demonstrating that the expenditure is part of an identifiable program or project which is otherwise sufficiently documented such as a disbursement which is one of a number of documented disbursements relating to a campaign mailing or to the operation of a campaign office; evidence that the disbursement is covered by a pre-established written campaign committee policy, such as a daily travel expense policy. For disbursements of $200 or less a canceled check negotiated by the payee that states the payee, date, amount and purpose of the disbursement. All records shall be kept for a period of three years pursuant to 11 CFR 102.9(c).

Section 102.9(c) of Title 11 of the Code of Federal Regulations states, in part, the treasurer shall preserve all records and accounts required to be kept for three years after the report to which such records relate is filed.

During the review of documentation from the Committee's Andover Account (see Section II.), the Audit staff identified 68 disbursements, totaling $693,212, which do not appear to be campaign related and/or are not adequately documented.

The undocumented disbursements appear to relate to Mr. Rizzo. There were 40 disbursements totaling $621,215 made payable to either Mr. Rizzo or Benco. There is no indication that either he or Benco was owed this amount. Also, there were 15 payments, totaling $50,004, to various banks which Committee believed to be payments on personal obligations of Mr. Rizzo. Responses from subpoenas have been received from all of these banks and indicate that Mr. Rizzo had obligations at some but not all of these banks (see Section II.). Finally, there were 13 payments totaling $21,993 which do not appear to be campaign related. If any of the funds are recovered from Mr. Rizzo or are shown to be for qualified campaign expenses, the undocumented amount will be reduced accordingly.

In the interim audit report, the Audit staff recommended that the Committee submit documentation which demonstrated that the expenses noted above were qualified campaign expenses or that the amounts had been recovered from Mr. Rizzo. Absent such a demonstration, the interim audit report stated that the Audit staff would recommend that the Commission make an initial determination that the Committee make a pro rata repayment of $98,288 (693,212 x 14.1786%) to the U.S. Treasury pursuant to 26 U.S.C. §9038(b)(2).

In response to the interim audit report, Counsel for the Committee states that "the Committee does not contest that $693,212 of disbursements from the Andover account would be considered undocumented and/or non-qualified disbursements if made from the Committee's account. The Department of Justice and Internal Revenue Service apparently traced most of the expenditures to banks, bookies and casinos, all lacking any nexus to the campaign.

"The Committee does contest the Audit staff's position that undocumented or non-qualified disbursements from the Andover account may trigger a repayment obligation from the Committee. The factual premise of the Committee's position is simple. No one has contended that a nickel of federal matching funds was deposited into the Andover account, nor was there any transfer of funds from the Committee's matching fund accounts into the Andover account.

"In Kennedy for President Committee v. Federal Election Commission, the United States Court of Appeals squarely rejected the Audit staff's position here. In Kennedy, the court held that 26 U.S.C. §9038(b)(2) creates a repayment obligation only if it is determined 'that matching fund payments were used

for unqualified purposes, and expressly limits the repayment obligation to 'such amount,' i.e., the amount of matching funds 'so used.'' The repayment required here is in no sense 'a reasonable determination that the repayment sum represents the matching funds used for unqualified purposes.' To the contrary, requiring the Committee to 'repay' anything from the Andover account is wholly arbitrary, punitive, and entirely without statutory or regulatory foundation."

The Committee's response does not address the fact that in Kennedy v. FEC, the Kennedy campaign proposed that its repayment be calculated by "multiplying the total amount of [non]qualified expenditures by the proportion of matching funds to total campaign funds." In addition, the court maintained that the FEC should not be bound by the Kennedy campaign's proposed repayment formula but should have discretion "in formulating a proper method for calculating the amount of unqualified campaign expenditures attributable to matching fund sources." Subsequent to this case, the Commission revised the Regulations to address this matter.

The Explanation and Justification for 11 CFR Part 9038 contained in the Federal Register, Vol. 50. No. 46 dated Friday, March 8, 1985 states that "in accordance with the court's order, the Commission has revised its regulations which currently require repayment of the total amount spent on non-qualified campaign expenses. The revised regulations implement a pro-rata formula based on the proportion of federal funds to total funds received by the candidate. The amount of any repayment sought would then be a similar proportion of the total amount spent on non-qualified campaign expenses...The use of such formulas is consistent with the court's opinion, which does not require a mathematically precise determination of the amount of the Federal funds spent improperly but only a reasonable determination of the amount of Federal matching funds so used."

Thus, the qualified campaign expense test and repayment is applied to all accounts of a Committee from beginning to a point when no matching funds are left. This includes accounts which may never contain matching funds or did not at the time of the expenditure. All funds of a Committee, regardless of where they are kept, are considered a mixed pool of private and federal funds. Finally, the Andover Account is considered to be an account of the Committee.

Recommendation #4

The Audit staff recommended that the Commission make an initial determination that $98,288 ($693,212 x 14.1786%) was repayable to the U.S. Treasury pursuant to 26 U.S.C. §9038(b)(2).

However, after considering the circumstances surrounding this matter, on December 8, 1994, the Commission decided not to seek a repayment.

D. Determination of Net Outstanding Campaign Obligations

Section 9034.5(a) of Title 11 of the Code of Federal Regulations requires that within 15 days after the candidate's date of ineligibility, the candidate shall submit a statement of net outstanding campaign obligations which contains, among other items, the total of all outstanding obligations for qualified campaign expenses and an estimate of necessary winding down costs.

Senator Tsongas' date of ineligibility was March 19, 1992. The Audit staff reviewed the Committee's financial activity through August 31, 1992, analyzed winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations ("NOCO") as of April 30, 1992. In addition, a limited review of Committee transactions and disclosure reports filed through June 30, 1994, was conducted for purposes of reviewing winding down costs and determining the Committee's remaining matching fund entitlement.

The Committee disagreed with the NOCO contained in the interim audit report for four reasons. Counsel for the Committee states,

> "First, the Committee disputes that the loans to Mr. Rizzo generate either an account receivable or an account payable...the Committee believes that a receivable from Mr. Rizzo is uncollectible...the Committee disputes the amount payable to the Treasury for excessive contributions and the amount owed to the press...Finally, in light of the extreme position adopted by the Audit staff in the Interim Audit Report and the Commission's determination in Advisory Opinion No. 1993-15 that legal fees incurred by the Committee in connection with the investigation and prosecution of Mr. Rizzo are required to be paid with funds subject to the Act, anticipated wind down legal fees have increased substantially and, with that increase, a corresponding increase in fundraising costs."

The Audit staff noted in the interim audit report that a determination would be made concerning the collectibility of the receivable from Mr. Rizzo. On October 13, 1993, Mr. Rizzo was sentenced to 52 months in prison, an $825 special assessment, and a restitution amount of $899,000. The court limited the restitution order to five years and acknowledged that Mr. Rizzo had limited funds with which to make the restitution. The court stated, in part, "that restitution order will continue for a period of five years from this day, and thereafter it will expire, unless the government can show that you have some funds to pay. Another reason I do that is because, I think, as Mr. McCann said, five years from now, when you come out, if you are going to be productive -- you will have every chance of being productive -- it seems to me you will be punished sufficiently and that you ought to have the opportunity to face life without that

several-hundred-thousand-dollar debt hanging over your head." The Audit staff agrees that the account receivable from Mr. Rizzo relative to the Andover Account appears to be uncollectible. Accordingly, the Audit staff has recognized an allowance for the uncollectible amount on the NOCO statement.

In addition, the estimated wind down amounts provided by the Committee extend through June 30, 1996. The Audit staff used the numbers provided by the Committee and did not attempt to verify the reasonableness of the numbers. As can be seen on the following NOCO statement, due in part to the uncollectibility of the receivable from Mr. Rizzo, the Committee would have a deficit and would not have received matching funds in excess of entitlement even if no estimated wind down was included on the NOCO. With respect to the Committee's other two objections, the Audit staff does not agree as discussed in prior findings in this report. The Committee's updated NOCO statement appears below:

THE TSONGAS COMMITTEE, INC.
Audit Analysis of April 30, 1992 NOCO Statement

Assets			
Cash		$312,401	
Accounts Receivable a/		191,954	
Capital Assets		7,701	
Accounts Receivable from Mr. Rizzo b/	$909,263		
Allowance for Uncollectible Amount from Mr. Rizzo	(909,263)		
		-0-	
TOTAL ASSETS			$ 512,056
Obligations			
Bank Loan Payable		$858,279	
Loan Payable to Candidate		45,000	
Accounts Payable for Qualified Campaign Expenses a/		1,452,120	
Loans Payable to Individuals c/		729,000	
Amounts Payable to U.S. Treasury for Excessive Contributions		64,163	
Amount Owed to the Press		15,262	
Amount Owed to the Secret Service		4,471	
Winding Down Costs (5/1/92-6/30/96)			
Actual Wind down Expenses Paid a/ (5/1/92-6/30/94)		659,732	
Estimated Wind down Expenses (7/1/94-6/30/96)			
Rent	$13,028		
Telephones	1,988		
Office Equipment	1,429		
Computer Lease	2,057		
Salaries	12,942		
Legal Fees	157,135		
Fundraising	48,569		
Total Estimated Wind down		237,148	
TOTAL OBLIGATIONS			$4,065,175
NOCO (Deficit) / Surplus			($3,553,119)

Footnotes to NOCO

a/ This amount includes amounts reported on Committee disclosure reports after audit fieldwork.

b/ This amount consists of all loans from individuals plus all receipts from individuals deposited into the Andover Account less the principal amount of the loans repaid by Mr. Rizzo personally and less campaign related expenses which were paid from the Andover Account.

c/ This amount excludes the $65,000 repaid from Mr. Rizzo's personal account. It is recognized that at this time the Committee does not have the funds available to make these payments nor is it anticipated that funds will be available in the foreseeable future.

From May 1, 1992 until August 2, 1993 (the last date of receipt of matching funds) the Committee received $398,838 in private contributions and $1,910,592 in matching funds. Thus, the Committee would have been entitled to an additional $1,243,745 ($3,553,175 - $398,838 - $1,910,592) in matching funds.

V. Recap of Amounts Due to the U.S. Treasury

Shown below is a recap of amounts due the U.S. Treasury as discussed in this report.

