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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 21-39-A
AGENDA ITEM
For the hearing of November 10, 2021

November 3, 2021

**MEMORANDUM**

To: The Commission

Through: Alec Palmer AP by KAH
Staff Director

From: Patricia C. Orrock PCO
Chief Compliance Officer

Dayna C. Brown DCB
Assistant Staff Director
Audit Division

Rickida Morcomb RM
Audit Manager

By: Ryan Krogen RK
Lead Auditor

Subject: Audit Hearing for Mike Braun for Indiana (A19-02)

Attached for your information is a copy of the Draft Final Audit Report (DFAR) and Office of General Counsel legal analysis that was provided to Mike Braun for Indiana (MBFI) on September 16, 2021. Counsel representing MBFI responded to the DFAR on October 4, 2021, and requested a hearing before the Commission to discuss the Audit Division's conclusion on Finding 4 - Receipt of Apparent Prohibited Contributions – Loans. The hearing was granted on October 12, 2021, and has been scheduled for November 10, 2021.

Receipt of Apparent Prohibited Contributions – Loans

This Finding is based on MBFI's failure to comply with 11 CFR §§100.33(b)(1)-(7), 100.52(b)(2), 100.82(a), 100.82(e), 100.82(e)(1) and (2), 100.142(e)(1) and (2), 103.3(b)(1), (4) and (5), 104.3(d)(1)(iii)-(v) and 52 U.S.C. §§30118, 30119, 30121 and 30122. The Federal Election Campaign Act ("Act") and related regulations require that a loan of money to a political committee by a lending institution be made in the ordinary

course of business, including assurance of repayment, and that political committees may not accept contributions from the general treasury funds of corporations.

In the Interim Audit Report (IAR), the Audit staff determined, based on loan documents provided by MBFI, there were apparent prohibited loans and lines of credit totaling $8,549,405. This included five loans and eleven lines of credit from financial institutions, totaling $7,049,405, that did not appear to be made in the ordinary course of business because they were not made on a basis that assured repayment based on either of the following:

- A loan may be considered made on a basis that assures repayment if the lending institution making the loan perfects a security interest in collateral owned by the candidate or political committee receiving the loan. Documents supplied by MBFI showed no guarantor nor collateral offered to the financial institutions making the loans.
- A loan may be considered made on a basis that assures repayment if the lending institution has obtained a written agreement whereby the candidate or political committee receiving the loan has pledged future receipts. MBFI did not provide documentation to support that it or the Candidate gave the financial institutions a pledge of future receipts or other method of assuring repayment.

The remaining $1,500,000 were two checks from one corporation that were reported as loans.

In response to the IAR, MBFI disagreed that the loans and lines of credits from financial institutions, totaling $7,049,405, were not made in the ordinary course of business for the following reasons:

(i) "The Audit Division simply fails to recognize that unsecured lines of credit are not unique to candidates for public office." MBFI provided a redacted copy of an unsecured line of credit issued to the MBFI counsel in March 2017. MBFI asserted that commercial lending institutions provide unsecured lines of credit to "creditworthy" individuals who are unlikely to default on the loan. MBFI counsel stated he was able to obtain the unsecured line of credit "without a net worth that remotely approaches that of the Candidate's."

(ii) "Under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment." "…it is the undersigned counsel's understanding and belief that the commercial lending institutions that made the [l]oans did so in their ordinary course of business (i.e., in their own commercial interests), and not for the purpose of influencing the outcome of the Candidate's candidacy."

According to MBFI, "There should be no dispute" that the loans satisfy three of the four components necessary for a loan to be deemed made in the ordinary course of business per 11 CFR §100.82 and §104.3(d)(1)(iii)-(v).

Regarding the fourth component, MBFI stated, "The critical inquiry,therefore, is whether the [l]oans were made on a basis that assures repayment." MBFI further stated, "Commission rules provide several express ways for commercial lending institutions to satisfy this remaining element, including obtaining a perfected security interest in collateral such as real or personal property and certificates of deposit, or a written agreement pledging a security in future receipts. While candidates, political committees, and the commercial lending institutions may rely on these express provisions as a 'safe harbor,' the Commission's rules also contain a fallback provision that permits the Commission to apply a 'totality of the circumstances' test todetermine whether loans were made on a basis that assures repayment."

(iii)"Prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness." MBFI stated, "In its own advisory opinions…, the Commission has noted that the critical inquiry is whether the terms, placed within the larger understanding of the relationship between the lending institution and the borrower, evidence an agreement that mitigates the risk of the loans to such a degree that repayment is assured."

And that "…the deference ordinarily given to a lending institution's commercial judgment (i.e., their own commercial interest) is not eliminated from the analysis simply because the loans are unsecured. Rather, the Commission must nonetheless give that deference while performing its analysis to determine whether significant risk mitigation still exists in the relationship between the parties to the agreement." MBFI noted that in the Cunningham Advisory Opinion (AO 1994-26), the Commission highlighted that "unsecured lines of credit can be made on a basis that assures repayment" and that the AO "citied several important contextual factors, including: the long-standing relationship between the commercial lender and the candidate; that the interest rates and additional contractual clauses were standard form agreement provisions matching agreements given to other customers; and the terms were not unduly favorable to the candidate."

> And that in the Matter Under Review (MUR) 5198 (Cantwell) enforcement matter, "the Commission considered the prior existing relationship between the candidate and the lending institution. Importantly, the Commission's analysis emphasized how the candidate's personal net worth far exceeded the actual value of the line of credit, and the Commission ultimately concluded that the banking institution validly relied on the very favorable ratio between the candidate's net worth and the value of the line of credit to determine that the risk of non-repayment was small."
>
> MBFI concluded that, "the Commission accepted the lending institution's conclusion that the loan agreement sufficiently mitigated the risk of nonrepayment because it bore the signature of a high-net-worth, creditworthy individual who, in the bank's own judgment, was very unlikely to default on the loan."

Concerning the two corporate checks reported as loans, totaling $1,500,000, MBFI said in response to the IAR these funds were "…the personal funds owed by Meyer Distributing to the Candidate, and the Candidate paid taxes on the amount as income to him." To support this statement, MBFI provided a letter from the Candidate's Certified Public Accountant (CPA).

The DFAR concluded that the loans and lines of credit totaling $7,049,405 were not made in the ordinary course of business because they were not made on a basis that assured repayment. The Audit staff specifically noted the following:

(i) The redacted bank documentation provided by MBFI demonstrates that no collateral was provided for the MBFI *counsel's* line of credit. It did not address MBFI. MBFI did not provide the the fully signed copy of a loan agreement, lending institution certificates or any other documentation from its financial institutions demonstrating that MBFI's loans were not unduly favorable to the Candidate, as required by 11 C.F.R. §104.3(d)(1).

(ii) The Audit staff agrees this finding is about MBFI receiving loans and lines of credit that were not made on the basis of assured repayment, irrespective of the totality of circumstances because: (1) documentation provided by MBFI showed no guarantor nor collateral offered to the financial institutions making the loans and (2) MBFI did not provide documentation to support that it or the Candidate gave the financial institutions a pledge of future receipts or other method of assuring repayment.

(iii)MBFI's reference to Advisory Opinion 1994-26 and MUR 5198 is applicable. However, MBFI failed to provide documentation to demonstrate that the loans and lines of credit were based on the assurance of repayment to include the following information from each of the lending institutions at issue: (1) the

> length of time of the Candidate's relationship with the bank; (2) the Candidate's creditworthiness, net worth, assets and repayment history; (3) the bank's underwriting criteria for unsecured loans of the type made to the Candidate; and (4) information demonstrating that the loan terms were not unduly favorable to the Candidate.

The DFAR further concluded that the two corporate checks reported as loans, totaling $1,500,000, were from a prohibited source absent records such as a stock purchase agreement between the Candidate and Meyer Distributing or the financial documents that the CPA reviewed to determine the stock sale. The DFAR also noted that MBFI's exit conference response indicated that the funds in question were compensation for services the Candidate provided Meyer Distributing; however, the letter from the CPA, in response to the Interim Audit Report, indicated the funds were for stock sale.

In response to the DFAR, MBFI provided a response consistent with the response it provided to the IAR concerning the loans and lines of credit totaling $7,049,405 not being made in the ordinary course of business. MBFI stated, in part:

> "Regarding the Audit Division's finding that various unsecured lines of credit (collectively, the "Loans") that the Candidate obtained from FDIC-insured commercial lending institutions were not made in the ordinary course of business, the Committee fervently disagrees with this finding for several reasons: (i) the Audit Division simply fails torecognize that unsecured lines of credit are not unique to candidates for public office; (ii) under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment; and (iii) prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness."

With regard to the two checks from one corporation totaling$1,500,000 that were reported as loans, in response to the DFAR, MBFI stated the following:

> "Regarding the deposit of funds into the campaign account from the Candidate's company, those funds were the personal funds owed by the Company to the Candidate, and the Candidate paid taxes on the amount as income to him. On June 16, 2021, the Committee submitted additional evidence from Gary Brick, the Candidate's CPA, to substantiate the fact that such funds were the personal funds of the Candidate. This evidence was submitted to the Commission with the understanding that, due to privacy concerns, it would not made part of the public record."

The Audit staff notes that, absent documentation to demonstrate the loans and lines of credit totaling $7,049,405 were made on a basis that assured repayment, they

were not made in the ordinary course of business. Additionally, absent documentation that verifies or supports the CPA's conclusion regarding the sale of stock, the Audit staff maintains the $1,500,000 appears to be from a prohibited source.

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Rickida Morcomb or Ryan Krogen 202-694-1200.

Attachments:
- Draft Final Audit Report of the Audit Division on Mike Braun for Indiana
- Office of General Counsel Legal Analysis, dated September 10, 2021
- MBFI Response to Draft Final Audit Report, dated October 4, 2021

cc: Office of General Counsel

# Draft Final Audit Report of the Audit Division on Mike Braun for Indiana
(August 7, 2017 - December 31, 2018)

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## Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.[1] The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

## Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

## About the Campaign (p. 2)

Mike Braun for Indiana is the principal campaign committee for Michael K. Braun, Republican candidate for the United States Senate from the state of Indiana, and is headquartered in Zionsville, Indiana. For more information, see the Campaign Organization Chart, p. 2.

## Financial Activity (p. 2)

| | |
|---|---|
| **• Receipts** | |
| o Contributions from Individuals | $ 6,336,454 |
| o Contributions from the Candidate | 13,938 |
| o Contributions from Other Political Committees | 833,940 |
| o Transfers from Other Authorized Committees | 802,946 |
| o Candidate Loans | 11,666,483 |
| o Offsets to Operating Expenditures | 3,097 |
| **Total Receipts** | **$ 19,656,858** |
| **• Disbursements** | |
| o Operating Expenditures | $ 18,016,343 |
| o Candidate Loan Repayments | 1,148,925 |
| o Contribution Refunds | 76,875 |
| o Other Disbursements | 342,000 |
| **Total Disbursements** | **$ 19,584,143** |

## Findings and Recommendations (p. 3)

- Misstatement of Financial Activity (Finding 1)
- Failure to File 48-Hour Notices (Finding 2)
- Disclosure of Occupation and/or Name of Employer (Finding 3)
- Receipt of Apparent Prohibited Contributions – Loans (Finding 4)
- Receipt of Contributions in Excess of the Limit (Finding 5)
- Disclosure of Memo Entries and Candidate Loans (Finding 6)
- Prohibited Candidate Personal Loan Repayments (Finding 7)

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[1] 52 U.S.C. §30111(b).

# Draft Final Audit Report of the Audit Division on Mike Braun for Indiana

(August 7, 2017 - December 31, 2018)

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# Part I
# Background

## Authority for Audit
This report is based on an audit of Mike Braun for Indiana (MBFI), undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 52 U.S.C. §30111(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 52 U.S.C. §30104. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. 52 U.S.C. §30111(b).

## Scope of Audit
Following Commission-approved procedures, the Audit staff evaluated various risk factors and as a result, this audit examined:
1. the receipt of excessive contributions and loans;
2. the receipt of contributions from prohibited sources;
3. the disclosure of contributions received;
4. the disclosure of individual contributors' occupation and name of employer;
5. the consistency between reported figures and bank records;
6. the completeness of records; and
7. other committee operations necessary to the review.

