FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
North Carolina Democratic Party	)	MUR 6732
and Charles E. Reece in his official	)	
capacity as treasurer	)	

STATEMENT OF REASONS OF
COMMISSIONER LEE E. GOODMAN

This matter raises difficult debt reporting issues that have confounded political committees as well as the Commission for a long time. For the reasons stated below, I believe the majority of the alleged violations in this matter were not in fact violations of the Federal Election Campaign Act of 1971, as amended (the "Act"), or the Commission's regulations, and that in any event the alleged violations should be dismissed pursuant to the Commission's prosecutorial discretion consistent with the Commission's past enforcement practice. Therefore, I voted to close the file.[1]

I. INTRODUCTION

In 2012 and 2013, the North Carolina Democratic Party (the "Party") typically paid vendor invoices within days or weeks of receipt. At the time of the payments, its staff operated under a good faith belief that invoices paid promptly did not have to be disclosed as "outstanding debts" on special debt schedules attached to the Party's monthly disclosure reports.[2] The Complaint, filed April 30, 2013, alleged that the Party failed to report debts in 2012 and 2013 in violation of 11 C.F.R. § 104.11(b), but it did not identify any particular debts that the Party should have disclosed.[3] This allegation caused the Party to undertake an exhaustive review of its account records and reporting practices in 2012 and 2013, and it then filed comprehensive amendments to relevant reports in December 2013.[4] In its amended reports, the Party disclosed as "outstanding debts" all vendor invoices open at the end of each month, even though "[m]ost of these invoices were paid within 5 to 7 days of receipt."[5] For example, if the Party received an

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1 Certification (Oct. 30, 2015).

2 Resp. at 2.

3 Compl. at 1.

4 Resp. at 2.

5 *Id.*

invoice on May 28, and paid the invoice in full five days later, on June 2, the Party did not report the invoice as an "outstanding debt" when it filed its original May monthly report on June 15. But the Party later amended the May monthly report to show the invoice as "outstanding debt." The Party amended reports to specifically identify over $450,000 of its vendor invoices as "outstanding debts" even though they were paid in full within ten days of receipt of an invoice and it disclosed over $632,000 as debts that were paid within 30 days.[6] These figures indicate that it was the Party's routine practice to pay vendor invoices promptly on receipt. Further, all of the Party's payments to satisfy these invoices were promptly disclosed to the public as disbursements on the Party's monthly reports.

The principal legal issue here is whether 11 C.F.R. § 104.11(a) requires committee treasurers to disclose all routine open invoices (invoices for which payment is not yet due), timely paid invoices, and goods or services for which no invoice has yet been received as "debts and obligations that remain outstanding" in special debt schedules attached to the committee's periodic reports, or whether the phrase "debts and obligations that remain outstanding" only refers to invoices that remain unpaid at some point after their initial payment due date, or within a commercially reasonable time if no due date is specified.

The Office of the General Counsel's ("OGC") First General Counsel's Report concluded that all of the Party's newly-disclosed debts, including open invoices not yet due and invoices promptly paid, constituted outstanding debts that the Party failed to timely disclose. Presumably, OGC would also expect goods and services for which no invoice has yet been received to be disclosable as outstanding debts as well.

Considering the text and legislative history of the Federal Election Campaign Act of 1971, as amended (the "Act"), the common meaning of the term "debts outstanding," the evolution of 11 C.F.R. § 104.11, the operation of other Commission regulations, and the public's informational interest, I conclude that a "debt" is not one that "remains outstanding"—and therefore must be disclosed on debt schedules pursuant to 11 C.F.R. § 104.11—unless a balance remains after the initial date that a payment is due, or within a commercially reasonable time if no due date is specified. Applying that standard here, the overwhelming majority of the Party's invoices were paid promptly and publicly disclosed in a timely manner as disbursements, and the Party did not violate the Act or the Commission's regulations with respect to these invoices. To the extent some invoices were not paid until after they were due and were thus undisclosed outstanding debts, they were not substantial relative to the Party's total spending in the 2012 and 2014 election cycles, and the Party long ago reported those invoiced amounts as outstanding debts.[7] To my knowledge, the Commission has never pursued an enforcement matter for failure to disclose such transactions as outstanding debts. Indeed, in all but a small number of matters involving long-term failures to disclose extensive unpaid debts, the Commission has consistently dismissed debt disclosure allegations, especially where the respondent, like the Party, remedied the alleged violation upon notice of the omission.

