

1 **BEFORE THE FEDERAL ELECTION COMMISSION**

2
3 In the Matter of)

4)
5 Carolyn Malenick d/b/a Triad Management)

6 Services; Triad Management Services, Inc.)

7 and Carolyn Malenick, as corporate officer;)

8 Citizens for the Republic Education Fund)

9 and Carolyn Malenick, as corporate officer;)

10 and Citizens for Reform)

MATTERS UNDER REVIEW

4568, 4633, 4634 and 4736

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13 **GENERAL COUNSEL'S REPORT**

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16 I. **ACTIONS RECOMMENDED:** (1) Find probable cause to believe: that

17 Carolyn Malenick d/b/a Triad Management Services ("Triad/CSM"), Triad Management

18 Services, Inc. ("Triad Inc."),¹ Citizens for the Republic Education Fund ("CREF") and

19 Citizens for Reform ("CR")² violated 2 U.S.C. §§ 433, 434, 441a(a)(1), 441a(f) and

20 11 C.F.R. § 102.5 by operating as unregistered and non-reporting political committees

21 which accepted and made excessive contributions; that Triad/CSM and Triad Inc.

22 violated 2 U.S.C. § 441a(a)(8) by failing to report certain earmarked contributions that

23 they forwarded to PACs under their control; that even if not required to report as a

24 political committee Triad/CSM violated 2 U.S.C. § 434(c) by failing to report

¹ As noted in the March 1 General Counsel's Report in these MURs on the Robert Cone Conciliation Agreement, this Office is preparing a Report regarding new reason to believe findings as to 1997-1998 election cycle activity by Mr. Cone and Triad Inc. This Report addresses the liability of all remaining respondents against whom this Office anticipates recommending Probable Cause to Believe in these MURs in connection with actions occurring during the 1995-1996 election cycle.

² This Office recently learned that, on April 20, 2001, CR's corporate status in the State of Virginia was terminated as a result of its failure to file annual reports. Under Virginia law, however, the dissolution of a corporation does not render it incapable of being sued for actions which preceded its termination. VA Code Ann., Sects. 13.1-906, 13.1-917 (2001)(relating to non-stock companies); *See Harris v. T.I., Inc.*, 413 S.E. 2d 605 (1992); *Oliver v. American Motors Corp.* 616 F. Supp. 714 (1985)(VA Code clearly abrogates the common law rule that absolves entity of liability once corporation is dissolved). Both Triad Inc. and CREF continue to exist as corporate entities, although both are reported to be inactive.

independent expenditures; and that Triad Inc., CREF and CR (as political committees) violated 2 U.S.C. § 441b and 11 C.F.R. § 102.5 by accepting corporate contributions.³ Under an alternative theory, find probable cause to believe that Triad Inc., CREF and CR, as well as Carolyn Malenick as a corporate officer of Triad Inc. and CREF, violated 2 U.S.C. § 441b by making prohibited corporate contributions and expenditures.

(2) (3) Take no further action and close the file as to eight political action committees and their treasurers which had relationships with Triad/CSM and Triad Inc. (4) Authorize contingent suit authority.

II. BACKGROUND

These matters involve more than \$4 million in funds that were contributed to and expended during the 1996 election cycle by Triad/CSM, Triad Inc., CREF and CR (referred to collectively hereinafter as "the Triad Respondents") for the purpose of influencing various 1996 congressional elections.⁴ As set forth in the 117-page July 18,

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⁴ The Commission has made reason to believe or probable cause findings and entered into conciliation agreements with a number of respondent donors and campaign committees that dealt with or received assistance from the Triad Respondents in 1996. See General Counsel's Reports regarding (1) Robert Riley, Jr. and Bob Riley for Congress; (2) John/Ruth Stauffer and Sam Brownback for U.S. Senate; (3) Madison Project Fund Inc.; (4) Brian Babin and Brian Babin for Congress; and (5) Robert Cone. The Commission made probable cause findings against Robert Cone for violations relating to excessive contributions to Triad/CSM and Triad Inc., but split 2-3 (with one Commissioner who had voted for PCTB on tally being absent from the Executive Session) on recommendations relating to Mr. Cone's contributions to CREF and CR. The Commission also split 3-3 on this Office's recommendation to make probable cause findings against the Rick Hill Committee in connection with advertisements sponsored on its behalf by Triad Inc. and CR.

2001 General Counsel's Brief ("GC Brief"), which is incorporated by reference herein, the extensive factual record shows that the Triad Respondents, all of which were under the control of Carolyn Malenick, acting as affiliated, unregistered and nonreporting political committees, both accepted and made excessive contributions. In the alternative, the evidence shows that Triad Inc., CREF and CR each made hundreds of thousands of dollars in prohibited corporate contributions and expenditures. The vast majority of the facts supporting these violations were stipulated to by the Triad Respondents. *See* January 20, 2000 GCR forwarding Stipulations of Fact.

