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July 30, 1998

Mark Shonkwiler, Esquire  
Federal Election Commission  
Office of the General Counsel  
999 E Street, N.W.  
Washington, D.C. 20463

Re: MURs 4568, 4633 and 4634

Dear Mr. Shonkwiler:

Enclosed please find materials submitted on behalf of Sam Brownback for U.S. Senate and Alan Groesbeck, as treasurer, in the above-referenced MURs, specifically: the Response of Sam Brownback for U.S. Senate and Alan Groesbeck, as Treasurer, to Factual and Legal Analysis; and the response (signed and notarized) to the Commission's subpoena.

Thank you for your attention to this matter. Please do not hesitate to contact us with any questions or concerns.

Sincerely,



Benjamin L. Ginsberg  
Donald F. McGahn II

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Jul 31 1998

**RESPONSE OF SAM BROWNBACK FOR U.S. SENATE  
AND ALAN W. GROESBECK, AS TREASURER,  
TO FACTUAL AND LEGAL ANALYSIS**

**RESPONDENTS: Sam Brownback for US Senate  
Committee and Alan Groesbeck,  
as treasurer**

**MURs: 4568, 4633 and 4634**

Sam Brownback for U.S. Senate and Alan W. Groesbeck, as treasurer ("Brownback for Senate"), respondents in the above-captioned Matters Under Review, hereby respond, by and through the undersigned counsel, to the Commission's Factual and Legal Analysis. The Factual and Legal Analysis is long on generalized allegations regarding Triad, CR and CREF, and the activities of other campaigns,<sup>1</sup> but short on specific accusations regarding Brownback for Senate.

Unfortunately, Brownback for Senate is unable to respond to the generalized factual allegations regarding Triad, CR and CREF, that have nothing to do with its activities and fall outside the knowledge of anyone affiliated with the Committee. Ultimately, the extent of Brownback for Senate's knowledge of Triad appears to mirror that of the Commission's: both know of the organizations' activities almost exclusively by way of the Investigation of Illegal or Improper Activities in Connection With 1996 Federal Election Campaigns, issued by the Committee on Governmental Affairs of the United States Senate ("Senate Report"),<sup>2</sup> and

<sup>1</sup> See Factual and Legal Analysis at 1 ("various 1996 campaigns"); 2 ("a substantial number of Republican congressional campaigns (more than twenty-five)"); 9 ("political audits' on approximately 250 campaigns during the 1996 election cycle); 15 (discussing specifically the campaigns of Pete Sessions and Ed Merritt); 17 n. 9 (referencing specifically the campaigns of Vince Snowbarger, Christian Leinbach, Bob Kilbanks, Jim Ryun, Mark Sharpe and Steve Stockman). It is less than clear how such allegations support a Reason to Believe finding against Brownback for Senate. Most troubling is the gratuitous references to specific campaigns. Brownback for Senate can only assume that it, too, is mentioned by name in other Factual and Legal Analyses, an apparent contradiction with 2 U.S.C. §§ 437g(a)(4)(b) and 437g(a)(12)(A).

<sup>2</sup> In fact, much of what is cited in the Factual and Legal Analysis (without page citation) is not even the

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after-the-fact newspaper articles. See Factual and Legal Analysis at 6 (citing *Dayton Daily News* and *National Journal*); 7 (citing *Denver Post*, *Minneapolis Star-Tribune*, *The Hill*, *Online U.S. News* and *Los Angeles Times*); 9 (citing *Minneapolis Star-Tribune*); 12 (citing *Minneapolis Star-Tribune*, *Wall Street Journal* and *Washington Post*); 13 (citing *Washington Post* and *Kansas City Star*); and 15 n. 7 (citing *The Hill*).

Despite Brownback for Senate's inability to comment on the workings of Triad and other groups and campaigns, the Factual and Legal Analysis does make certain assertions regarding the activities of Brownback for Senate which are incomplete, misleading, or in some instances incorrect. Most significant is the omission of exculpatory material from the Senate Report, particularly its conclusion that "[t]he Committee found no evidence to suggest that the Brownback campaign acted in any way illegally or improperly in its dealings with Triad." Senate Report at 4010. Instead, it appears that the Commission has elected to rest much of its reasoning on the conclusory and baseless partisan opinions of the Minority on that Committee. See Senate Report at 4603-4604; see also *id.* at 4569 (describing issue advocacy as a "loophole," without any reference to its constitutional protection). By way of this Response and its other submissions, Brownback for Senate will correct such misstatements of fact, which when analyzed under the proper legal standard, establishes that Brownback for Senate has not violated the Act or the Commission's Regulations.

