FEDERAL ELECTION COMMISSION
Washington DC 20463

16092710088

THIS IS THE BEGINNING OF ADMINISTRATIVE FINE CASE # 3011

DATE SCANNED 4/18/16

SCANNER NO. 2

SCAN OPERATOR DH

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2015 JUN 24 PM 5:08

June 24, 2015

MEMORANDUM

SENSITIVE

TO: The Commission

THROUGH: Alec Palmer
Staff Director

FROM: Patricia C. Orrock PCO
Chief Compliance Officer

Debbie Chacona for PCO
Assistant Staff Director
Reports Analysis Division

BY: Kristin D. Roser KDR
Compliance Branch

SUBJECT: Reason to Believe Recommendation -
Failure to File 48-Hour Notices under the Administrative Fine Program

Attached is the name of a principal campaign committee that has failed to file 48-hour notices with the Commission for contributions of $1,000.00 or more received from the close of books for the Nebraska 2014 12 Day Pre-Primary report up to 48 hours before the May 13, 2014 Primary Election in accordance with 52 U.S.C. § 30104(a) and 11 CFR § 104.5(f). The committee, Bart McLeay for U.S. Senate, Inc., represents a candidate who lost the 2014 Primary Election. The committee is being referred for failing to file 48-hour notices for contributions totaling $112,425.06.

A 48-hour notice is required to report all contributions of a $1,000.00 or more, to any authorized committee of a candidate, including contributions from the candidate, loans from the candidate and other non-bank sources and endorsements or guarantees of loans from banks, as per 11 CFR § 104.5(f).

We have attached an information sheet which includes the contributor name, date of receipt and amount of the contributions for which a 48-hour notice was not filed.

In accordance with the schedule of civil money penalties outlined within 11 CFR § 111.44, this committee should be assessed the civil money penalty so indicated.

Recommendation

1. Find reason to believe that Bart McLeay for U.S. Senate, Inc. and Robert C. McChesney, Treasurer, violated 52 U.S.C. § 30104(a) and make a preliminary determination that a civil money penalty of $12,122 be assessed.

2. Send the appropriate letter.

Attachment

Contributions for Which a 48-Hour Notice Was Not Received

AF 3011
Committee ID: C00547406
Committee Name: Bart McLeay for U.S. Senate, Inc.
Report Type: 2014 July Quarterly Report (4/24/2014 – 6/30/2014)
Primary 48-Hour Reporting Period: 4/24/2014 – 5/10/2014

CONTRIBUTOR	DATE	AMOUNT
MCPHEETERS, SCOTT	4/24/2014	$1,000.00
VACANTI, CHARLES	4/24/2014	$1,200.00
VACANTI, JOE	4/24/2014	$2,475.00
BALEDGE, LES	4/25/2014	$1,000.00
KUBAT, GEORGE J	4/28/2014	$1,000.00
MCLEAY, BARTHOLOMEW	4/29/2014	$48,000.00
HORGAN, ROBERT P	4/30/2014	$1,350.06
FLEMING, WILLIAM H	5/6/2014	$1,000.00
ROGERS, JOE	5/6/2014	$1,000.00
GOTTSCHALK, MICHAEL	5/7/2014	$1,000.00
KIZER, T EDWARD	5/7/2014	$1,400.00
MCKINNIS, DAVID C	5/7/2014	$1,000.00
MCLEAY, BARTHOLOMEW	5/7/2014	$50,000.00
O'NEILL, DAN	5/9/2014	$1,000.00
	TOTAL	**$112,425.06**

Proposed Civil Money Penalty: Proposed Civil Money Penalty: $12,122.00 ((8 Notices Not Filed at $110 each) + (10% of the Overall Contributions Not Filed))

Federal Election Commission
Reason to Believe Circulation Report
48-Hour Notification Report

AF#	Committee ID	Committee Name	State	Election	Candidate Name	Treasurer	Prev Violations	Notices Not Filed	LOA	Penalty
3011	C00547406	BART MCLEAY FOR US SENATE INC	NE	2014	MCLEAY, BARTHOLOMEW L	ROBERT C MCCHESNEY	0	8	$112,425	$12,122

16092710093

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Reason To Believe Recommendation - Failure to File 48-Hour Notices under the Administrative Fine Program: Bart McLeay for U.S. Senate, Inc. and Robert C. McChesney, Treasurer	)	AF 3011

CERTIFICATION

I, Shawn Woodhead Werth, Secretary and Clerk of the Federal Election Commission, do hereby certify that on June 26, 2015, the Commission decided by a vote of 6-0 to take the following actions in AF 3011:

1. Find reason to believe that Bart McLeay for U.S. Senate, Inc. and Robert C. McChesney, Treasurer, violated 52 U.S.C. § 30104(a) and make a preliminary determination that a civil money penalty of $12,122 be assessed.