On October 4, 2001, Carolyn Malenick, on behalf of herself, as well as "Triad and related entities" submitted a two-page Response to the GC Brief ("the Response").⁵ Despite having previously asserted her Fifth Amendment privilege against self-incrimination rather than provide testimony in response to a Commission deposition subpoena, Ms. Malenick's response states that she "strongly disagrees" with this Office's probable cause recommendations, and that she "vigorously den[ies] the proposed findings of fact and law" in the GC Brief. The Response argues that the Commission should not approve this Office's recommendations, because the GC Brief purportedly does not include or reference three affidavits provided by Ms. Malenick or various interrogatory

⁵ Although the second page of the Response contains a header that states "Page 2 of 4," this Office confirmed with Ms. Malenick that the Response was only intended to include the two pages that were received. As this Office previously informed the Commission, counsel for Triad/CSM, Triad Inc., Ms. Malenick, CREF and CR withdrew from his representation after the GC Brief was served and designated Ms. Malenick as the point of contact for each of the Triad Respondents. In exchange for additional tolling, this Office granted the Triad Respondents an extension of time in which to respond to the GC Brief. *See* September 13, 2001 General Counsel's Report.

1 responses provided by the Triad Respondents during the investigation.⁶ The Response
2 implies that these materials would overcome any negative inference that the Commission
3 is entitled to draw from Ms. Malenick's Fifth Amendment assertion.

4 The Response asserts that "Triad" (the Response does not distinguish between
5 Triad/CSM and Triad Inc.) and Ms. Malenick acted in reliance on the advice of counsel,
6 generally denies any violation of the Act, then contends, without elaboration, that neither
7 engaged in coordination, that "Triad" did not serve as a conduit for unlawful candidate or
8 PAC contributions, that CREF and CR advertisements were not coordinated and
9 contained no express advocacy, and that these two entities were not political committees
10 and did not violate the ban against corporate contributions. *See* Response at p. 1. The
11 Response presents no facts or law supporting these conclusory denials and does not
12 dispute the evidence in the GC Brief.

13 In the face of no specific facts to the contrary, the Response leaves unchallenged
14 the evidence that each of the Triad Respondents made contributions and expenditures
15 totaling far in excess of \$1,000 for the purpose of influencing federal elections, including
16 expenditures that constituted in-kind contributions to various 1996 congressional
17 campaigns, and direct contributions (some of which were earmarked) through two
18 affiliated PACs under Triad's control. GC Brief at 14-24, 28-62, 76-99 (for Triad/CSM
19 and Triad Inc.) and GC Brief at 25-28, 62-75, 100-109 (for CREF and CR). Likewise,
20 there is no rebuttal to the evidence that numerous Triad/CSM and Triad Inc. publications

⁶ Ms. Malenick is evidently referring to an affidavit she provided in MUR 4633, and two affidavits she submitted on behalf of CREF and Triad, Inc. in MUR 4736. These affidavits, as well as the interrogatory responses of Triad Respondents are appended as Attachment 1.

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1 contained express advocacy and solicited contributions for specific federal candidates, or
2 that Triad/CSM and Triad Inc. forwarded several hundred thousand dollars in political
3 contributions to federal candidates and federal political action committees without
4 receiving payment for these services from either the donors or the recipients. GC Brief at
5 34-62. The Response does not dispute that the Triad Respondents received most of their
6 funding from excessive contributions from Robert Cone or through other excessive or
7 prohibited contributions. GC Brief at 28-33 and 91-93. Finally, the Response presents
8 no facts disputing the accuracy of any of the evidence regarding the coordination of the
9 CREF and CR advertising campaigns, all of which named congressional candidates or
10 their opponents, with their campaign committees.⁷ GC Brief at 62-75 and 100-109.

11 **III. ANALYSIS**

12 **A. The GC Brief Fairly Presented the Evidence**

13 The only specific points raised in the Response to the factual record contained in
14 the GC Brief is the assertion that the Triad Respondents could not have violated the Act

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⁷ On December 18, 2001, following a negotiated resolution to subpoena enforcement litigation, this Office deposed Kenneth "Buddy" Barfield, who managed the Economic Education Trust ("EET"), a Koch Industries, Inc.-funded entity that contributed \$1.8 million to finance advertisements sponsored by CREF and CR. Although Mr. Barfield provided testimony that strongly confirmed the GC Brief's interpretation of documentary evidence that the purpose of the EET contributions to CREF and CR was to fund "issue ads" that would help candidates favored by Koch Industries, Inc. in specific federal elections (*see* GC Brief at 101), this Office concluded that the testimony did not provide any new information that required supplemental briefing in this matter. In particular, Mr. Barfield testified that he had no knowledge regarding the possible coordination of CREF and CR advertisements with particular congressional campaigns. Mr. Barfield also testified that, consistent with its policies with regard to funding various groups sponsoring "issue ads" in connection with the 1996 congressional elections, EET only sent funds to CREF and CR after receiving assurances (in the form of an opinion letter from counsel to CREF and CR) that their activities would not contain express advocacy or constitute expenditures under FECA. The Barfield deposition, as well as the other depositions cited in the GC Brief, can be reviewed in full in the FEC shared drawer, *Ntsrv1/logcproj/Commissioners/Depos-Transcripts/MURs 4568, 4633, 4634 and 4736*.