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# Part II
# Overview of Campaign

## Campaign Organization

| Important Dates | |
|---|---|
| • Date of Registration | August 10, 2017[2] |
| • Audit Coverage | August 7, 2017 [3] - December 31, 2018 |
| **Headquarters** | Zionsville, Indiana |
| **Bank Information** | |
| • Bank Depositories | One |
| • Bank Accounts | One checking account |
| **Treasurer** | |
| • Treasurer When Audit Was Conducted | Thomas Datwyler (1/1/2019 – Present) |
| • Treasurer During Period Covered by Audit | Travis Kabrick (8/7/2017 – 12/31/2018) |
| **Management Information** | |
| • Attended FEC Campaign Finance Seminar | Yes |
| • Who Handled Accounting and Recordkeeping Tasks | Paid Staff |

## Overview of Financial Activity
### (Audited Amounts)

| Cash on hand @ August 7, 2017 | $ 0 |
|---|---|
| **Receipts** | |
| ○ Contributions from Individuals | 6,336,454 |
| ○ Contributions from the Candidate | 13,938 |
| ○ Contributions from Other Political Committees | 833,940 |
| ○ Transfers from Other Authorized Committees | 802,946 |
| ○ Candidate Loans | 11,666,483 |
| ○ Offsets to Operating Expenditures | 3,097 |
| **Total Receipts** | **$ 19,656,858** |
| **Disbursements** | |
| ○ Operating Expenditures | 18,016,343 |
| ○ Candidate Loan Repayments | 1,148,925 |
| ○ Contribution Refunds | 76,875 |
| ○ Other Disbursements | 342,000 |
| **Total Disbursements** | **$ 19,584,143** |
| **Cash on hand @ December 31, 2018** | **$ 72,715** |

[2] MBFI filed a Statement of Organization on August 10, 2017. Mike Braun filed a Statement of Candidacy on August 9, 2017.
[3] MBFI opened its bank account on August 7, 2017.

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# Part III
# Summaries

## Findings and Recommendations

### Finding 1. Misstatement of Financial Activity

During audit fieldwork, a comparison of MBFI's reported financial activity with its bank records revealed a misstatement of receipts and disbursements in calendar year 2018. MBFI overstated receipts by $6,293,350 and disbursements by $6,294,482. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission). MBFI stated, "…the former treasurer did not ultimately report the repayments from the Candidate's personal funds correctly" and that loan repayments should have been reported as in-kind contributions instead of as memo entries as recommended by the Audit staff. Absent the filing of amended reports or a Form 99, MBFI's receipts and disbursements remain misstated.
(For more detail, see p. 6.)

### Finding 2. Failure to File 48-Hour Notices

During audit fieldwork, the Audit staff identified that MBFI failed to file or untimely filed 48-hour notices for ten contributions totaling $262,600. This amount included seven contributions totaling $9,100 for which MBFI misreported contribution dates. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission). MBFI stated the former treasurer failed to properly file the 48-hour notices and that "the Committee will amend the reports to report the correct dates of all contributions." Absent the filing of amended reports or a Form 99, MBFI did not correct the public record for the misreported dates of the seven contributions totaling $9,100.
(For more detail, see p. 8.)

### Finding 3. Disclosure of Occupation and/or Name of Employer

During audit fieldwork, a review of contributions from individuals requiring itemization indicated that 1,363 contributions totaling $1,464,449 lacked or inadequately disclosed the required occupation and/or name of employer information. MBFI did not sufficiently demonstrate "best efforts" to obtain, maintain and submit the required information. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission), but stated it prepared amended reports and obtained the missing information for all but 387 contributors. Absent the filing of amended reports or a Form 99, MBFI did not correct the public record for contributions totaling $1,464,449 that lacked or inadequately disclosed the required occupation and/or name of employer information.
(For more detail, see p. 10.)

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## Finding 4. Receipt of Apparent Prohibited Contributions – Loans

During audit fieldwork, a review of loan documents provided by MBFI, indicated apparent prohibited loans and lines of credit totaling $8,549,405. This included five loans and eleven lines of credit from financial institutions, totaling $7,049,405, that did not appear to be made in the ordinary course of business. These loans were not made on a basis that assured repayment and, therefore, appeared to be prohibited contributions from the financial institutions.

Additionally, the Audit staff identified two checks from one corporation totaling $1,500,000 that were reported as loans.

In response to the Interim Audit Report recommendation, MBFI did not provide documentation from MBFI's financial institutions, but stated it "fervently" disagreed that the loans and lines of credits were not made in the ordinary course of business and stated that the Audit Division had not correctly applied the law or Commission precedents. Additionally, MBFI stated that the Audit Division failed "to recognize that unsecured lines of credit are not unique to candidates for public office." MBFI also provided a letter it asserts supports that the two corporate checks were from a permissible source. However, no documentation was provided to support the assertions outlined within the letter. Absent additional documentation, the Audit staff maintains the loans and lines of credit totaling $7,049,405 were not made on a basis that assured repayment and the $1,500,000 in corporate checks were not from a permissible source.
(For more detail, see p. 13.)

## Finding 5. Receipt of Contributions in Excess of the Limit

During audit fieldwork, the Audit staff reviewed contributions from individuals and political committees to determine if any exceeded the contribution limit. Based on these reviews, MBFI received apparent excessive contributions totaling $1,173,557. This included apparent excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212. These errors occurred as a result of MBFI not resolving the excessive portion of contributions in a timely manner and by designating contributions for Primary or General debt that had already been extinguished.

In response to the Interim Audit Report recommendation, MBFI did not provide documentation that the contributions in question were not excessive. MBFI stated it will provide confirmations from the contributors regarding the reattribution and redesignation of contributions, based on the reconciliations performed by MBFI's current treasurer. Absent documentation, the Audit staff maintains that MBFI received excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212.
(For more detail, see p. 22.)

## Finding 6. Disclosure of Memo Entries and Candidate Loans

During audit fieldwork, the Audit staff determined that MBFI failed to properly disclose joint fundraising memo entries totaling $933,814 from 13 joint fundraising committees. MBFI also failed to properly disclose the correct loan balances and loan terms for 29

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transactions totaling $11,569,963. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission) and did not provide any documentation. However, regarding disclosure of joint fundraising memo entries, MBFI stated "all have been corrected and will be included in the amendments that have been prepared to be filed." Regarding the disclosure of loan balances and loan terms, MBFI did not agree with the finding. Absent filing of amendments or a Form 99, MBFI has not corrected the public record regarding memo entries from joint fundraisers totaling $933,814, and loan balances and terms for transactions totaling $11,569,963.
(For more detail, see p. 28.)

## Finding 7. Prohibited Candidate Personal Loan Repayments

Based on a review of loans, the Audit staff determined that MBFI made excessive Primary candidate loan and interest repayments totaling $750,669. This amount is in excess of the $250,000 limit permitted for repayment to the Candidate within 20 days following the Primary election. In response to the Interim Audit Report recommendation, MBFI stated, "…the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission,* Civil No. 19-cv-908…." The Audit staff maintains MBFI did not comply with 11 CFR §116.11 (d).
(For more detail, see p. 33.)

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# Part IV
# Findings and Recommendations

## Finding 1. Misstatement of Financial Activity

### Summary
During audit fieldwork, a comparison of MBFI's reported financial activity with its bank records revealed a misstatement of receipts and disbursements in calendar year 2018. MBFI overstated receipts by $6,293,350 and disbursements by $6,294,482. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission). MBFI stated, "…the former treasurer did not ultimately report the repayments from the Candidate's personal funds correctly" and that loan repayments should have been reported as in-kind contributions instead of as memo entries as recommended by the Audit staff. Absent the filing of amended reports or a Form 99, MBFI's receipts and disbursements remain misstated.

### Legal Standard
**Contents of Reports.** Each report must disclose:
- The amount of cash on hand at the beginning and end of the reporting period;
- The total amount of receipts for the reporting period and for the election cycle;
- The total amount of disbursements for the reporting period and for the election cycle; and
- Transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 52 U.S.C. §30104(b)(l), (2), (3), (4), and (5).

### Facts and Analysis

**A. Facts**
During audit fieldwork, the Audit staff reconciled MBFI's reported financial activity with its bank records for calendar years 2017 and 2018. In addition to the bank records provided by MBFI, on May 9, 2019, the Commission issued subpoenas to one vendor and its financial institution to obtain documentation necessary to complete the comparison of MBFI's financial activity to the information contained in the disclosure reports filed with the Commission. [4] The reconciliation determined that MBFI misstated receipts and disbursements for 2018. The following chart details the discrepancies between MBFI's disclosure reports and bank activity. The succeeding paragraphs explain why the discrepancies occurred.

| **2018 Committee Activity** | | | |
|---|---|---|---|
| | **Reported** | **Bank Records** | **Discrepancy** |
| Beginning Cash on hand @ January 1, 2018 | $2,313,439 | $2,313,439 | $0 |
| Receipts | $22,376,798 | $16,083,448 | $6,293,350 |

[4] MBFI was cooperative and attempted to comply with the Audit staff's request for documentation but was unable to obtain the requested information from the associated vendors, resulting in the issuance of subpoenas.

| **2018 Committee Activity** | | | |
|---|---|---|---|
| | **Reported** | **Bank Records** | **Discrepancy** |
| | | | Overstated |
| Disbursements | $24,618,654 | $18,324,172 | $6,294,482<br>Overstated |
| Ending Cash on hand @ December 31, 2018 | $71,583 | $72,715 | $1,132<br>Understated |

The overstatement of receipts resulted from the following:

- Two unreported Candidate loans + 96,520
- Candidate loans incorrectly reported - 6,388,558
- Unexplained differences - 1,312

**Net Overstatement of Receipts** **$ 6,293,350**

The overstatement of disbursements resulted from the following:

- Disbursements not reported or reported incorrectly + 2,736
- Credit card fees over-reported - 4,472
- Candidate loan repayments not reported + 96,520
- Candidate loans incorrectly reported - 6,388,558
- Unexplained differences - 708

**Net Overstatement of Disbursements** **$ 6,294,482**

The $1,132 understatement of the ending cash on hand was a result of the reporting discrepancies described above.

The Candidate loan and loan repayments totaling $6,388,558 were the result of MBFI misreporting the conversion of Candidate loans to contributions. The converted loan amounts should have been disclosed as memo entries on Schedule A (Itemized Receipts) and Schedule B (Itemized Disbursements), given the campaign finance software used by MBFI.[5] Instead, MBFI reported the loan amounts as transactions on Schedules A and B, which overstated receipts and disbursements, respectively.

The credit card fees totaling $4,472 were the net result of some fees being over-reported and some fees being under-reported.

**B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter during the exit conference with MBFI representatives and provided schedules detailing the misstatement of financial activity.

In response to the exit conference, MBFI submitted a written response as follows:

> "The Committee provided documentation related to this finding during the audit process, including access to all banking records, electronic transaction processors,

[5] Various campaign finance software handle the conversion of a candidate loan to a contribution differently, but in no case should this conversion be reported as an in-kind contribution. The software used by MBFI treats the conversion of a candidate loan to a contribution as memo entries on Schedules A and B. Regardless of which campaign finance software a committee chooses to use, the amounts in the disclosure reports must match the bank statement activities.

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> and the Committee's electronic information database. The Committee has no new materials to provide with this response, but it is the Committee's belief that the FEC's preliminary finding mischaracterizes certain transactions. The Committee will likely be requesting Commission guidance on legal questions related to this finding[6], and the Committee intends to take further corrective action as may be required at the conclusion of this matter."

The Interim Audit Report recommended that MBFI amend its disclosure reports or file a Form 99[7] to correct the misstatements noted above and reconcile the cash balance on its most recently filed report to correct any subsequent discrepancies.

**C. Committee Response to Interim Audit Report**
In response to the Interim Audit Report recommendation, MBFI stated, "…the former treasurer did not ultimately report the repayments from the Candidate's personal funds correctly" and "The current treasurer has since conferred with the software provider and legal counsel, and they are all in agreement that the proper reporting of the payments is as an in-kind contribution." MBFI stated that the lines of credit were in the name of the Candidate and repaid from his personal funds, without first being deposited into MBFI's bank account, and it prepared amended reports to "more clearly disclose the source(s) of the funds." MBFI also stated that "…while the transaction(s) were not reported on the correct lines of the FEC report, all the transactions were publicly disclosed."

The Audit staff notes the Candidate loans and lines of credit were not taken out in the name of MBFI, as such, the repayments were not made on behalf of MBFI and should not be reported as in-kind contributions. The transactions were between the Candidate and the financial institution. As a result, and in consultation with the Reports Analysis Division, the Audit staff maintains that the converted loans should have been disclosed as memo entries on Schedule A and Schedule B, given the campaign finance software used by MBFI[5], rather than in-kind contributions. The Audit staff further notes that MBFI has not filed amendments or a Form 99 as of this report.

Absent the filing of amended reports or a Form 99, MBFI's 2018 receipts remain overstated by $6,293,350 and disbursements overstated by $6,294,482.

## Finding 2. Failure to File 48-Hour Notices

### Summary

During audit fieldwork, the Audit staff identified that MBFI failed to file or untimely filed 48-hour notices for ten contributions totaling $262,600. This amount included seven contributions totaling $9,100 for which MBFI misreported contribution dates. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission). MBFI stated the former treasurer failed to properly file the 48-hour notices and that "the Committee will amend the reports

[6] MBFI did not submit a Request for Consideration of a Legal Question by the Commission with respect to this finding.
[7] MBFI was advised by the Audit staff that if it chose to file a Form 99, instead of amending its disclosure reports, the form must contain all pertinent information that is required on each schedule.

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to report the correct dates of all contributions." Absent the filing of amended reports or a Form 99, MBFI did not correct the public record for the misreported dates of the seven contributions totaling $9,100.

### Legal Standard

**Last-Minute Contributions (48-Hour Notice).** Campaign committees must file special notices regarding contributions of $1,000 or more received less than 20 days but more than 48-hours before any election in which the candidate is running. This rule applies to all types of contributions to any authorized committee of the candidate, including:
- Contributions from the candidate;
- Loans from the candidate and other non-bank sources; and
- Endorsements or guarantees of loans from the banks. 11 CFR §104.5(f).

