



FEDERAL ELECTION COMMISSION  
WASHINGTON, D C 20463

SEP 14 2004

**CERTIFIED MAIL**  
**RETURN RECEIPT REQUESTED**

Haley Gay

Salt Lake City, Utah 84103-2848

RE: MUR 5333

Dear Haley Gay:

On November 21, 2002, the Federal Election Commission notified a number of individuals of a complaint in this matter alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). Although the complaint did not allege that you violated the Act and you were not notified of the complaint, you responded to the complaint by undated letter that was received on December 23, 2002.

Based on the available information, on June 30, 2004, the Federal Election Commission found that there is reason to believe you violated 2 U.S.C. § 441f, a provision of the Federal Election Campaign Act of 1971, as amended ("the Act"). The Factual and Legal Analysis, which formed a basis for the Commission's finding, is attached for your information.

The Commission initially notified you of these actions through your counsel of record, J. Curtis Herge, who has since withdrawn as your counsel in this matter. Accordingly, the Commission is notifying you directly. If you intend to be represented by new counsel, please advise the Commission by completing the enclosed form stating the name, address, and telephone number of such counsel, and authorizing such counsel to receive any notifications and other communications from the Commission.

You may submit any factual or legal materials that you believe are relevant to the Commission's consideration of this matter. Please submit such materials to the General Counsel's Office within 15 days of your receipt of this letter. Where appropriate, statements should be submitted under oath. In the absence of additional information, the Commission may find probable cause to believe that a violation has occurred

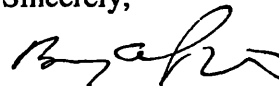
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Requests for extensions of time will not be routinely granted. Requests must be made in writing at least five days prior to the due date of the response and specific good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

This matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A), unless you notify the Commission in writing that you wish the investigation to be made public.

If you have any questions, please contact Mark Allen, the attorney assigned to this matter, at (202) 694-1650. During the period September 10 through October 8, 2004 please contact Cynthia Tompkins, Assistant General Counsel, at the same number.

Sincerely,



Bradley A. Smith  
Chairman

Enclosures

Factual and Legal Analysis  
Designation of Counsel Form

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1 **FEDERAL ELECTION COMMISSION**

2 **FACTUAL AND LEGAL ANALYSIS**

3 **RESPONDENT:** Haley Gay

MUR 5333

4 **I. GENERATION OF MATTER**

5 This matter was generated by a complaint filed with the Federal Election  
6 Commission by Scott Clayton and based on information ascertained by the Commission  
7 in the normal course of carrying out its supervisory responsibilities. *See*  
8 2 U.S.C. § 437g(a)(1) and (2).

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Available factual information**

11 The complaint alleges that various individuals made excessive contributions to John  
12 Swallow for Congress ("Committee").<sup>1</sup> Haley Gay contributed \$1,000 to the Committee on  
13 June 28, 2002. The available information indicates that Haley Gay's contribution was made by a  
14 check drawn on the account of Winterhawk Enterprises ("Winterhawk"). The Winterhawk  
15 check was attributed to Haley Gay and several other persons, as set forth in the chart below.  
16 Winterhawk is a limited liability company ("LLC") identified in public records as an active LLC  
17 organized in Utah.

18

Check drawn on account	Check date	Amount	Attributed persons (\$1,000 each)
Winterhawk Enterprises	6/21/02	\$5,000	Haley Gay, Dennis Gay, Gina Gay, Bodee Gay, Kim Gay,

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<sup>1</sup> Although the complaint did not allege that Haley Gay violated the Act and Haley Gay was not notified of the complaint, s/he responded to the complaint. *See infra* at 2

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1 Winterhawk wrote a \$5,000 check to the Committee dated June 21, 2002. The signature  
2 on the check appears to be that of Dennis Gay and the memo line reads "Dennis, Gina, Bodee,  
3 Kim, Haley Campaign Dona" [sic]. The Committee sent an undated letter to Winterhawk,  
4 expressing thanks for the contribution and then stating:

5 The strict Federal Election Commission regulations [prohibit] making contributions on  
6 behalf of someone else to federal election campaigns. We must refund this money to you  
7 within thirty (30) days unless you can establish in writing that the contribution came from  
8 personal funds of a corporate drawing account, such as a draw against salary, wages,  
9 dividends, etc. Please confirm that such was indeed the case with this check by signing  
10 below....

11  
12 The letter provides fields for the signature, occupation and employer of Dennis Gay, Gina Gay,  
13 Bodee Gay and Kim Gay, and the date of their signature, but the letter makes no mention of  
14 Haley Gay, the fifth attributed contributor. The completed fields contain the signatures of the  
15 four Gay contributors listed, with dates ranging from September 20 to September 25, 2002, and  
16 identify "Majestic" as the employer of three individuals.<sup>2</sup>

17 Haley Gay responded to the complaint, stating a belief that s/he had "followed the  
18 regulations of the FEC" and was allowed to contribute \$1,000 for each of the three  
19 elections involving John Swallow.<sup>3</sup> Attached to Haley Gay's response was a "Receipt  
20 Transaction List," apparently from a Committee database, that listed Haley Gay's  
21 contribution as \$1,000 for the general election.<sup>4</sup>

22 **B. Law on contributions by LLCs, corporations and partnerships**

23 The Commission's regulations establish two possible treatments for contributions by

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<sup>2</sup> The employer field is blank for the fourth individual, Dennis Gay. The Committee disclosed Winterhawk as the employer of all four individuals.

<sup>3</sup> Haley Gay's response is undated and was received on December 23, 2002.