1 because they acted in reliance on the advice of counsel and the assertion that the GC Brief
2 “completely ignored” three Malenick affidavits and unspecified interrogatory responses
3 from the Triad Respondents.

4 Given that Ms. Malenick asserted her Fifth Amendment privilege rather than
5 testify, and has not waived her attorney-client privilege to present an “advice-of-counsel”
6 defense, it is difficult to even evaluate the first assertion. Although reliance on the advice
7 of counsel might negate the *mens rea* required for finding that a particular violation was
8 “knowing and willful,” this Office is not recommending that the Commission find that
9 any of these violations were “knowing and willful.” Accordingly, while the asserted
10 reliance on the advice of counsel might appropriately be considered as a mitigating factor
11 during conciliation, the Response’s assertion as to the advice of counsel is not legally
12 relevant as to liability. *See FEC v. Friends of Jane Harman*, 59 F.Supp. 2d 1046, 1058
13 (C.D. Cal. 1999)(reliance on the advice of counsel is evidence of good faith belief that
14 conduct was not illegal and relevant to determining the amount of a civil penalty, but
15 does not absolve Respondents of liability for violation); *See also* May 8, 2001 General
16 Counsel’s Report in these MURs regarding John and Ruth Stauffer (recommending that
17 the Commission make a probable cause finding, but not a “knowing and willful” finding,
18 due to Respondents purported reliance on the advice of counsel).

19 The second assertion is untrue, because this Office considered and acknowledged
20 the Triad Respondents’ points of view in the GC Brief. First, the referenced affidavits
21 and interrogatories were obtained early in the investigation, and the general statements
22 made therein were later contradicted or superceded by more reliable information in the

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1 form of depositions, documents and stipulations.⁸ Despite this, the GC Brief did not
2 “ignore” relevant evidence in those materials. For example, although the GC Brief did
3 not specifically reference the Malenick affidavit submitted on behalf of Triad, Inc. in
4 MUR 4736, it set forth the Triad Respondents’ position on each of the points raised in the
5 affidavit, and then presented the deposition, documentary and stipulation evidence
6 refuting those positions. Specifically, the arguments that Triad held itself out to the world
7 as a for-profit corporation, that Rodriguez & Company did not provide any services to
8 candidates or political committees, and that Triad and its agents did not coordinate
9 advertising communications with campaigns, were all presented (and refuted) in the GC
10 Brief, *see* discussions at pages 28-34, 40-48, and 68-75. Second, contrary to the
11 Response, the GC Brief specifically referenced the one-page Malenick affidavit submitted
12 in MUR 4633 on pages 36 and 98 as support for Triad’s position that it did not earmark
13 PAC contributions for any specific congressional campaign. Third, the affidavit
14 submitted by Ms. Malenick on behalf of CREF in MUR 4736 was limited to establishing
15 that CREF undertook no activities in Montana in 1996. Since the GC Brief did not allege
16 to the contrary, there was no reason to cite this affidavit. Finally, where appropriate, the
17 GC Brief cited to interrogatory responses submitted by the Triad Respondents. *See* pages
18 29, 33 and 68.

19 That the Triad Respondents’ points of view were represented is further evidenced
20 by the GC Brief’s use of stipulations negotiated with their counsel, sworn deposition

⁸ The interrogatory responses are vague and conclusory, and as explained in a prior Report, this Office did not propose seeking more complete interrogatory answers from the Triad Respondents only because of their willingness to negotiate comprehensive Stipulations of Fact.

1 testimony of Triad employees and agents, and documentary evidence submitted by the
2 Triad Respondents. The Response does not point to any facts presented in the GC Brief
3 and claim they are untrue or distorted, nor show how the addition of any other facts in the
4 affidavits or interrogatory responses would change the legal analysis.

5 Finally, the notion that affidavits or answers to interrogatories submitted by
6 Ms. Malenick early in the investigation should serve to refute the negative inference that
7 can be drawn by her subsequent refusal to testify on Fifth Amendment grounds should be
8 rejected. Affidavits and interrogatory responses are helpful in setting the stage and
9 providing leads, and in some cases provide probative, and even sufficient, evidence to
10 reach a determination. This is not such a case. As the GC Brief shows, after the
11 Malenick affidavits and the interrogatory responses were received, this Office obtained
12 deposition evidence that contradicts these materials. This Office sought to depose Ms.
13 Malenick, who played a key role in all the activity, in order to elicit sworn testimony that
14 was subject to cross-examination, follow-up and clarification in a manner that her
15 carefully worded written responses did not permit. Because she chose to invoke her Fifth
16 Amendment privilege rather than testify, this opportunity was lost, and Ms. Malenick
17 should not be able to escape the negative inference based on her earlier submissions.⁹

⁹ For these types of reasons, federal courts have upheld a district court's power to strike (or disregard) testimony, whether live or in the form of an affidavit, from witnesses who assert their Fifth Amendment privilege and refuse to answer the government's deposition questions in order to shield their testimony from scrutiny. *See, e.g., U.S. v. Parcels of Land*, 903 F. 2d 36 (1st Cir. 1990); *Lawson v. Murray*, 837 F. 2d 653, 656 (4th Cir.), *cert denied*, 488 U.S. 831 (1988) (To allow a witness to testify and then assert the Fifth Amendment to escape scrutiny would be "a positive invitation to mutilate the truth."). Although this Office is not suggesting, and has never suggested, following such precedent to strike any testimony in this matter, the Commission should give little or no weight to Ms. Malenick's written submissions.