2. Send the appropriate letter.

Commissioners Goodman, Hunter, Petersen, Ravel, Walther, and Weintraub voted affirmatively for the decision.

Attest:

June 29, 2015
Date

Shawn Woodhead Werth
Shawn Woodhead Werth
Secretary and Clerk of the Commission

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 29, 2015

Robert C. McChesney, in official capacity as Treasurer
Bart McLeay for U.S. Senate, Inc.
P.O. Box 540788
Omaha, NE 68154

C00547406
AF#: 3011

Dear Mr. McChesney:

The Federal Election Campaign Act of 1971, as amended, 52 U.S.C. § 30101, *et seq.* ("the Act"), requires principal campaign committees of candidates for federal office to notify in writing either the Secretary of the Senate or the Federal Election Commission ("FEC"), and the Secretary of State, as appropriate, of any contribution of $1,000 or more, received by any authorized committee of the candidate after the 20th day, but more than 48 hours before, any election. 52 U.S.C. § 30104(a)(6)(A). The Act further requires notification to be made within 48 hours after the receipt of the contribution and to include the name of the candidate and office sought, the date of receipt, the amount of the contribution, and the identification of the contributor. *Id.* These notification requirements are in addition to all other reporting requirements. 52 U.S.C. § 30104(a). Our records indicate that Bart McLeay for U.S. Senate, Inc. did not submit 48-Hour Notices for contributions of $1,000 or more, received between April 24, 2014 and May 9, 2014, totaling $112,425, as required by 52 U.S.C. § 30104(a)(6)(A). Attachment 1.

The Act permits the FEC to impose civil money penalties for violations of the reporting requirements of 52 U.S.C. § 30104(a). 52 U.S.C. § 30109(a)(4). On June 26, 2015, the FEC found that there is Reason to Believe ("RTB") that Bart McLeay for U.S. Senate, Inc. and you, in your official capacity as treasurer, violated 52 U.S.C. § 30104(a) by failing to file the 48-Hour Notices. Based on the FEC's schedule of civil money penalties at 11 CFR § 111.44, the amount of your civil money penalty calculated at the RTB stage is $12,122. Please see the attached copy of the Commission's administrative fine regulations at 11 CFR §§ 111.30-111.55. Attachment 2. The Commission's website contains further information about how the administrative fine program works and how the fines are calculated. http://www.fec.gov/af/af.shtml. 11 CFR § 111.34. The amount of the civil money penalty is $110 for each non-filed notice plus 10 percent of the dollar amount of the contributions not timely reported. The civil money penalty increases by 25 percent for each prior violation. Send your payment of $12,122 within forty (40) days of the finding, or by August 5, 2015.

At this juncture, the following courses of action are available to you:

1. **If You Choose to Challenge the RTB Finding and/or Civil Money Penalty**

If you should decide to challenge the RTB finding and/or calculated civil money penalty, you must submit a written response to the FEC's Office of Administrative Review, 999 E Street, NW, Washington, DC 20463. Your response must include the AF# (found at the top of page 1 under your committee's identification number) and be received within forty (40) days of the Commission's RTB finding, or August 5, 2015. 11 CFR § 111.35(a). Your written response must include the reason(s) why you are challenging the RTB finding and/or calculated civil money penalty, and must include the factual basis supporting the reason(s) and supporting documentation. The FEC strongly encourages that documents be submitted in the form of affidavits or declarations. 11 CFR § 111.36(c).

The FEC will only consider challenges that are based on at least one of three grounds: (1) a factual error in the RTB finding; (2) miscalculation of the calculated civil money penalty by the FEC; or (3) your demonstrated use of best efforts to file in a timely manner when prevented from doing so by reasonably unforeseen circumstances that were beyond your control. 11 CFR § 111.35(b). In order for a challenge to be considered on the basis of best efforts, you must have filed the required report no later than 24 hours after the end of these reasonably unforeseen circumstances. *Id.* Examples of circumstances that will be considered reasonably unforeseen and beyond your control include, but are not limited to: (1) a failure of Commission computers or Commission-provided software despite your seeking technical assistance from Commission personnel and resources; (2) a widespread disruption of information transmissions over the Internet that is not caused by a failure of the Commission's or your computer systems or Internet service provider; and (3) severe weather or other disaster-related incident. 11 CFR § 111.35(c). Examples of circumstances that will not be considered reasonably unforeseen and beyond your control include, but are not limited to: (1) negligence; (2) delays caused by vendors or contractors; (3) treasurer and staff illness, inexperience or unavailability; (4) committee computer, software, or Internet service provider failures; (5) failure to know filing dates; and (6) failure to use filing software properly. 11 CFR § 111.35(d).