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[6] *Id.*, Ex. A. Approximately $24,000 of over $2 million in total expenditures in the 2012 and 2014 election cycles was unpaid for over one year.

[7] Indeed, the only reason the Commission is aware of any debts at issue in this matter is due to the Party's amendment of its reports and its Response to the Complaint.

Additionally, notwithstanding this interpretation of the Act and Commission regulations, an overzealous application of Section 104.11 to the Party for any alleged debt is impractical, inequitable, and inconsistent with past Commission practice. Accordingly, I concluded that the Commission should close this matter.

II. DISCLOSURE OF INVOICES NOT YET DUE FOR PAYMENT AS DEBTS THAT REMAIN OUSTANDING IS INCONSISTENT WITH THE ACT AND THE COMMISSION'S REGULATIONS, UNDERMINES THE PUBLIC INFORMATINAL INTERESTS, IS UNDULY BURDENSOME, AND IS IMPRACTICAL

Debt reporting has proven to be one of the most vexing reporting schemes for political committees and the Commission. One reason is that the complexity[8]—and indeed ambiguity—of the Commission's debt reporting regulation is inconsistent with the focused and limited debt disclosure requirement in the Act. The regulation's shortcomings are exacerbated by the practical difficulties associated with managing vendors, accommodating myriad variations in business and billing practices, and accounting for invoices and paying open accounts. As a result, political committees and the Commission have struggled with determining how to address the reporting of "outstanding debt" that must be disclosed. The following considerations lead me to conclude that invoices for which payment is not yet due and those that are timely paid are not debts or obligations that "remain outstanding" within the meaning of the Commission's regulations.

A. The Act's Plain Language Calls for the Disclosure of Debts that Are Due, Not Open Invoices or Timely Paid Invoices

The Act requires committees to disclose "the amount and nature of outstanding debts and obligations."[9] The Act does not define the key terms "outstanding," "debt," or "obligation." According to the definition in Black's Law Dictionary, however, a debt is a "[l]iability on a claim; a specific sum of money due by agreement or otherwise."[10] (Black's Law Dictionary once defined an "outstanding debt" as "[a]n amount of debt that will *continue* to generate interest until paid off," but does not include any definition in its most recent version.)[11] Thus, there is no disclosable "outstanding debt" when goods or services are received but for which payment is not yet due to be paid, or for which a committee has timely paid an invoice. For example, contract-

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8 Among other complexities, the Commission's regulations distinguish debt disclosure obligations based on both the amount involved and what the debt purchased. Debts under $500 must be reported when they are *paid*—that is, after they are no longer debts—or no later than 60 days after the debt is *incurred*, whichever comes first. *Id.* § 104.11(b). A debt over $500, however, must be reported "as of the date on which the debt or obligation is *incurred*," but debts for "regularly reoccurring administrative expenses" such as rent or salary "shall not be reported as a debt before *the payment due date*." *id.* (italics added).

9 52 U.S.C. § 30104(b)(8).

10 Black's Law Dictionary (10th ed. 2014).

11 Black's Law Dictionary (2d ed.) (emphasis added) *available at* http://thelawdictionary.org/.

based monthly service agreements involving regular monthly installment payments are certainly financial obligations, but before each installment is due, or if timely paid by the due date, do not constitute disclosable "outstanding debts and obligations" under the Act.[12]

Although we need not refer to legislative history to interpret unambiguous statutory text, doing so only confirms the plain meaning of the Act. The legislative history of the Act provides interesting insight into Congress's legislative purpose for requiring disclosure of "outstanding debts." As one Senator explained, there was a concern that political committees were cheating service providers. He cited the example of airlines "carrying outstanding debts from political candidates and parties of over $1 million" and asserting that there were "$1.5 million in outstanding telephone bills."[13] Thus, to the extent the debt reporting requirement was explicated in legislative history, there was a concern for holding committees accountable for paying their vendors on a timely basis.[14]

B. The Commission's Current Regulation is Inconsistent with the Act and Internally Inconsistent

Consistent with the plain meaning of the Act and its legislative history, the Commission's earliest regulation—the direct precursor of the current regulation at issue here—set forth a very clear rule for what constituted an "outstanding debt" that the regulation required to be disclosed. In Section 104.8 of the Commission's early regulations, the Commission required committees to disclose on separate schedules those "[d]ebts and obligations which remain outstanding *after the election.*"[15] The required disclosure was thus based on the original concern that Congress contemplated—a concern for vendors that committees left unpaid after an election. The original rule thus drew a clear bright line and proved practical for treasurers.

