FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 8, 2009

MEMORANDUM

TO: John D. Gibson
Chief Compliance Officer

Joseph F. Stoltz
Assistant Staff Director
Audit Division

THROUGH: D. Alec Palmer
Acting Staff Director

FROM: Christopher Hughey
Deputy General Counsel

Lawrence L. Calvert, Jr.
Associate General Counsel
General Law and Advice

Lorenzo Holloway
Assistant General Counsel
Public Finance and Audit Advice

Allison T. Steinle
Attorney

SUBJECT: Proposed Final Audit Report on Biden for President, Inc. (LRA 742)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Final Audit Report ("FAR") of the Audit Division on Biden for President, Inc. ("the Committee"),[1] which you submitted to this Office on August 31, 2009. Our comments address Finding 1 (Net Outstanding Campaign Obligations) and Finding 2 (Receipt of Contributions that Exceed

[1] This audit pertains to Mr. Biden's campaign for the Office of President in the primary election. It does not pertain to Mr. Biden's campaign for the Office of Vice President in the general election.

Limits). We concur with any portion of findings not specifically discussed in this memorandum. If you have any questions, please contact Allison T. Steinle, the attorney assigned to this audit.

II. FINDING 1 – NET OUTSTANDING CAMPAIGN OBLIGATIONS

The Committee accepted private general election contributions during the primary election period under the conditions set forth in Advisory Opinion ("AO") 2007-03 (Obama). When Mr. Biden withdrew from the Presidential primary race on January 3, 2008, the Committee was required to refund or redesignate those contributions. *See* 11 C.F.R. § 102.9(e)(3); AO 2008-04 (Dodd); AO 2007-03 (Obama); AO 2003-18 (Smith). Although it is not clear from the proposed FAR, we understand that the Committee's Statement of Net Outstanding Campaign Obligations ("NOCO Statement") currently includes the private general election contributions as part of cash on hand, and the subsequent general election refunds and redesignations as part of accounts payable. The Audit Division's cover memorandum to the proposed FAR raises the question of whether these general election contributions, refunds, and redesignations should be included in the NOCO Statement.

There is nothing that legally either requires or prohibits the inclusion of general election contributions, refunds, and redesignations in the NOCO Statement.[2] *See* 11 C.F.R. § 9034.5. Thus, we conclude that the Audit Division may take either approach, provided that, if the general election contributions and any subsequent refund and redesignation obligations are included in the NOCO Statement, they net each other out as assets (cash on hand) and liabilities (accounts payable).

In our opinion, however, it appears that excluding private general election contributions, refunds, and redesignations from the NOCO Statement is the approach most consistent with both the purpose of the NOCO Statement and two recent Commission AOs addressing the receipt of general election contributions by Presidential primary candidates. The purpose of a NOCO Statement is to determine a candidate's financial status and entitlement to matching funds after the DOI with respect to that candidate's participation in the primary election under the Presidential Matching Payment Account Act ("Matching Payment Program"). *See* 11 C.F.R. § 9034.5; Explanation and Justification for 11 C.F.R. § 9034.5, 44 Fed. Reg. 20,336, 20,340 (Apr. 4, 1979). Although section 9034.5 does not explicitly exclude private contributions made for the general election from the funds that should be included on the NOCO Statement, contributions designated for the general election but received during the primary election period should not affect a candidate's financial status or entitlement to matching funds with respect to the primary election. While the Commission allows a candidate participating in the Matching Payment Program to raise general election contributions during the primary election period, once the candidate fails to qualify for the general election or elects to receive public financing for

[2] This applies both to NOCO Statements submitted by committees after their dates of ineligibility ("DOI") in support of their requests for matching funds, and to the NOCO Statements as adjusted by the Audit Division that are included in its audit report of any publicly financed presidential primary committee.

the general election, the general election contributions become impermissible funds that must be refunded, redesignated, or disgorged. *See* AO 2008-04 (Dudd); AO 2007-03 (Obama); AO 2003-18 (Smith). For this reason, a candidate who is participating in the Matching Payment Program is required to use an acceptable accounting method to distinguish between contributions designated for the primary and contributions designated for the general election, must limit access to the general funds, and may not use the general funds for any purpose. *See* 11 C.F.R. § 102.9(e); AO 2008-04 (Dodd); AO 2007-03 (Obama). Assuming that a committee has adequately segregated general election contributions from its primary election funds as required by section 102.9(e) and AO 2007-03, the general election contributions and any obligations to make general election refunds or redesignations should net each other out as assets and liabilities and thus should neither increase nor decrease the amount of post-DOI matching funds to which a committee may otherwise be entitled.