The "failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver" of your right to present such argument in a petition to the U.S. District Court under 52 U.S.C. § 30109. 11 CFR § 111.38.

If you intend to be represented by counsel, please advise the Office of Administrative Review. You should provide, in writing, the name, address and telephone number of your counsel and authorize counsel to receive notifications and communications relating to this challenge and imposition of the calculated civil money penalty.

2. If You Choose Not to Pay the Civil Money Penalty and Not to Submit a Challenge

If you do not pay the calculated civil money penalty and do not submit a written response, the FEC will assume that the preceding factual allegations are true and make a final determination that Bart McLeay for U.S. Senate, Inc. and you, in your official capacity as treasurer, violated 52 U.S.C. § 30104(a) and assess a civil money penalty.

Unpaid civil money penalties assessed through the Administrative Fine regulations will be subject to the Debt Collection Act of 1982 ("DCA"), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 *et seq.* The FEC may take any and all appropriate

action authorized and required by the DCA, as amended, including transfer to the U.S. Department of the Treasury for collection. 11 CFR § 111.51(a)(2).

3. If You Choose to Pay the Civil Money Penalty

If you should decide to pay the calculated civil money penalty, send the enclosed remittance form, along with your payment, to the FEC at the address on page 4. Upon receipt of your payment, the FEC will send you a final determination letter.

NOTICE REGARDING PARTIAL PAYMENTS AND SETTLEMENT OFFERS

4. Partial Payments

If you make a payment in an amount less than the calculated civil money penalty, the amount of your partial payment will be credited towards the full civil money penalty that the Commission assesses upon making a final determination.

5. Settlement Offers

Any offer to settle or compromise a debt owed to the Commission, including a payment in an amount less than the calculated civil money penalty assessed or any restrictive endorsements contained on your check or money order or proposed in correspondence transmitted with your check or money order, will be rejected. Acceptance and deposit or cashing of such a restricted payment does not constitute acceptance of the settlement offer. Payments containing restrictive endorsements will be deposited and treated as a partial payment towards the civil money penalty that the Commission assesses upon making a final determination. All unpaid civil money penalty amounts remaining will be subject to the debt collection procedures set forth in Section 2, above.

This matter was generated based on information ascertained by the FEC in the normal course of carrying out its supervisory responsibilities. 52 U.S.C. § 30109(a)(2). Unless you notify the FEC in writing that you wish the matter to be made public, it will remain confidential in accordance with 52 U.S.C. § 30109(a)(4)(B) and 30109(a)(12)(A) until it is placed on the public record at the conclusion of this matter in accordance with 11 CFR § 111.42.

As noted earlier, you may obtain additional information on the FEC's administrative fine program, including the final regulations, on the FEC's website at http://www.fec.gov/af/af.shtml. If you have questions regarding the payment of the calculated civil money penalty, please contact David Garr in the Reports Analysis Division at our toll free number (800) 424-9530 (at the prompt press 5) or (202) 694-1130. If you have questions regarding the submission of a challenge, please contact the Office of Administrative Review at our toll free number (800) 424-9530 (press 0, then ext. 1660) or (202) 694-1660.

On behalf of the Commission,

Ann M. Ravel

Ann M. Ravel
Chair

ADMINISTRATIVE FINE REMITTANCE & PAYMENT INSTRUCTIONS

In accordance with the schedule of penalties at 11 CFR § 111.44, the amount of your civil money penalty calculated at RTB is $12,122 for the 2014 Primary Election 48-Hour Notification Report.

Please mail this remittance with a check or money order made payable to the Federal Election Commission to the following address:

Federal Election Commission
P.O. Box 979058
St. Louis, MO 63197-9000

If you choose to send your remittance and payment by courier or overnight delivery, please use this address:

U.S. Bank - Government Lockbox
FEC #979058
1005 Convention Plaza
Attn: Government Lockbox, SL-MO-C2GL
St. Louis, MO 63101

The remittance and your payment are due by August 5, 2015. Upon receipt of your remittance and payment, the FEC will send you a final determination letter.

PAYMENTS BY PERSONAL CHECK

Personal checks will be converted into electronic funds transfers (EFTS). Your account will be electronically debited for the amount on your check, usually within 24 hours, and the debit will appear on your regular statement. We will destroy your original check and keep a copy of it. In case the EFT cannot be processed for technical reasons, you authorize us to process the copy in lieu of the original check. Should the EFT not be completed because of insufficient funds, we may try to make the transfer twice.