B. The Evidence Supports the Probable Cause Recommendations

1. Triad/CSM and Triad Inc. as Political Committees

a. Failure to Register and Report; Making and Receipt of Excessive Contributions

The evidence in the GC Brief shows that Triad/CSM and Triad, Inc. were organized and operated for political, not commercial, purposes; that each received far in excess of \$1,000 in contributions; and that each also made far in excess of \$1,000 in expenditures. Triad/CSM's and Triad Inc.'s major purpose was the election of candidates to federal office. Indeed, their self-avowed goals were to "1) Return Republican House Freshmen; 2) Increase by 30 the Republican House Majority; [and] 3) Increase Senate Republicans to a Filibuster-proof 60" and they translated these goals into expenditures and fundraising on behalf of, and in-kind contributions to, specific federal candidates. GC Brief at 17 (quoting numerous Triad publications). Unlike the situation in *FEC v. GOPAC*, 917 F. Supp. 851 (D.D.C. 1996), Triad/CSM and Triad Inc. made expenditures (including expenditures for express advocacy and contribution solicitations) and in-kind contributions to support actual identified federal candidates.¹⁰

During the 1995-1996 election cycle, Triad/CSM and Triad Inc. acted solely to further their political goals, and despite purporting to be for-profit commercial

¹⁰ The District Court concluded that although GOPAC had an ultimate purpose of influencing the election of Republican candidates to the House of Representatives in future elections, its immediate purposes for the years in question (1989-1990) were to (1) elect state and local candidates; and (2) to develop ideas and circulate them generally to Republican candidates and supporters, including, but not limited to, unidentified Republican candidates for federal office. 917 F. Supp. 851, 858 (1996). Further, while GOPAC made contributions to Republican candidates for state and local office, it did not make any direct contributions to, or otherwise directly support, candidates for federal office. *Id.* at 858 and 862. Further, the District Court concluded that GOPAC's indirect support of federal candidates by trying to develop future candidates and influence re-districting did not satisfy the major purpose test. *Id.* at 862-864.

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1 enterprises, did not send invoices to any of the individuals, corporations or PACs to
2 which they provided election-related information or services. Rather than building a base
3 of paying clients, Triad/CSM and Triad Inc. received the majority of its funding from a
4 single individual, Robert Cone, who testified that he provided funds to Triad/CSM and
5 Triad Inc. because he wanted to build a network of donors that would help elect
6 conservative candidates. GC Brief at 15, 28-34, 86-88. During 1995-1996, Mr. Cone
7 contributed in excess of \$1 million to Triad/CSM and Triad, Inc. on a "pay as you go
8 basis" and received the same services that were provided to others for free.¹¹ GC Brief at
9 15, 28-34, 76-88 and 91-94. Mr. Cone's own accounting records described his payments
10 to Triad/CSM and Triad, Inc. as "GI [Gift]: Political Indirect." GC Brief at 29.

11 Similarly, certain other individuals who provided funds to Triad explicitly characterized
12 them as contributions or donations, rather than fees for services. GC Brief at 29-31.

13 The GC Brief also sets forth detailed evidence that Triad/CSM and Triad Inc. each
14 made expenditures far in excess of \$1,000. GC Brief at 34-62, 76-86 and 95-98. See
15 2 U.S.C. § 431(8)(A)(i). For example, Triad/CSM and Triad Inc. paid Mr. Rodriguez
16 \$495,000 for his work in connection with the 1996 congressional elections, which
17 included his providing consulting services to targeted candidates during his political
18 audits of their campaigns. GC Brief at 22-25 and 40-48. Triad Inc. also paid Trenton
19 West \$32,270 to perform pre-emptive opposition research on Republican candidates

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¹¹ In 1995, Triad/CSM received \$200,000 from Robert Cone, and \$37,250 from other sources. Similarly, in 1996, Triad/CSM received \$465,500 from Robert Cone, and \$17,000 from other sources. Finally, in 1996, Triad Inc. received \$426,621 from Robert Cone, \$152,000 in "commissions" from CREF and CR, and \$28,000 from other sources. GC Brief at 29-31.