Finding	Topic	Amount
III.A.2.	Apparent Excessive Contributions	$64,163
IV.C.2.	Convention Related Expenses	10,567
TOTAL		$74,730

Adjusted Receipts
(Through September 30, 1994)

	Federal Matching Funds	Individual Contributions Minus Refunds	PAC's and Other Cmte Contrib Minus Refunds	Contributions from the Candidate	Candidate Loans Minus Repayments	Other Loans Minus Repayments	Other Receipts	Adjusted Total Receipts
Democrats								
Larry Agran	$269,691	$331,631	$0	$500	$3,000	$1,029	$3,001	$608,852
Jerry Brown	$4,239,345	$5,176,336	$0	$0	$0	$0	$4,693	$9,420,374
Bill Clinton	$12,518,130	$24,983,688	$2,429	$0	$0	$1	$30,724	$37,534,972
Tom Harkin	$2,103,352	$3,080,206	$415,570	$0	$0	$0	$22,601	$5,621,729
Bob Kerrey	$2,198,284	$3,913,332	$349,757	$0	$0	($1,225)	$5,931	$6,466,079
Lyndon LaRouche	$568,434	$1,604,065	$0	$0	$0	$0	$8,231	$2,180,730
Paul Tsongas	$3,039,388	$5,072,689	$3,566	$0	$45,000	($9,575)	$0	$8,151,068
Doug Wilder	$289,026	$508,519	$750	$0	$0	$0	$1,039	$799,334
Total Democrats	$25,225,650	$44,670,466	$772,072	$500	$48,000	($9,770)	$76,220	$70,783,138
Republicans								
Patrick Buchanan	$4,999,983	$7,157,808	$24,750	$0	$0[4]	$0	$43,940	$12,226,481
George Bush	$10,658,513	$27,088,825	$44,250	$0	$0	$0	$222,417	$38,014,005
David Duke*	$0	$220,715	$0	$0	$1,000	$0	$0	$271,815
Total Republicans	$15,658,496	$34,467,348	$69,000	$0	$1,000	$0	$266,357	$50,512,301
Other Party								
Andre Marrou*	$0	$562,770	$181	$116	$15,000	$0	$0	$578,067
Lenora Fulani*	$1,935,524	$2,201,490	$0	$325	($1,258)	$1,200	$0	$4,137,281
John Hagelin	$353,160	$563,800	$449	$0	$0	$5,630	$5,316	$928,355
Total Other Party	$2,288,684	$3,328,060	$630	$441	$13,742	$6,830	$5,316	$5,643,703
Grand Total	$43,172,830	$82,465,874	$841,702	$941	$62,742	($2,940)	$347,893	$126,939,142
Perot	$0	$3,905,594	$0	$65,544,735	$2,056,371	$0	$5,807	$71,512,507

Adjusted Disbursements
(Through September 30, 1994)

	Operating Expenditures Minus Offsets	Exempt Fundraising Minus Offsets	Exempt Legal/Accounting Minus Offsets	Other Disburse	Adjusted Total Disbursements	Expenditures Subject to Limit	Latest Cash On Hand	Debts Owed By the Campaign
Democrats								
Larry Agran	$609,111	$0	$0	$95	$609,206	$616,223	$47	$3,170
Jerry Brown	$6,315,622	$2,278,938	$311,790	$108,584	$9,014,934	$6,688,482	$135,482	$0
Bill Clinton	$25,321,257	$5,524,000	$3,989,675	$0	$34,834,932	$24,528,607	$284,544	$20,932
Tom Harkin	$4,027,765	$1,144,006	$198,633	$35,316	$5,405,720	$3,142,973	$164,248	$143,389
Bob Kerrey	$5,181,458	$1,076,978	$179,911	$23,404	$6,461,751	$6,050,481	$9,662	$0
Lyndon LaRouche	$1,550,693	$0	$132,929	$290,804	$1,974,426	$1,520,588	$215,155	$0
Paul Tsongas	$6,808,157	$754,978	$191,375	$0	$7,754,510	$7,001,566	$7,496	$164,472
Doug Wilder	$806,776	$6,568	$39	$0	$813,383	$807,258	$786	$0
Total Democrats	$50,621,039	$10,785,468	$5,004,352	$458,003	$66,868,862	$50,356,178	$817,418	$331,963
Republicans								
Patrick Buchanan	$11,828,268	$0	$0	$0	$11,828,268	$11,828,272	$487,655	$0
George Bush	$27,429,416	$5,526,322	$4,938,167	$73,400	$37,967,307	$27,429,422	$6,405	$0
David Duke	$353,838	$0	$0	$1,000	$354,838	$0	$0	$29,250
Total Republicans	$39,611,524	$5,526,322	$4,938,167	$74,400	$50,150,413	$39,257,694	$494,060	$29,250
Other Party								
Andre Marrou*	$415,576	$160,219	$0	$0	$575,795	$0	$0	$0
Lenora Fulani*	$4,204,009	$0	$0	$3,235	$4,207,244	$4,207,526	$0	$0
John Hagelin	$700,534	$91,458	$52	$90,293	$882,337	$700,534	$0	$0
Total Other Party	$5,320,119	$251,677	$52	$93,528	$5,665,376	$4,908,060	$0	$0
Grand Total	$95,552,682	$16,563,467	$9,942,571	$625,931	$122,684,651	$94,521,932	$1,311,478	$361,213
Perot	$69,152,998	$0	$0	$5,388	$69,158,386	$0	$975,716	$1,938,407

THE TSONGAS COMMITTEE, INC.
Andover Account
Loans from Individuals

Contributor	Address	Date of Deposit	Amount	Total
Larry Ansin*	61 Possum Road Weston, MA 02193	03/11/91	$100,000	$100,000
Elkin McCallum*	34 Bridge Path Way Tynasboro, MA 01889	08/13/91	100,000	
		10/21/91	50,000	
		02/10/92	100,000	250,000
Anastasios Kalogianis*	c/o Olympic Construction 40 Lowell St., Bldg. 2 Salem, NH 03079	09/10/91	10,000	
		09/25/91	15,000	
		10/02/91	24,000	
		12/04/91	35,000	
		12/06/91	65,000	
		01/27/92	100,000	249,000
Peter Caloyeras	4053 Redwood Avenue Los Angeles, CA 90066	09/27/91	10,000	10,000
Michael Spinelli*	35 Montview Road Chelmsford, MA 01824	10/16/91	20,000	20,000
Thomas Kelley	250 Market Street Portsmouth, NH 03801	10/22/91	25,000	25,000
Roger Trudeau	255 N. Road, Unit 126 Chelmsford, MA 01824	08/08/91	60,000	
		09/10/91	20,000	80,000
William Berg**	34 Brantwood Road Arlington, MA 02174	12/04/91	60,000	60,000
	TOTAL BORROWED			$794,000

* Also contributed $1,000 to the Committee.
** Also contributed $750 to the Committee.

The Thongas Committee, Inc.
Andover Savings Bank

Checks from 1/8/91 to 1/27/92

Payee	Date	Amount	Notations	Russo	BENCO	Banks	Unknown	Other		Processing Bank
M. Russo	1/11/91	$75,000.00		$75,000.00						Bay Bank Boston
BENCO	1/12/91	$25,500.00			$25,500.00					Bay Bank Boston
M. Russo	1/25/91	$4,000.00	See note #1	$4,000.00						?
Andover Bank	1/30/91	$2,990.00				$2,990.00				?
Bank of N.E.	1/28/91	$3,657.93				$3,657.93				?
Medford Bank	1/27/91	$3,000.00				$3,000.00				?
M. Russo	4/2/91	$5,000.00		$5,000.00						?
M. Russo	4/5/91	$2,000.00	See note #1	$2,000.00						?
M. Russo	4/5/91	$4,000.00	See note #1	$4,000.00						Bay Bank Boston
Bank of N.E.	4/5/91	$315.00	See note #1			$315.00				?
M. Russo	4/10/91	$3,000.00		$3,000.00						Bay Bank Boston
BENCO	4/10/91	$5,615.00			$5,615.00				011193854	Bay Bank Boston
M. Russo	4/12/91	$13,000.00	See note #1	$13,000.00						Bay Bank Boston
M.A. Russo	4/15/91	$1,000.00						$1,000.00		?
P.L. Shea	4/1/91	$1,560.00						$1,560.00		?
BENCO	4/22/91	$5,000.00			$5,000.00				011193854	Bay Bank Boston
M. Russo	4/22/91	$10,000.00		$10,000.00						Bay Bank Boston
Andover Bank	4/30/91	$2,990.00				$2,990.00				?
M. Russo	5/5/91	$10,000.00		$10,000.00						?
M. Russo	5/28/91	$5,000.00		$5,000.00						Bay Bank Boston
Stouffer's	5/28/91	$1,471.66						$1,471.66		Fifth Third Bnk
Mack Money	5/24/91	$2,500.00						$2,500.00		?
M. Russo	5/29/91	$8,100.00		$8,100.00						Bay Bank Boston
M. Russo	6/1/91	$7,000.00		$7,000.00						Bay Bank Boston
M. Russo	6/3/91	$3,000.00		$3,000.00						Bay Bank Boston
M. Russo	6/18/91	$5,000.00		$5,000.00						Bay Bank Boston
Jay Donovan	6/14/91	$1,000.00						$1,000.00		Commer. Bnkstrs
Vera Snyder	6/12/91	$500.00						$500.00		Bay Bank Boston
M. Russo	6/17/91	$4,500.00		$4,500.00						Bay Bank Boston
M. Russo	6/20/91	$3,000.00		$3,000.00						Bay Bank Boston
Lawrence SB	6/24/91	$10,116.66				$10,116.66				Lawrence Sv Bnk
BENCO	6/24/91	$2,500.00			$2,500.00					Nat. Bnk Greece
M. Russo	6/26/91	$20,000.00		$20,000.00						Bay Bank Boston
M. Russo	6/27/91	$7,000.00		$7,000.00						Bay Bank Boston