As this regulation evolved through subsequent rulemakings, the rationale was never revisited. But the text was edited. Eventually, the qualifying language "*after the election*" was dropped from the regulatory text. As a result, the regulation—perhaps inadvertently—became untethered from the interest that it originally advanced. I presume that an interest in disclosure of debts for the sake of financial transparency supplanted the original purpose. As the objectives and text changed, new complexities and burdens were introduced for treasurers.

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[12] The exemption in 11 CFR 104.11(b) to the outstanding debt disclosure requirement for regularly reoccurring administrative expenses is, therefore, potentially consistent with the Act, if not redundant, under this interpretation. If, on the other hand, the Act is not interpreted to mean that only debts not paid when due are "outstanding debts," then section 104.11(b)'s exclusion of reoccurring administrative expenses is inconsistent with the Act.

[13] LEGISLATIVE HISTORY OF THE FEDERAL ELECTION CAMPAIGN ACT OF 1971 270 (1981) (quoting statement of Sen. Hugh Scott).

[14] To the extent that the meaning of the Act is ambiguous rather than plain, the Commission has greater leeway to fill the statutory gap. *See Van Hollen*, 811 F.3d.486, 493 (D.C. Cir. 2016).

[15] 11 C.F.R. § 104.8 (1977) (emphasis added).

The regulation in place today at section 104.11 contains vague terms that are in tension with one another. On the one hand, subsection (a) requires committees to report "[d]ebts and obligations owed by or to a political committee which remain *outstanding*," which is consistent with the Act. Although the regulation does not define those terms, "outstanding debt," as noted above, was once understood to be debt that has become due for payment but has not been paid. Meanwhile, subsection (b) of section 104.11introduces an inconsistent requirement—that each "debt or obligation" over $500 must be reported "as of the date on which the debt or obligation is *incurred*." The regulation does not define the term "incurred," leaving committees and indeed the Commission to debate or guess its meaning. More importantly, triggering disclosure at the moment a debt is "incurred" conflicts with both the Act and subsection (a), which trigger disclosure only after a debt is outstanding, that is, past due. The regulation then compounds its imprecision and inconsistency by inserting an exception hinging on additional vague terms: debts for any "regularly reoccurring administrative expense shall not be reported as a debt before the payment due date." But "regularly reoccurring" and "administrative expense" are not defined. And if the interest served by the regulation is financial transparency (rather than identifying "contributions" within the meaning of the Act to deter corruption), it is not clear why such debts would be excluded.

C. Other Relevant Commission Regulations

In deciding how best to interpret the terms in our debt reporting regulation, I am mindful of the concern held by some that routine extensions of credit by vendors could, theoretically, represent temporary loans or contributions. However, although the public may have an informational interest in knowing the extent to which a committee has *outstanding* debts, and therefore to whom it is indebted and may be beholden as it would for a contributor, that interest is not served by requiring committees to specially disclose *timely paid* invoices because the committee is not beholden or indebted to any vendors that it promptly pays on or before an invoiced due date. Interpreting the debt reporting regulation around this concern would also be misguided for another reason: The Commission has separately regulated the extension of credit by vendors, as well as the settlement of vendor debts—and indeed has excluded vendor credit from the definition of contribution.[16]

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[16] It is tempting to equate vendor debts with loans, but the Commission regulates loans through numerous different regulations. *See* 11 C.F.R. §§ 100.52, 100.82, 100.83, 100.142, 101.2, 102.7, 104.3, 104.8, 104.9, 104.11, 104.14. Open vendor invoices, particularly those that are not yet due and payable, do not implicate the same concerns as bank loans. One of the Act's core prohibitions is the prohibition against contributions by national banks to candidates. 52 U.S.C. § 30118(a). In addition to prohibiting bank contributions, the Act defines contributions to include loans and exempts bank loans only if they meet certain prerequisites. *See* 52 U.S.C. §§ 30101(8)(A)(i), 30101(8)(B)(vii). The Act does not, however, embody a similar concern with respect to the potential influence on elections of a committee's day-to-day commercial vendors. As noted above, the debt outstanding rules appear to have had their genesis in a Congressional concern *for* vendors, not a fear *of* vendors. Accordingly, there is no equivalent need to tightly regulate the activity of all committee vendors. Thus, the Commission's regulation of transactions between committees and commercial vendors is generally permissive within the bounds of commercially reasonable transactions in the ordinary course of business. The Commission further has set forth factors for determining whether credit was extended in the ordinary course of business, and therefore is not a contribution. *See* 11 C.F.R. § 116.3(c).