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1 being recommended to prospective donors, and in some instances, discussed this research
2 with the congressional campaign. GC Brief at 48. Triad/CSM and Triad Inc. also
3 provided valuable fundraising services by telephone and personal solicitation (e.g., see
4 discussion of Triad fundraising for the Sam Brownback campaign in GC Brief at 37-38
5 and for the Joe Pitts campaign in GC Brief at 43-44). In addition, Triad/CSM and Triad,
6 Inc. expended thousands of dollars to produce and distribute publications containing
7 express advocacy and contribution solicitations for particular federal candidates, and
8 forwarded contribution checks to their campaigns. GC Brief at
9 36, 49-62. Finally, Triad/CSM and Triad, Inc. made in excess of \$75,000 in direct
10 contributions to candidates through their affiliated, controlled PACS, AFE and CAFE.
11 GC Brief at 38-40 and 95-97.

12 Given the evidence that both Triad/CSM and Triad, Inc. met the contribution or
13 expenditure criteria and satisfied the major purpose test, both are political committees
14 within the meaning of the Act. 2 U.S.C. § 431(4)(A). Accordingly, this Office
15 recommends that the Commission find probable cause to believe that Carolyn Malenick
16 d/b/a Triad Management Services and Triad Management Services Inc. violated 2 U.S.C.
17 §§ 433 and 434 by failing to register and report as political committees.¹² In addition,
18 based on the evidence that both Triad/CSM and Triad, Inc. made and received excessive
19 contributions, this Office recommends that the Commission find probable cause to
20 believe that Carolyn Malenick d/b/a Triad Management Services and Triad Management

¹² If the Commission should determine that Triad/CSM was not required to report as a political committee, this Office, in the alternative, recommends that the Commission find probable cause that Triad/CSM violated 2 U.S.C. § 434(c) by failing to report independent expenditures.

1 Services Inc. violated 2 U.S.C. § 441a(a)(1) by making excessive contributions and
2 violated 2 U.S.C. §§ 441a(f) and 434, and 11 C.F.R. § 102.5 by accepting, failing to
3 report, and improperly depositing excessive contributions in 1995 and 1996.

4 **b. Earmarking of Contributions to AFE and CAFE**

5 The evidence establishes that Triad/CSM and Triad, Inc. controlled two PACs,
6 AFE and CAFE. GC Brief at 38-40. Therefore, implicit designations, instructions or
7 encumbrances which were communicated from the donor to Triad were effectively
8 received by these PACs and the contributions were forwarded to the donors' candidates
9 of choice.

10 The Commission previously found probable cause to believe that Robert Riley, Jr.
11 and John and Ruth Stauffer violated the 2 U.S.C. § 441a making excessive contributions,
12 through the Triad-organized PAC Coalition to Bob Riley for Congress and Sam
13 Brownback for US Senate. GC Brief at 34-40 and 98-99.¹³ In both cases, a portion of
14 their contributions flowed through the two Triad-controlled PACs, AFE and CAFE.
15 Thus, Triad/CSM (for the Riley, Jr. contributions) and Triad Inc. (for the Stauffer
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1 contributions) acted as conduits or intermediaries for these earmarked contributions, and
2 had an obligation to report this earmarking to both the Commission and the ultimate
3 recipients. 2 U.S.C. § 441a(a)(8). No such reports were made. Accordingly, this Office
4 recommends that the Commission find probable cause to believe that Carolyn Malenick
5 d/b/a Triad Management Services, and Triad Management Services, Inc. each violated
6 2 U.S.C. § 441a(a)(8) in connection with certain contributions sent through AFE and
7 CAFE.

8 2. CREF and CR as Political Committees

9 The evidence in the GC Brief shows that CREF and CR were organized and
10 operated for the purpose of running candidate-specific advertisements designed to
11 influence various 1996 congressional elections.¹⁴ Although CREF and CR avoided
12 express advocacy, the evidence establishes that their major purpose was to help elect
13 specific candidates to federal office, and not to educate the voters on a defined set of
14 issues.¹⁵ Indeed, the nominal leaders of CREF and CR acknowledged the connection
15 between their advertising and the 1996 congressional elections (GC Brief at 27-28).
16 Further, Triad Inc. operated the two groups, which in reality were simply bank accounts,
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¹⁴ Unlike entities such as GOPAC, which focused on state and local elections, and in developing future federal candidates, all of the CREF and CR activities were directly related to supporting specific identified candidates for federal office in the 1996 congressional elections.

¹⁵ As noted in the GC Brief, documents produced by EET, which was funded entirely by Koch Industries, Inc., indicate that it sent \$1.8 million to CREF and CR as a means of participating in specific congressional races, with the hope of helping to elect particular candidates, without restriction or instruction regarding the topics or issues to be addressed in the advertisements. GC Brief at 101-102, *See also* Barfield Deposition Tr. at 244-245, 309-310, and 338-341 (confirming GC Brief's interpretation of the EET documents).

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1 as nothing more than vehicles for advancing its own electoral agenda in connection with
2 the 1996 congressional elections. GC Brief at 17-22 and 25-28.

