



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 22, 2002

MEMORANDUM

TO: The Commission
FROM: Lawrence H. Norton
General Counsel
BY: Gregory R. Baker *GRB*
Acting Associate General Counsel
Lorenzo Holloway *LH*
Assistant General Counsel

AGENDA ITEM
For Meeting of: 5-23-02

SUBMITTED LATE

SUBJECT: Bauer for President 2000, Inc. Submission (LRA #543)

I. Background

On May 22, 2002, Bauer for President 2000, Inc., ("Committee") submitted a document for the Commission's consideration during its Open Session Meeting on May 23, 2002. Attachment 1. The Committee casts the document not as an intention to submit additional factual evidence, but as an effort to respond to material that is presently in the record.

A committee has 60 days from the date that it receives the Preliminary Audit Report to submit a response for the Commission's consideration. 11 C.F.R. § 9038.1(c)(2). The response may include legal and factual materials disputing or commenting on the proposed findings in the Preliminary Audit Report. *Id.* It is important that a committee file all materials and comments during this 60-day period because there are no provisions in the regulations that permit a committee to submit additional materials (or comments on the materials in the record) after the 60-day period, but prior to the Commission's consideration of the Audit Report. The Commission will consider legal and factual materials that are timely submitted. 11 C.F.R. § 9038.1(d)(1).

Bauer for President 2000, Inc., had 60 days to respond to the Preliminary Audit Report. In fact, the Committee used 75 days to respond to the Preliminary Audit Report because it was granted an extension of time of the regulatory maximum of 15 days to respond. 11 C.F.R. § 9038.4(c). Although the Commission-approved Audit Report may include issues that were not addressed in the Preliminary Audit Report, 11 C.F.R. § 9038.1(d)(1), the findings in the Committee's Audit Report are the same findings included in the Committee's Preliminary Audit Report. Therefore, the Committee has

had ample opportunity to address the issues.¹ Considering the Committee's response at this stage of the process is unfair to the other committees that were able to frame the issues and submit their comments within the 60-day time frame. Accordingly, the Office of General Counsel recommends that the Commission not consider the Committee's document submitted on May 22, 2002.

II. Recommendations

The Office of General Counsel recommends that the Commission:

- 1) Not consider the Bauer for President, Inc., response submitted on May 22, 2002; and
- 2) Approve the appropriate letter notifying the Committee.

¹ The audit report does not include any repayment determinations. Therefore, the Committee cannot submit any additional responses in the audit context. If any matters arising out of the audit are referred to the Office of General Counsel for enforcement, the Committee may submit a response in that context. 11 C.F.R. § 111.16.

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May 21, 2002

Via Hand Delivery

Mr. David Mason
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Bauer for President 2000, Inc.

Dear Mr. Mason:

RECEIVED
FEDERAL ELECTION
COMMISSION
MAY 22 9 54 AM '02

I am writing to respond to questions raised by several Commissioners during the consideration of the above referenced matter at the open meeting on May 16, 2002. I do not intend to submit additional factual evidence, but to respond on the basis of material presently in the record.

Donor List (List Exchange)

The Audit Staff argues that the list exchange between CWF and the Committee did not meet the requirements of AO 1981-46, which approved list exchanges between political committees. This is incorrect.

AO 1981-46 addressed a wide range of list exchanges.

Two commercially acceptable ways of paying for the use of another organization's mailing list are 1) for the user to pay the list owner a fee determined by the market's view of the value of the list; and 2) for the user to exchange names of corresponding value with the list owner. The exchange may be a direct exchange of the same number of names, a multiple use of a smaller number of names or some other variation which the parties believe is an exchange of equal value.

AO 1981-46 specifically approved the type of exchange in which CWF and the Committee engaged.

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The Commission concludes, based on its response to your first question, that a current use of names in exchange for a future use of the names of another political committee does not result in a contribution within the definition of 2 U.S.C. SS 431(8)(A).¹

The Audit Staff contends that CWF made a contribution to the Committee because "as of May 2001" the Committee had used CWF's list more times than CWF had used the Committee's list. The Audit Staff's analysis has several flaws.

As the Committee noted in its response to the preliminary audit report, calculation of the commercial reasonableness of the exchange must be judged at the time of the exchange. At the time of the exchange CWF gave the Committee its existing list for unlimited use during a limited period of time and the Committee promised CWF the list the Committee would develop during the campaign for unlimited use, in perpetuity. CWF gave the Committee a list of 87,013 names that rented for \$115 per thousand names, and CWF and the Committee expected CWF to receive an equal if not greater number of names with an equal or greater value. CWF and the Committee estimated the potential value of the names correctly because, according to the Audit Division, the Committee's list rents for more than CWF's list; however, because of the candidate's lack of success, the number of names fell below the number CWF and the Committee expected the Committee to provide. The Audit Staff concludes that "the exchange was not of equal value according to industry standards" but the failure of the Committee to generate during the campaign the number of names the parties expected it to generate does not show that the exchange was not commercially reasonable when it took place, i.e., when the exchange agreement was made.