Pursuant to section 113.3 of the Commission's regulations, the Commission will not consider vendor credit to be a contribution, whether or not the vendor is incorporated, "provided that the credit is extended in the ordinary course of the [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."[17] Even when vendors may potentially make a contribution to a committee by forgiving a committee's debt, the Commission exempts forgiveness of debt by a vendor—including incorporated vendors who are prohibited from making contributions to a committee—if the "vendor has treated the debt in a commercially reasonable manner" and the Commission's general regulations regarding debt forgiveness are satisfied.[18] The Commission also has separate debt-forgiveness regulations for terminating committees and ongoing committees.[19] Pursuant to these provisions, vendors may forgive debts owed to them by ongoing committees.[20]

These regulations further undermine the interpretation of the debt reporting regulations as a means to ferret out potential contributions, particularly with respect to invoices that are not yet due or which are timely paid.

D. Mandating Disclosure of All *Open Invoices* as *Debts Outstanding* Undermines the Act's Public Disclosure Objectives

To the extent the terms of the debt disclosure regulations are interpreted to advance a financial transparency objective (rather than an anti-corruption objective), we should also keep in mind that the information disclosed must be useful and should not confuse the public while attempting to inform the public. As the D.C. Circuit recently reasoned, if the Commission requires excessive disclosure of information not tailored to the public's specific information interest, it risks misinforming the public, which defeats the purpose of disclosure.[21] A serious concern raised in this case is the degree of potential duplication and overlap between the Party's debt disclosures and disbursement disclosures for hundreds of routine and timely-paid commercial invoices.

Interpreting all open invoices as "outstanding debts" would require each open invoice to be reported one month as a debt and the next month as a disbursement. This would cause each month's Schedule B (disbursements) to largely duplicate the preceding month's Schedule D (debt schedule). Such overreporting would thwart the public's interest by burying useful debt information in meaningless and redundant disclosures about timely-paid routine expenses. One

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17 11 C.F.R. 116.3(a),(b).

18 11 C.F.R. § 116.4(a), (b).

19 *See* 11. C.F.R. §§ 116.7, 116.8.

20 *See* 11. C.F.R. § 116.8. Such debts must have been outstanding for at least 24 months.

21 *Van Hollen v. FEC*, 811 F.3d 486, 497 (D.C. Cir. 2016) (reasoning that requiring disclosure of all donors to a nonprofit corporation, including those who disagreed with its advertisements rather than only those who donated to further the group's advertisements, would thereby "convey some misinformation to the public about who *supported* the advertisements" (emphasis in original)).

can reasonably question the usefulness of seeing an open invoice reported as an "outstanding debt" one month when it will appear as a paid-in-full disbursement the next month.

The Commission's original regulation avoided this absurd and counterproductive duplication by requiring debts and obligations of any amount to be disclosed once *as expenditures*—until the end of the election when invoices were deemed outstanding and reportable. As the Commission stated in the regulation, this was "designed to prevent unnecessary duplication of reporting operating expenditures, i.e., once as a debt when incurred and again as an expenditures when paid, for small obligations."[22] The Act has not changed, nor has the public's interest in vendor transactions. The Commission must therefore consider the extent to which OGC's interpretation of 104.11 might compel duplicative disclosures that undermine the public's interest in meaningful information.

E. Reporting Open Vendor Invoices as Outstanding Debts is Unduly Burdensome

Furthermore, our interpretation must be mindful of the practical compliance burdens the regulation imposes upon treasurers and committees. To reduce overall compliance costs, agencies may adopt limitations on disclosure by clarifying the meaning of terms to exclude less relevant information.[23] Large committees with relatively extensive activities, including political parties and national and statewide campaigns, as well as congressional committees with limited resources, face tremendous compliance burdens. Managing dozens of vendors and accounts payable is a complicated undertaking. Our implementation of debt reporting rules should not unnecessarily compound those burdens in the pursuit of disclosing information with minimal value to the public.