3 Triad Inc. (acting as the managing agent of both CREF or CR), following
4 extensive consultation with the Republican congressional campaigns in that district as
5 part of its political audits, chose the varied topics of the CREF and CR advertisements
6 (all of which mentioned one or both candidates by name) based on an analysis of what
7 issues would have the most impact on the congressional race, and not on the basis of an
8 ideological commitment to a particular issue. GC Brief at 69-75. The repeated contacts,
9 both in face-to-face meetings and by telephone, between Triad and the congressional
10 campaigns included the exchange of information regarding the campaigns' plans, projects
11 and needs with regard to the election. *See* GC Brief at 40-48 and Stipulations of Fact
12 with Triad/CSM and Triad Inc. at ¶ 3.4. The culmination of these repeated contacts were
13 telephone conversations in which the Republican congressional campaign in each of the
14 districts in which CREF or CR advertising was contemplated were asked to request or
15 suggest topics for the advertisements. GC Brief at 69, citing Oliver Depo. Tr. at 116,
16 122-129. The campaigns' issue preferences were recorded on a chart, and as noted in the
17 GC Brief, there was a high correlation between the topics requested or suggested by the
18 campaigns and the topics used in the candidate-specific CREF and CR advertisements.
19 GC Brief at 70-75. In such circumstances, it is clear that the campaigns either
20 "requested" or "suggested" that CREF and CR run particular advertisements; or that the
21 campaigns exercised control over the topics or "contents" of the communications by

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1 virtue of their substantial discussions or negotiations with Triad during the course of the
2 political audits.¹⁶ *See FEC v. Christian Coalition*, 52 F. Supp. 2d 45, 92 (D.D.C. 1999).

3 As set forth in the GC Brief, and discussed above, CREF and CR each made far in
4 excess of \$1,000 in coordinated expenditures. They coordinated with Republican
5 campaign committees through the Triad political audits, and the topics of many of the
6 advertisements were specifically requested or suggested by representatives of those
7 campaigns. GC Brief at 40-62 (detailing political audits and fundraising interaction) and
8 62-75 (detailing advertising campaign activities). Indeed, in one instance, the
9 Commission already has found probable cause that a CR expenditure was coordinated
10 with a congressional campaign where there was also evidence that the campaign solicited
11 contributions from its own donors to fund the CR advertising campaign that criticized the
12 candidate's opponent. GC Brief at 75 and fn 53. *See also* General Counsel's Brief and
13 Probable Cause Report regarding Brian Babin and Brian Babin for Congress.¹⁷

14 Thus, CREF and CR each met the criteria for political committee status by
15 making more than \$1,000 in coordinated expenditures, accepting more than \$1,000 in
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¹⁶ In the Explanation and Justification for its coordination regulations, the Commission noted that "numerous discussions with a campaign about a complex or controversial issue would not be considered 'substantial' for the purposes of [coordination], but a brief discussion as to how to phrase an issue, *or as to which issues to emphasize*, could be considered 'substantial.'" 65 Fed. Reg. 76144 (Dec. 6, 2000)(explaining 11 C.F.R. § 100.23)(emphasis added). The communications between Triad Inc. and the campaigns, particularly the telephone inquiries made by Jason Oliver, appear to have focused on what issues should be emphasized in the CREF and CR advertisements.

¹⁷ As noted above, Brian Babin and the Babin Campaign entered into a conciliation agreement in which they admitted alternative violations of the Act in connection with either an excessive in-kind contribution (if CR was a political committee) or a prohibited corporate in-kind contribution (if CR was a corporation) in the form of the coordinated Triad Inc./CR advertising campaign. The Response does not dispute any of the specific evidence that the Brian Babin campaign solicited a contribution to CR from one of its donors, Peter Cloeren.

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1 contributions and by having a major purpose of supporting the election of candidates for
2 federal office. Moreover, CREF's and CR's coordinated expenditures that constituted in-
3 kind contributions to specific congressional candidates exceeded the limitations
4 established by the Act. 2 U.S.C. § 441a(a)(1). Further, CREF and CR accepted and
5 deposited more than three million dollars in contributions that either exceeded the
6 limitations or violated the prohibitions established by the Act. 2 U.S.C. § 441a(f), GC
7 Brief at 63-66 and 104-107.¹⁸ Accordingly, this Office recommends that the Commission
8 find probable cause to believe that CR and CREF violated 2 U.S.C. §§ 433 and 434 by
9 failing to register and report as one or more political committees. In addition, this Office
10 also recommends that the Commission find probable cause to believe that CREF and CR
11 violated 2 U.S.C. §§ 441a(a)(1), 441a(f), 434, and 441b and 11 C.F.R. § 102.5 by
12 accepting, failing to report, and improperly depositing excessive and prohibited
13 contributions, and by making coordinated expenditures that constituted excessive in-kind
14 contributions in 1996.