### Facts and Analysis

**A. Facts**
During audit fieldwork, the Audit staff identified 302 contributions totaling $2,345,363 that equaled or exceeded $1,000 and were received during the 48-hour notice reporting period for the Primary and General elections. A review of these contributions indicated that MBFI did not file 48-hour notices for three contributions totaling $3,400 and untimely filed 48-hour notices for seven contributions totaling $259,200. These contributions are summarized below.

| | Primary | General | Total |
|---|---|---|---|
| 48-Hour Notices Not Filed | $0 | $3,400 | $3,400 |
| 48-Hour Notices Filed Untimely | $253,500 | $5,700 | $259,200 |
| **TOTAL** | **$253,500** | **$9,100** | **$262,600** |

In addition, seven contributions totaling $9,100 for the General election, noted above, were disclosed with the incorrect receipt dates.

**B. Interim Audit Report & Audit Division Recommendation**
The Audit staff discussed this matter during the exit conference with MBFI representatives and provided a schedule of the contributions for which 48-hour notices were not filed or were filed in an untimely manner, as well as contributions with misreported dates.

In response to the exit conference, MBFI submitted a written response as follows:

> "The Committee provided documentation related to this finding during the audit process, including providing the FEC with access to the Committee's accounts and electronic information database. The Committee has no new materials to provide with this response, and the Committee intends to take any such corrective action as may be required at the conclusion of this matter."

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The Interim Audit Report recommended that MBFI provide any additional comments it deemed necessary and submit documentation demonstrating that:

- The 48-hour notices for the contributions in question were timely filed;
- The contributions were received outside of the 48-hour notice reporting period; and
- Amend its disclosure reports or file a Form 99[7] to correct the misreported dates for the seven contributions totaling $9,100.

**C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MBFI stated, "Although the former treasurer's failure to file 48-hour notices is uncorrectable at this point, the Committee will amend the reports to report the correct dates of all contributions if the Audit Division's team will provide to the Committee a list of 48-hour notices that were either not timely filed or not filed at all."

The Audit staff notes, as stated in Section B of this finding, MBFI was provided with a schedule of the contributions for which 48-hour notices were not filed or were filed in an untimely manner, as well as contributions with misreported dates at the exit conference. In addition, the Audit staff offered to send the schedule again with the issuance of the Interim Audit Report if MBFI requested it; however, MBFI did not make the request at that time. The Audit staff again provided the relevant information upon receipt of MBFI's response to the Interim Audit Report.

The Audit staff acknowledges MBFI's statement that the "…former treasurer's failure to file 48-hour notices is uncorrectable at this point…" as the response to why there were untimely and unfiled 48-hour notices totaling $262,600. However, absent the filing of amended reports or a Form 99, MBFI has not corrected the public record for the misreported dates of the seven contributions totaling $9,100.

## Finding 3. Disclosure of Occupation and/or Name of Employer

### Summary

During audit fieldwork, a review of contributions from individuals requiring itemization indicated that 1,363 contributions totaling $1,464,449 lacked or inadequately disclosed the required occupation and/or name of employer information. MBFI did not sufficiently demonstrate "best efforts" to obtain, maintain and submit the required information. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission), but stated it prepared amended reports and obtained the missing information for all but 387 contributors. Absent the filing of amended reports or a Form 99, MBFI did not correct the public record for contributions totaling $1,464,449 that lacked or inadequately disclosed the required occupation and/or name of employer information.

### Legal Standard

A. **Itemization Required for Contributions from Individuals.** An authorized candidate committee must itemize any contribution from an individual if it exceeds

$200 per election cycle, either by itself or when combined with other contributions from the same contributor. 52 U.S.C. §30104(b)(3)(A).

**B. Required Information for Contributions from Individuals.** For each itemized contribution from an individual, the committee must provide the following information:

- The contributor's full name and address (including zip code);
- The contributor's occupation and the name of his or her employer;
- The date of receipt (the date the committee received the contribution);
- The amount of the contribution; and
- The election cycle year-to-date total of all contributions from the same individual. 52 U.S.C. §30104(b)(3)(A) and 11 CFR §§100.12 and 104.3(a)(4)(i).

**C. Best Efforts Ensure Compliance.** When the treasurer of a political committee shows that the committee used best efforts (see below) to obtain, maintain, and submit the information required by the Act, the committee's reports and records will be considered in compliance with the Act. 52 U.S.C. §30102(i) and 11 CFR §104.7(a).

**D. Definition of Best Efforts.** The treasurer and the committee will only be deemed to have exercised "best efforts" if the committee satisfied all of the following criteria.

- All written solicitations for contributions included:
  - A clear request for the contributor's full name, mailing address, occupation, and name of employer; and
  - The statement that such reporting is required by Federal law.
- Within 30 days of receipt of the contribution, the treasurer made at least one effort to obtain the missing information, in either a written request or a documented oral request.
- The treasurer reported any contributor information that, although not initially provided by the contributor, was obtained in a follow-up communication or was contained in the committee's records or in prior reports that the committee filed during the same two-year election cycle. 11 CFR §104.7(b).

## Facts and Analysis

### A. Facts

MBFI did not disclose or inadequately disclosed the required occupation and/or name of employer information for contributions requiring itemization on its FEC reports, as of the date of the audit notification letter.

| Contribution Lacking or Inadequate Occupation and/or Name of Employer Disclosure | |
|---|---|
| Number of Contributions | 1,363 |
| Dollar Value of Contributions | $1,464,449 |
| Percent of Contributions | 26% |

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**1. Contributor Information Provided but Amendments Not Filed:**
During audit fieldwork, MBFI provided the Audit staff with the required contributor occupation and/or name of employer information; however, MBFI did not report the required amendments for the following:

| Contributor Information Provided but Amendments Not Filed | |
|---|---|
| Number of Contributions | 88[8] |
| Dollar Value of Contributions | $73,622 |

**2. Best Efforts Documentation Not Provided:**
MBFI did not provide the Audit staff records to document "best efforts" for the following:

| Best Efforts Documentation Not Provided by Committee | |
|---|---|
| Number of Contributions | 1,275 |
| Dollar Value of Contributions | $1,390,827 |

**3. Additional Information:**
MBFI disclosed the following unacceptable entries on Schedule A:

- "Information Requested" for 1,125 contributions totaling $1,340,623, and
- Inadequate occupation and/or name of employer for 238 contributions totaling $123,826.

**B. Interim Audit Report & Audit Division Recommendation**
The Audit staff provided schedules and discussed the disclosure of the contributors' occupation and/or name of employer information with MBFI representatives during audit fieldwork and at the exit conference. MBFI representatives did not provide any comments during audit fieldwork.

In response to the exit conference, MBFI submitted a written response as follows:

> "The Committee provided documentation related to this finding during the audit process and has no new materials to provide with this response. To date, the Committee has made additional preemptive adjustments to its contributor information and intends to take any such corrective action as may be required at the conclusion of this matter."

[8] MBFI's database for the audit period, provided to the Audit staff during fieldwork, contained the occupation and name of employer information.

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The Interim Audit Report recommended that MBFI amend its reports or file a Form 99 [7] to report and submit the occupation and/or name of employer information for the 1,363 contributions.

**C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MBFI submitted a written response as follows:

> "The Committee has researched all donors whose contributions require 'best efforts' to obtain and report employer/occupation information. Amended reports have been prepared and the Committee has obtained and will report employer/occupation information for most donors for which the Audit Division identified as missing information. As of this writing, there are only 387 remaining donors with 'Information Requested' for the 2018 election cycle. The Committee will continue its ongoing 'best efforts' to obtain and report the employer/occupation information for the remaining 387 donors from the 2018 election cycle."

The Audit staff notes that MBFI has not filed amendments or a Form 99 as of this report. Absent the filing of amended reports or a Form 99, MBFI has not corrected the public record for contributions totaling $1,464,449 that lacked or inadequately disclosed the required occupation and/or name of employer information.

## Finding 4. Receipt of Apparent Prohibited Contributions – Loans

### Summary

During audit fieldwork, a review of loan documents provided by MBFI, indicated apparent prohibited loans and lines of credit totaling $8,549,405. This included five loans and eleven lines of credit from financial institutions, totaling $7,049,405, that did not appear to be made in the ordinary course of business. These loans were not made on a basis that assured repayment and, therefore, appeared to be prohibited contributions from the financial institutions.

Additionally, the Audit staff identified two checks from one corporation totaling $1,500,000 that were reported as loans.

In response to the Interim Audit Report recommendation, MBFI did not provide documentation from MBFI's financial institutions, but stated it "fervently" disagreed that the loans and lines of credits were not made in the ordinary course of business and stated that the Audit Division had not correctly applied the law or Commission precedents. Additionally, MBFI stated that the Audit Division failed "to recognize that unsecured lines of credit are not unique to candidates for public office." MBFI also provided a letter it asserts supports that the two corporate checks were from a permissible source. However, no documentation was provided to support the assertions outlined within the letter. Absent additional documentation, the Audit staff maintains the loans and lines of credit totaling $7,049,405 were not made on a basis that assured repayment and the $1,500,000 in corporate checks were not from a permissible source.

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**Legal Standard**

**A. Loans Excluded from the Definition of Contribution.** A loan of money to a political committee by a state bank, a federally chartered depository institution (including national bank) or a depository institution whose deposits and accounts are insured by the Federal Deposit Insurance Corporation or the National Credit Union Administration is not a contribution by the lending institution if such loan is made in accordance with applicable banking laws and regulations and is made in the ordinary course of business.

A loan will be deemed to be made in the ordinary course of business if it bears the usual and customary interest rate of the lending institution for the category of loan involved; is made on a basis which assures repayment; is evidenced by a written instrument and is subject to a due date or amortization schedule. 11 CFR §100.82(a).

**B. Assurance of Repayment.** Commission regulations state a loan is considered made on a basis which assures repayment if:

- The lending institution making the loan has perfected a security interest in collateral owned by the candidate or political committee receiving the loan;
- Amounts guaranteed by secondary sources of repayment, such as guarantors and cosigners, do not exceed the contribution limits of 11 CFR part 110;
- The lending institution making the loan has obtained a written agreement whereby the candidate or political committee receiving the loan has pledged future receipts, such as public financing payments; and
- If these requirements are not met, the Commission will consider the totality of circumstances on a case by case basis in determining whether the loan was made on a basis which assured repayment. 11 CFR §100.82(e).

**C. Gift, subscription, loan, advance or deposit of money.** A loan is a contribution at the time it is made and is a contribution to the extent that it remains unpaid. The aggregate amount loaned to a candidate or committee by a contributor, when added to other contributions from that individual to that candidate or committee, shall not exceed the contribution limits set forth at CFR § 110. A loan, to the extent it is repaid, is no longer a contribution. 11 CFR §100.52(b)(2).

**D. Receipt of Prohibited Contributions General Prohibition.** Candidates and committees may not accept contributions (in the form of money, in-kind contributions or loans):

- In the name of another; or
- From the treasury funds of the following prohibited sources:
    - Corporations (this means any incorporated organization, including a non-stock corporation, an incorporated membership organization, and an incorporated cooperative);
    - Federal government contractors (including partnerships, individuals, and sole proprietors who have contracts with the federal government); and
    - Foreign nationals (including individuals who are not U.S. citizens and not lawfully admitted for permanent residence; foreign governments and foreign political parties; and groups organized under the laws of a foreign

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country or groups whose principal place of business is in a foreign country, as defined in 22 U.S.C. §611(b). 52 U.S.C. §§30118, 30119, 30121, and 30122.

**E. Receipt of Prohibited Corporate Contributions.** Political committees may not accept contributions from the general treasury funds of corporations. This prohibition applies to any type of corporation including a non-stock corporation, an incorporated membership organization, and an incorporated cooperative. 52 U.S.C. §30118.

**F. Questionable Contributions.** It is the Treasurer's responsibility to ensure that all contributions are lawful. 11 CFR §103.3(b). If a committee receives a contribution that appears to be prohibited (a questionable contribution), it must follow the procedures below:

- Within 10 days after the treasurer receives the questionable contribution, the committee must either:
  - Return the contribution to the contributor without depositing it; or
  - Deposit the contribution (and follow the steps below). 11 CFR §103.3(b)(1).
- If the committee deposits the questionable contribution, it may not spend the funds and must be prepared to refund them. It must therefore maintain sufficient funds to make the refunds or establish a separate account in a campaign depository for possibly illegal contributions. 11 CFR §103.3(b)(4).
- The committee must keep a written record explaining why the contribution may be prohibited and must include this information when reporting the receipt of the contribution. 11 CFR §103.3(b)(5).
- Within 30 days of the treasurer's receipt of the questionable contribution, the committee must make at least one written or oral request for evidence that the contribution is legal. Evidence of legality includes, for example, a written statement from the contributor explaining why the contribution is legal or an oral explanation that is recorded by the committee in a memorandum. 11 CFR §103.3(b)(1).
- Within these 30 days, the committee must either:
  - Confirm the legality of the contribution; or
  - Refund the contribution to the contributor and note the refund on the report covering the period in which the refund was made. 11 CFR §103.3(b)(1) and (5).