The interpretation of the Commission's regulation in the First General Counsel's Report treats as a reportable "outstanding debt" any service rendered or good provided to a committee for which a payment will subsequently become due. That interpretation would create onerous burdens for treasurers. Should the treasurer of every registered political committee be required to determine if the committee received <u>any</u> goods or services during the reporting period that have not yet been invoiced and report an estimated value of those goods and services as "outstanding debts" that have been "incurred," and later amend reports to reflect the charges after they are actually invoiced, *even though the invoices have been paid before the amended debt schedules are filed*? Under that interpretation of the regulation, a treasurer might have to report one vendor's services six times, potentially including multiple disclosures in the same report:

(1) if the debt is for an independent expenditure, an Independent Expenditure Report filed within 24-48 hours of the dissemination of the IE disclosing the estimated cost;

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22 11 C.F.R. § 104.8 (1977).

23 *Van Hollen v. FEC*, 811 F.3d 486, 498-499 (D.C. Cir. 2016) (rejecting challenge to the Commission's limiting interpretation of required electioneering communication disclosure for the purpose of mitigating the burden of compliance).

(2) in the next regularly scheduled monthly report for a monthly filer like the Party, an estimate of the debt on Schedule D with memo text indicating the debt is estimated—in addition to estimates also disclosed on Schedule E (for independent expenditures),.

(3) when the invoice is received, an amendment to the report with the original estimate to disclose the actual debt in Schedule D and Schedule E;

(4) for month two, continued disclosure of the open invoice on Schedule D;

(5) in month three, the disbursement that paid the invoice in month two will be reported on Schedule B; and

(6) also in month three, a zero-out of the debt on Schedule D.

Now multiply that exercise by 30 or 40 vendors. To what public benefit is a treasurer put to that extensive burden? We should interpret the debt reporting rules to avoid such irrational results.[24]

F. Compelling Disclosure of All Open Invoices as Debts Outstanding Contradicts Long-Standing Commission Enforcement Practice

The Party here is the subject of an OGC recommendation for a large civil penalty for failing to report hundreds of thousands of dollars in invoices that it paid within thirty days and promptly reported as disbursements. But this Party's debt schedules are similar to hundreds of other political committees. As a general practice, political committees are not reporting each and every vendor service as an outstanding debt on one month's Schedule D and then as a corresponding disbursement on the next month's Schedule B. Were all committees to do that, then all Schedule B disbursement reports would mirror previously filed Schedule D debt reports. Schedule D debt reports would be as voluminous—or more voluminous—as Schedule B reports. That is not happening as a common practice. It suggests that many committees share the Party's original understanding, that is, that timely paid invoices are not outstanding debts—and the Commission has been accepting thousands of reports without questioning debt reporting compliance.[25]

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[24] The burdens of compliance are also relevant to enforcement proceedings. When the Commission considers pursuing allegations of disclosure violations, it must assess the significance of any omission when determining whether further enforcement proceedings are a prudent use of Commission resources. The difficulty of compliance with the Commission's rules may be relevant to evaluating the significance of alleged omissions.

[25] *See Christopher v. SmithKline Beecham*, 132 S.Ct. 2156, 2168 (2012) (Where "an agency's announcement of its interpretation is preceded by a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute . . . while it may be 'possible for an entire industry to be in violation . . . for a long time without the [agency] noticing,' the 'more plausible hypothesis' is that the [agency] did not think the industry's practice was unlawful.") (quoting *Yi v. Sterling Collision Centers, Inc.*, 480 F.3d 505, 510-511 (2007)).

Moreover, the Commission has routinely dismissed debt disclosure allegations as a matter of prosecutorial discretion, with only a small number of exceptions.[26] The Commission's dismissals included matters where the violations were clear and substantial. A key factor in many dismissals was that the committee, like the Party in this matter, amended its reports to remedy the alleged omissions. To my knowledge, the only matters in which the Commission imposed penalties involved extensive failures to disclose past due accounts over long periods of time, or similar egregious circumstances such as intentional concealment of debts.[27] The Commission has never pursued a committee for failing to disclose timely-paid invoices as outstanding debts on Schedule D in addition to the disclosure of the timely payment as a disbursement on Schedule B.