The Thongsa Committee, Inc.
Andover Savings Bank

Checks from 1/1/91 to 1/31/92

Payee	Date	Amount	Notations	Bianco	BANCO	Banks	Unknown	Other		Processing Bank
(no check)	7/1/91	$10,808.83	See note #2				$10,808.83			?
Bay Bank	7/22/91	$1,937.06				$1,937.06				?
Sutton Travel	7/24/91	$2,237.00						$2,237.00		?
Sutton Travel	7/24/91	$534.50						$534.50		?
Colony Travel	8/1/91	$472.00						$472.00		?
BANCO	8/14/91	$75,000.00			$75,000.00					?
Sullivan Bro.	8/19/91	$14,962.50	See note #1					$14,962.50		?
BANCO	8/21/91	$10,000.00			$10,000.00					?
Bank of N.E.	8/29/91	$3,307.57				$3,307.57				?
Andover Bank	9/10/91	$2,066.77	See note #1			$2,066.77				?
First Essex	9/10/91	$613.54				$613.54				First Essex
Shawmut Bank	9/10/91	$1,545.95	See note #1			$1,545.95				CNB HDFD CT
Bay Bank	9/10/91	$1,922.76				$1,922.76				Bay Bnk Middlesex
Enterprise Bank	9/10/91	$2,193.54				$2,193.54				?
D. Bottris	9/10/91	$668.02						$668.02		?
B. Bianco	9/26/91	$16,000.00	See note #1	$16,000.00						?
B. Bianco	9/30/91	$10,000.00		$10,000.00						Bay Bank Boston
B. Bianco	10/2/91	$20,000.00		$20,000.00						?
B. Bianco	10/11/91	$4,500.00		$4,500.00						Bay Bank Boston
B. Bianco	10/17/91	$22,500.00		$22,500.00						Bay Bank Boston
B. Bianco	10/22/91	$51,000.00		$51,000.00						?
Atty. Terranova	10/23/91	$950.00						$950.00		?
B. Bianco	10/24/91	$20,000.00	See note #1	$20,000.00						?
Shawmut Bank	10/28/91	$2,538.15				$2,538.15				?
BANCO	10/28/91	$2,000.00			$2,000.00					?
B. Bianco	11/29/91	$7,000.00	See note #1	$7,000.00						?
B. Bianco	12/5/91	$50,000.00	See note #1	$50,000.00						Bay Bank Boston
BANCO	12/5/91	$8,000.00			$8,000.00				#111193854	Bay Bank Boston
V. Pactunalis	12/9/91	$1,200.00						$1,200.00		?
V. C. Manzi Jr	12/9/91	$2,111.00						$2,111.00		Shawmut
Sullivan Bro.	12/9/91	$4,700.77						$4,700.77		Bay Bank Boston
BANCO	12/9/91	$4,000.00	See note #1		$4,000.00				#111193854	Bay Bank Boston
Mark Henry	12/11/91	$7,500.00	See note #1					$7,500.00		Shawmut
B. Bianco	12/11/91	$50,000.00	See note #1	$50,000.00						Bay Bank Boston

The Tsongas Committee, Inc.
Andover Savings Bank

Checks from 1/6/91 to 1/27/92

Payee	Date	Amount	Notations	Rizzo	RNLD	Banks	Unknown	Other	Processing Bank
M. Rizzo	12/17/91	$25,000.00		$25,000.00					Bay Bank Boston
M. Rizzo	12/26/91	$13,000.00		$13,000.00					?
J. Hancock Bus.	12/30/91	$234.11						$234.11	?
J. Hancock Life	12/30/91	$48.35						$48.35	?
Tricia Malvin	1/22/92	$1,000.00						$1,000.00	?
V. Petrinelli	1/22/92	$2,000.00						$2,000.00	Shawmut
M. Rizzo	1/27/92	$6,000.00	See note #1	$6,000.00					Bay Bank Boston
Totals		$718,258.67	See note #4	$463,600.00	$137,615.00	$39,194.73	$10,808.83	$47,040.11	$718,258.67

Notes:

#1 Payee, Date and amounts are from copies of canceled checks.
Illegible or missing information is from spreadsheet prepared by Tsongas committee Treasurer.

#2 No check available, payee information missing.
Amount and date from committee spreadsheet and bank statement.
According to the Department of Justice, this payment was made to a bank for a personal debt of Mr. Rizzo's.

#3 Illegible on check and no payee listed on committee spreadsheet.

#4 All amounts were traced to bank statements.

The Tsongas Committee
Benco Consulting and Marketing Co., Inc.

Check Number	Check Date	Check Amount	Distribution
1538	10/16/91	$ 783.49	Telephone Charges
1570	11/15/91	$ 962.02	Telephone Charges
1585	11/21/91	$15,000.00	Unknown
1632	12/13/91	$ 651.53	Appears to be Services
2009	02/27/92	$ 924.10	Telephone Charges
2010	02/29/92	$ 764.40	Reimburse Rentex Charges
2399	03/14/92	$ 5,500.00	Committee Check
2355	03/16/92	$ 1,008.84	Telephone Charges
2465	03/17/92	$ 7,290.00	Consulting
2622	04/03/92	$ 3,665.00	Merchants Motors Hooksett NH
2754	04/13/92	$ 1,142.58	Telephone Expense
2844	04/24/92	$ 7,550.00	Consulting April 92
3019	05/19/92	$ 713.57	Telephone Expenses
1013	04/05/91	$ 2,703.96	Office/Fundraising Expense
1022	04/12/91	$ 391.53	Office/General
1128	05/21/91	$ 724.54	Reimbursement Telephone
1177	06/05/91	$ 5,000.00	Services June 91 s.s. 025-24-4305
1258	07/01/91	$15,000.00	Appears t/b serv/consult per Data Base
1263	07/03/91	$ 5,000.00	Appears to be Services

The Tsongas Committee
Benco Consulting and Marketing Co., Inc.

Check Number	Check Date	Check Amount	Distribution
1303	07/12/91	$ 703.22	Telephone Charges
1308	07/15/91	$ 105.91	Telephone Charges
1499	10/02/91	$ 2,549.83	Telephone Charges
3041	05/28/92	$ 7,550.00	Consulting May 92
Total Payments		$93,234.52	$93,234.52
Accounts Payable		$ 590.45	Telephone Bills May
TOTAL		$93,824.97	$93,824.97

The Tsongas Committee, Inc.
Payments to Nicholas A. Rizzo

Check Number	Check Date	Amount	Distribution	Description
1052	04/24/91	$ 5,000.00	$ 5,000.00	Consultant Services 3/91
1053	04/24/91	$ 5,000.00	$ 5,000.00	Consultant Services 4/91
1054	04/24/91	$ 5,000.00	$ 5,000.00	Consultant Services 5/91
1176	06/05/91	$ 1,422.67	$ 540.00	Cash transer Western Union
			$ 162.35	Computer Rental
			$ 60.32	Postage
			$ 360.00	Watermark Cleveland
			$ 300.00	Sammy's Restaurant Cleveland
1300	07/08/91	$ 5,000.00	$ 5,000.00	Travel Advance & Expenses - CA Fundraiser
1692	12/31/91	$15,931.73	$ 115.00	Futterman Photography
			$ 359.00	
			$ 223.74	Four Seasons Hotel - Austin
			$ 392.70	Amex for Rentex - Boston
			$ 2,029.50	Sutton Travel- Rizzo, Tsongas, Kanin - Atlanta 9/91
			$ 400.50	Sutton Travel - Thomann, Los Angeles 9/91
			$ 387.50	Sutton Travel - Rizzo, Los Angeles 9/91
			$ 298.00	Sutton Travel - Bourtris, Los Angeles 8/91
			$ 1,020.50	Sutton Travel - Rizzo, Cataldo, CA 7/91
			$ 924.00	Sutton Travel - Rizzo, Joncas, Snyder Cleveland
			$ 1,385.00	Sutton Travel - Rizzo, Snyder, Detroit 5/91
			$ 258.00	Sutton Travel - Upton, Atlanta
			$ 928.50	Sutton Travel - Rizzo, L.A.
			$ 474.50	Sutton Travel - Thomann, D.C. 6/91
			$ 378.00	Sutton Travel - Kraft, Denver/NM 7/91
			$ 431.50	Sutton Travel - Thomann, Louisville/Pittsburgh 7/91

The Tsongas Committee, Inc.
Payments to Nicholas A. Rizzo

Check Number	Check Date	Amount	Distribution	Description
			$ 570.00	Sutton Travel - Thomann, D.C. 6/91
			$ 534.50	Sutton Travel - Tsongas, Louisville/Pittsburgh 7/91
			$ 1,216.50	Sutton Travel - Tsongas, L.A./San Francisco 7/91
			$ 196.15	The Carlton, D.C. Rizzo 12/15/91
			$ 1,553.37	Miscellaneous Receipts
			$ 10.50	Cash Register Tape
			$ 62.38	Cash Register Tape
			$ 93.00	Postage Receipt
			$ 120.00	Receipt
			$ 1,569.39	
1697	01/02/92	$42,000.00	$42,000.00	Reimbursemnt Exp. Recovered from Rizzo1/
2781	04/15/92	$17,153.75	$ 3,648.75	Colonial Print. Tsongas Brochures
			$13,505.00	Lafayette Hotel 4/11/91 Event
TOTAL		$96,508.15	$96,508.15	

1/ This payment was reimbursed by Rizzo in January of 1992. There was no documentation associated with the payment when it was made. At the time of the payment, Mr. Rizzo was in control of the Committee accounts.