**G. Reporting Bank Loans, Home Equity Loans and Other Lines of Credit.** When a political committee obtains a loan from, or establishes a line of credit at, a lending institution as described in 11 CFR §100.82(a) through (d) and 100.142(a) through (d), it shall disclose in the report covering the period when the loan was obtained, the following information on Schedules C-1:

- The types and value of the collateral or other sources of repayment that secure the loan or line of credit, and whether that security interest is perfected;
- An explanation of the basis upon which the loan was made or the line of credit established, if not made on the basis of either traditional collateral or the other sources of repayment described in 11 CFR §§100.82(e)(1) and (2) and 100.142(e)(1) and (2); and

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- A certification from the lending institution that the borrower's responses to 11 CFR §104.3(d)(1)(i)-(iv) are accurate, to the best of the lending institution's knowledge; that the loan was made or the line of credit established on terms and conditions (including interest rate) no more favorable at the time than those imposed for similar extensions of credit to other borrowers of comparable credit worthiness; and that the lending institution is aware of the requirement that a loan or a line of credit must be made on a basis which assures repayment and that the lending institution has complied with Commission regulations at 11 CFR §100.82(a) through (d) and 100.142(a) through (d). 11 CFR §104.3(d)(1)(iii)-(v).

**H. Income.** Income received during the current election cycle, of the candidate, including:

- A salary and other earned income that the candidate earns from bona fide employment;
- Income from the candidate's stocks or other investments including interest, dividends, or proceeds from the sale or liquidation of such stocks or investments;
- Bequests to the candidate;
- Income from trusts established before the beginning of the election cycle;
- Income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary;
- Gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and
- Proceeds from lotteries and similar legal games of chance. 11 CFR §100.33(b)(1)-(7).

## Facts and Analysis

### A. Assurance of Repayment - Bank Loans

#### 1. Facts

MBFI received five loans and eleven lines of credit totaling $7,049,405. These loans consisted of promissory/consumer bank notes and open-ended lines of credit in the name of the Candidate, Mike Braun ('Candidate'), supported with agreements from five lending institutions.

***Information About the Bank Loans***

- None of the five lending institution agreements provided to the Audit staff indicated collateral[9] or guarantors were used to secure the loans and lines of credit.
- MBFI reported $2,856,163 in loans and lines of credit as secured with collateral on Schedule C-1 (Loans and Lines of Credit from Lending Institutions). The remaining $4,193,242 in loans were not reported as secured.

[9] The Audit staff reviewed the Candidate's financial forms filed with the Senate. Based on these documents, the Candidate appeared to have enough personal equity to cover the loans obtained. However, no property or assets were listed as collateral on the financial institution documents, provided to the Audit staff, to secure the loans and lines of credit.

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Based upon the documents provided by MBFI, it did not appear that the loans were made in the ordinary course of business because, per 11 CFR §100.82(e), they were not made on a basis that assured repayment based on either of the following:

- A loan may be considered made on a basis that assures repayment if the lending institution making the loan perfects a security interest in collateral owned by the candidate or political committee receiving the loan. Documents supplied by MBFI showed no guarantor nor collateral offered to the financial institutions making the loans.
- A loan may be considered made on a basis that assures repayment if the lending institution has obtained a written agreement whereby the candidate or political committee receiving the loan has pledged future receipts. MBFI did not provide documentation to support that it or the Candidate gave the financial institutions a pledge of future receipts or other method of assuring repayment.

**2. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter with MBFI representatives during audit fieldwork and at the exit conference and provided a schedule of the loans. During audit fieldwork, MBFI verified loan receipt and repayment amounts and provided additional loan documentation.

In response to the exit conference, MBFI submitted a written response as follows:

> "As requested by the FEC, the Committee provided extensive documentation for the loan agreements considered by the FEC in this preliminary finding. The Committee has no new materials to provide with this response, but it is the Committee's belief that the documentation already provided establishes that the loans in question were provided by commercial lenders on terms customary in the ordinary course of business. The Committee will likely be requesting Commission guidance on legal questions related to this finding, and the Committee intends to take further corrective action as may be required at the conclusion of this matter." [10]

The Interim Audit Report recommended that MBFI demonstrate the loans and lines of credit totaling $7,049,405 were made in the ordinary course of business and were made on a basis that assured repayment. Documentation could have included, but was not limited to submission of:

- Fully signed copy of the loan agreement.
- Required lending institution certifications.
- Amended disclosure reports, consistent with 11 C.F.R. §104.3(d)(1), to support its contention that the loans and lines of credit were made on a basis that assured repayment.
- Other information to demonstrate that the loans and lines of credit were based on the assurance of repayment to include the following information from each

[10] On April 8, 2020, counsel for MBFI submitted a Request for Consideration of a Legal Question by the Commission (Request). MBFI asked whether an unsecured line of credit issued by a commercial lending institution to a "high-net-worth, creditworthy" candidate may be deemed to be made within the ordinary course of business under 11 C.F.R. §100.82. Two or more Commissioners did not agree to consider the Request. MBFI was informed of this outcome on April 21, 2020.

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of the lending institutions at issue: (1) the length of time of the Candidate's relationship with the bank; (2) the Candidate's creditworthiness, net worth, assets and repayment history; (3) the bank's underwriting criteria for unsecured loans of the type made to the Candidate; and (4) information demonstrating that the loan terms were not unduly favorable to the candidate.

**3. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MBFI stated it "fervently disagrees with this finding" for the following reasons:

(i) "The Audit Division simply fails to recognize that unsecured lines of credit are not unique to candidates for public office."

MBFI provided a redacted copy of an unsecured line of credit issued to the MBFI counsel in March 2017. MBFI asserted that commercial lending institutions provide unsecured lines of credit to "creditworthy" individuals who are unlikely to default on the loan. MBFI counsel stated he was able to obtain the unsecured line of credit "without a net worth that remotely approaches that of the Candidate's."

(ii) "Under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment."

"…it is the undersigned counsel's understanding and belief that the commercial lending institutions that made the [l]oans did so in their ordinary course of business (i.e., in their own commercial interests), and not for the purpose of influencing the outcome of the Candidate's candidacy."

According to MBFI, "There should be no dispute" that the loans satisfy three of the four components necessary for a loan to be deemed made in the ordinary course of business per 11 CFR §100.82 and §104.3(d)(1)(iii)-(v). Regarding the fourth component, MBFI stated, "The critical inquiry, therefore, is whether the [l]oans were made on a basis that assures repayment." MBFI further stated, "Commission rules provide several express ways for commercial lending institutions to satisfy this remaining element, including obtaining a perfected security interest in collateral such as real or personal property and certificates of deposit, or a written agreement pledging a security in future receipts. While candidates, political committees, and the commercial lending institutions may rely on these express provisions as a 'safe harbor,' the Commission's rules also contain a fallback provision that permits the Commission to apply a 'totality of the circumstances' test to determine whether loans were made on a basis that assures repayment."

(iii) "Prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness."

MBFI stated, "In its own advisory opinions…, the Commission has noted that the critical inquiry is whether the terms, placed within the larger understanding of the relationship between the lending institution and the

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borrower, evidence an agreement that mitigates the risk of the loans to such a degree that repayment is assured."

MBFI further stated, "…the deference ordinarily given to a lending institution's commercial judgment (i.e., their own commercial interest) is not eliminated from the analysis simply because the loans are unsecured. Rather, the Commission must nonetheless give that deference while performing its analysis to determine whether significant risk mitigation still exists in the relationship between the parties to the agreement."

MBFI noted that in the Cunningham Advisory Opinion (AO 1994-26), the Commission highlighted that "unsecured lines of credit can be made on a basis that assures repayment" and that the AO "citied several important contextual factors, including: the long-standing relationship between the commercial lender and the candidate; that the interest rates and additional contractual clauses were standard form agreement provisions matching agreements given to other customers; and the terms were not unduly favorable to the candidate."

MBFI further noted that in the Matter Under Review (MUR) 5198 (Cantwell) enforcement matter, "the Commission considered the prior existing relationship between the candidate and the lending institution. Importantly, the Commission's analysis emphasized how the candidate's personal net worth far exceeded the actual value of the line of credit, and the Commission ultimately concluded that the banking institution validly relied on the very favorable ratio between the candidate's net worth and the value of the line of credit to determine that the risk of non-repayment was small."

MBFI concluded that, "the Commission accepted the lending institution's conclusion that the loan agreement sufficiently mitigated the risk of non-repayment because it bore the signature of a high-net-worth, creditworthy individual who, in the bank's own judgment, was very unlikely to default on the loan."

Concerning section (i) above, the redacted bank documentation provided by MBFI demonstrates that no collateral was provided for the MBFI *counsel's* line of credit. However, the Audit staff notes MBFI did not provide the fully signed copy of a loan agreement, lending institution certificates or any other documentation from its financial institutions demonstrating that MBFI's loans were not unduly favorable to the Candidate, as required by 11 C.F.R. §104.3(d)(1).

Concerning section (ii) above, the Audit staff agrees this finding is about MBFI receiving loans and lines of credit that were not made on the basis of assured repayment, because: (1) documentation provided by MBFI showed no guarantor nor collateral offered to the financial institutions making the loans and (2) MBFI did not provide documentation to support that it or the Candidate gave the financial institutions a pledge of future receipts or other method of assuring repayment. The Commission can make a determination based on the totality of circumstances on a case-by-case basis in determining whether the loans were made on a basis which

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assured repayment. However, based upon the submitted documentation, the Audit staff believes MBFI did not demonstrate the loans and lines of credit were made on a basis of assured repayment due to the reasons listed above, irrespective of the totality of circumstances.

Concerning section (iii) above, the Audit staff notes that MBFI's reference to Advisory Opinion 1994-26 and MUR 5198 is applicable. However, MBFI failed to provide documentation to demonstrate that the loans and lines of credit were based on the assurance of repayment to include the following information from each of the lending institutions at issue: (1) the length of time of the Candidate's relationship with the bank; (2) the Candidate's creditworthiness, net worth, assets and repayment history; (3) the bank's underwriting criteria for unsecured loans of the type made to the Candidate; and (4) information demonstrating that the loan terms were not unduly favorable to the Candidate. Absent this documentation, the Audit staff maintains the loans and lines of credit totaling $7,049,405 were not made in the ordinary course of business because they were not made on a basis that assured repayment.

## B. <u>Corporate Contributions Reported as Candidate Loans</u>

### 1. Facts

During audit fieldwork, the Audit staff identified two checks received by MBFI totaling $1,500,000 that appeared to be from a corporation, which is a prohibited source. These checks, dated October 17, 2018 and October 25, 2018, were from Meyer Distributing, and were reported as loans on Schedule C (Loans), and memo text identified these transactions as 'Personal Funds'. The Audit staff verified the corporate status of Meyer Distributing, as of the date of the contribution, with the applicable Secretary of State office. Based on the Indiana Secretary of State website, this business entity is a for-profit corporation. The Candidate was President of Meyer Distributing during the audit period. Loans other than from lending institutions are considered contributions to the extent of the outstanding balance of the loan. MBFI did not repay the $1,500,000; rather MBFI reported $1,250,000 as a contribution from the Candidate on the disclosure reports and reported the remaining $250,000 as an outstanding loan balance on the disclosure reports.

However, MBFI did not correctly report the $1,250,000 contribution from the Candidate as a memo entry (see Finding 1. Misstatement of Financial Activity). MBFI did not maintain a separate account for questionable contributions. Additionally, MBFI did not maintain a sufficient balance in its bank account to refund the apparent prohibited contributions.

### 2. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with MBFI representatives during audit fieldwork as well as at the exit conference and provided a schedule of the apparent prohibited contributions. MBFI representatives did not provide any comments during audit fieldwork.

In response to the exit conference, MBFI submitted a written response as follows:

> "To support this preliminary finding, the FEC identified two checks paid from Meyer Distributing to Mike Braun. Despite the FEC's mischaracterization of these checks, the Committee properly reported the associated value of these checks as loans to the Committee. The Committee intends to provide additional documentation demonstrating that the checks in question were initially issued to Mr. Braun, pursuant to his employment agreement, as compensation for services that he provided to Meyer Distributing; however, the Committee has been unable to obtain the relevant documentation because of the ongoing COVID-19 crisis, and the information will be provided to the FEC upon its receipt. Furthermore, Mr. Braun then endorsed these payments to the Committee directly as a loan to the Committee without first depositing and re-issuing payment, an option permitted by FEC rules."
>
> "The Committee's compliance with the FEC's recommendation regarding this preliminary finding would cause the Committee to knowingly misrepresent the transactions in question and incorrectly disclose prohibited corporate contributions that did not take place. Therefore, the Committee declines to take the FEC's recommended remedial action at this time."

MBFI contended that the $1,500,000 represented compensation paid to the Candidate from Meyer Distributing for services rendered pursuant to his employment agreement. MBFI did not provide the employment agreement or any additional documentation regarding the checks in question.