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[26] *See* MURs 6605, 6572, 6676 (Tarkanian for Congress) (dismissal of misreported outstanding debt violations in part due to remedial actions already taken); MUR 6525 (Friends of Christine O'Donnell) (dismissal of failure to disclose outstanding debt); MUR 6457 (Peckinpaugh for Congress) (dismissal of failure to disclose outstanding debt); *c.f.* Factual and Legal Analysis, MUR 6894 (Steve Russell for Congress) (no reason to believe allegation that committee failed to disclose an outstanding debt or obligation for a media buy where the committee disclosed disbursements over two reporting periods to a vendor to pay incurred fees for the media buy).

Where a committee asserts that it disputes the amount of an outstanding debt claimed by a vendor for something of value already provided to the committee, the Commission routinely dismisses the complaint despite regulations at 11 C.F.R. § 116.10 requiring the disclosure of such debts, like any other, pursuant to 11 C.F.R. § 104.11. *See* MUR 6720 (Connecticut Republican State Central Committee) (dismissal of failure to disclose disputed debt); MUR 6714 (Jill Stein for President) (same); MUR 6712 (Kreegel for Congress) (dismissal of failure to disclose disputed debt; reports amended after complaint filed); MUR 6681 (Jill Stein for President) (dismissal of failure to disclose disputed debt); MURs 6636, 6629, 6626 (Mittman for Congress) (dismissal of failure to disclose disputed debt; remedial action after complaint filed); MUR 6605 (Gary Latanich for Congress) (same); MUR 6554 (Friends of Weiner) (dismissal of failure to disclose disputed debt); MUR 6532 (Jason Buck for Congress) (failure to disclose disputed debts totaling over $80,000 referred to Alternative Dispute Resolution Office); MUR 6460 (Friends of Jim Bender/Bender for Senate) (dismissal of failure to disclose disputed debt; remedial action after complaint filed); MUR 6382 (Len Britton for Vermont) (dismissal of failure to disclose $27,618 in disputed debt); MUR 6323 (Randall for Congress) (dismissal of failure to disclose $24,456.25 in disputed debt); MUR 6281 (McPadden for Congress) (dismissal of failure to disclose disputed debt); MUR 6165 (Patriots for Crimmins) (dismissal of failure to disclose disputed debt; remedial action after complaint filed); MUR 6157 (Jim Ogonowski for Senate) (dismissal of failure to disclose $27,361 in disputed debts). This lengthy list comprises matters decided in just the last six years, approximately, which indicates the regularity of both the public's difficulties with this regulation and the Commission's conclusions that such violations are not sufficiently significant to warrant enforcement.

Further, the Commission's auditors will not refer for enforcement action any violations for failure to disclose outstanding vendor debt that they discover unless the debt involved is higher than a certain threshold amount and has been outstanding for a certain period of time. *See* Audit Division 2013-2014 Cycle Materiality Thresholds at 35 (public version) (the precise thresholds are confidential and redacted) available at http://www.fec.gov/pdf/2014AuthorizedMaterialityThresholds_Redacted_for_Public_Release.pdf.

[27] Conciliation Agreement, MUR 6493 (Republican Party of Orange County) (2013 disclosure of debts from the 2010 cycle); Conciliation Agreement, MUR 6177 (21st Century Democrats) (Commission discovered in the ordinary course of its supervisory responsibilities that committee failed to disclose $671,498 in 2014 cycle debts, comprising most of its debts in that cycle); Conciliation Agreement, MUR 6521, 6742 (Republican Party of Minnesota) (party officer concealed invoices from party treasurer, causing the party to fail to disclose $395,305 in debts from the previous three years).

The Commission must consider this long-standing compliance and enforcement practice before interpreting the regulation to severely punish the Party for a common, reasonable, and good-faith understanding of the Commission's regulations, particularly where such enforcement may be unprecedented.

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Taking all of these considerations into account, I conclude that a vendor invoice is not a debt that "remains outstanding" for purposes of the debt reporting regulation if it has not yet been provided to the committee in the normal course of business or is not yet due and payable, or if it has been paid on or before the date payment was due. Rather, disclosable debts and obligations that "remain outstanding" refers to invoices already presented in the ordinary course of business to a committee which the committee has failed to pay by its due date (or within a commercially reasonable amount of time if no due date has been stated).