## **I. SUMMARY OF THE ALLEGATIONS**

In the words of the Factual and Legal Analysis, "[t]he available information suggests that Sam Brownback for US Senate and Alan Groesbeck, as treasurer, may have violated the Act by

Committee's Report, but rather the views of a minority of Senators on the Committee.

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accepting what can alternatively be characterized as excessive in-kind contributions or prohibited corporate contributions from Triad and CREF." Factual and Legal Analysis at 24. Further, "[t]he available information also suggests that the Sam Brownback for US Senate and Alan Groesbeck, as treasurer, may have violated the Act by accepting indirect contributions from the Stauffers, which alternatively can be characterized as contributions made in the name of another or as excessive indirect contributions." *Id.* at 25.

## II. ANALYSIS

The Commission offers two alternate theories in support of its Reason to Believe finding against Brownback for Senate, both of which focus first and foremost on Triad: (1) that Triad was a political committee which made excessive contributions to Brownback for Senate; or (2) that Triad was a corporation which made prohibited expenditures and contributions to Brownback for Senate. *See* Factual and Legal Analysis at 19. Although Brownback for Senate cannot, based on its own personal knowledge, shed light on the nature of Triad's existence (*i.e.*, whether it is a political committee or a corporation),<sup>3</sup> it can nonetheless clarify and correct the factual analysis presented in support of both theories in the Factual and Legal Analysis. These clarifications and corrections demonstrate why the Commission ought to dismiss this complaint as it pertains to Brownback for Senate.

The Factual and Legal Analysis asserts that certain activities of Triad "appear to have been coordinated" with Brownback for Senate. Factual and Legal Analysis at 20. The sole predicate for this supposed coordination is the alleged "Triad political audit" of Brownback for

<sup>3</sup> Of course, although neglected by the Factual and Legal Analysis, the Senate Report does provide an answer to the question: "Triad, which was the subject of several press reports, is a for-profit political consulting firm that advises conservative donors as to which PACs candidates and special projects (*i.e.*, tax-exempt organizations) are most likely to advance the conservative principles of the donors." Senate Report at 4006 (*citing* Deposition of Meredith O'Rourke, pp. 107-108). Brownback for Senate has no first hand knowledge to doubt this statement.

Senate. *See id.* at 10. The Factual and Legal Analysis alleges that "Triad appears to have used the information derived from its 'political audits' in a number of different ways that may have resulted in excessive, prohibited and/or unreported in-kind contributions" to Brownback for Senate. *Id.* at 11. Specifically, the certain activities alleged include Triad fundraising efforts, including Triad fax alerts; so-called "Triad consulting advice"; and CREF advertising, characterized as "pro-Brownback/anti-Docking advertising." As described in more detail below, Brownback for Senate never knew it was accepting anything of value from Triad, CR or CREF, and does not believe it did so. Furthermore, a fair look at the record demonstrates that Brownback for Senate did not unlawfully "coordinate" with Triad regarding such activities (even under the Commission's unique, untested version of "coordination"), and has not violated the Act.

#### **A. The "Political Audit"**

Concerning the so-called "political audit," although Brownback for Senate had some contact with individuals from Triad, Brownback for Senate takes issue with the sinister implications of such contact as alleged in the Factual and Legal Analysis. Such contact is insufficient as a matter of law to sustain the Commission's coordination theories, even if there were some grounds for this theory. "Communication in the abstract is not equivalent to coordination." Senate Report at 40008. More specifically, "[c]ommunication alone is clearly not sufficient to infer illegal or improper coordination of expenditures." *Id.* at 4009.

As explained more fully in its Written Answers, the information that was provided to Triad was no different than the information provided to any potential supporter who requested such information. Written Answer No. 3. Brownback for Senate met with and dealt with Triad

as they dealt with any other individual or group. No "special" or "insider" information was disclosed, and Brownback for Senate never "coordinated" its activities with Triad, nor was Triad an agent of Brownback for Senate. Written Answers Nos. 5 and 6. As the Senate report concluded, "[t]he Committee found no evidence to suggest that the Brownback campaign acted in any way illegally or improperly in its dealings with Triad." Senate Report at 4010.

Certainly there is nothing to sustain a finding that the campaign received anything of value from the session, which came in June, a month before the primary election. The consultant at issue was unknown to the campaign and apparently had never worked in a race in Kansas. Any plans the campaign may have had in June, before they had even won the primary, would have changed so significantly by the time of the alleged general election ads of CR and CREF as to render the session meaningless.