Based on the above analysis, we believe that the general election contributions, and the corresponding obligation to refund them that attaches to the campaign of an unsuccessful primary candidacy, should not be included in the NOCO Statement as a matter of policy.[3] Again, however, there is nothing that legally prevents these amounts from being included in the NOCO Statement. *See* 11 C.F.R. § 9034.5. Accordingly, the Audit Division may elect to include these amounts in the NOCO Statement, so long as the general election contributions and any obligations to make general election refunds or redesignations net each other out as assets and liabilities.

II. FINDING 2 – RECEIPT OF CONTRIBUTIONS THAT EXCEED LIMITS

A. THE FAR SHOULD INCLUDE ADDITIONAL DETAIL ABOUT WHY THE ONLINE CONTRIBUTION SCREEN DID NOT PROVIDE ENOUGH INFORMATION TO ATTRIBUTE CONTRIBUTIONS TO OTHER CONTRIBUTORS OR DESIGNATE A PORTION OF EXCESSIVE PRIMARY CONTRIBUTIONS TO THE GENERAL

Finding 2 in the proposed FAR includes a projected dollar value of $106,016 in unresolved excessive contributions. This number includes sample errors related to contributions received through the Committee's online contribution screen. Consistent with the Commission's conclusion in the Preliminary Audit Report ("PAR"), the proposed FAR states that these errors are because "the website did not provide sufficient notice to the contributor to constitute an attribution of a portion of the contribution to another person or to designate a portion of the contribution to the general election." Proposed FAR at 12.

[3] We recognize that one disadvantage to this approach is that it fails to provide an accurate "overall" picture of the Committee's financial status. However, this concern could be addressed by the Audit Division by adding an accompanying footnote to the NOCO Statement that explains the existence of the additional general election funds. Moreover, the general election funds will be reflected on the Committee's disclosure reports.

Regarding the attribution problem, we recommend that the proposed FAR include more detail about the sample errors, if any, related to the attribution of joint contributions, and explain how the attribution problem is related to the Committee's online contribution screen. *See* 11 C.F.R. § 110.1(k).

Regarding the designation problem, while we concur with the Audit Division that the online contribution screen did not provide enough information to properly designate the excessive primary election contributions, we recommend that the proposed FAR include more detail about why the online contribution screen was inadequate. Specifically, we know that the Committee's online contribution screen stated that the Committee could "accept contributions from an individual totaling up [to] $2,300 per election." It did not state that an individual could contribute $2,300 to the primary election and $2,300 to the general election or a total of $4,600 to both elections, and failed to provide an opportunity for the contributor to designate a contribution for each election. Accordingly, we cannot discern whether a contributor intended to contribute part of his or her contribution to the general election when that contribution was made during the primary election period. *See* 11 C.F.R. § 110.1(b)(2)(ii); Explanation and Justification for 11 C.F.R. § 110.1(b), 52 Fed. Reg. 760, 763 (Jan. 9, 1987) (stating that for a contributor to "effectuate a designation," a committee may provide a preprinted form "that clearly states the election to which the contribution will be applied"); *cf.* FAR on Craig Romero for Congress, Inc. (Oct. 18, 2007) (concluding that that a contributor fact sheet with language stating that it would allow "an individual donor to make a contribution of $6,000 before [the primary election date], designating $2,000 to each of the [primary, general, and runoff] election cycles" was sufficient to show contributor intent). The contrast between the contribution screen here and the detailed contributor notice at issue in the Romero audit is particularly compelling. The notice in Romero explained clearly the limits with respect to each election for which the candidate sought contributions, permitting an inference that a contribution above the primary election limit was intended for a later election. The screen here contained no such detail.

B. ADDITIONAL DECLARATIONS PROVIDED BY THE COMMITTEE ARE NOT SUFFICIENT TO ESTABLISH THAT THE COMMITTEE TIMELY SENT PRESUMPTIVE REDESIGNATIONS

Finding 2 in the proposed FAR also includes a projected dollar value of $1,092,899 in late resolved excessive contributions. The Committee received undesignated contributions prior to the primary election greater than the primary election contribution limit and treated these contributions as redesignated to the general election. After Mr. Biden withdrew from the Presidential primary race, the Committee then obtained written redesignations from these contributors to redesignate the contributions to Mr. Biden's 2008 Senate elections. The Committee claims that it sent presumptive redesignation letters to the contributors that would authorize the redesignations from the Presidential primary election to the Presidential general election, but has not been able to produce them for the auditors. The Committee was able to produce redesignation forms completed by the contributors authorizing the Committee to redesignate Presidential general election contributions to the 2008 Senate primary election, or to the 2008 Senate general election to

the extent that the contribution to the Senate primary election would result in an excessive contribution. Consequently, the PAR concluded that the Presidential general to Senate written redesignations were the functional equivalent of untimely presumptive redesignations of those same contributions from the Presidential primary to the Presidential general.