In reaching this interpretation, I have closely considered Congress' and the Commission's choice to use the term "outstanding debts" and "debts and obligations . . . which remain outstanding," respectively, rather than more general terms such as "accounts payable" or "open invoices" or even "liabilities." Such alternatives would have expressed a more rigid and expansive treatment. Under ordinary rules of statutory construction, we must assume that Congress' and the Commission's choice of words was deliberate.[28] Common legal definitions of the terms selected imply financial obligations that are legally enforceable after a due date. Moreover, the phrase "debts and obligations . . . which remain outstanding" clearly has two elements—"debts and obligations" and the limiting qualifier "remain outstanding"—and thus Congress and the Commission did not choose to demand the disclosure of *all* debts and obligations, but only those which remain outstanding.

I also have examined, but do not rely on, the legislative purpose stated in the legislative history of the Act and the Commission's original understanding and pursuit of that purpose—which has never changed. Only such unpaid invoices should constitute reportable "debts that remain outstanding" because they implicate the original concern for unpaid vendors and they may also conceal potential in-kind contributions. Before they are due or when they are timely paid, however, they do not raise such concerns and the disclosure of the disbursements to pay such invoices vindicates the public's legitimate informational interests.

The purpose of the Act's disclosure requirements—to identify a group's contributors in order for the public to evaluate the group's messages and to serve as a prophylactic against corruption—are not served by mandating the disclosure of routine commercial transactions, particularly when the committee has yet to be invoiced or the payment is made promptly. Moreover, the Commission's regulations exempt from the definition of contribution extension of credit and the forgiveness of debt by vendors in the ordinary course of business. Therefore, I

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[28] ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 174 (2012); *United States v Butler*, 297 U.S. 1, 65 (1936) ("These words cannot be meaningless, else they would not have been used." (per Roberts, J.)).

believe interpreting the debt reporting rules consistent with ordinary course of business principles is the best way to advance the Act's objectives.[29]

The Office of the General Counsel and our colleagues apparently have interpreted the phrase "debts which remain outstanding" to mean amounts to be due for services rendered that have not yet been invoiced, as well as amounts billed but not yet due and payable. For the reasons noted above, I conclude that this myopic interpretation is inaccurate and unprecedented.

In addition to being consistent with the text and purpose of the Act, my interpretation of the regulatory terms strikes a proper balance between useful disclosure and practical compliance burdens. And it attempts to instill fairness into the enforcement process because currently many committees report debts in the manner proposed for punishment in this case, and the Commission, to my knowledge, has never sought to punish a committee for failing to disclose as an outstanding debt an invoice which was not yet due or which the Committee timely paid.

III. THE PARTY DID NOT FAIL TO DISCLOSE DEBTS THAT REMAINED OUTSTANDING FOR THE VAST MAJORITY OF ITS INVOICE PAYMENTS

Here, the Party has demonstrated that it paid the vast majority of its vendor invoices within 10 days of receipt, and a sizable remainder within 30 days. Of the $785,999.08 in vendor payments at issue, the Party paid $450,000 within 10 days of invoice receipt and $632,000 within 30 days.[30] In fact, of the $785,999.08 in total vendor payments, $646,619.46 was paid in full *before the Party even filed its report for the prior month* (given the lag time between the close of reporting periods, the last day of the month, and report deadline of the 20th day of the following month).[31] All invoice payments were then fully disclosed as disbursements on the next month's public report. For the reasons explained above, I conclude that the Party was not required to disclose these promptly paid invoices as debts that remained outstanding for purposes of our reporting regulation. Even if the Party was required to disclose all open invoices as debts outstanding, the nature of the violation was *de minimis* as to those open invoices that were promptly paid when due and disclosed as disbursements. Therefore, I would dismiss any such violation pursuant to the Commission's prosecutorial discretion as the Commission has done in nearly every debt disclosure matter that it has considered.