The Interim Audit Report recommended that MBFI:

- Submit documentation demonstrating that the funds represented salary or other income the Candidate earned from bona fide employment and thus were the personal funds of the Candidate. Or that the contributions in question totaling $1,500,000 were not from a prohibited source or, if prohibited, were resolved through the timely issuance of refunds.
- Absent documentation that the funds were from a permissible source or were timely resolved, MBFI should have refunded these apparent prohibited contributions to the corporation or disgorged them to a governmental entity or to a qualified charitable organization.[11]
- If funds were not available to make the necessary refunds or disgorgement, MBFI should have disclosed the contributions requiring refunds on Schedule D (Debts and Obligations) until funds became available to make such refunds.

**3. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MBFI stated these funds were "…the personal funds owed by Meyer Distributing to the Candidate, and the Candidate paid taxes on the amount as income to him." To support this statement, MBFI provided a letter from the Candidate's Certified Public Accountant (CPA). The Audit staff notes that MBFI's exit conference response indicated that the funds in question were compensation for services the Candidate provided Meyer Distributing; however, the letter from the CPA, in response to the Interim Audit Report, states the funds were for stock sale. The Audit staff further notes MBFI did not provide any

[11] See 26 U.S.C. §170(c).

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documentation the CPA indicates he reviewed to make the determination the funds were from the sale of stock and the CPA appeared to not have first-hand knowledge of the transactions. Additional documentation is needed to assist the Commission in determining whether the $1,500,000 was from the sale of stock.

Political committees must maintain records which provide in sufficient detail the necessary information and data from which filed reports and statements may be verified. Absent records such as a stock purchase agreement between the Candidate and Meyers Distributing, or the financial documents that the CPA reviewed to determine the stock sale, the Audit staff maintains the $1,500,000 appears to be from a prohibited source.

## Finding 5. Receipt of Contributions in Excess of the Limit

### Summary

During audit fieldwork, the Audit staff reviewed contributions from individuals and political committees to determine if any exceeded the contribution limit. Based on these reviews, MBFI received apparent excessive contributions totaling $1,173,557. This included apparent excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212. These errors occurred as a result of MBFI not resolving the excessive portion of contributions in a timely manner and by designating contributions for Primary or General debt that had already been extinguished.

In response to the Interim Audit Report recommendation, MBFI did not provide documentation that the contributions in question were not excessive. MBFI stated it will provide confirmations from the contributors regarding the reattribution and redesignation of contributions, based on the reconciliations performed by MBFI’s current treasurer. Absent documentation, the Audit staff maintains that MBFI received excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212.

### Legal Standard

A. **Authorized Committee Limits.** For the 2018 election, an authorized committee may not receive more than a total of $2,700 per election from any one person or $5,000 per election from a multicandidate political committee. 52 U.S.C. §§30116(a)(1)(A) and (a)(2)(A); 11 CFR §§110.1(a) and (b) and 110.9.

B. **Handling Contributions That Appear Excessive**. If a committee receives a contribution that appears to be excessive, the committee must either:
   - Return the questionable check to the donor; or
   - Deposit the check into its federal account and:
     - Keep enough money in the account to cover all potential refunds;
     - Keep a written record explaining why the contribution may be illegal;
     - Include this explanation on Schedule A if the contribution has to be itemized before its legality is established;

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- Seek a reattribution or a redesignation of the excessive portion, following the instructions provided in the Commission regulations (see below for explanations of reattribution and redesignation); and
- If the committee does not receive a proper reattribution or redesignation within 60 days after receiving the excessive contribution, refund the excessive portion to the donor. 11 CFR §§103.3(b)(3), (4) and (5) and 110.1(k)(3)(ii)(B).

**C. Joint Contributions.** Any contribution made by more than one person (except for a contribution made by a partnership) must include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A joint contribution is attributed equally to each donor unless a statement indicates that the funds should be divided differently. 11 CFR §110.1(k)(1) and (2).

**D. Reattribution of Excessive Contributions**. The Commission regulations permit committees to ask donors of excessive contributions (or contributions that exceed the committee's net debts outstanding) whether they had intended their contribution to be a joint contribution from more than one person and whether they would like to reattribute the excess amount to the other contributor. The committee must inform the contributor that:

- The reattribution must be signed by both contributors;
- The reattribution must be received by the committee within 60 days after the committee received the original contribution; and
- The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3).

Within 60 days after receiving the excessive contribution, the committee must either receive the proper reattribution or refund the excessive portion to the donor. 11 CFR §§103.3(b) (3) and 110.1(k)(3)(ii)(B). Further, a political committee must retain written records concerning the reattribution in order for it to be effective. 11 CFR §110.1(l)(5).

Notwithstanding the above, any excessive contribution that was made on a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless instructed otherwise by the contributor(s). The committee must inform each contributor:

- How the contribution was attributed; and
- The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(ii)(B).

**E. Redesignation of Excessive Contributions**. When an authorized candidate committee receives an excessive contribution (or a contribution that exceeds the committee's net debts outstanding), the committee may ask the contributor to redesignate the excess portion of the contribution for use in another election. The committee must inform the contributor that:

- The redesignation must be signed by the contributor;
- The redesignation must be received by the committee within 60 days after the committee received the original contribution; and

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- The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(b)(5).

Within 60 days after receiving the excessive contribution, the committee must either receive the proper redesignation or refund the excessive portion to the donor. 11 CFR §§103.3(b) (3) and 110.1(b) (5) (ii) (A). Further, a political committee must retain written records concerning the redesignation in order for it to be effective. 11 CFR §110.1(l)(5).

Presumptive Redesignation- When an individual makes an excessive contribution to a candidate's authorized committee, the campaign may presumptively redesignate the excessive portion to the general election if the contribution:

- Is made before that candidate's primary election;
- Is not designated in writing for a particular election;
- Would be excessive if treated as a primary election contribution; and
- As redesignated, does not cause the contributor to exceed any other contribution limit.

The committee is required to notify the contributor of the redesignation within 60 days of the treasurer's receipt of the contribution and must offer the contributor the option to receive a refund instead. 11 CFR §110.1(b)(5)(ii)(B)(1), (2), (3), (4), (5), and (6).

F. **Contributions by Multi-candidate Committees.** A contribution designated in writing for a particular election, but made after that election, shall be made only to the extent that the contribution does not exceed net debts outstanding from such election. To the extent that such contribution exceeds net debts outstanding, the candidate or the candidate's authorized political committee shall return or deposit the contributions within ten days from the date of the treasurer's receipt of the contribution and if deposited, then within sixty days from the date of the treasurer's receipt the treasurer shall take that the following action, as appropriate:

- Refund the contribution using a committee check or draft; or
- Obtain a written redesignation by the contributor for another election in accordance with 11 CFR §110.2(b)(5). 11 CFR §110.2(b)(3)(i).

## Facts and Analysis

### A. <u>Contributions from Individuals</u>

#### 1. Facts

The Audit staff utilized sample testing and a review of high dollar contributions not included in the sample population to identify apparent excessive contributions from individuals, as noted below.

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| Excessive Contributions - Testing Method | |
|---|---|
| Sample Projection Amount[12] | $568,545 |
| High Dollar Review Contribution Error Amount | $416,800 |
| **Total Amount of Excessive Contributions** | **$985,345** |
| **Reason for Excessive Contributions** | |
| Contributions not resolved via presumptive letter or refund | $327,710 |
| Contributions not resolved via signed reattribution letter or refund | $642,935 |
| Contributions refunded untimely | $14,700 |
| **Total Amount of Excessive Contributions** | **$985,345** |

**2. Additional Information**

Contributions, totaling $642,935, could not be presumptively reattributed or redesignated by MBFI. These contributions were either made with a single account holder check, joint account holder checks that exceeded the per election limit for both individuals or credit cards which required signed authorization from its contributors or a refund.

MBFI did not maintain a separate account for questionable contributions. Additionally, based on its cash on hand at the end of the audit period ($72,715), it appears that MBFI did not maintain sufficient funds to refund the apparent excessive contributions.

**3. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter with MBFI representatives during audit fieldwork as well as at the exit conference and provided a schedule of the apparent excessive contributions. MBFI representatives did not provide any comments during audit fieldwork.

In response to the exit conference MBFI submitted a written response as follows:

> "The Committee provided documentation related to these findings during the audit process and has no new materials to provide with this response. To date, the

[12] The sample error amount ($568,545) was projected using a Monetary Unit Sample with a 95 percent confidence level. The sample estimate could be as low as $378,477 or as high as $947,020.

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> Committee has made additional preemptive adjustments to its contributor information and intends to take any such corrective action as may be required at the conclusion of this matter."

The Interim Audit Report recommended that MBFI:

- Provide evidence demonstrating that the contributions totaling $985,345 were not excessive or were timely resolved.
- Absent evidence that the contributions were not excessive or were timely resolved, MBFI should have reviewed its contributions to determine which were excessive and how each should be resolved. For any excessive contributions that MBFI could have resolved by sending a presumptive redesignation and/or reattribution letter, it could now send letters to inform the contributors how the committee designated and/or reattributed the contribution and offer a refund. Absent the contributor's request for a refund, these letters would obviate the need to refund the contributions or disgorgement to a governmental entity or to a qualified charitable organization.[11]
- For any excessive contributions that were not resolved through the timely receipt of a signed authorization letter from the contributor or by refund, MBFI should have obtained signed authorization notification from the contributor or make refunds in response to the audit.
- If funds were not available to make such refunds, MBFI should have reported the excessive contributions as debts owed on Schedule D (Debts and Obligations) until funds became available to make the refunds.

**4. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MBFI submitted a written response as follows:

> "When the current treasurer took over the accounting and compliance duties in early 2019, he found a number of refund checks that had been prepared but not sent to donors, with some information suggesting that the former treasurer had initiated the reattribution and redesignation tasks required of a treasurer. It is unknown the extent to which those normal and customary procedures were completed. All reattributions and redesignations were completed by the current treasurer in 2019 after he took over the accounting and reporting duties, and refunds were sent to donors at that time."

MBFI indicated it will provide confirmations from the contributors regarding the reattribution and redesignation of contributions, based on the reconciliations performed by MBFI's current treasurer. MBFI also stated "…to the extent that the facts and conclusions in Finding 5 relate to the $250,000 loan repayment limit found in Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and 28 U.S.C. § 2884 or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding in light of a recent decision of the federal court regarding the constitutional validity of the provision of law on which the Audit Division is relying on." MBFI further stated that the Audit staff should reconsider its findings, reissue the Interim Audit Report and give MBFI the opportunity to respond

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to the revised report, in light of the decision in *Ted Cruz for Senate v. Federal Election Commission,* Civil No. 19-cv-908.

Although there was a decision in the D.C. District Court, the Commission is appealing the decision. MBFI did not provide any documentation demonstrating the contributions from individuals totaling $985,345 were not excessive or were timely resolved.

## B. Contributions From Political Committees

### 1. Facts

***Contributions Received in Excess of Primary Debt***

As of May 8, 2018, the date of the Primary election, the Audit staff calculated that MBFI had net debt outstanding of $191,951. The review determined that there was no Primary debt as of June 30, 2018. A review of all contributions from political committees received after May 8, 2018 and designated by the political committees for primary debt, determined that MBFI received 22[13] apparent excessive contributions totaling $78,000 which exceeded the amount needed to retire the net debt outstanding for the Primary election.

***Contributions Received in Excess of General Debt***

As of November 6, 2018, the date of the General election, the Audit staff calculated that MBFI had net debt outstanding of $101,066. The review determined that there was no General debt as of December 18, 2018. A review of all contributions received from political committees after November 6, 2018 and designated by the political committees for general debt, identified that MBFI received 34[13] apparent excessive contributions totaling $110,212 which exceeded the amount needed to retire the net debt outstanding for the General election.

MBFI did not maintain a separate account for questionable contributions. Additionally, MBFI did not maintain a sufficient balance in its bank account to refund the apparent excessive contributions.

### 2. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with MBFI representatives at the exit conference and provided schedules of the apparent excessive contributions.

In response to the exit conference, MBFI submitted a written statement as follows:

> "The Committee provided documentation related to these findings during the audit process and has no new materials to provide with this response. To date, the Committee has made additional preemptive adjustments to its contributor information and intends to take any such corrective action as may be required at the conclusion of this matter."[14]

[13] Two contributions totaling $4,500 moved from the General to Primary election after issuance of the Interim Audit Report due to the designation on the contributors' check memo line. The total excessive contributions from political committees remains $188,212.

[14] On April 23, 2019, counsel for MBFI submitted a Request for Consideration of a Legal Question by the Commission. MBFI asked whether the proceeds from the Candidate's personal lines of credit were

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The Interim Audit Report recommended that MBFI provide documentation demonstrating that the contributions in question were not excessive, or if excessive, were resolved by refund.

**3. Committee Response to Interim Audit Report**
In response to the Interim Audit Report recommendation, MBFI submitted a written response as follows:

> "When the current treasurer took over the accounting and compliance duties in early 2019, he found a number of refund checks that had been prepared but not sent to donors, with some information suggesting that the former treasurer had initiated the reattribution and redesignation tasks required of a treasurer. It is unknown the extent to which those normal and customary procedures were completed. All reattributions and redesignations were completed by the current treasurer in 2019 after he took over the accounting and reporting duties, and refunds were sent to donors at that time."