In response to the PAR, the Committee has submitted sworn declarations from four contributors and a staff member that it claims are sufficient to establish that the untimely resolved excessive contributions addressed in Finding 2 were, in fact, timely. *See* Committee Response at 2-3. The declarations from the four contributors state that they "recall receiving a letter from the Committee in 2007 that in form and substance" matched the Committee's boilerplate presumptive redesignation letter. The declaration from the staff member states that he worked with the deceased staff member who was primarily responsible for sending the presumptive redesignation letters and "recall[s] regularly preparing and sending notices to contributors that, in form and substance" matched the Committee's boilerplate presumptive redesignation letter.

The issue presented here is whether the additional declarations provided by the Committee are sufficient to establish that the Committee timely sent the presumptive redesignations. As a legal matter, there is no specific legal or precedential basis for concluding that a declaration would be sufficient evidence with regard to timely reattributions or redesignations. In fact, the Commission's regulations expressly state that a contribution will not be considered timely redesignated if a committee does not retain the written records concerning that redesignation. 11 C.F.R. § 110.1(l)(5); *see also* Explanation and Justification for Section 110.1(l)(4) and (5), 67 Fed. Reg. 69,928, 69,934 (Nov. 9, 2002) (rejecting a process by which committees could orally notify contributors of the redesignation and then write a memorandum of the conversation as documentation because it "would provide too great an opportunity for fraud and abuse").

The D.C. Circuit has addressed whether declarations are sufficient supporting documentation in the context of cost attributions to state expenditure limits under Title 26. In *John Glenn Presidential Comm. v. FEC*, 822 F.2d 1097, 1103 (D.C. Cir. 1987), the court concluded that a one-sentence affidavit signed by a person whose relationship to the campaign was unknown was not sufficient to establish that bumper stickers were distributed to other states after they were shipped to New Hampshire. The court concluded that it was neither arbitrary nor irrational for the Commission to reject an affidavit that purported to convey common rather than personal knowledge and provided no specific information regarding the actual allocations. More recently in *LaRouche's Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 738 (D.C. Cir. 2006), the court concluded that the Commission was not required to find that a charged vendor mark-up was a qualified campaign expense based solely on an expert affiant's "general, unsubstantiated, and conclusory opinion that the charged mark-up was reasonable." In contrast, in *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995), the court concluded that the Commission could not reject proof of postage and an affidavit by a campaign worker verifying that a mailing had taken place without explaining why it had done so. While the court noted that the

accounting burden fell on the committee, it stated that the Commission could not reject uncontroverted documentation relevant to the state expenditure limits:

Applying this caselaw to the case at hand, it is clear that the declarations provided by the Committee are more like those in *Glenn* and *LaRouche* than *Robertson*. The declarations provide no specific information regarding the main contested element of the finding: whether the Committee sent the presumptive redesignation notices within 60 days of its receipt of the excessive contributions. *See* 11 C.F.R. § 110.1(b)(5)(ii)(B)(5)-(6). The four contributors do not attest to when the presumptive redesignations were postmarked, or even the specific date they received them; they only attest to recalling receiving a letter in 2007. Moreover, it is unclear whether the declarations are from contributors who triggered the sample errors. Even if they were, they presumably would make up only a small percentage of the contributors whose presumptive redesignation letters the Committee could not produce. Likewise, the staff member does not attest to having personal knowledge that the presumptive redesignation notices at issue here were sent or when they were sent; he only generally attests that his job duties "included sending notices and other letters seeking re-designations, re-attributions, and authorizations from contributors to transfer funds between Biden for President and [Mr. Biden's Senate committee]," and he recalls regularly doing so. Accordingly, we are of the view that the additional declarations are not sufficient to establish that the Committee timely sent the presumptive redesignations.

Nevertheless, we note that the Commission has recently accepted affidavits as supporting documentation in lieu of the documentation required by Commission regulations, although it has not yet done so in the context of reattributions or redesignations. Specifically, the Commission has accepted partial timesheets for seven staff members and one affidavit attesting that staff members spent 25 percent or less of their time in connection with a federal election for purposes of allocating staff salary. Commission regulations state that a committee must maintain a monthly log of the percentage of time each employee spends in connection with a federal election pursuant to 11 C.F.R. § 106.7(d)(1). *See* FAR on the Missouri Democratic Party (Feb. 3, 2009).