In the Final Audit Report, the Audit Staff rejects the Committee's contention that the question of the commercial reasonableness of the exchange must be evaluated as of the time of the exchange:

Counsel is correct in stating that the Audit staff made no effort to determine the "value" of the "future" use of the names expected to be generated by the Committee. Such an effort could never produce a reliable result... The Audit staff analyzed only the facts as they existed and concluded the exchange between the Committee and CWF was not equal and resulted in an excessive contribution.

But the facts analyzed by the Audit staff are not the facts that existed at the time the exchange was made. They are the facts that existed after the campaign had ended. They do not answer the question that the law requires the Commission to answer: Was the exchange

¹ AO 1981-46 makes clear that "future use" includes names that are not on the list now, but will be developed in the future." Assuming the exchange of names, either current or future, represents the normal and usual charge for such use, it is permissible for the Committee to exchange names..."

commercially reasonable at the time it was made? AO 1981-46 supports the Committee's analysis. It anticipates that an expected "future use" may not occur, but it does not conclude, as does the Audit staff, that a failure to develop the expected number of names to exchange must inevitably result in a contribution.

"If that future use does not occur for any reason a contribution *may* result depending on the *circumstances of the particular situation*" (emphasis supplied).

The Audit staff's approach produces an unsupportable result. Persons exchanging a list for the future use of another list, regardless of the commercial reasonableness of the exchange at the time it is made, will have made or received a contribution unless the number of names on the future list is exactly equal to the names and uses of the exchanged list. Had the Committee had greater success and made available to CWF for use in perpetuity a list of 100,000 names, the Audit staff would under its approach have had to charge the Committee with a contribution to CWF and sought repayment of the federal portion of the funds contributed.

The Audit staff also fails, in assessing the alleged "contribution" between CWF and the Committee, to take into consideration the difference in value between the Committee's right to CWF's list for a limited time and CWF's right to the Committee's list in perpetuity, a point noted by the Commission at the Open Meeting. The Audit staff stopped counting CWF's use of the Committee's list on May, 2001.

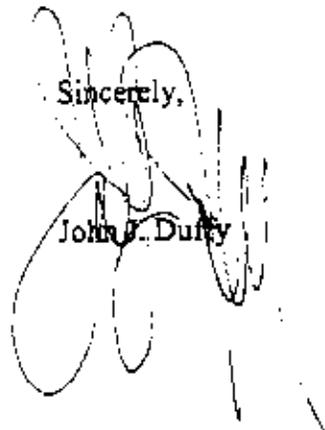
Rental of Donor List

As with the prior issue, the Committee's activity here was approved explicitly by the Commission in an Advisory Opinion. The Audit staff concedes that the Commission allows political committees to rent their mailing list if the list was developed by the political committee in the normal course of its operations primarily for its own use rather than as an item to be sold to others as part of a campaign fundraising activity. The Audit staff's objection to the transaction here is its contention that the donor file was not developed for the Committee's own use, but rather as an item to be sold to others as a campaign fundraising activity.

The Audit staff notes in the Final Audit Report that on the same day the Committee received \$70,000 from Lukens it received \$1,969,127 in its *first* matching funds payment. To obtain this amount of matching funds, the Committee had raised at least that amount from contributors, primarily, if not exclusively, by the use of its mailing list. The Audit staff's conclusion that the Committee's primary reason for developing the mailing list was not to obtain millions of dollars of contributions through direct mail, but to "sell" the list once for \$70,000 is, to put it mildly, unreasonable.

If you have any questions concerning this matter, please do not hesitate to contact the undersigned.

Sincerely,



John J. Duffy

- cc: Mr. Lawrence Norton
- Mr. Karl J. Sandstrom
- Mr. Danny L. McDonald
- Mr. Bradley A. Smith
- Mr. Scott E. Thomas
- Mr. Michael E. Toner
- Mr. Robert J. Costa

ATTACHMENT

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CLIENT/CASE NUMBER: 13152.1

FROM:
NAME: JOHN J. DUFFY

REQUEST MADE ON DATE: 5/21/02 TIME: 5:00 PM

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ATTACHMENT 1
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