MBFI indicated it will provide confirmations from the contributors regarding the reattribution and redesignation of contributions, based on the reconciliations performed by MBFI's current treasurer. MBFI also stated "…to the extent that the facts and conclusions in Finding 5 relate to the $250,000 loan repayment limit found in Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and 28 U.S.C. § 2884 or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding in light of a recent decision of the federal court regarding the constitutional validity of the provision of law on which the Audit Division is relying on." MBFI further stated that the Audit staff should reconsider its findings, reissue the Interim Audit Report and give MBFI the opportunity to respond to the revised report, in light of the decision in *Ted Cruz for Senate v. Federal Election Commission,* Civil No. 19-cv-908.

Although there was a decision in the D.C. District Court, the Commission is appealing the decision. MBFI did not provide any documentation demonstrating the contributions from political committees totaling $188,212 were not excessive or were timely resolved.

## Finding 6. Disclosure of Memo Entries and Candidate Loans

### Summary
During audit fieldwork, the Audit staff determined that MBFI failed to properly disclose joint fundraising memo entries totaling $933,814 from 13 joint fundraising committees.

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"personal loans" per 11 C.F.R. §116.11(a); and whether the $250,000 post-election loan-repayment limitation was a constitutional and enforceable limitation. On June 20, 2019, the Commission concluded that MBFI may not repay the Candidate in excess of $250,000 more than 20 days after the Primary election and rejected MBFI's argument that the candidate loan repayment requirements are unconstitutional.

MBFI also failed to properly disclose the correct loan balances and loan terms for 29 transactions totaling $11,569,963. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission) and did not provide any documentation. However, regarding disclosure of joint fundraising memo entries, MBFI stated "all have been corrected and will be included in the amendments that have been prepared to be filed." Regarding the disclosure of loan balances and loan terms, MBFI did not agree with the finding. Absent filing of amendments or a Form 99, MBFI has not corrected the public record regarding memo entries from joint fundraisers totaling $933,814, and loan balances and terms for transactions totaling $11,569,963.

### Legal Standard

A. **Contents of Reports.** Each report must disclose for the reporting period and for the election cycle, the total amount of:
   - Contributions from persons other than political committees;
   - Contributions from authorized committees which makes a transfer to the reporting committee;
   - Loans made by or guaranteed by the candidate and the identification of each person who makes, endorses or guarantees a loan to the committee.
   52 U.S.C. §30104(b)(2)(G), (3)(E) and 4(D).

B. **Contents Required - Information for Contributions.** For each itemized contribution, the committee must provide the following information:
   - The contributor's full name and address (including zip code);
   - The contributor's occupation and the name of his or her employer (for individual contributors);
   - The date of receipt (the date the committee received the contribution);
   - The amount of the contribution; and
   - The aggregate year-to-date total of all contributions from the same individual. 11 CFR §§100.12 and 104.3(a)(4) and 52 U.S.C. §30104(b)(3)(A).

C. **Itemization of Contributions from Joint Fundraising Efforts**. Participating political committees shall report joint fundraising proceeds in accordance with 11 CFR §102.17(c) (8) when such funds are received from the fundraising representative. 11 CFR §102.17(c)(3)(iii).

   Each participating political committee reports its share of the net proceeds as a transfer-in from the fundraising representative and shall also file a memo Schedule A itemizing its share of gross receipts as contributions from the original contributors to the extent required under 11 CFR §104.3(a). 11 CFR §102.17(c)(8)(i)(B).

D. **Itemization required.** Political committees must itemize:
   - Any contributions from an individual if it exceeds $200 per calendar year (or per election cycle in the case of an authorized committee) either by itself or when aggregated with other contributions from the same contributor. 11 CFR §104.3(a)(4)(i); and
   - Every contribution from any political committee, regardless of the amount.
   52 U.S.C. §30104(b)(3)(A) and (B).

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**E. Itemizing Loans.** Each person who makes a loan to the political committee during the reporting period must be disclosed with the following information:

- Identification of any endorser or guarantor of the loan;
- The date the loan was made;
- The amount of the loan. 11 CFR §104.3(a)(4)(iv).

**F. Schedule C.** On a Schedule C, both the original loan and payments to reduce principal must be reported each reporting period until the loan is repaid. The committee need only list the candidate as the source of the loan. Also, the type of loan the candidate receives (i.e., bank loan, brokerage account, credit card, home equity line of credit) must be disclosed in either the first box for endorsers and guarantors with a notation for loan type or in the box for "Loan Source" after the candidate's name. 11 CFR §104.3(d) and §104.11.

**G. Reporting Bank Loans, Home Equity Loans and Other Lines of Credit.** A political committee must disclose in the report covering the period when the loan was obtained on Schedules C-1:

- The date, amount, and interest rate of the loan;
- The name and address of the lending institution; and
- The types and value of the collateral or other sources of repayment that secure the loan, if any. 11 CFR §104.3(d)(4).

## Facts and Analysis

### A. Transfers from Joint Fundraising Committees

#### 1. Facts

The Audit staff's review of all joint fundraising transfers identified that MBFI failed to properly disclose joint fundraising memo entries totaling $933,814 from 13 joint fundraising committees. The chart below details the $933,814 as follows:

| Disclosure Errors | |
|---|---|
| Type of Review | 100% |
| Memo Entries Not Itemized | $29,785 |
| Memo Entries Disclosed on Schedule A - Incorrect Receipt Date | $904,029 |
| **Total Amount** | **$933,814** |

#### 2. Additional Information

For the contributions that were disclosed on Schedule A, totaling $904,029, MBFI reported the date of the transfer from the joint fundraising committee rather than the date the contribution was reported received by the joint fundraising committee.

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### 3. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with MBFI representatives during the exit conference and provided schedules of the incorrectly disclosed joint fundraising memo entries.

In response to the exit conference, MBFI submitted the written response as follows:

> "The Committee provided documentation related to this preliminary finding during the audit process and has no new materials to provide with this response. To date, the Committee has made additional preemptive adjustments to its contributor information, including identifying memo entries to be added to contribution entries. The Committee intends to take further corrective action as may be required at the conclusion of this matter."

The Interim Audit Report recommended that MBFI provide additional documentation demonstrating that the joint fundraising memo entries were correctly disclosed on Schedule A. Absent such documentation, it was further recommended that MBFI amend its disclosure reports or file a Form 99 [7] to correct the memo entries totaling $904,029 and itemize the missing memo entries on Schedule A totaling $29,785.

### 4. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, MBFI submitted a written statement as follows :

> "Regarding the receipts from joint fundraising committees ("JFCs"), two years ago the current treasurer reviewed all receipts from JFC's and personally contacted all the JFC treasurers from whom the Committee did not have memo entries related to the transfers. He then added those memo entries to the Committee's reports as the information was obtained. Some of the reported JFC transfers were missing memo entries and others were reported on line 11c, not line 12. All have been corrected and will be included in the amendments that have been prepared to be filed."

The Audit staff notes that MBFI has not filed amendments or a Form 99 as of this report and maintains, absent filing of amendments or a Form 99, that MBFI has not corrected the public record for disclosing memo entries from joint fundraisers totaling $933,814.

## B. <u>Disclosure of Loans</u>

### 1. Facts

During audit fieldwork, the Audit staff reviewed 31 bank loans, lines of credit and candidate loans to MBFI totaling $11,666,483. Of this amount:

- Three bank loans, 13 lines of credit and 13 candidate loans, for 29 transactions totaling $11,569,963 were disclosed incorrectly on Schedules C and C-1; and
- Loans and lines of credit for two transactions, totaling $96,520, were not reported (see Finding 1. Misstatement of Financial Activity).

Disclosure errors consisted of disclosing incorrect or missing information including: loan terms and dates, repayment amounts, loan forgiveness, outstanding balances, as well as disclosing the Candidate's spouse as a guarantor for a loan. The loan documentation did not support the information that was reported on the disclosure reports.

**2. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter with MBFI representatives during the exit conference and provided a schedule of the loans and lines of credit disclosed incorrectly.

In response to the exit conference, MBFI submitted a written response as follows:

> "The Committee provided documentation related to this preliminary finding during the audit process and has no new materials to provide with this response. The Committee intends to take further corrective action as may be required at the conclusion of this matter."

The Interim Audit Report recommended that MBFI provide additional documentation demonstrating that the identified loans and lines of credit were correctly disclosed. Absent such documentation, it was further recommended that MBFI amend its reports or file a Form 99[7] to correct the disclosure errors.

**3. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MBFI stated, "…it is currently unclear to the Committee how the Audit Division concluded that the Committee accepted two unreported candidate loans totaling $96,520 since this finding does not correspond to any of the Committee's records." There was no specific comment regarding the disclosure of the 29 transactions totaling $11,569,963. Additionally, MBFI further stated:

> "Furthermore, to the extent that the facts and conclusions in Finding 6 relate to the $250,000 loan repayment limit found in Section 403 of BCRA or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding because of the recent federal court decision in Ted Cruz for Senate v. Federal Election Commission, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021). Since many of the facts and conclusions of Finding 6 may involve and may be impacted by the loan repayment limit, the Commission's conclusions may rely on an unconstitutional provision that renders Finding 6 invalid, or at least a portion of it.
>
> Given the significant impact that the Ted Cruz for Senate ruling may have on Finding 6, the Committee believes it is imperative for the Commission's Audit staff to reconsider its preliminary audit findings, reissue a revised Interim Audit Report, and give the Committee the opportunity to respond to the revised Interim Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 6 until that occurs."

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The Audit staff notes that MBFI was provided the schedule for the unreported loans and lines of credit totaling $96,520 at the exit conference, as it relates to the unreported loans outlined in Finding 1, Misstatement of Financial Activity. In addition, the Audit staff offered to send the schedule again with the issuance of the Interim Audit Report if MBFI requested it; however, MBFI did not make the request at that time. The Audit staff again provided the relevant information upon receipt of MBFI's response to the Interim Audit Report.

The Audit staff notes that this finding is not related to MBFI making Candidate loan and interest repayments in excess of the $250,000 limit permitted for repayment to the Candidate, as discussed in Finding 7, and therefore is not impacted by the ruling cited by MBFI. MBFI has not filed amendments or a Form 99 as of this report. The Audit staff maintains, absent filing of amendments or a Form 99, that MBFI has not corrected the public record regarding the proper disclosure of the loans, including the loan balance and loan terms, and incorrectly disclosing the Candidate's spouse as a guarantor for transactions totaling $11,569,963.

## Finding 7. Prohibited Candidate Personal Loan Repayments

### Summary

Based on a review of loans, the Audit staff determined that MBFI made excessive Primary candidate loan and interest repayments totaling $750,669. This amount is in excess of the $250,000 limit permitted for repayment to the Candidate within 20 days following the Primary election. In response to the Interim Audit Report recommendation, MBFI stated, "…the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission,* Civil No. 19-cv-908…." The Audit staff maintains MBFI did not comply with 11 CFR §116.11 (d).

### Legal Standard

**A**. **Limitation on Repayment of Personal Loans.** Any candidate who incurs personal loans made after the effective date of the Bipartisan Campaign Reform Act of 2002 in connection with the candidate's campaign for election shall not repay (directly or indirectly), to the extent such loans exceed $250,000, such loans from any contributions made to such candidate or any authorized committee of such candidate after the date of such election. 52 U.S.C. §30116(j).

**B. Restriction on an Authorized Committee's Repayment of Personal Loans Exceeding $250,000 Made by the Candidate to the Authorized Committee.** Specific to this finding, personal loans mean a loan or loans, including advances, made by a candidate, using personal funds, as defined in 11 CFR §100.33, to his or her authorized committee where the proceeds of the loan were used in connection with the candidate's campaign for election. Personal loans also include loans made to a candidate's authorized committee that are endorsed or guaranteed by the candidate or that are secured by the candidate's personal funds. 11 CFR §116.11(1)(a).

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For personal loans that, in the aggregate, exceed $250,000 in connection with an election, the authorized committee:

- May repay the entire amount of the personal loans using contributions to the candidate or the candidate's authorized committee provided that those contributions were made on the day of the election or before;
- May repay up to $250,000 of the personal loans from contributions made to the candidate or the candidate's authorized committee after the date of the election; and
- Must not repay, directly or indirectly, the aggregate amount of the personal loans that exceeds $250,000, from contributions to the candidate or the candidate's authorized committee if those contributions were made after the date of the election. 11 CFR §116.11(1)(b)(1),(2) and (3).

If the aggregate outstanding balance of the personal loans exceeds $250,000 after the elections, the authorized political committees must comply with the following conditions:

- If the authorized committee uses the amount of cash-on-hand as of the day after the election to repay all or part of the personal loans, it must do so within 20 days of the election.
- Within 20 days of the election date, the authorized committee must treat the portion of the aggregate outstanding balance of the personal loans that exceeds $250,000 minus the amount of cash-on-hand as of the day after the election used to repay the loan as a contribution by the candidate.
- The candidate's principal campaign committee must report the transactions in paragraphs (c) (1) and (c) (2) of this section in the first report scheduled to be filed after the election pursuant to 11 CFR §104.5(a) or (b) and 11 CFR §116.11(1)(c)(1),(2) and (3)
- This section applies separately to each election. 11 CFR §116.11 (d).