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[29] The Commission should, as a matter of prosecutorial discretion, not pursue alleged nondisclosure of "debt" that "remains outstanding" unless a fixed number of days have elapsed to ensure that its enforcement practices serve the Act's objectives and that its resources are not wasted on *de minimis* and debatable potential violations. The Commission employs a non-public enforcement threshold for undisclosed debts when the non-disclosure is determined in the course of a Commission audit, *see* n. 26, *supra*, but in our view the Commission should publish any such enforcement threshold in the interest of regulatory clarity and transparency. This discretion could also be characterized as a safe harbor, as is done with misreporting that is the product of embezzlement if certain best practices were followed. *See Statement of Policy; Safe Harbor for Misreporting Due to Embezzlement*, 72 Fed. Reg. 16695 (Apr. 5, 2007).

[30] Resp. Ex. A.

[31] *Id.*; 11 C.F.R. § 104.5(c)(3) ("[M]onthly report shall be filed no later than 20 days after the last day of the month.").

IV. CIRCUMSTANCES WARRANT THE COMMISSION'S EXERCISE OF PROSECUTORIAL DISCRETION AS TO THE SMALL AMOUNT OF UNPAID INVOICES THAT WERE NOT TIMELY REPORTED

The Party did carry some debt for long periods of time and did not initially report that debt. As noted above, however, the purpose and scope of the Commission's regulation was not clear. Additionally, as a party committee rather than a candidate committee, the potential corruption interest that supports the required disclosure of vendor debts is highly attenuated and, therefore, the public interest in party debt disclosures is weaker than it is with respect to candidate committees.[32] Aside from a relatively small amount of long-term debt the Party disclosed in an untimely manner in the course of a $2.1 million cycle, the Party's invoice payment and debt reporting practices largely complied with the Commission's regulations as construed here. To the extent there is concern about potentially concealed contributions to the Party from its vendors, the Party's disclosure reports did not materially mislead the public as to the Party's outstanding debts and, therefore, the persons to whom it was theoretically beholden. I further credit the Party for the burden and expense of its thorough internal review, remedial measures, and comprehensive response to the allegations in this matter. Notwithstanding the Party's failure to timely disclose some long-term debt, it has now remedied that omission through the filing of amended reports. I therefore concluded that the Commission should exercise its prosecutorial discretion and dismiss this aspect of the matter as it has done in past matters.[33]

V. CONCLUSION

For these reasons, I concluded that no reporting violation occurred with respect to the Party's nondisclosure of invoices that it timely paid shortly after receipt as debts that remain outstanding, which were the vast majority of the invoices at issue in this matter. Even if the scope of disclosable "debts that remain outstanding" includes such invoices, I concluded that the *de minimis* nature of the violation in light of the purpose of the regulation, the considerations discussed above, the minimal duration of any omission, and the Party's remedial measures warrant the dismissal of any such violation pursuant to the Commission's prosecutorial discretion under *Heckler v. Chaney*, 470 U.S. 821, 832 (1985), consistent with the Commission's past practice. The remainder of invoices that the Party neither paid promptly nor disclosed as outstanding debts was not a significant portion of the Party's activity, the Party timely reported

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[32] Based upon a bipartisan recognition that political parties have been unduly burdened by the Act and the Commission's regulations, both Congress and the Commission have recently considered proposals to reduce those burdens through amendments to the Act and the Commission's regulations.

[33] *See* MURs 6605, 6572, 6676 (Tarkanian for Congress) (dismissal of misreported outstanding debt violations in part due to remedial actions taken); MUR 6712 (Kreegel for Congress) (dismissal of failure to disclose disputed debt; reports amended after complaint filed); MURs 6636, 6629, 6626 (Mittman for Congress) (dismissal of failure to disclose disputed debt; remedial action after complaint filed); MUR 6605 (Gary Latanich for Congress) (same); MUR 6460 (Friends of Jim Bender/Bender for Senate) (dismissal of failure to disclose disputed debt; remedial action after complaint filed); MUR 6165 (Patriots for Crimmins) (dismissal of failure to disclose disputed debt; remedial action taken after complaint filed).

its disbursements to pay these invoices, and the Party took extraordinary remedial action in a gray area of law when the issue was raised. Therefore, I conclude that any violation for such late-disclosed debts should also be dismissed as an appropriate exercise of the Commission's prosecutorial discretion consistent with the Commission's past practice. Therefore, I voted to close the file.

Lee E. Goodman
Commissioner

Dec. 8, 2016
Date