The Tsongas Committee
Amounts Due From M. Rizzo
For Excess Expenses and Consulting Fees Paid

Payee	Description	Check Date	Check Number	Check Amount	Disputed Amount
N. Rizzo	Travel Advance and Expenses Ca. F/R Applied to 8/1/92 Unpaid Voucher. $3,610.88	07/08/91	1300	$5,000.00	$1.389.12
N. Rizzo	Reimbursement Lafayette Hotel F/R 4/21/91	04/15/92	2781	$17,153.73	$13,505.00
N. Rizzo	Rentex for Computer Rental Also Paid directly to on Rizzo's Amex account. Ck. No. 1253 6/28/91	06/05/91	1176	$1,422.67	$ 162.35
S. Joncas	Amount Pd. by Rizzo to Pixe Town, Assumed Personal Also Pd. Directly on Rizzo Amex Account	03/26/92 04/01/92	2505 2565	$1,275.54 $1,503.33	$ 479.25 $ 479.25
S. Joncas	Bill for "Special Lady" Rizzo Personal Exp.	05/04/92	2894	$1,473.54	$ 250.49
Benco	Extra Month's Consulting Feb. 92	03/17/92	2465	$7,290.00	$ 5,000.00
American Express	Gift Fruit Ship. Hale Ind. River Groves Personal	03/03/92	2106	$2,303.39	$ 84.90
N. Rizzo	Request Amount in Excess supporting documentation	12/31/91	1692	$15,931.73	$ 1,569.39
S. Joncas	Math Error on Expense Voucher 3/20-24/92	03/26/92	2502	$ 1,275.54	$ 154.92

The Tsongas Committee
Amounts Due From M. Rizzo
For Excess Expenses and Consulting Fees Paid

Payee	Description	Check Date	Check Number	Check Amount	Disputed Amount
S. Joncas	Math Error on Expense Voucher 4/29-5/3/92	05/04/92	2894	$ 1,473.54	$ 287.10
S. Joncas	Amer. Airline Tick. Upgrade on 3/20-24/92 & 4/29-5/3/92 Vouchers	05/04/92	2894	$ 1,473.54	$ 100.00
American Express	Payment on Rizzo Account also included on 4/1-3/92 Voucher under Joncas. St. Regis Hotel 462.00 & Delta Airlines $285.00	05/04/92	2893	$ 357.00	$ 347.00
S. Joncas	Consulting Per Data Base No Documentation	04/13/92	2561	$ 1,000.00	$ 1,000.00
S. Joncas	Travel Advance Not Applied	04/08/92	2736	$ 500.00	$ 500.00
Sutton Travel	Amounts Included on Various Vouchers and also Included on Various Rizzo and Joncas Vouchers or Paid from the Andover Account	Various	Various		$ 9,809.00
				TOTAL	$35,117.77

THE TSONGAS COMMITTEE, INC.
Schedule of Excessive Individuals

Individual	Amount of Individual Contribution	Deposit Date of Individual Contribution	Aggregate Amt. Untimely per Reimbursement Request	Dates Expenses Incurred	Amount in Excess of Limit	Date Reimbursed	Balance Remaining in Excess of Limit
David Goldman*	$1,000.00	03/30/91	$ 3,849.98	04/16/91-06/16/92	$ 3,849.98	06/18/92	—
			32,658.00	07/13/92-07/17/92	32,658.00	07/27/92	
Dennis Newman	125.00	05/24/91	Amount Varies	05/03/91-01/19/92	3,927.85	01/19/92	3,677.85
	100.00	06/27/91		01/19/92-02/11/92	10,076.98	02/11/92	7,876.23
				02/11/92-02/17/92	9,360.01	02/20/92	8,360.01
				02/20/92-04/01/92	11,168.70	04/06/92	10,920.84
				04/07/92-04/12/92	10,956.84	04/13/92	9,956.84
						04/22/92	8,992.38
						04/22/92	7,977.50
						05/08/92	6,415.12
						05/08/92	5,536.06
Andy Paven			Amount Varies	05/01/91-10/01/91	2,125.13	10/01/91	1,073.06
						10/07/91	601.34
				10/09/91-12/01/91	1,992.60	01/03/92	—
Bob Krueger* Krueger Railroad Commission			15,892.14	Dates Unknown	14,892.14	02/27/92	—

* These individuals are not subject to $1,000 unreimbursed travel exemption. Mr. Goldman advanced funds for cellular phone expenses and Committee staff expenses to attend Democratic Convention. Mr. Krueger's expenses relate to opening an office in Texas. His personal travel is not included.

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12/16/94

Received in Audit
10/31/94

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

October 31, 1994

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Kenneth E. Kellner
Assistant General Counsel

Delanie DeWitt Painter
Attorney

James Portnoy
Attorney

Jane Whang
Attorney

SUBJECT: Final Audit Report on the Tsongas for President Committee, Inc. (LRA # 424)

The Office of General Counsel has reviewed the proposed Final Audit Report on the Tsongas for President Committee, Inc. ("the Committee") dated August 18, 1994. The following memorandum contains our legal analysis of the findings and recommendations in the proposed Final Audit Report.1/ In

1/ Parenthetical references are to the placement of findings in the proposed report. Throughout our comments, "FECA" refers to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, and "Matching Payment Act" refers to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9041.

addition, as you requested, this memorandum provides our research and analysis on agency law. We concur with findings in the proposed Final Audit Report which are not discussed separately in the following memorandum.2/ If you have any questions concerning our comments, please contact Delanie DeWitt Painter, the lead attorney assigned to this audit.

I. RIZZO AND THE ANDOVER ACCOUNT (II. A., III. A. and B., IV. A., C. and D.)

A. INTRODUCTION

Nicholas A. Rizzo, Jr., the Committee's chief fundraiser, opened an account in the Committee's name at the Andover Bank (the "Andover account"). Rizzo solicited contributions to the Committee including large loans from individuals, deposited the funds into the Andover account or his own accounts, and embezzled most of the money. The repercussions of these transactions appear throughout the proposed Final Audit Report findings and initial repayment determinations.3/

B. COMMITTEE RESPONSE

The Committee asserts that Rizzo's actions in soliciting illegal loans from individuals exceeded the scope of his authority as a Committee agent. The Committee contends that Rizzo had no actual authority to solicit loans in the name of the Committee. The Committee further asserts that Rizzo could not have had apparent authority to solicit the loans, because such solicitations are in direct violation of federal election law.

The Committee also argues that the loans procured by Rizzo are his personal obligations, not the Committee's responsibility. The Committee contends that it never

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2/ The Commission's discussion of this document is not exempt from disclosure under the Commission's Sunshine Regulations and the document should be considered in open session. 11 C.F.R. § 2.4. However, since many of the issues are related to an ongoing enforcement matter, it will be necessary to redact references to that matter from the record.

3/ The Commission is concomitantly pursuing this matter in the enforcement context in MUR 3585. This Office summarized the facts uncovered by our investigation of this matter in a memorandum to the Audit Division dated July 20, 1994. We incorporate that document by reference, and will not delineate the complex facts of this case here. We have discussed the facts of this case informally with the Audit staff and have made minor suggestions which are not discussed in this document.

received the proceeds of the loans, because in the Committee's view, Rizzo was not acting as the Committee's agent when he procured the loans. In support of this proposition, the Committee relies on Rizzo's plea bargain, which included an order that he, rather than the Committee, repay the lenders. While the Committee concedes that receipt by an agent would normally constitute receipt by the Committee, it argues that Rizzo's activities interrupted the conveyance of the contributions from the lenders. Finally, the Committee contends that the Andover account was not a Committee account, but rather a secret account used by Rizzo as part of a criminal scheme to defraud the lenders and the Committee.

C. AGENCY LAW

The FECA and the Commission's regulations clearly contemplate that an agent's authority can include the solicitation and acceptance of contributions on a committee's behalf. See 2 U.S.C. § 432(a); 11 C.F.R. §§ 102.8, 102.9 (referring to "an agent authorized by the treasurer to receive contributions") and 110.1(b)(6) (a contribution is made when the contributor delivers it to the candidate, committee "or to an agent of the political committee").4/ Indeed, for the purpose of determining whether an expenditure is attributable to a candidate's campaign, the regulations define the term "agent" as:

> any person who has actual oral or written authority, either express or implied, to make or to authorize the making of expenditures on behalf of a candidate, or . . . any person who has been placed in a position within the campaign organization where it would reasonably appear that in the ordinary course of campaign-related activities he or she may authorize expenditures.

11 C.F.R. § 109.1(b)(5). Thus, an agent, for expenditure purposes, is an individual who either has authority to make expenditures on behalf of a campaign or occupies a position that third parties would reasonably believe to confer such authority.

4/ In addition, the regulations expressly contemplate that agents will make expenditures on behalf of presidential candidates. See 11 C.F.R. § 110.8(g) (agent's expenditures count against presidential candidate's expenditure limitation); Cf. 11 C.F.R. § 110.6(b)(2) (contrasting earmarked contributions made via conduits with contributions made through individuals authorized to accept contributions on behalf of a committee.)

Even a low level committee employee may be considered an agent. See Advisory Opinion ("AO") 1992-29 (receipt of contributions by clerical employee assigned to open envelopes constitutes receipt by committee). Moreover, one need not be employed by a committee to be the committee's agent. See AO 1989-21 (checks from customers to a vendor selling committee-authorized campaign paraphernalia constitute contributions received by the committee as of the date they are received by the vendor); AO 1980-42 (ticket sale proceeds from fundraising concert are considered contributions received by the committee upon receipt by the concert promoter).

Moreover, a Committee is responsible for its agent's actions even if the agent acts negligently or contrary to express instructions. For example, in AO 1992-29, the Commission instructed a committee to refund contribution checks that an employee had left in a drawer until after the 10-day deposit requirement expired. The employee acted without the treasurer's knowledge and against express instructions issued to Committee personnel. Nonetheless, since the employee was the Committee's agent authorized to receive contributions, the Committee was deemed to have received the checks on the date the employee received them. In addition, there is precedent in the Title 26 context for holding a committee responsible for an agent's acts that violate election law and even go against the committee's best interests. See Final Audit Report on Wallace Campaign, Inc. (1976) approved August 13, 1979 (Commission based part of the repayment in the Wallace audit on undocumented expenditures of committee funds deposited by a staff person in his personal checking account.) Indeed, in every case where a committee has violated the FECA, there ultimately was a committee official who authorized, conducted or participated in the prohibited event.

The Commission's application of agency principles is consistent with settled principles of agency law. The Restatement of Agency defines an agent as one who exercises the actual or apparent authority of a principal. Restatement (Second) of Agency § 1. Thus, the Restatement provides that a principal's responsibility for his agent's conduct may derive either: (1) from an express or implied grant of authority from the principal to the agent; or (2) from actions taken by the principal that reasonably cause a third party to believe that the principal has empowered the agent to act on his behalf. Id. §§ 26-27. Similarly, the Commission has defined an agent as one who exercises actual authority, or who holds a position within a campaign organization that reasonably appears to confer such authority. 11 C.F.R. § 109.1(b)(5).