## Facts and Analysis

### A. Facts

Based on a review of loans, the Audit staff determined that MBFI made Primary candidate loan and interest repayments totaling $1,000,669 after the May 8, 2018 Primary election. MBFI could have repaid up to $250,000 of the personal loans for the Primary election from contributions made to the Candidate after the date of the election. Also, after 20 days following the Primary election, MBFI was required to treat as a contribution the amount which was equal to the outstanding balance of the candidate Primary loans less the repayment limit.[14] Therefore, the Audit staff identified that MBFI made excessive Primary candidate loan and interest repayments totaling $750,669.

| | |
|---|---|
| • Primary candidate loan and interest repayments | + $1,000,669 |
| • Allowable repayment amount of candidate loans from contributions limit | - 250,000 |
| **Excessive Primary Candidate Loan and Interest Repayments** | **$750,669** |

**B. Interim Audit Report & Audit Division Recommendation**
The Audit staff discussed this matter with MBFI representatives at the exit conference and provided schedules of the apparent excessive contributions.

In response to the exit conference MBFI submitted a written response as follows:

> "The FEC's preliminary finding shows no apparent "mis-disclosure" of the transactions in question. The Committee has no new materials to provide with this response, but it is the Committee's belief that the FEC's preliminary finding is based on the FEC's mischaracterization of certain loans (which, in turn, would require the loans to be converted to personal contributions and not repayable). The Committee will likely be requesting Commission guidance on legal questions related to this finding."[6]

The Interim Audit Report recommended that MBFI provide additional documentation to demonstrate the Primary candidate loan and interest repayments were not excessive and provide any relevant comments on the matter.

**C. Committee Response to Interim Audit Report**
In response to the Interim Audit Report recommendation, MBFI stated:

> "To the extent that the facts and conclusions in Finding 7 relate to the $250,000 loan repayment limit found in Section 403 of BCRA or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission,* Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021). Since many of the facts and conclusions of Finding 7 involve and are impacted by the loan repayment limit, the Commission's conclusions rely on an unconstitutional provision that renders Finding 7 invalid, or at least a portion of it.
>
> Given the significant impact that the *Ted Cruz for Senate* ruling has on Finding 7 and others, the Committee believes it is imperative for the Commission's Audit staff to reconsider its preliminary audit findings, reissue a revised Interim Audit Report, and give the Committee the opportunity to respond to the revised Interim Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 7 until that occurs."

Although there was a decision in the D.C. District Court, the Commission is appealing the decision. Therefore, the Audit staff maintains that MBFI made excessive Primary candidate loan and interest repayments totaling $750,669.

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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**MEMORANDUM** September 10, 2021

**TO:** Patricia C. Orrock
Chief Compliance Officer

**FROM:** Neven F. Stipanovic *NFS*
Associate General Counsel
Policy Division

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Danita Alberico *DA*
Attorney

**SUBJECT:** Draft Final Audit Report on Mike Braun for Indiana (LRA 1096)

## I. INTRODUCTION

The Office of the General Counsel has reviewed the draft Interim Audit Report ("Report") on Mike Braun for Indiana ("Committee"). The Report contains seven findings: (1) Misstatement of Financial Activity; (2) Failure to File 48-Hour Notices; (3) Disclosure of Occupation and/or Name of Employer; (4) Receipt of Apparent Prohibited Contributions — Loans; (5) Receipt of Contributions in Excess of the Limit; (6) Disclosure of Memo Entries and Candidate Loans; and (7) Prohibited Candidate Personal Loan Repayments. We comment on Finding 4 and otherwise concur with the findings. If you have any questions, please contact Danita Alberico, the attorney assigned to this audit.

## II. RECEIPT OF APPARENT PROHIBITED CONTRIBUTIONS — LOANS (Finding 4 – Corporate Contributions Reported as Candidate Loans)

The Audit Division identified two checks received by the Committee totaling $1,500,000 that appear to be from a corporation. The checks were from Meyer Distributing, but the Committee reported them as loans from the Candidate's personal funds. The Committee never repaid the $1,500,000. In the Interim Audit Report, the Audit Division recommended that the Committee demonstrate that these funds were the personal funds of the Candidate. In response, the Committee contended that the funds were the Candidate's personal funds because Meyer Distributing paid the Candidate $1,500,000 to purchase his stock. The Committee stated that the Candidate paid personal income taxes on these funds. In support of its contentions, the Committee submitted a letter from Gary Brick, certified public accountant, to show that the two checks totaling $1,500,000 were from permissible sources. The Audit Division asks whether the letter from Mr. Brick is sufficient to conclude that the funds were permissible. We do not believe that it is. However, we recommend that the auditors raise the issue for the Commission's consideration.

Personal funds of a candidate include income received during the current election cycle, including income from the candidate's stocks or other investments including interest, dividends, or proceeds from the sale or liquidation of such stocks or investments. 11 C.F.R. § 100.33(b)(2). The letter from Mr. Brick does not establish that the two checks totaling $1,500,000 were the proceeds from the sale of the Candidate's stock, as the Committee contends. Mr. Brick's letter does not contain any assertions of personal knowledge regarding the source of the funds for the Candidate's loan to the Committee. Instead, the letter is Mr. Brick's analysis of information and documents that Mr. Brick appears to have reviewed. For the Audit Division to verify whether the funds at issue were the Candidate's personal funds, however, they must review the actual documents which effectuated the purported stock sale. *See* 11 C.F.R. § 104.14(b)(1) (Political committees must maintain records which provide in sufficient detail the necessary information and data from which filed reports and statements may be verified). A record such as a stock purchase agreement between the Candidate and Meyers Distributing, or the financial documents that Mr. Brick reviewed, may aid the auditors in verifying whether the two checks were the Candidate's personal funds. The Commission, however, has the discretion to accept or reject Mr. Brick's conclusions. We, therefore, recommend that the Audit Division raise this issue in the cover memorandum to the Commission that will accompany this audit report.

**RESPONSE
OF
MIKE BRAUN FOR INDIANA
TO
THE DRAFT FINAL AUDIT REPORT**

Mike Braun for Indiana ("Committee") is in receipt of the Federal Election Commission's Draft Final Audit Report ("DFAR") regarding the audit of the Committee's records from August 7, 2017 – December 31, 2019. The Committee, through counsel, hereby responds to the findings and recommendations of the Audit Division staff resulting from that audit.

Pursuant to Commission procedures, the Committee is requesting a hearing before the Commission to respond to the DFAR and present legal arguments concerning the findings in the draft report. Specifically, the Committee's request for a hearing to present legal arguments is limited to disputing two conclusions within Finding 4 of the DFAR:

- The conclusion that "the $1,500,000 in corporate checks were not from a permissible source"; and

- The conclusion that "the loans and lines of credit totaling $7,049,405 were not made on a basis that assured repayment."

**BACKGROUND**

Many of the misstatements of financial activity, failures to file, and other issues identified in the Draft Final Audit Report are traceable to the harm suffered by the Committee because of its former treasurer's failure to perform FEC accounting and reporting services properly. Therefore, prior to responding to each of Audit Division's findings and recommendations, the Committee first wants to provide some background that not only led to the hiring of the Committee's current treasurer, but also led to many of the findings detailed in the Draft Final Audit Report.

In 2017, the Committee hired the former treasurer to serve as its treasurer because he was, at least ostensibly, an experienced FEC compliance professional who had worked for many federal candidate committees over many years. This former treasurer had represented that he was able and willing to do the accounting and reporting work he was hired and paid to do; however, as both the Committee and the Audit Division team are now aware, at some point during the 2018 election cycle this individual began making mistakes and failing to perform his services as warranted (and for which he was being paid). He ultimately vanished, and he has not been able to be located since the end of 2018.

Following the former treasurer's disappearance, the Committee quickly retained another individual to serve as treasurer. The new treasurer immediately began to uncover various accounting and reporting problems while attempting to prepare and file the Committee's 2018 Year-End Report on short notice and with minimal documentation.

Notably, the current treasurer began to correct mistakes, errors, and other problems in the Committee's accounts and reports long prior to the commencement of this FEC audit.

Unfortunately, there are documents that the Committee believes existed at some point (such as reattribution and redesignation letters, best efforts letters, etc.), but the Committee cannot confirm whether any copies were retained by the former treasurer or otherwise exist. For the practical purposes of this audit, the Committee can confirm that no such copies were provided to the new treasurer, and the Committee has no choice but to proceed with this audit with the limited documentation from the 2018 election cycle that it has in its possession.

## RESPONSES TO FINDINGS

### DFAR FINDING 1. MISSTATEMENT OF FINANCIAL ACTIVITY

*During audit fieldwork, a comparison of MBFI's reported financial activity with its bank records revealed a misstatement of receipts and disbursements in calendar year 2018. MBFI overstated receipts by $6,293,350 and disbursements by $6,294,482. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission). MBFI stated, "…the former treasurer did not ultimately report the repayments from the Candidate's personal funds correctly" and that loan repayments should have been reported as in-kind contributions instead of as memo entries as recommended by the Audit staff. Absent the filing of amended reports or a Form 99, MBFI's receipts and disbursements remain misstated.*

### THE COMMITTEE'S RESPONSE TO FINDING 1

The Committee amended its reports on October 4, 2021, as recommended by the Audit Division.

### DFAR FINDING 2. FAILURE TO FILE 48-HOUR NOTICES

*During audit fieldwork, the Audit staff identified that MBFI failed to file or untimely filed 48-hour notices for ten contributions totaling $262,600. This amount includes seven contributions totaling $9,100 for which MBFI misreported contribution dates. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission). MBFI stated the former treasurer failed to properly file the 48-hour notices and that "the Committee will amend the reports to report the correct dates of all contributions." Absent the filing of amended reports or a Form 99, MBFI did not correct the public record for the misreported dates of the seven contributions totaling $9,100.*

### THE COMMITTEE'S RESPONSE TO FINDING 2

With respect to the 48-hour notices totaling $253,500 that the Commission believes were filed "untimely" during the 2018 primary, the Committee has attached a time-stamped

report evidencing the fact that the three contributions totaling $253,500 were in fact filed in a timely manner. *See* Exhibit A. Based on a cursory review of this time-stamped report, it appears that the Commission's belief that the 48-hour notice was not filed in a timely manner may be the result of a faulty scan on the part of the Commission.

As recommended by the Audit Division, the Committee amended its disclosure reports on June 15, 2021, to account for the 48-hour notices for three contributions totaling $3,400. The Committee also corrected the public record for the misreported dates of the seven contributions totaling $9,100.

**DFAR FINDING 3. DISCLOSURE OF OCCUPATION AND/OR NAME OF EMPLOYER**

*During audit fieldwork, a review of contributions from individuals requiring itemization indicated that 1,363 contributions totaling $1,464,449 lacked or inadequately disclosed the required occupation and/or name of employer information. MBFI did not sufficiently demonstrate "best efforts" to obtain, maintain and submit the required information. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission), but stated it prepared amended reports and obtained the missing information for all but 387 contributors. Absent the filing of amended reports or a Form 99, MBFI did not correct the public record for contributions totaling $1,464,449 that lacked or inadequately disclosed the required occupation and/or name of employer information.*

**THE COMMITTEE'S RESPONSE TO FINDING 3**

The Committee has researched all donors whose contributions require "best efforts" to obtain and report employer/occupation information.

As recommended by the Audit Division, the Committee has amended its disclosure reports to report employer/occupation information for most donors for which the Audit Division identified as missing information. As of this writing, there are only 97 remaining donors with "Information Requested" for the 2018 election cycle. The Committee has already sent "best efforts" letters to the remaining 97 donors from the 2018 election cycle, and it will continue its ongoing "best efforts" to obtain and report the employer/occupation information for such donors.

**DFAR FINDING 4. RECEIPT OF APPARENT PROHIBITED CONTRIBUTIONS – LOANS**

*During audit fieldwork, a review of loan documents provided by MBFI, indicated apparent prohibited loans and lines of credit totaling $8,549,405. This included five loans and eleven lines of credit from financial institutions, totaling $7,049,405, that did not appear to be made in the ordinary course of business. These loans were not made on a basis that assured repayment and, therefore, appeared to be prohibited contributions from the financial institutions.*

*Additionally, the Audit staff identified two checks from one corporation totaling $1,500,000 that were reported as loans.*

*In response to the Interim Audit Report recommendation, MBFI did not provide documentation from MBFI's financial institutions, but stated it "fervently" disagreed that the loans and lines of credits were not made in the ordinary course of business and stated that the Audit Division had not correctly applied the law or Commission precedents. Additionally, MBFI stated that the Audit Division failed "to recognize that unsecured lines of credit are not unique to candidates for public office." MBFI also provided a letter it asserts supports that the two corporate checks were from a permissible source. However, no documentation was provided to support the assertions outlined within the letter. Absent additional documentation, the Audit staff maintains the loans and lines of credit totaling $7,049,405 were not made on a basis that assured repayment and the $1,500,000 in corporate checks were not from a permissible source.*

## THE COMMITTEE'S RESPONSE TO FINDING 4

Regarding the deposit of funds into the campaign account from the Candidate's company, those funds were the personal funds owed by the Company to the Candidate, and the Candidate paid taxes on the amount as income to him. On June 16, 2021, the Committee submitted additional evidence from Gary Brick, the Candidate's CPA, to substantiate the fact that such funds were the personal funds of the Candidate. This evidence was submitted to the Commission with the understanding that, due to privacy concerns, it would not made part of the public record. We are that evidence once again as Exhibit B; however, consistent with our previous understanding and directives, this document should be excluded from the public record. **Please note that, as stated above, the Committee has requested a hearing before the Commission to present legal arguments to dispute the Audit Division's finding that "the $1,500,000 in corporate checks were not from a permissible source."**

Regarding the Audit Division's finding that various unsecured lines of credit (collectively, the "Loans") that the Candidate obtained from FDIC-insured commercial lending institutions were not made in the ordinary course of business, the Committee fervently disagrees with this finding for several reasons: (i) the Audit Division simply fails to recognize that unsecured lines of credit are not unique to candidates for public office; (ii) under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment; and (iii) prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness.