#### **B. Advertisements**

As will be the case with much of the Factual and Legal Analysis, Brownback for Senate cannot comment on the general allegations regarding Triad's advertising, due to its lack of knowledge about the activities of Triad, CR or CREF until those activities became public. However, regarding the specific allegations on page 13 of the Factual and Legal Analysis, assuming *arguendo* that such advertising occurred, the advertising was not paid for, authorized by, "coordinated" with, condoned by, or otherwise sanctioned or controlled by Brownback for Senate. Written Answer No. 11. Thus, any inference or belief to the contrary is unfounded.

With respect to the ads themselves, the Factual and Legal Analysis appears to concede that such ads were merely issue advocacy. See Factual and Legal Analysis at 11 ("Triad may

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have used information obtained . . . to select some . . . of the issues raised in CR and CREF advertisements") (emphasis added); *see also* Senate Report at 4006-4007 ("Triad solicited donations to CR and CREF from its conservative clients in order to fund an issue advocacy campaign that was critical of Democratic congressional candidates") (emphasis added).<sup>4</sup>

Given that concession, any so-called "coordination," assuming *arguendo* any occurred, is immaterial. "With respect to coordinated media advertisements . . . , the proper characterization of a particular expenditure depends not on the degree of coordination, but rather on the content of the message." April 14, 1997 Letter by Attorney General Janet Reno to Senator Orrin Hatch. Further, the Commission's attempts over the years to regulate issue advocacy have not survived judicial scrutiny.<sup>5</sup> And while the Factual and Legal Analysis relies on a theory of coordination, the Commission itself has been unable to move forward with its proposed rulemaking regarding

<sup>4</sup> In an earlier footnote, the Factual and Legal Analysis states that "the Triad-managed CR advertising . . . appear[s] to meet the definition of an 'electioneering message.'" Factual and Legal Analysis at 4 n. 3. This conclusion appears to be based on nothing more than dated advisory opinions (which do not, contrary to the Factual and Legal Analysis' assertion, constitute a "ruling" by the Commission), and a Supreme Court decision from 1957, *United States v. United Auto Workers*, 352 U.S. 567, 587 (1957), a case which predates the Act, the Commission itself, and the seminal case of *Buckley v. Valeo*, 424 U.S. 1 (1976). The Factual and Legal Analysis' legal conclusion on this point ignores such "recent" jurisprudential developments, and is incorrect. *See* footnote 5, *infra*.

<sup>5</sup> *See, e.g., Buckley v. Valeo*, 424 U.S. 1 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986); *FEC v. Christian Action Network*, 110 F.3d 1049 (4th Cir. 1997), *aff'd* 894 F. Supp. 946 (W.D.Va. 1995); *Maine Right to Life Comm. v. FEC*, 914 F. Supp. 8 (D.Me. 1996), *aff'd*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997); *Clifton v. FEC*, 114 F.3d 1309 (1st Cir. 1997); *Faucher v. FEC*, 928 F.2d 468 (1st Cir.), *cert. denied*, 502 U.S. 820 (1991); *FEC v. Colorado Republican Federal Campaign Comm.*, 839 F. Supp. 1448 (D. Co.), *rev'd on other grounds*, 59 F.3d 1015 (10th Cir.), *vacated on other grounds*, 116 S. Ct. 2309 (1996); *FEC v. Central Long Island Tax Reform Immediately Comm.*, 616 F.2d 45 (2d Cir. 1980); *Right to Life of Dutchess County, Inc. v. FEC*, No. 97 Civ. 2614 (S.D.N.Y. June 1, 1998); *Minnesota Citizens Concerned for Life, Inc. v. FEC*, 936 F. Supp. 633 (D. Minn. 1996), *aff'd* 113 F.3d 129 (8th Cir. 1997), *reh'g, en banc, denied*, 1997 U.S. App. LEXIS 17528; *West Virginians for Life, Inc. v. Smith*, 960 F. Supp. 1036 (S.D.W.Va. 1996); *FEC v. Survival Education Fund*, 1994 U.S. Dist. Lexis 210 (S.D.N.Y. 1994), *aff'd in part and rev'd in part*, 65 F.3d 285 (2nd Cir. 1995); *FEC v. National Organization for Women*, 713 F. Supp. 428 (D.D.C. 1989); *FEC v. American Federation of State, County and Municipal Employees*, 471 F. Supp. 315, 316-17 (D.D.C. 1979). Despite the attempt to craft a more expansive standard, no other court has reached a conclusion consistent with the Ninth Circuit's in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987). *See Maine Right to Life Comm. v. FEC*, 914 F. Supp. 8, *aff'd*, 98 F.3d 1 (1st Cir. 1996), *cert. denied*, 118 S. Ct. 52 (1997); *FEC v. Christian Action Network*, 894 F. Supp. 946 (W.D.Va. 1995), *aff'd*, 110 F.3d 1049, 1057 (4th Cir. 1997) (explicitly rejecting what the Fourth Circuit described as the FEC's chosen standard that it "will know 'express advocacy' when it sees it").