Where a principal grants an agent express or implied authority, the principal generally is responsible for the agent's acts within the scope of his authority. See Weeks v. United States, 245 U.S. 618, 623 (1918). See also Rouse Woodstock, Inc. v. Surety Federal Savings & Loan Ass'n, 630 F.

Supp 1004, 1010-11 (N.D. Ill. 1986) (principal who places agent in position of authority normally must accept the consequences when the agent abuses that authority). The conduct of an agent is within the scope of his authority if:

> (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master.

Restatement (Second) of Agency § 228(1).

When an agent acts within the scope of his authority, a principal cannot escape responsibility on the grounds that he lacked knowledge of the agent's actions or that the agent's actions were unauthorized, tortious, or even unlawful. 3 Am. Jur. 2d Agency § 280 at 783. It is a "well-settled general rule . . . that a principal is liable civilly for the tortious acts of his agent which are done within the course and scope of the agent's employment." Id. at 782; see also Stockwell v. United States, 80 U.S. 531, 534 (1871); Veranda Beach Club Ltd. Partnership v. Western Sur Co., 936 F.2d 1364, 1376 (1st Cir. 1991).5/ Indeed, "[a]n act may be within the scope of employment although consciously criminal or tortious." Restatement (Second) of Agency § 231; Local 1814, Int'l Longshoremen's Ass'n v. NLRB, 735 F.2d 1384, 1395 (D.C. Cir.), cert. denied, 469 U.S. 1072 (1984); see also Hunt v. Weatherbee, 626 F. Supp. 1097, 1103 (D. Mass. 1986).

Even if an agent does not enjoy express or implied authority, however, a principal may be liable for the actions of his agent on the basis of apparent authority. See E.A. Prince & Son, Inc. v. Selective Ins. Co. of Southeast, 818 F. Supp. 910, 914 (D.S.C. 1993) (refusing to dismiss "insured" party's claim against insurance company where former agent misappropriated premiums and, consequently, company never received payment or issued policies). An agent is imbued with apparent authority where the principal has held the agent out as having such authority or has permitted the agent to represent that he has such authority, so that a reasonable person would believe the agent to have such authority. See e.g., Metco Products, Inc., Division of Case Mfg. Co. v. NLRB, 884 F.2d 156, 159 (4th Cir. 1989).

Apparent authority commonly exists when a principal appoints an agent to a position with generally recognized duties or responsibilities. See Restatement (Second) of Agency § 27 at 104 ("apparent authority can be created by appointing a

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5/ This rule is analogous to the concept of respondeat superior, which holds an employer responsible for the tortious acts of his employee. 3 Am. Jur. 2d Agency § 280 at 783.

person to a position, such as that of manager or treasurer, which carries with it generally recognized duties"). See also Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1121 (1st Cir. 1993) (citing Restatement (Second) of Agency § 27); Property Advisory Group, Inc. v. Bevona, 718 F. Supp. 209, 211 (S.D.N.Y. 1989). A principal may be held liable based on apparent authority although his agent's acts are unauthorized. Richards v. General Motors Corp., 991 F.2d 1227, 1232 (6th Cir. 1993). Similarly, a principal may be held liable for his agent's illegal acts, such as fraud, when he places an employee in a position to commit those acts. First Amer. State Bank v. Continental Ins. Co., 897 F.2d 319 (8th Cir. 1990); Hester v. New Amsterdam Casualty Co., 412 F.2d 505, 508 (4th Cir. 1969).

Unlike express or implied authority cases, moreover, a principal is not relieved of liability simply because an agent with apparent authority acts for his own benefit.6/ Even if the agent committed fraud, the principal is liable provided the agent acted within his apparent authority. Amer. Society of Mechanical Engineers, Inc. v. Hydrolevel Corp. ("ASME"), 456 U.S. 556, 566, (1982). In fact, the United States Supreme Court has observed that the federal courts routinely "have imposed liability upon principals for the misdeeds of agents acting with apparent authority." ASME, 456 U.S. at 568 (citing cases involving federal tax liability, common-law fraud, securities fraud and bail bond fraud).

D. ANALYSIS

Our analysis of this case focuses on two intertwined issues: whether the Committee should be held responsible for Rizzo's actions and whether the Andover account was a Committee account. We concur with the Audit Division that the answer to both of these questions should be affirmative.

6/ Moreover, irrespective of an agent's actual or apparent authority, a principal is liable "if he is negligent or reckless . . . in the supervision of [the agent's] activity." Restatement (Second) of Agency § 213. See, e.g., Int'l Distributing Corp. v. District Telegraph Co., 569 F.2d 136, 139 (D.C. Cir. 1977) (security company can be held liable for its employees' thefts from customers). See also Restatement (Second) of Agency § 213 (master is liable for torts of servants acting outside the scope of their employment if the master was negligent or reckless; or where the servant purported to act on the master's behalf and the third party relied upon the servant's apparent authority, the servant was aided in committing the tort by the existence of the agency relationship.)

1. Rizzo was a Committee Agent

The record demonstrates that Rizzo was the Committee's agent with actual and apparent authority to solicit and accept contributions, make expenditures, and conduct diverse financial transactions from the outset of the campaign until June, 1992. Rizzo was one of the three most powerful people in the Tsongas campaign. He functioned as the Committee's principal fundraiser, had broad authority over most aspects of the Committee's financial activity, and operated with a great deal of independence. Moreover, Rizzo occupied a position and had a history with the candidate that would lead third parties to believe that he had authority to solicit contributions.

Contrary to the Committee's contentions, Rizzo's solicitations of loans totaling $794,000 from eight individuals were within the scope of his authority as the Committee fundraiser. Loans are contributions, 2 U.S.C. § 431(8)(A)(i), and Rizzo had broad authority to solicit contributions. The Committee's contention that Rizzo could not have authority to solicit these contributions because they were excessive is without merit. Doubtless in most cases where a campaign official accepts an excessive or prohibited contribution, the official was not expressly authorized to do so. Under the Committee's reasoning, a committee would not be responsible for any violations by its agents unless the actions were expressly approved by the principal. The Committee cannot escape liability for the conduct of its agent that was well within the scope of his authority.

2. Andover Account Was a Committee Account

The evidence supports the conclusion that the Andover account was a Committee account. The Andover account was opened in the name of the Committee, and functioned as a Committee account. Indeed, contribution checks made payable to the Committee were deposited into the Andover account and legitimate Committee expenses totaling $25,046 were paid from the Andover account.

When Rizzo opened the Andover account in March, 1991, he had virtually unlimited authority over the Committee's finances. He was involved in opening the Committee's operating account at Bay Bank and controlled the checkbook for that account. Since Rizzo exercised broad authority over virtually every Committee financial transaction, including opening accounts, he had authority to open the Andover account on behalf of the Committee.

The Committee draws an analogy to MUR 1402, in which a fundraiser failed to forward contributions to a committee, but instead opened an account in the name of the committee in

order to embezzle the contributions.7/ We concur with the Audit Division that MUR 1402, which did not involve a publicly-financed presidential election campaign, is distinguishable from this case. The individual in MUR 1402 did not have broad authority over the committee's financial transactions, as Rizzo did. Moreover, she set up an account in the committee's name solely for the purpose of depositing embezzled checks intended for the committee. Conversely, the record does not indicate that Rizzo opened the Andover account solely to facilitate his embezzlement of Committee funds since some funds in the Andover account were used for legitimate campaign expenditures.

While the existence of the Andover account may have enabled Rizzo to embezzle Committee funds, the evidence supports the conclusion that the Andover account was not a mere instrumentality of a criminal scheme. Rizzo himself contends that he opened the Andover account as a Committee exploratory account, not as his own personal account. Rizzo used the legal address of the Committee for the account, and claims that he made no attempt to hide the account from the Committee.8/ There is evidence to support Rizzo's claim that he did not originally intend the Andover account to be his secret account; for example, Rizzo discussed the possibility of opening an exploratory account with Kanin and Tsongas in March, 1991. There is no doubt that Rizzo embezzled Committee funds from the Andover account, but Rizzo's misdeeds do not transform the character of the Andover account.

Therefore we concur with the Audit Division that the Andover account should be considered a Committee account, and transactions related to the Andover account should be included in the audit findings and the repayment determinations.

7/ The Commission did not address the issue of whether the account was a committee account in that case because the fundraiser paid an amount equivalent to the contributions to the committee. The Commission permitted the committee to retain the repaid contributions and instructed the committee to attribute the contributions to the original contributors.

8/ It should be noted, however, that the Committee's address at this point was the post office box in Andover, and that it is not clear that any Committee staff other than Rizzo had access to the box. Rizzo claims that he used his own social security number to open the account because the Committee had not yet applied for a taxpayer identification number.

3. Excessive Contributions

Rizzo solicited a total of $794,000 in loans from eight individuals to the Committee, including $280,000 made payable to Rizzo himself or his company, Benco, Inc., but intended to benefit the Committee, and $514,000 made payable to the Committee and deposited into the Andover account. The loans exceeded the eight individual's contribution limitations by $790,750, of which $65,000 has been repaid. 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(b)(1). The proposed Final Audit Report concludes that the loans are excessive contributions, the Committee should repay $729,000 to the individual contributors, and the Committee must disclose the loans and repayments on its disclosure reports.

We concur with the Audit Division that the loans were excessive contributions. Rizzo, Kanin and Tsongas were the three most important Committee officials, and each had authority to solicit and accept contributions. All of the lenders relied upon one or more of these individuals. Rizzo's solicitations of loans from the eight individuals were clearly within the scope of his authority as the Committee fundraiser.

The Committee's contention that the loans were Rizzo's personal debts is not persuasive. Rizzo solicited each loan ostensibly on behalf of the Committee, and the lenders relied on his authority. See Restatement (Second) of Agency §§ 26-27; ASME, 456 U.S. at 566-568. Most of the loan checks were made payable to the Committee. Two of the loans were solicited with some participation by Kanin and Tsongas, who would have no reason to be involved unless the transactions were loans to the Committee.9/ The lenders testified that even the loans made payable to Rizzo himself or his consulting company were intended as contributions to the Committee, not personal loans to Rizzo.10/ Many of the lenders

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9/ Lawrence Ansin loaned $100,000 to the Committee following a meeting at his home with Kanin, Rizzo, and Tsongas. Kanin acknowledged that at the meeting Ansin was asked to make a loan to the Committee of more than $1,000, but he did not recall the exact amount involved. Although Tsongas attended the meeting, he does not recall any details of the solicitation of the loan from Ansin. Kanin was also involved in the solicitation of a $60,000 loan from Roger Trudeau, but subsequently discovered that the transaction was impermissible and called Rizzo to cancel it.

