



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

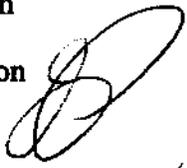
RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2002 DEC 11 P 4: 08

December 11, 2002

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director 

FROM: Lawrence H. Norton
General Counsel 

BY: Gregory R. Baker 
Acting Associate General Counsel

SUBJECT: LRA #596 – Memorandum on Postponement Request
Submitted by Buchanan Foster, Inc.
Late Submission and Placement as Agenda Item
Agenda Document No. 02-86

AGENDA ITEM
For Meeting of: 12-12-02

SUBMITTED LATE

The attached memorandum is being circulated as a late submission for the Open Session on December 12, 2002. The memorandum is late because the Buchanan Foster Committee submitted a letter to the Commission requesting a postponement of the Commission's consideration of the Audit Report. This Office requests that the Commission suspend its rules regarding late submission of documents and place this item on the agenda for the Open Session on December 12, 2002.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 11, 2002

MEMORANDUM

TO: The Commission

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Gregory R. Baker
Acting Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Kimberly D. Hart
Attorney

SUBJECT: Postponement Request Submitted by Buchanan Foster, Inc. (LRA #596)
Agenda Document No. 02-86

On December 9, 2002, the Commission received a letter from Buchanan Foster, Inc. ("Committee"). The Committee states that the Audit Division, in the Preliminary Audit Report, "treated the Committee's purchase of a mailing list as a reimbursement issue while the Audit Report treats the mailing list purchase as a qualified campaign expense issue." Attachment 1. The Committee contends that the "change in treatment is so substantial that the Committee should be given the opportunity to comment on the Audit Division's new theory before the Commission considers the Audit Report." Attachment 1. Therefore, the Committee requests that consideration of the Audit Report be postponed until the Committee can provide a brief response to the Audit Division's new theory regarding the mailing list purchase.

The Office of General Counsel recommends that the Commission deny the Committee's request to postpone the Commission's consideration of the Audit Report. The Committee is correct in its assertion that the mailing list issue, which was treated as a reimbursement issue in the Preliminary Audit Report, is addressed as a qualified campaign expense issue in the Audit Report. However, this difference is not a basis for the Commission to postpone consideration of the Proposed Audit Report to allow the General Committee to submit a response. Section 9007.1(d)(1) of the regulations states "the Commission-approved audit report may address issues other than those contained in

Buchanan Foster, Inc.
LRA #596
Memo to Commission re: Postponement request submitted
by Buchanan Foster, Inc.
page 2

the Preliminary Audit Report.” 11 C.F.R. § 9007.1(d)(1). This section anticipates that the issues contained in the Audit Report may differ from those issues discussed in the Preliminary Audit Report. The reports are different because the Committee failed to provide information that the Commission requested in the Preliminary Audit Report. The Committee was aware of the Commission’s interest in the mailing list purchase at the Preliminary Audit Report stage. The Audit Division requested documentation from the Committee demonstrating the fair market value of the mailing list.

If the Commission proceeds without a postponement, the Committee’s opportunity to comment on the issue is not foreclosed. The Committee will have an opportunity to dispute the Commission’s repayment determination at the administrative review stage as provided by 11 C.F.R. § 9007.2(c)(2). It is at this stage that the Committee can submit responses to address the Audit Division’s treatment of the mailing list purchase as a qualified campaign expense issue.

Recommendations

The Office of General Counsel recommends that the Commission:

- 1) Deny the Committee’s request for a postponement of the consideration of the Proposed Audit Report to allow the submission of a response; and
- 2) Approve the appropriate letter notifying the Committee.

Attachments

1. Letter from Buchanan Foster, Inc. dated December 9, 2002

John J. Duffy
202.429.8020
jduffy@steptoel.com

December 9, 2002

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

Re: Buchanan Foster, Inc.

Dear Mr. Mason:

We received recently a copy of the Report of the Audit Division on Buchanan Foster, Inc. ("Report"). In the Report, the Audit Division altered its treatment of Buchanan Foster, Inc.'s (the "Committee") purchase of a mailing list from Buchanan Reform, Inc., the candidate's primary committee. In its Preliminary Audit Report, the Audit Division treated the purchase as a "reimbursement" issue, while in the Report it treated the purchase as a "qualified campaign expense" issue. The Audit Division made this change on the recommendation of the General Counsel, for the sole purpose of insuring that the "burden of proof" of the "fair market value" of the list fell on the Committee.

We believe that the change in the treatment between the Preliminary Audit Report, on which the Committee made comments, and the Report is so substantial that the Committee must be allowed an opportunity to comment on the Audit Division's "new theory" before the Commission considers the Report. Otherwise, the Committee's right to comment on the repayment issues raised in the Preliminary Audit Report (11 CFR § 9007.1(c)) and to have those comments considered by the Commission before the Final Report is issued (11 CFR § 9007.1(d)) will be effectively denied.

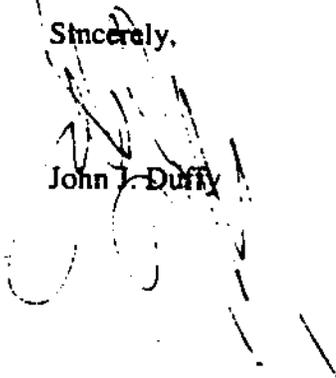
We recognize that the Committee will have an opportunity to comment on the Audit Division's "new theory" of the case during the administrative phase, but in the circumstances presented here, such an opportunity is inadequate. In its Memorandum on the Report, the Office of the General Counsel states that "this issue is about a disbursement for a qualified campaign expense" (Memo at 5), a conclusion which appears to conflict with 11 CFR § 9004.4(b)(7), and that mere "overpayment" for goods and services can convert a qualified campaign expense into a non-qualified campaign expense, a statement which, in our view, has no support in the Commission's regulations or in the case cited by the General Counsel.

ATTACHMENT 1
Page 1 of 2

The General Counsel goes on to state that: (1) the Committee will have the burden of demonstrating that its disbursement to the primary committee for the mailing list was a qualified campaign expense, and (2) this burden can be satisfied only by getting and submitting an "independent appraisal," an appraisal that the General Counsel admits the auditors attempted to obtain prior to the issuance of the Preliminary Audit Report without success.

We request, therefore, that consideration of the Report be postponed until the Committee can provide a brief response to the Audit Division's new contention that the Committee's purchase of the primary committee's list does not constitute a "qualified campaign expense."

Sincerely,



John J. Duffy

cc: Lawrence H. Norton, General Counsel
Joseph F. Stoltz, Assistant Staff Director, Audit Division
Alex Boniewicz, Audit Manager
Paula King, Lead Auditor
The Commissioners
Ms. Angela M. Buchanan