<sup>4</sup> Haley Gay's name appears on the Receipt Transaction List in handwriting above a scratched-out typed name. The List itemizes a second contribution, \$1,000 on March 31, 2002, which does not correspond to any contribution by Haley Gay disclosed by the Committee.

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business entities that are recognized as limited liability companies under the laws of the State in which they are established. 11 C.F.R. § 110.1(g)(1). The treatment depends on how the firm elects to file with the Internal Revenue Service (“IRS”). *Id.* at 110.1(g)(2). If the contribution is from an LLC filing with the IRS as a partnership pursuant to 26 C.F.R. § 301.7701-3, or from one that fails to make an election, it shall be treated as a contribution from a partnership pursuant to 11 C.F.R. § 110.1(e). *Id.* If the contribution is from an LLC electing to file with the IRS as a corporation, the contribution is prohibited. 2 U.S.C. § 441b(a) and 11 C.F.R. § 110.1(g)(3). An LLC that makes a contribution pursuant to this provision shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed, and affirm to the recipient committee that it is eligible to make the contribution. 11 C.F.R. § 110.1(g)(5).

The Federal Election Campaign Act of 1971, as amended (“the Act”), prohibits corporations from making contributions in connection with any election and prohibits any candidate or political committee from knowingly accepting or receiving any such contributions. 2 U.S.C. § 441b(a). In addition, section 441b(a) prohibits any officer or director of any corporation from consenting to any contribution by the corporation. The Commission has recognized, however, limited circumstances in which a corporate employee may make a contribution drawn on a corporate account, specifically, a nonrepayable corporate drawing account established to permit an employee to draw against her salary, profits or other compensation. *See Campaign Guide for Congressional Candidates and Committees* (2002), page 21; *FEC Record*, September 1978, page 1.<sup>5</sup> Contributions may not be made from the

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<sup>5</sup> The only place in the Act or the Commission’s regulations that specifically addresses the making of contributions through nonrepayable corporate drawing accounts is in the context of contributions to separate segregated funds. *See* 11 C.F.R. § 102.6(c)(3). This regulation provides that a contributor may

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1 general treasury fund of corporations. *See* 2 U.S.C. § 441b(a); *cf. FEC v. Massachusetts Citizens*  
2 *for Life*, 479 U.S. 238, 241 (1986).

3 A contribution by a partnership shall be attributed to the partnership and to each partner  
4 in one of two ways: 1) in proportion to his or her share of the profits, according to instructions  
5 which shall be provided by the partnership to the political committee or candidate; or 2) by  
6 agreement of the partners, as long as only the profits of the partners to whom the contribution is  
7 attributed are reduced (or losses increased), and these partners' profits are reduced (or losses  
8 increased) in proportion to the contribution attributed to each of them. 11 C.F.R. § 110.1(e). A  
9 contribution by a partnership shall not exceed the Act's limitations on contributions, and no  
10 portion of such contribution may be made from the profits of a corporation that is a partner. *Id.*

11 C. Analysis of contributions

12 Winterhawk, an LLC, wrote a \$5,000 contribution check to the Committee. Winterhawk  
13 attributed this amount to Haley Gay and several other persons. No contribution was attributed to  
14 the LLC itself. The threshold question regarding LLC contributions is whether the LLC is to be  
15 treated as a corporation or as a partnership, which depends on whether the LLC elected federal  
16 income tax treatment as a corporation. *See* 11 C.F.R. § 110.1(g). The available information does  
17 not indicate whether Winterhawk elected tax treatment as a corporation.

18 The Winterhawk check on its face attributes the contributions among several individuals,  
19 but it does not appear that the LLC affirmed to the Committee that it is eligible as an entity to  
20 make the contributions in the first place. *See* 11 C.F.R. § 110.1(g)(5). Instead, the Committee's  
21 letter in response to the Winterhawk contribution check invites four of the attributed individual

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write a check that represents both a contribution and payment of dues or other fees that must be drawn on the contributor's personal checking account or on a "non-repayable corporate drawing account of the individual contributor." *Id.* *See also* Explanation and Justification, 48 Fed. Reg. 26,297 (June 7, 1983).

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1 contributors to categorize the contributions as coming from “personal funds of a corporate  
2 drawing account, such as a draw against salary, wages, dividends, etc.” The four individual  
3 contributors appeared to agree with this categorization by signing in the space provided. While  
4 the Commission permits contributions from corporate employees drawn on nonrepayable  
5 corporate drawing accounts, *see supra*, the contributions here do not appear to be drawn on such  
6 accounts. First, the check appears to be drawn on the general treasury account of an LLC; no  
7 account name is indicated on the checks relating to a possible nonrepayable drawing account.  
8 Second, the attributed individual contributors may not even be employees of the LLC. None of  
9 the four attributed contributors listed Winterhawk as their employer, but the Committee  
10 disclosed Winterhawk as the employer of all four individuals and of Haley Gay as well.

11       There appear to be contributions made in the name of another whether Winterhawk was  
12 treated as a corporation or as a partnership. The Act prohibits contributions made in the name of  
13 another person and prohibits a person from knowingly permitting her name to be used to effect  
14 such a contribution. *See* 2 U.S.C. § 441f. If Winterhawk was treated as a corporation, then it  
15 made contributions in the names of the various individuals to whom the contribution was  
16 attributed. If Winterhawk was treated as a partnership, then the attributed partners made  
17 contributions in the names of the other individuals who are not partners. In addition, the various  
18 attributed individual contributors may have knowingly permitted their names to be used to effect  
19 the Winterhawk contribution on their behalf. *See* 2 U.S.C. § 441f. Therefore, there is reason to  
20 believe that Haley Gay violated 2 U.S.C. § 441f.

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