10/ Rizzo explained to each lender that the money would benefit the Committee although the checks were made payable to him or his consulting company. Since Rizzo was paid as a Committee consultant through his consulting company, the fact that Trudeau made his loan checks payable to the company, at

did not know Rizzo and would not have made personal loans to him of such magnitude. Moreover, the fact that Rizzo personally guaranteed the loans does not alter the nature of these contributions.

Contrary to the Committee's contentions, Rizzo's receipt of the loan checks from the lenders constituted receipt by the Committee because Rizzo was a Committee agent with authority to accept contributions. See 11 C.F.R. §§ 102.8(a), 102.9, 110.1(b)(6); AO 1992-29. Rizzo deposited the checks, along with other contributions to the Committee, into an account in the Committee's name at the Andover Bank and apparently used some of the funds for campaign expenses. In addition, he used $25,046 of the funds for campaign expenses. It is immaterial to our analysis of this issue that Rizzo converted the lion's share of the contributions for his own personal use. Rather than interrupting the conveyance of the contributions to the Committee, Rizzo embezzled the funds after he had accepted them as an agent of the Committee.

In sum, the loans were excessive contributions to the Committee, solicited by Committee agents and received on behalf of the Committee by a Committee agent. 2 U.S.C. § 441a(a)(1)(A); 11 C.F.R. § 110.1(b)(1). The question of how to treat these contributions is problematic. Generally, disgorgement of such excessive contributions to the United States Treasury would be appropriate. However, given the unusual circumstances of this case, we do not recommend that approach for equitable reasons. While the Committee did receive the funds when Rizzo accepted the contributions from the lenders, the Committee was deprived of the benefit of those funds by Rizzo's illegal actions. Moreover, the Committee made some, albeit largely unsuccessful, efforts to investigate the Andover account and brought this matter to the Commission's attention. We do not believe that it is necessary for the Commission to require the Committee to repay the lenders in this case. We acknowledge that the loans should be included as payables on the Committee's NOCO Statement; however, we recommend that the Audit staff include language in a footnote clarifying that, in light of the specific facts regarding this matter, the Commission is not requiring that the Committee repay the lenders. It should be noted that we are not addressing the issue of whether the lenders can seek repayment of the loans from the Committee.

(Footnote 10 continued from previous page)
Rizzo's request, is consistent with Trade's stated intent to give money to the Committee through Rizzo. These contributions should be treated the same as the other loans, as contributions to the Committee received by Rizzo.

Finally, we concur that excessive contributions deposited into the Andover account totaling $29,314 be included in the total amount of excessive contributions payable to the United States Treasury. Unlike the loans, we believe that disgorgement of these contributions is the appropriate solution. In addition, the amount involved is close to the amount of legitimate campaign expenditures paid from the Andover account ($25,046).

4. Misstatement of Financial Activity (III. B.)

The Committee misstated receipts, disbursements, and ending cash in its 1991 and 1992 disclosure reports. These misstatements were in large part caused by unreported transactions related to the Andover account, the individual loans, and other transactions by Rizzo. While the Committee has amended its reports to correct some of the misstatements, the Committee did not disclose any activity related to the Andover account and other transactions by Rizzo.

The Interim Audit Report recommended that the Committee file a comprehensive amendment including the Andover account transactions. The Committee did not follow this recommendation. Instead, the Committee proposed filing an amended report reflecting an uncollectible receivable from Rizzo of the contribution checks (excluding the loans) that he "failed to forward," with footnotes reflecting the Committee's contentions. The Audit staff concludes that the proposed amendments, which were never filed by the Committee, would not have been adequate because the Committee did receive the contributions through Rizzo, its fundraising agent.

We agree with the Audit Division's analysis. As previously discussed, the Committee received the contributions, including the loans, when Rizzo, its agent, received them. Moreover, the Andover account was a Committee account. Therefore, the Committee's reports must reflect all of the transactions related to the Andover account as well as all contributions received by Rizzo.

5. Repayment Issues - Non-qualified Campaign Expenses (IV. C. 1. and 3.)

The proposed Final Audit Report includes several repayment issues involving non-qualified campaign expenses. The first issue involves non-qualified campaign expenses totaling $35,118 paid to Rizzo, Steven Joncas, a campaign volunteer who traveled with Rizzo, and Benco, Inc. for expenses which were not

campaign-related or were paid more than once.11/ The Audit staff offset this amount against Rizzo's expense vouchers for qualified campaign expenses totaling $57,100, and recommends no repayment. We agree with the recommendation.

In addition, the proposed Final Audit Report includes an initial determination that the Committee make a pro rata repayment to the United States Treasury of $98,288 for disbursements from the Andover account totaling $693,212 which do not appear to be campaign related or are not adequately documented. 26 U.S.C. § 9038(b)(2). These disbursements primarily appear to be related to Rizzo's personal obligations. While the Committee admits that the expenditures would properly be considered non-qualified if they had been made from a Committee account, based on its contention that the Andover account was not a Committee account, the Committee argues that there is no repayment obligation.

This Office concurs with the proposed repayment, which is consistent with the conclusion that the Andover account was a Committee account. To obtain matching funds, the Committee agreed to supply all of its receipt and disbursement records, including bank records for all accounts. 11 C.F.R. § 9033.1. Thus, any undocumented disbursements from the Andover account are non-qualified campaign expenses. See 11 C.F.R. § 9033.11. Indeed, the Committee has the burden of proving that any disbursements made by any person authorized to make expenditures on behalf of the Committee, such as Rizzo, are qualified campaign expenses. 11 C.F.R. §§ 9033.1 and 9033.11.

Moreover, we concur that non-qualified campaign expenses related to the Andover account are subject to repayment. 2 U.S.C. § 9038(b)(2); 11 C.F.R. § 9038.2(b)(2). For purposes of repayment, the Commission generally considers all funds of a committee to be a mixed pool of private contributions and federal matching funds. See 11 C.F.R. § 9038.3(c)(2); Kennedy for President Committee v. FEC 734 F.2d 1558, 1559 (D.C. Cir. 1984); Reagan for President Committee v. FEC 734 F.2d 1569 (D.C. Cir. 1984). Even if an account never actually contains any matching funds, the funds in the account are considered part of the larger pool of all private and public funds in all of a committee's accounts. Since the Andover account was a Committee account, these transactions are subject to repayment.

Arguably, even if the funds were never deposited into a Committee account, they should be considered part of the mixed pool of Committee funds subject to repayment because they were

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11/ The Audit Division properly included the Andover account activity in its determination of the repayment ratio for non-qualified campaign expenses, which is 14.1786%. The Committee does not contest an additional repayment of $10,567 based on disbursements related to the Democratic Convention.

contributions to the Committee accepted by a Committee agent. During the 1988 election cycle, the Commission based several repayments, in part, on in-kind contributions in the form of testing the waters expenditures paid for by unaffiliated committees. See Final Repayment Determination and Statement of Reasons - Senator Robert Dole and the Dole for President Committee, Inc. (approved February 6, 1992); Memorandum to Robert J. Costa, Comments on Proposed Final Audit Report - Dole for President, Inc., dated December 17, 1990. The Statement of Reasons on the Dole campaign concluded that the in-kind contributions "were expenditures equivalent to expenditures by the Committee itself" and "should be considered commingled with the Committee's expenditures and subject to repayment." Statement of Reasons - Senator Robert Dole and the Dole for President Committee, Inc., Page 25. By analogy, the contributions received by Rizzo as agent of the Committee should be considered commingled with the Committee's other funds and, thus, are subject to repayment.

The Commission has made repayment determinations for non-qualified expenses even where a staff person uses funds for other than the interests of a committee. See Final Audit Report on Wallace Campaign, Inc. (1976), approved August 13, 1979. In the Wallace audit, a campaign staff person received $36,900 from the Wallace committee, commingled the funds with funds in his personal checking account, and provided no documentation that his expenditure of the funds was for qualified campaign expenses. The Commission based a repayment determination on these undocumented non-qualified expenditures. The Wallace audit is similar to the situation here because the individual apparently used some of the funds for personal expenses.

While there may be situations where a committee takes sufficient precautions to prevent the theft or misuse of funds, or where an action is so far outside the bounds of foreseeable possibility that a committee should not be subject to a repayment based on the loss of public funds, this is not such a case. The evidence reveals a year long pattern of illegal conduct by the Committee's principal fundraiser and one of the most powerful individuals in this publicly-financed presidential campaign. The fact that such a high level official was able to continue his illegal activities for such a long time raises the question of whether the Committee exercised prudent financial management of the campaign. During the campaign, the Committee had reason to question Rizzo's actions. The Committee should have been aware at some point, certainly by late January 1992, that Rizzo had, at least, made significant compliance errors. Nonetheless, Rizzo continued to work for the Committee until June, 1992. The Committee also sent Rizzo on fundraising trips with Joncas in the spring of 1992. It should be acknowledged that certain Committee officials expressed concerns and tried to take some steps after there were signs of potential problems

involving Rizzo.12/ However, the Committee did not take sufficient action in time to prevent Rizzo's illegal activities, and failed to adequately control its financial transactions to prevent the misuse of public funds. Therefore, we concur with the proposed repayment.

6. NOCO Statement (IV. D.)

The Andover account transactions are reflected in the Committee's Statement of Net Outstanding Campaign Obligations ("NOCO statement") as Accounts Receivable and Loans Payable. The Committee disputed the NOCO statement contained in the Interim Audit Report. In support of its contention that the Andover account was not an authorized Committee account, the Committee notes a footnote to the NOCO statement in the Interim Audit Report that identifies a receivable of "receipts into the Account which were never forwarded to the Committee." The NOCO statement in the proposed Final Audit Report has been revised, resulting in a deficit of $3,561,910. We concur with the substance of the Audit Division's revisions, but disagree with the descriptions and footnotes describing several items.