***The Audit Division simply fails to recognize that unsecured lines of credit are not unique to candidates for public office.***

As evidenced by Exhibit C, which is a copy of an unsecured line of credit issued by BBVA Compass to the undersigned counsel in March 2017, commercial lending institutions

provide unsecured lines of credit to creditworthy individuals who, in the bank's own judgment, are very unlikely to default on the loan. And despite being creditworthy in the eyes of BBVA Compass, the undersigned counsel can assure the Commission that he was able to obtain the unsecured line of credit without a net worth that remotely approaches that of the Candidate's.

***Under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment.***

As the Commission is aware, the Federal Election Campaign Act of 1971, as amended, prohibits commercial institutions from contributing to a federal candidate's authorized campaign committee. This prohibition includes loans from commercial institutions that are not made in the "ordinary course of business" and outside applicable banking practices, laws, and regulations.[1] The FEC has supplemented this statutory restriction with rules defining the relevant terms, including what does and does not constitute a loan made in the "ordinary course of business." According to current FEC regulations, a loan is made in the "ordinary course of business" if it:

(1) bears the usual customary interest rate of the lending institution;

(2) is made on a basis that assures repayment;

(3) is evidenced by a written instrument; and

(4) is subject to a due date or amortization schedule.[2]

Satisfaction of the four elements is intended to demonstrate that when commercial lending institutions extend credit to federal candidates and political committees, they are doing so in their ordinary course of business (i.e., in their own commercial interests) rather than for the purpose of influencing the outcome of a federal election. In the instant matter, it is the undersigned counsel's understanding and belief that the commercial lending institutions that made the Loans did so in their ordinary course of business (i.e., in their own commercial interests), and not for the purpose of influencing the outcome of the Candidate's candidacy.

There should be no dispute that the Loans satisfy three of the four elements established by the Commission: (i) the Loans were evidenced by a written instrument; (ii) the Loans each bear the customary interest rate of the lending institution; and (iii) the Loans are

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[1] *See generally* 52 USC §30118(a)(1)-(2).

[2] 11 C.F.R. § 100.82.

subject to a due date or amortization schedule. The critical inquiry, therefore, is whether the Loans were made on a basis that assures repayment.

Commission rules provide several express ways for commercial lending institutions to satisfy this remaining element, including obtaining a perfected security interest in collateral such as real or personal property and certificates of deposit, or a written agreement pledging a security in future receipts.[3] While candidates, political committees, and the commercial lending institutions may rely on these express provisions as a "safe harbor," the Commission's rules also contain a fallback provision that permits the Commission to apply a "totality of the circumstances" test to determine whether loans were made on a basis that assures repayment.[4]

***Prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness.***

Since the Commission's earliest considerations of whether commercial loans were made on a basis that assures repayment, the FEC has clearly analyzed such loans in their full context. In its own advisory opinions, for example, the Commission has noted that the critical inquiry is whether the terms, placed within the larger understanding of the relationship between the lending institution and the borrower, evidence an agreement that mitigates the risk of the loans to such a degree that repayment is assured.[5]

To be clear, the deference ordinarily given to a lending institution's commercial judgment (i.e., their own commercial interest) is not eliminated from the analysis simply because the loans are unsecured. Rather, the Commission must nonetheless give that deference while performing its analysis to determine whether significant risk mitigation still exists in the relationship between the parties to the agreement.[6]

As the Commission highlighted in its *Cunningham* advisory opinion, unsecured lines of credit can be made on a basis that assures repayment. The Commission cited several important contextual factors in that opinion, including:

(1) the long-standing relationship between the commercial lender and the candidate;

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[3] *See* 11 C.F.R. § 100.82(e)(1)-(2).

[4] 11 C.F.R. § 100.82(e)(3).

[5] FEC Advisory Opinion 1980-108 (Anderson).

[6] FEC Advisory Opinion 1994-26 (Cunningham).

(2) that the interest rates and additional contractual clauses were standard form agreement provisions matching agreements given to other customers; and

(3) the terms were not unduly favorable to the candidate.[7]

More recently, the Commission has considered the applicability of its "totality of the circumstances" analysis in the context of enforcement actions. In the *Cantwell* enforcement matter, the Commission considered the prior existing relationship between the candidate and the lending institution. Importantly, the Commission's analysis emphasized how the candidate's personal net worth far exceeded the actual value of the line of credit, and the Commission ultimately concluded that the banking institution validly relied on the very favorable ratio between the candidate's net worth and the value of the line of credit to determine that the risk of non-repayment was small.

The analysis and conclusion reached in the *Cantwell* enforcement matter is instructive in the instant case because it is another clear example of the Commission deferring to the lending institution's commercial judgment (i.e., their own commercial interest) as to whether the candidate is creditworthy. Stated differently, in the *Cantwell* enforcement matter, the Commission accepted the lending institution's conclusion that the loan agreement sufficiently mitigated the risk of non-repayment because it bore the signature of a high-net-worth, creditworthy individual who, in the bank's own judgment, was very unlikely to default on the loan.[8]

**Please note that, as stated above, the Committee has requested a hearing before the Commission to present legal arguments to dispute the Audit Division's finding that "the loans and lines of credit totaling $7,049,405 were not made on a basis that assured repayment."**

## DFAR FINDING 5. RECEIPT OF CONTRIBUTIONS IN EXCESS OF THE LIMIT

*During audit fieldwork, the Audit staff reviewed contributions from individuals and political committees to determine if any exceeded the contribution limit. Based on these reviews, MBFI received apparent excessive contributions totaling $1,173,557. This included apparent excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212. These errors occurred as a result of MBFI not resolving the excessive portion of contributions in a timely manner and by designating contributions for Primary or General debt that had already been extinguished.*

*In response to the Interim Audit Report recommendation, MBFI did not provide documentation that the contributions in question were not excessive. MBFI stated it will provide confirmations from the*

[7] *Id.*

[8] FEC Matter Under Review 5198 (Cantwell) ("Bank approved the increase in the line of credit to $600,000 as it was partially secured and guaranteed by the candidate's signature.").

*contributors regarding the reattribution and redesignation of contributions, based on the reconciliations performed by MBFI's current treasurer. Absent documentation, the Audit staff maintains that MBFI received excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212.*

**THE COMMITTEE'S RESPONSE TO FINDING 5**

As with other issues identified in the Draft Final Audit Report, the Committee hired and paid an experienced FEC compliance professional to handle the reattribution, redesignation, and refund requirements of the campaign. When the current treasurer took over the accounting and compliance duties in early 2019, he found a number of refund checks that had been prepared but not sent to donors, with some information suggesting that the former treasurer had initiated the reattribution and redesignation tasks required of a treasurer. It is unknown the extent to which those normal and customary procedures were completed. All reattributions and redesignations were completed by the current treasurer in 2019 after he took over the accounting and reporting duties, and refunds were sent to donors at that time. The Committee has attached documentation regarding some of its efforts to reattribute and redesignate excessive contributions from the 2018 election cycle. *See* Exhibit D.

Notwithstanding the foregoing, to the extent that the facts and conclusions in Finding 5 relate to the $250,000 loan repayment limit found in Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and 28 U.S.C. § 2284 or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding in light of a recent decision of the federal court regarding the constitutional validity of the provision of law on which the Audit Division is relying on.

Specifically, in *Ted Cruz for Senate v. Federal Election Commission*, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021), a three-judge district court convened pursuant to Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and 28 U.S.C. § 2284 and issued an opinion on June 3, 2021, striking down the prohibition on federal candidates using post-election contributions to repay personal loans over $250,000 (the "loan repayment limit"). On September 30, 2021, the United States Supreme Court agreed to hear the Commission's appeal of the case. Since many of the facts and conclusions of Finding 5 may involve and may be impacted by the loan repayment limit, the Commission's conclusions may rely on an unconstitutional provision that renders Finding 5 invalid, or at least a portion of it.

Given the significant impact that the *Ted Cruz for Senate* ruling may have on Finding 5, the Committee believes it is imperative for the Commission's Audit staff to either postpone or reconsider its audit findings, reissue a revised Draft Final Audit Report, and give the Committee the opportunity to respond to the revised Draft Final Audit Report. For this

reason, the Committee will refrain from providing any additional response to Finding 5 until that occurs.

**DFAR FINDING 6. DISCLOSURE OF MEMO ENTRIES AND CANDIDATE LOANS**

*During audit fieldwork, the Audit staff determined that MBFI failed to properly disclose joint fundraising memo entries totaling $933,814 from 13 joint fundraising committees. MBFI also failed to properly disclose the correct loan balances and loan terms for 29 transactions totaling $11,569,963. In response to the Interim Audit Report recommendation, MBFI did not file amendments or a Form 99 (Miscellaneous Electronic Submission) and did not provide any documentation. However, regarding disclosure of joint fundraising memo entries, MBFI stated "all have been corrected and will be included in the amendments that have been prepared to be filed." Regarding the disclosure of loan balances and loan terms, MBFI did not agree with the finding. Absent filing of amendments or a Form 99, MBFI has not corrected the public record regarding memo entries from joint fundraisers totaling $933,814, and loan balances and terms for transactions totaling $11,569,963.*

**THE COMMITTEE'S RESPONSE TO FINDING 6**

Regarding the receipts from joint fundraising committees ("JFCs"), two years ago the current treasurer reviewed all receipts from JFC's and personally contacted all the JFC treasurers from whom the Committee did not have memo entries related to the transfers. He then added those memo entries to the Committee's reports as the information was obtained. Some of the reported JFC transfers were missing memo entries and others were reported on line 11c, not line 12. All have been corrected and included in the amendments that have been filed with the Commission.

Regarding the candidate loans, it is still unclear to the Committee how the Audit Division concluded that the Committee accepted two unreported candidate loans totaling $96,520 since this finding does not correspond to any of the Committee's records. The Committee would appreciate the opportunity to respond to this finding; however, at the time of this writing, it does not have the necessary information to respond.

Notwithstanding the foregoing, to the extent that the facts and conclusions in Finding 6 relate to the conclusions of law that the Audit Division makes in Finding 4 (i.e., that various lines of credit were not made in the ordinary course of business), the Committee disagrees with this finding.

Furthermore, to the extent that the facts and conclusions in Finding 6 relate to the $250,000 loan repayment limit found in Section 403 of BCRA or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission*, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021). Since many of the facts and conclusions of Finding 6 may involve and may be impacted by the loan repayment limit, the Commission's

conclusions may rely on an unconstitutional provision that renders Finding 6 invalid, or at least a portion of it.

Given the significant impact that the *Ted Cruz for Senate* ruling may have on Finding 6, the Committee believes it is imperative for the Commission's Audit staff to either postpone or reconsider its audit findings, reissue a revised Draft Final Audit Report, and give the Committee the opportunity to respond to the revised Draft Final Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 6 until that occurs.

**DFAR FINDING 7. PROHIBITED CANDIDATE PERSONAL LOAN REPAYMENTS**

*Based on a review of loans, the Audit staff determined that MBFI made excessive Primary candidate loan and interest repayments totaling $750,669. This amount is in excess of the $250,000 limit permitted for repayment to the Candidate within 20 days following the Primary election. In response to the Interim Audit Report recommendation, MBFI stated, "…the Audit Division should amend this finding because of the recent federal court decision in Ted Cruz for Senate v. Federal Election Commission, Civil No. 19-cv-908…." The Audit staff maintains MBFI did not comply with 11 CFR §116.11 (d).*

**THE COMMITTEE'S RESPONSE TO FINDING 7**

To the extent that the facts and conclusions in Finding 7 relate to the $250,000 loan repayment limit found in Section 403 of BCRA or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission*, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021). Since many of the facts and conclusions of Finding 7 involve and are impacted by the loan repayment limit, the Commission's conclusions rely on an unconstitutional provision that renders Finding 7 invalid, or at least a portion of it.

Given the significant impact that the *Ted Cruz for Senate* ruling has on Finding 7 and others, the Committee believes it is imperative for the Commission's Audit staff to either postpone or reconsider its audit findings, reissue a revised Draft Final Audit Report, and give the Committee the opportunity to respond to the revised Draft Final Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 7 until that occurs.

**CONCLUSION**

Thank you for your consideration of this response. If you require additional information, or if we can be of any assistance, then I can be reached at (512) 354-1783.

Sincerely,

Chris K. Gober
Counsel, Mike Braun for Indiana