15 3. Alternative Theory: Triad Inc. Made
16 Prohibited Corporate Expenditures

17 Should the Commission determine that Triad Inc. was not a political committee,
18 the GC Brief set forth extensive evidence that, under an alternative theory, Triad Inc.
19 violated 2 U.S.C. § 441b by making corporate expenditures, some of which constituted
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¹⁸ CREF accepted and deposited \$930,000 in excessive contributions and \$1,030,000 in prohibited corporate contributions. GC Brief at 105-106. CR accepted and deposited \$630,000 in excessive contributions and \$868,000 in prohibited corporate contributions. GC Brief at 106-107. As noted in the GC Brief, the Triad Inc. Fax Alert solicitations for contributions to CREF and CR make it clear that the funds would be used to support candidates in the upcoming congressional elections. GC Brief at 63-64.

1 in-kind contributions to federal candidates, and by using corporate resources to facilitate
2 political contributions in connection with various 1996 congressional elections. GC Brief
3 at 109-114. Ms. Malenick, as a corporate officer of Triad Inc., violated 2 U.S.C. § 441b
4 by consenting to these activities. *Id.*

5 Accordingly, this Office recommends that the Commission find probable cause to
6 believe that Triad Management Services, Inc. and Carolyn Malenick, as a corporate
7 officer, violated 2 U.S.C. § 441b by making and consenting to prohibited corporate
8 expenditures and contributions. This Office also recommends that the Commission find
9 probable cause to believe that Triad Management Services, Inc. and Carolyn Malenick, as
10 a corporate officer, violated 2 U.S.C. § 441b by using, and consenting to the use of,
11 corporate resources to facilitate the making of contributions.

12 4. Alternative Theory: CREF and CR
13 Made Prohibited Corporate Expenditures

14 Should the Commission determine that either CREF or CR were not political
15 committees, the GC Brief set forth extensive evidence that, under an alternative theory,
16 CREF and CR violated 2 U.S.C. § 441b by making corporate expenditures which
17 constituted in-kind contributions to federal candidates in connection with various 1996
18 congressional elections.¹⁹ GC Brief at 25-28, 62-75 and 114-116. Ms. Malenick, as a
19 corporate officer of both Triad Inc. and CREF, violated 2 U.S.C. § 441b by consenting to

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¹⁹ Although Carolyn Malenick effectively controlled CR, this Office concluded that she was not an officer of the corporation. While this Office considered making recommendations against CR President Peter Flaherty, it eventually concluded that there was insufficient evidence to show that he was personally involved in, or even aware that, the various CR advertising efforts had been coordinated with particular congressional campaigns.

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1 these activities. Accordingly, this Office recommends that the Commission find probable
2 cause to believe that Citizens for the Republic Education Fund and Carolyn Malenick, as
3 a corporate officer, and Citizens for Reform violated 2 U.S.C. § 441b by making, and
4 consenting to, prohibited corporate expenditures and in-kind contributions.

5 **C. No Further Action Recommendations**

6 At the onset of the investigation, the Commission made reason-to-believe findings
7 against nine political action committees that participated in Triad's Coalition of PACs in
8 connection with their contributions to Bob Riley for Congress and/or Sam Brownback for
9 US Senate, following the receipt of contribution checks from Robert Riley, Jr. and/or
10 John and Ruth Stauffer that were transmitted through Triad. *See* GC Brief at 34-40; and
11 General Counsel's Reports dated March 20, 2001 and May 8, 2001 in these MURs as to
12 Robert Riley, Jr. and John and Ruth Stauffer. Based on the totality of the evidence
13 gathered in its investigation, including the description of the contacts between Triad and
14 each of the PACs discussed in the GC Briefs, this Office recommends that the
15 Commission not further pursue the §§ 441f and 434 findings previously made against the
16 eight PACs which remain respondents in these matters.²⁰

17 This Office previously recommended that the Riley and Stauffer transfers be
18 viewed as excessive contributions from the original donors to the campaign committees

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²⁰ One of the nine PACs, the Madison Project Fund Inc., an SSF which authorized Triad to solicit donors outside of its restricted class, already has entered into a pre-probable cause conciliation agreement with the Commission for these activities. *See* General Counsel's Report regarding Madison Project Fund Inc. Based on the evidence, this Office concluded that the other SSFs that were part of the PAC Coalition never clearly authorized Triad to make solicitations on their behalf, and can credibly be argued to have accepted the Triad-forwarded checks as unsolicited contributions.

under 2 U.S.C. § 441a(a)(1) and 11 C.F.R. § 110.1(h), rather than as contributions in the name of another under 2 U.S.C. § 441f. Under the former theory, which was the basis for the Commission's probable cause findings against, and the approval of conciliation agreements with, the original donors, the PACs would have no liability under the Act.

For the reasons set forth above, this Office recommends that the Commission take no further action and close the file as to: American Free Enterprise PAC and David Bauer, as treasurer; Citizens Allied for Free Enterprise and Kurt Knight, as treasurer;²¹ Conservative Campaign Fund and Peter Flaherty, as treasurer; Citizens United Political Victory Fund and Kevin Allen, as treasurer; Conservative Victory Committee and Leif E. Noren, as treasurer; Eagle Forum PAC and Margaret Gaul, as treasurer; Faith, Family & Freedom PAC and Devin Anderson, as treasurer; Free Congress PAC and Thomas O'Connor, as treasurer.²²

IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY

²¹ The treasurers for Citizens Allied for Free Enterprise and Free Congress PAC have changed since the reason to believe findings were made in this matter.