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this and related subjects, after much delay. See FEC Seeks Comments on 'Soft Money' Proposed Rulemaking (July 10, 1998). To subject the respondents to "rulemaking by MUR" is contrary to the statutory framework of the Act and the Commission's own Regulations.

### C. Fundraising

As with the discussion regarding advertising, the Factual and Legal Analysis contains a general discussion of allegations regarding Triad's so-called "fundraising efforts," to which Brownback for Senate can offer little illumination. See Factual and Legal Analysis at 13. Turning to the specifics, regarding the July 18, 1996 Triad Fax Alert cited in the Factual and Legal Analysis at page 14, Brownback for Senate had no knowledge of such a fax. Further, the plain text of the message does not contain any information that could be read as constituting "coordination" with Brownback for Senate. All the factual information is public knowledge (*i.e.*, who the primary candidates are, etc.), and the Factual and Legal Analysis infers that Triad apparently sent similar faxes referencing other elections. As for the other information, Brownback for Senate respectfully submits that it is fundraising hyperbole by a third party group, *i.e.*, sending "shockwaves throughout the Republican National Convention," and ought not be used to support the tenuous "coordination" theory of the Commission.

As for the second Fax Alert, assuming *arguendo* that its contents are true (a point disputed by Brownback for Senate), the Senate Report has already chronicled what occurred, placing the information in context:

The Committee found no evidence to suggest that the Brownback campaign acted in any way illegally or improperly in its dealings with Triad. It is entirely appropriate for Senator Brownback to meet with campaign contributors to thank them for a donation. The Committee has no evidence suggesting that any of those contributions were given illegally or improperly.



Senate Report at 4010. Such after-the-fact celebration and self-congratulation by Triad does not support the Commission's "coordination" theory, or implicate Brownback for Senate in some violation of the Act.

As for the assertion that "Triad may have tried to interest such donors in making contributions to certain selected political action committees ("PACs"), which made subsequent, and often identical, contributions to the original donor's preferred candidate(s)," Factual and Legal Analysis at 15, this assertion lacks merit with respect to Brownback for Senate. Such a theory is contradicted by the Senate Report statement that "[t]here is no evidence that Senator Brownback had any knowledge of or involvement with [the Stauffers'] activities." Senate Report at 4016.

Further, the Factual and Legal Analysis' assertion that John and Ruth Stauffer made various contributions to PACs "which within a short time, made identical or nearly identical contributions to the Brownback Committee," is based on erroneous press reports (emphasized by the Minority of the Senate Committee, and refuted by the Senate Report).<sup>6</sup> Such accusations are false, and unsupported by the facts presented. For example:

- The Stauffers' contribution to American Free Enterprise PAC occurred after that PAC had already contributed \$1,000 to Brownback for Senate, thus negating any inference of a temporal link.
- The same is true of the Conservative Victory Committee, which had already donated \$500 to Brownback for Senate prior to the Stauffers' contribution. That PAC supported

<sup>6</sup> Even if this conclusion were supported by the facts presented, it is still insufficient as a matter of law, as stated by the Senate Report with respect to another matter: "Relying solely on a suspicious pattern of donations is unpersuasive by itself, because the pattern is far too common to support a finding of wrongdoing." Senate Report at 4017.

Brownback for Senate long after the Stauffers' contribution, making a \$1,000 donation on October 17, 1996.

- Nor do the contributions of Eagle Forum PAC support the Commission's theory. There, that PAC had given \$4,000 to Brownback for Senate prior to the Stauffers' contribution to the PAC. The PACs support continued after the Stauffers' July 10, 1996 contribution, with a \$1,000 contribution on September 11, 1996; \$1,000 on October 11, 1996; and \$1,000 on October 25, 1996. In all, Eagle Forum PAC contributed a total of \$7,000 to Brownback for Senate, while the Stauffers' contributed only \$5,000 to the PAC, thus negating any notion of "identical contributions."
- The same is true with respect to Faith, Family & Freedom, which contributed a total of \$5,000 to Brownback for Senate, while receiving \$2,500 from the Stauffers. In fact, that PAC had already contributed \$1,000 to Brownback for Senate prior to the Stauffer's contribution to the PAC.