Under assets, the NOCO Statement lists "Accounts Receivable Relative to Andover Account." The footnote for this item states that this amount "consists of receipts into the account which were never forwarded to the Committee . . . ." We note that the Committee specifically referred to this footnote in its response. This language should be revised as it is inconsistent with our legal analysis of this matter as well as with the Audit Division's position throughout the proposed Final Audit Report. Since Rizzo acted as the Committee's agent when he received the contributions, he did not fail to forward them to the Committee. Rather, he converted Committee funds to his personal use. Moreover, the amount includes funds that were not related to the Andover account, such as loans to the Committee made payable to Rizzo or his company and deposited into other accounts. Therefore, we suggest that description of the item be revised to "Amounts Receivable from Nicholas Rizzo," and that the footnote be revised to state that this amount consists of Committee funds that Rizzo converted to his personal use. Similarly, the allowance for the uncollectible amount should be revised to state that the uncollectible amount is due from Nicholas Rizzo. We concur that the amount appears to be uncollectible.

12/ For example, Committee officials made numerous attempts to gain control of the Committee's financial systems from Rizzo, and were eventually successful. In addition, Committee officials retained an attorney to look into the matter of the Andover account, made futile attempts to obtain the records of the Andover account from Rizzo, and eventually informed the Commission of the situation.

Finally, while we agree that the loans should be considered Committee obligations, we disagree with the description of this item as "Loans Payable Relative to Andover Account." Again, some of the loans were not deposited into the Andover account. Therefore, we suggest that the item be described as "Loans Payable to Individuals." In addition, as previously discussed, we suggest that the Audit staff include a footnote clarifying that the Commission is not requiring that the Committee repay the lenders.

II. APPARENT EXCESSIVE CONTRIBUTIONS (III. A.)

A. PARTNERSHIP CONTRIBUTION (III. A. 2. a. ii.)

The Audit staff found that the Committee accepted 25 contributions totaling $22,500 made on partnership checks from a law firm.13/ It appeared that an excessive contribution of $21,500 resulted, pursuant to 11 C.F.R. § 110.1(e).14/ The Interim Audit Report recommended that the Committee show that the contributions were solely attributable to individual partners by documentation that partners could withdraw funds from the partnership account. The Committee's response to the Interim Audit Report provided a letter from the law firm's Executive Director. This letter states that "these contributions were deducted from each Partner's individual net income distribution," and that the contributions were deducted from the firm's profits which are typically held back until the end of the fiscal year. The Committee analogized these contributions to those from corporate "non-repayable drawing accounts" which are permitted. See 11 C.F.R. § 102.6(c)(3). The Committee, however, did not provide further documentation or evidence to show that the partners were able to draw against the firm's profits before the end of the fiscal year.

We concur with the proposed Audit Report's finding that the Committee has failed to demonstrate that these contributions should be attributed only to the individual partners. In 1987, the Commission clarified that contributions made by partnership check are attributable to both the partnership and designated individual partners. See Explanation and Justification for 11 C.F.R. § 110.1(e), 52 Fed. Reg. 764-765 (January 9, 1987). This rule prevents persons in partnerships from contributing more than other contributors not belonging to partnerships. Id., see also AOs 1981-50, 1990-3, and 1992-17. In the past, the Commission has in limited situations allowed for contributions by partnership checks to be attributed solely to the designated

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13/ The candidate is a partner in this law firm.

14/ Because a partnership is defined to be a "person" under 2 U.S.C. § 431(11), a partnership cannot contribute more than $1,000 to a federal candidate per election. 2 U.S.C. §§ 431(11) and 441a.

individual partners. See MUR 1669 (Commission found no excessive partnership contribution had resulted when contributions designated by partners against their separate partner accounts went to the firm's political action committee), and AO 1982-63 (law firm's PAC allowed to withhold designated amounts from partners' shares of firm profits). These cases involved partnerships with "check-off systems," whereby the partners could indicate their interest in contributing to a committee, and the partnership would then draw the sums from each individual's "separate partner accounts." Thus, contrary to the case at hand, the money was segregated from the general corporate funds. In the Committee's case, the account was not segregated nor did it appear that the partners were able to draw off that account until the end of the year.15/

The Committee's contention that the partnership contributions are analogous to those drawn off a corporate non-repayable drawing account is without merit.16/ A corporate non-repayable drawing account is an account for corporate employees "established to permit personal draws against salary, profits or commissions." See AO 1980-6, and Commission's Notice on Corporate Contributions [Transfer Binder] Federal Election Campaign Financing Guide (CCH) ¶ 9064 (Federal Election Commission, Aug. 28, 1978). In the Committee's case, it appears that the law firm's profits were not distributed until the end of the year and the partners were not able to make personal draws against the account. Thus, the account from which the partners made the contributions is actually more analogous to a repayable drawing account, in that the partners contributed money that was not yet in their possession. Therefore, the contributions are properly attributed to both the partnership and the individual partners.

B. SELECTED CODES AND SAMPLE REVIEW (III. A. 2. a. iii.)

On June 2, 1992, the Commission notified committees by letter that it would no longer recognize untimely refunds "made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later." The Committee received this letter on June 8, 1992, which was later than the candidate's date of ineligibility (May

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15/ Further, the Commission decided these cases before 1987, prior to its promulgation of 11 C.F.R. § 110.1(e).

16/ Although contributions made from a nonrepayable drawing account are permissible personal contributions, contributions made from corporate accounts which require employees to repay whatever amounts they have withdrawn are considered corporate contributions. See Notice on Corporate Contributions [Transfer Binder] Federal Election Campaign Financing Guide (CCH) ¶ 9064 (Federal Election Commission, Aug. 28, 1978) and 11 C.F.R. § 102.6(c)(3).

18, 1992). The Commission also notified committees in its letter that it would use sampling projections to calculate impermissible contributions to the Committee, and that it would request any untimely refunded contributions to be paid to the United States Treasury ("Treasury").

As noted in the proposed Report, the Committee made refunds of $7,312 in excessive contributions identified by the Audit staff, but after the deadline set by the Commission's letter.17/ In addition, the Audit staff, using a sample review, projected that there were $9,419 in excessive contributions. The proposed Audit Report's findings do not differ from the findings in the Interim Audit Report.

The Committee's response to the Interim Audit Report argues two points with respect to the disgorgement recommendation: (1) the refunded amount of $7,312 should not be disgorged to the Treasury since the Commission's 1992 letter was unclear as to the date when refunds were considered untimely; and (2) there was inadequate rulemaking process for the Commission's stated intention in its letter. The Committee did not challenge or dispute the finding of $9,419 in excessive contributions projected from sampling.

Our Office disagrees with the proposed Report's conclusion that the Committee should pay the Treasury the $7,312 it has already refunded to contributors. As noted previously, the Committee refunded the $7,312 to contributors only ten days after it received notice from the Commission's letter that such untimely refunds would no longer be acceptable. It appears that the Committee did so in a good faith attempt to comply with the Commission's notice, but that it misinterpreted the Commission's letter. The Committee interprets the language to mean that the Commission would allow for 60 days following the date of ineligibility, or 60 days following the date of receipt of the letter. While we believe that there is no ambiguity in the Commission's letter notifying the Committee of the date on which untimely refunds would no longer be recognized, we note that the Committee made the refunds soon after it received the letter with the misunderstanding that it could do so. We recommend that in this instance the amount of $7,312 be excluded from the amount must be paid to the Treasury.

The Committee also argues that there was inadequate rulemaking process for the 1992 letter setting forth the Commission's policy with respect to disgorgement of untimely refunded contributions. We concur with the proposed Report's view that the Commission's 1992 letter falls within the general policy statement or interpretative rule exemption. The Administrative Procedure Act ("APA") requires that an agency

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17/ The Committee also has not refunded $1,330 in excessive contributions which the auditors identified.

provide for a notice-and-comment period when promulgating new "legislative rules." 5 U.S.C. § 553.18/ An exemption from such a requirement is created for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A).

Legislative rules are defined as those which have a substantive impact on individuals' rights or interests. Generally, courts look at whether the agency pronouncement "substantially alter[s] the rights or interests of regulated parties," and whether it acts prospectively. American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1041 (D.C. Cir. 1987). In contrast, an agency makes a general policy statement when its announcement is prospective, or leaves the agency and decision-makers free to exercise discretion. American Bus Ass'n v. U.S. , 627 F.2d 525, 529 (D.C. Cir. 1980). The Commission's stated intent to request disgorgement of a committee's unlawfully retained contributions was prospective. Moreover, the disgorgement policy does not impact the rights or interests of parties, as committees are not permitted to retain contributions beyond 30 or 60 days of receipt, pursuant to 11 C.F.R. § 103.3. Nothing in the Commission's letter alters the requirements of section 103.3. Therefore, we concur with the proposed Report's finding that the unlawful contributions (excluding the $7,312 already refunded) must be paid to the Treasury.

C. STAFF ADVANCES (III. A. 3. a.)

The proposed Audit Report notes that four individuals advanced funds on behalf of the Committee for travel expenses, or campaign-related goods and services. The amount totaled to $60,844.12 in excessive contributions, which were reimbursed anywhere from 11 days to 236 days. One individual was campaign business manager David Goldman, who charged $32,658 on his credit card for hotel and campaign expenses of other staff during the Democratic National Convention, and was reimbursed approximately 10 or 11 days later. Another individual was the Committee's state chairman for Texas, who apparently advanced $15,892. The two other individuals apparently were untimely reimbursed for their expenses.

We concur that the Committee received in-kind contributions in the form of staff advances. The Committee argues that it reimbursed Goldman in a timely manner, within 10 days after the charge was incurred. However, the Committee misinterprets the

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18/ A notice and comment period consists of 30 days notice (or actual notice) in the Federal Register before the rule becomes effective, and a period for interested parties to participate in rulemaking "through submission of written data, views, or arguments, with or without opportunity for oral presentation." 5 U.S.C. § 553(b) and (c).

regulations to allow payment of others' travel expenses by a staff member.19/ The Committee contends that "the proposed advance by Goldman was presented to and expressly approved by members of the audit staff prior to the payment in question." However, the Commission's Explanation & Justification for 11 C.F.R. § 116.5, clearly states that an in-kind contribution results if "an individual pays the transportation, or subsistence expenses of others . . . such as the costs of meeting rooms or telephone services, regardless of how long reimbursement, if any, takes." 55 Fed. Reg. 26382 (June 27, 1989).