²² Due to their affiliation with Triad/CSM and Triad Inc., AFE and CAFE shared a single contribution limit, and as a result made each made a number of \$1,000 excessive contributions to candidates who already had received a contribution from the other PAC. GC Brief at 95-97. Although AFE and CAFE also violated the Act by making these contributions, this Office is recommending that AFE and CAFE be included with the rest of the PACs in the Triad PAC Coalition, for which it is recommending the Commission take no further action and close the file

Further, AFE and CAFE were essentially shell entities established to further Triad's political goals, and this Office is recommending that the Commission make probable cause findings regarding these transactions against the real-parties-in-interest. Further, neither AFE nor CAFE have reported any activity since 1998.

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MURs 4568, 4633, 4634, and 4736
Probable Cause GCR for Triad/CSM
Triad Inc.; CREF, CR and Carolyn Malenick

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11 **V. CONTINGENT SUIT AUTHORITY**

12 In an effort to streamline the enforcement process, this Office also is requesting
13 that the Commission authorize contingent suit authority in this matter.

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VI. RECOMMENDATIONS

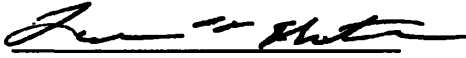
1. Find probable cause to believe that Carolyn Malenick d/b/a Triad Management Services violated 2 U.S.C. §§ 433 and 434.
2. Find probable cause to believe that Triad Management Services, Inc. violated 2 U.S.C. §§ 433 and 434.
3. Find probable cause to believe that Carolyn Malenick d/b/a Triad Management Services violated 2 U.S.C. § 434(c).
4. Find probable cause to believe that Carolyn Malenick d/b/a Triad Management Services violated 2 U.S.C. § 441a(f) and 11 C.F.R. § 102.5.
5. Find probable cause to believe that Triad Management Services Inc. violated 2 U.S.C. §§ 441a(f) and 441b and 11 C.F.R. § 102.5.
6. Find probable cause to believe that Carolyn Malenick d/b/a Triad Management Services violated 2 U.S.C. § 441a(a)(1).
7. Find probable cause to believe that Triad Management Services, Inc. violated 2 U.S.C. § 441a(a)(1).
8. Find probable cause to believe that Carolyn Malenick d/b/a Triad Management Services violated 2 U.S.C. § 441a(a)(8).
9. Find probable cause to believe that Triad Management Services, Inc. violated 2 U.S.C. § 441a(a)(8).

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- 1 10. Find probable cause to believe that Citizens for the Republic Education
2 Fund violated 2 U.S.C. §§ 433 and 434.
- 3 11. Find probable cause to believe that Citizens for Reform violated 2 U.S.C.
4 §§ 433 and 434.
- 5 12. Find probable cause to believe that Citizens for the Republic Education
6 Fund violated 2 U.S.C. §§ 441a(f) and 441b, and 11 C.F.R. § 102.5
- 7 13. Find probable cause to believe that Citizens for Reform violated 2 U.S.C.
8 §§ 441a(f) and 441b, and 11 C.F.R. § 102.5.
- 9 14. Find probable cause to believe that Citizens for the Republic Education
10 Fund violated 2 U.S.C. § 441a(a)(1).
- 11 15. Find probable cause to believe that Citizens for Reform violated 2 U.S.C.
12 § 441a(a)(1).
- 13 16. Find probable cause to believe that Triad Management Services, Inc. and
14 Carolyn Malenick, as corporate officer, violated 2 U.S.C. § 441b.
- 15 17. Find probable cause to believe that Citizens for the Republic Education
16 Fund and Carolyn Malenick, as corporate officer, violated 2 U.S.C.
17 § 441b.
- 18 18. Find probable cause to believe that Citizens for Reform violated 2 U.S.C.
19 § 441b.
- 20 19. Take no further action and close the file as to: American Free Enterprise
21 PAC and David Bauer, as treasurer; Citizens Allied for Free Enterprise
22 and Kirk Knight, as treasurer; Conservative Campaign Fund and Peter
23 Flaherty, as treasurer; Citizens United Political Victory Fund and Kevin
24 Allen, as treasurer; Conservative Victory Committee and Leif E. Noren, as
25 treasurer; Eagle Forum PAC and Margaret Gaul, as treasurer; Faith,
26 Family & Freedom PAC and Devin Anderson, as treasurer; and Free
27 Congress PAC and Thomas O'Connor, as treasurer.
- 28 20.
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- 32 21. Authorize contingent suit authority.

22. Approve the appropriate letters.

3/18/02
Date


Lawrence H. Norton
General Counsel

Staff Assigned: Mark Shonkwiler and Marianne Abely

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