In light of the foregoing, any inference regarding the remaining PACs is unreasonable; there are no "identical" contributions made "within a short time."

Ultimately, there is no evidence that there was any sort of "coordination" with respect to fundraising. Not only did Brownback for Senate make this clear in its initial May 25, 1997 response, *see* Brownback Aff. ¶¶ 2-3; Kensinger Aff. ¶ 3; Russell Aff. ¶ 3, the Factual and Legal Analysis notes that Ms. Malenik has "denied that there was any coordination between individual contributions to the PACs and the PAC contributions to the candidate." Factual and Legal Analysis at 15 n. 7 (*citing* October 8, 1997 article in *The Hill*).

#### **D. Consulting Assistance**

Once again, the Factual and Legal Analysis regarding Brownback for Senate is long on generalities, and short of specifics concerning actual violations by Brownback for Senate. The specific allegations concerning so-called consulting are based entirely on two newspaper articles published in December of 1997. What the Factual and Legal Analysis fails to acknowledge is that those same articles reported that Ms. O'Rourke's activities in question were done voluntarily, and not at the behest of Triad. *See* 12/12/97 *Washington Post* article. The Factual and Legal Analysis also ignores the Senate Report's refutation of the identical charge:

In addition, the Committee finds no impropriety in Meredith O'Rourke helping Senator Brownback telephone potential donors. While it would be an illegal in-kind donation from a corporation for O'Rourke to assist Senator Brownback as part of her job responsibilities at Triad, the preliminary evidence indicates that O'Rourke performed this service in a voluntary capacity and on her own time. Mark Braden, Triad's Counsel, has indicated that Triad's employment records show that O'Rourke was not compensated by Triad for the service she rendered Senator Brownback. Like any other citizen, O'Rourke is free to volunteer time to political candidates of her choosing.

Senate Report at 4010 (citation omitted).

#### **E. Triad As a So-Called "Conduit"**

In addition to its general allegations apparently unrelated to Brownback for Senate, the Factual and Legal Analysis takes issue with one check from one PAC, which allegedly was forwarded by Triad from that PAC to Brownback for Senate. A copy of this check has already been submitted to the Commission. *See* May 25, 1997 Letter from Mark B. Russell to F. Andrew Turley, Esq. On its face, the check appears to be legal, and Brownback for Senate had no reason to believe it to be impermissible. *See* Brownback Aff. ¶ 4; Kensinger Aff. ¶ 4; Russell

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Aff. ¶ 4. Nowhere does the check reference Triad.<sup>7</sup> Thus, even if Triad did forward the check, it would be a non-event with respect to Brownback for Senate's compliance with the Act.<sup>8</sup>


### III. CONCLUSION

Ultimately, the Factual and Legal Analysis is long on discussion of Triad, but short on specific allegations of wrongdoing by Brownback for Senate. The Factual and Legal Analysis offers no specifics to contradict Brownback for Senate's earlier submissions and no specifics to justify its continued investigation of the campaign. Simply put, this matter as it pertains to Brownback for Senate should be dismissed since the Commission's entire case is predicated upon the so-called "political audit" of Brownback for Senate. In the "audit," Triad did not learn any information that had not already been available to the public. Nor are such meetings prohibited by the Act. Ultimately, the Commission's theory hinges on the activities of Triad, an entity not under the direction or control of Brownback for Senate. Thus, with respect to Brownback for Senate, the Commission's "coordination theory," notwithstanding its legal infirmities, fails on the facts.

<sup>7</sup> The same is true of other checks which the Commission may view as possible examples of contributions made in the name of another person. See Factual and Legal Analysis at 22-23. The support for this theory appears to be the assertion that "[a]t this time, there is no other explanation for the proximity in timing and similarity in amounts between the contributions to the PACs and the subsequent PAC contributions to the Brownback Committee." *Id.* at 23. Of course, as explained above, the facts contradict the Commission's theory.

<sup>8</sup> Brownback for Senate is troubled that, although the Commission has only recently found Reason to Believe, and that the investigation is in its infancy, it appears as though the Commission has already concluded that the PACs at issue were conduits. See Factual and Legal Analysis at 23 ("many of the conduit PACs"). Also, Brownback for Senate is disappointed that its prior submission has been characterized as "conclusory denials." *Id.* In fact, not only did the campaign provided sworn affidavits, it provided a written response and all relevant documents, including copies of the checks at issue.

Respectfully submitted,



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