The Committee further argues that there is no rationale for treating in-kind contributions arising from staff advances differently from those that are excessive contributions. The Committee contends that once Goldman learned of the advances being made by the Texas office, he made reimbursements promptly and within 10 days of learning of the expenditures. The Committee argues that these reimbursements would be timely, according to 11 C.F.R. § 103.3. Staff advances, however, are not similar to direct excessive or corporate contributions. In the situation where direct excessive or corporate contributions are received, a committee must deposit these funds into a depository, and refund, redesignate, or reattribute within a certain amount of time. See 11 C.F.R. § 103.3(b). A committee is not allowed to withdraw or use this money, and therefore, derives no benefit from the illegal funds. To the contrary, a committee obtains the immediate benefit of a staff advance. Therefore, the Committee received $60,844.12 in excessive contributions, in violation of 11 C.F.R. § 116.5.

D. ADVANCES BY LAW FIRM (III. A. 3. b.)

The proposed Final Audit Report finds that the Committee owes $14,591 [$13,995 + $596] to the law firm of Armenakis & Armenakis, for provision of goods and services related to the Committee's campaign. The Committee underpaid Armenakis & Armenakis $13,995 for non-legal work.20/ The Committee also underpaid $596 to the firm, for legal defense of a petition challenge by the Fulani campaign.21/ Thus, the proposed Final

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19/ The Committee read section 116.5(b) to forbid payment of other's "transportation expenses," but not other types of expenses.

20/ This payment was for services rendered to obtain 14,000 signatures for the campaign.

21/ This amount was due for legal work concerning state laws, and not FECA compliance. Therefore, the underpayment was an in-kind contribution. See 11 C.F.R. § 100.7(b)(14).

Audit Report concludes that there was an excessive in-kind contribution resulting in the amount of $13,591.22/

In response to the Interim Audit Report, the Committee argued that the law firm has been fully reimbursed, and that the charges originally submitted to the Committee "were not discernibly campaign-related." It submitted a new invoice, dated September, 1992, by the Armenakis & Armenakis firm, which reduced the original billed amounts, with accompanying correspondence that noted all previous invoices were "supersede[d]" by this one. The Committee also noted that a creditor and a political committee are entitled to settle a disputed debt, pursuant to 11 C.F.R. § 116.10.

We concur with the Audit Division's findings and recommendations on this issue. Section 116.10 does not absolve committees of their obligations to pay the debts at issue. It merely provides for a method of reporting such obligations. The original invoices by the law firm indicated that Armenakis paid for Committee expenses without full reimbursement. If a political committee's debt is forgiven or settled for less than the amount owed, a contribution results "unless such debt is settled in accordance with the standards set forth at 11 C.F.R. § 116.3 and 116.4." 11 C.F.R. § 100.7(b)(4). Section 116.4 also requires that the commercial vendor treat the debt in a commercially reasonable manner, pursuant to 11 C.F.R. § 116.7. A Committee must submit debt settlements for the Commission's review and acceptance, before the debt is considered to be settled. See 11 C.F.R. § 116.7. The Committee and the law firm have not complied with the debt settlement review procedures and therefore, until they do so, the debt will be treated as an in-kind contribution.

The Committee also argues in the alternative, that if these legal services were considered to be volunteered, the services and expenses would not amount to a contribution. In AOs 1979-58 and 1980-107, cited by the Committee, the Commission did permit individual partners of a law firm to volunteer non-FECA compliance services to a committee, but noted that if the partners were compensated for their volunteer services by their firm, an in-kind contribution would result. In the Committee's case, the firm's partners did not provide volunteer services, and always intended to be reimbursed for their expenses and services.23/ Therefore, the expenses for these goods and

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22/ During the period of this activity, Armenakis & Armenakis was a partnership, and advances were made with partnership checks. Thus, pursuant to Section 110.1(e), the excessive contribution of $14,591 would be attributed to the two partners in the amounts of $6,295.50 each.

23/ The Committee also did not provide adequate documentation to prove that the charges were not justified or campaign-related.

services, if not fully reimbursed, are in-kind contributions subject to the limitations of 2 U.S.C. § 441a(a).

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

AK005776

December 16, 1994

Mr. S. George Kokinos
The Tsongas Committee, Inc.
Sherman and Kokinos
220 Broadway, Suite 104
Lynnfield, MA 01940

Dear Mr. Kokinos:

Attached, please find the Final Audit Report on The Tsongas Committee, Inc. The Commission approved this report on December 15, 1994. The Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §9038.2(c)(1) and (d)(1), the Commission has made an initial determination that the Candidate is to repay to the Secretary of the Treasury $10,567 within 90 days after service of this report (March 21, 1995). Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9038.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 30 calendar days after service of the Commission's notice (January 20, 1995), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 CFR §9038.2(c)(3) permits a Candidate who has submitted written materials, to request an opportunity to make an oral presentation in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted by the Candidate within the 30 day period in making a final repayment determination. Such materials may be submitted by counsel if the Candidate so elects. If the Candidate decides to file a response to the initial repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 219-3690 or toll free at (800) 424-9530. If the Candidate does not dispute this initial determination within the 30 day period provided, it will be considered final.

In addition, the Commission determined that a payment to the U.S. Treasury in the amount of $64,163 representing the value of unresolved excessive contributions was required. The Commission adopted this policy for the 1992 presidential cycle,

and so informed The Tsongas Committee, Inc. by a letter dated June 2, 1992.

The Commission approved Final Audit Report will be placed on the public record on December 22, 1994. Should have any questions regarding the public release of this report, please contact Ron Harris of the Commission's Press Office at (202) 219-4155.

Any questions you may have related to matters covered during the audit or in the report should be directed to Joe Swearingen or Joe Stoltz of the Audit Division at (202) 219-3720 or toll free at (800) 424-9530.

Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Final Audit Report
Legal Analysis dated 10/31/94

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

AR005776

December 16, 1994

The Honorable Paul Tsongas
The Tsongas Committee, Inc.
c/o Foley Hoag & Eliot
One Post Office Square
Boston, MA 02109

Dear Senator Tsongas:

Attached, please find the Final Audit Report on The Tsongas Committee, Inc. The Commission approved this report on December 15, 1994. The Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §9038.2(c)(1) and (d)(1), the Commission has made an initial determination that the Candidate is to repay to the Secretary of the Treasury $10,567 within 90 days after service of this report (March 21, 1995). Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9038.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 30 calendar days after service of the Commission's notice (January 20, 1995), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 CFR §9038.2(c)(3) permits a Candidate who has submitted written materials, to request an opportunity to make an oral presentation in open session based on the legal and factual materials submitted.

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Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Final Audit Report
Legal Analysis dated 10/31/94

CHRONOLOGY

THE TSONGAS COMMITTEE, INC.

Pre-audit Inventory Commenced	5/18/92
Audit Fieldwork	6/22/92-8/28/92
Interim Audit Report to the Committee	11/09/93
Response Received to the Interim Audit Report1/	12/13/93
Final Audit Report Approved	12/08/94

1/ Additional response time was granted after the revote and reissuance of the Interim Audit Report following the Courts decision in FEC v. NRA Political Victory Fund, et al., No. 91-5360, slip op. at 2 (D.C. Cir. Oct. 22, 1993).

Public Records

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

JUN 23 AK006481

June 23, 1995

MEMORANDUM

TO: THE COMMISSIONERS

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: ROBERT J. COSTA RJZ for
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: REPAYMENT OF $10,567 RECEIVED FROM THE TSONGAS COMMITTEE

This informational memorandum is to advise you of a $10,567 Repayment received from the Tsongas Committee (the Committee). The repayment satisfies the Committee's repayment obligation as recommended in the final audit report and represents a repayment for non-qualified convention related expenses. Still outstanding is a payment recommended in the final audit report relating to excessive contributions. Attached is a copy of the check, the letter which accompanied the payment, and the receipt showing delivery to the Department of Treasury.

Should you have any questions regarding the payment please contact Ray Lisi at 219-3720.

Attachments as stated

3675

OLDAKER, RYAN & LEONARD
818 CONNECTICUT AVE., N.W.
SUITE #1100
WASHINGTON, D.C. 20006
PH: 202-728-1010

15-153/4

6/16 19 95

PAY TO THE ORDER OF U.S. Treasury $ 10567.00

Missing features indicate a counterfeit. Look for transparent watermark when check is held to light, blue and pink background and MicroPrint signature line

Ten Thousand, Five Hundred and Sixty-Seven Dollars and no/cents------DOLLAR

Century NATIONAL BANK
Washington, D.C. 20006

FOR Tsongas

Robert J. Tsonaro

⑈003675⑈ ⑆054001534⑆ 001 002065 4⑈

ORIGINAL

OLDAKER, RYAN & LEONARD
ATTORNEYS AT LAW
818 CONNECTICUT AVENUE, N.W.
SUITE 500
WASHINGTON, D.C. 20006

(202) 728-1010
FACSIMILE (202) 728-4044

LYN UTRECHT

June 19, 1995

Lawrence M. Noble, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Noble:

Please find enclosed a check payable to the U.S. Treasury on behalf of Senator Paul E. Tsongas and the Tsongas Committee, Inc. representing the final repayment determination in the amount of $10,567. On June 16, 1995, Senator Tsongas wired this amount to the law firm of Oldaker, Ryan and Leonard for the purpose of making the repayment.

If you have any questions on this matter, please do not hesitate to contact me.

Sincerely,

Lyn Utrecht

Lyn Utrecht

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

June 22, 1995

RECEIPT FROM THE
UNITED STATES DEPARTMENT OF TREASURY
FOR A REPAYMENT OF
1992 PRESIDENTIAL PRIMARY MATCHING FUNDS

Received on JUNE 21, 1995, from the Federal Election Commission (by hand delivery), a check drawn on the Century National Bank in the amount of $10,567. The check represents a repayment from the Tsongas Committee for non-qualified convention related expenses.

Pursuant to 26 U. S. C. §9038(d), the repayment should be deposited into the Matching Payment Account.

The Tsongas Committee
Amount of Payment: $10,567

Presented by:

for the
Federal Election Commission

Received by:

for the
United States Treasury