PLEASE DETACH AND RETURN THE PORTION BELOW WITH YOUR PAYMENT

FOR: Bart McLeay for U.S. Senate, Inc.

FEC ID#: C00547406

AF#: 3011

PAYMENT DUE DATE: August 5, 2015

PAYMENT AMOUNT DUE: $12,122

16092710097

Contributions for Which a 48-Hour Notice Was Not Received

AF 3011
Committee ID: C00547406
Committee Name: Bart McLeay for U.S. Senate, Inc.
Report Type: 2014 July Quarterly Report (4/24/2014 – 6/30/2014)
Primary 48-Hour Reporting Period: 4/24/2014 – 5/10/2014

CONTRIBUTOR	DATE	AMOUNT
MCPHEETERS, SCOTT,	4/24/2014	$1,000.00
VACANTI, CHARLES	4/24/2014	$1,200.00
VACANTI, JOE	4/24/2014	$2,475.00
BALEDGE, LES	4/25/2014	$1,000.00
KUBAT, GEORGE J	4/28/2014	$1,000.00
MCLEAY, BARTHOLOMEW	4/29/2014	$48,000.00
HORGAN, ROBERT P	4/30/2014	$1,350.06
FLEMING, WILLIAM H	5/6/2014	$1,000.00
ROGERS, JOE	5/6/2014	$1,000.00
GOTTSCHALK, MICHAEL	5/7/2014	$1,000.00
KIZER, T EDWARD	5/7/2014	$1,400.00
MCKINNIS, DAVID C	5/7/2014	$1,000.00
MCLEAY, BARTHOLOMEW	5/7/2014	$50,000.00
O'NEILL, DAN	5/9/2014	$1,000.00
	TOTAL	$112,425.06

Proposed Civil Money Penalty: Proposed Civil Money Penalty: $12,122.00 ((8 Notices Not Filed at $110 each) + (10% of the Overall Contributions Not Filed))

July 30, 2015

VIA U.S.MAIL AND FEDEX
The Honorable Ann M. Ravel
Chair
Federal Election Commission
Office of Administrative Review
999 E Street, NW
Washington D.C. 20463
RE: C00547406
AF 3011
Dear Chairman Ravel,
Attached are the following comprising the response to your letter dated June 29, 2015, which I deliver in my capacity as Treasurer of the Bart McLeay for U.S. Senate, Inc.:

1. Declaration of Robert C. McChesney dated July 30, 2015 (attaching separate letter of same date);

2. Declaration of Bartholomew L. McLeay dated July 29, 2015; and

3. Letter dated July 30, 2015 to Federal Election Commission, Office of Administrative Review (Attention: Rhiannon R. Magruder).

Thank you for your attention to this matter.

Respectfully Submitted,

Robert C. McChesney, in official capacity as
Treasurer Bart McLeay for U.S. Senate, Inc.

In Re: C00547406
AF#:3011

Declaration of Robert C. McChesney

I, Robert C. McChesney, declare:

1. I am Treasurer of Bart McLeay for U.S. Senate, Inc. ("Corporation"), the principal campaign committee for a former candidate for the U.S. Senate, Bartholomew L. McLeay ("Candidate") in the primary election held on May 13, 2014. I make this declaration in response to matters raised in a letter dated June 29, 2015 ("June 29 letter") from the Federal Election Commission ("Commission") to the Declarant in my official capacity as Treasurer of the Corporation.
2. Your Declarant has executed and timely delivered to the Commission a response to the June 29 letter, namely, a letter dated July 30, 2015 ("July 30 letter") attached hereto as Exhibit A and incorporated herein by reference, along with the Declaration of Bartholomew L .McLeay.
3. Any fact relied upon in the July 30 letter is true and correct to the best of your Declarant's knowledge and belief. Any reporting, compliance or other error identified in the June 29 letter resulting in an obligation of the Corporation, Candidate or the undersigned having to pay any civil money penalty would have been solely due to inadvertence.

I hereby declare under penalty of perjury of the laws of the State of Nebraska that the foregoing is true and accurate to the best of my knowledge and belief.

Executed this 30th day of July, 2015 in North Platte, Nebraska.

Robert C. McChesney, in his official capacity
as Treasurer of Bart McLeay for U.S. Senate, Inc.

July 30, 2015

VIA U.S.MAIL AND FEDEX
The Honorable Ann M. Ravel
Chair
Federal Election Commission
Office of Administrative Review
999 E Street, NW
Washington D.C. 20463
RE: C00547406
AF 3011

16092710101

Dear Chairman Ravel,

I appreciate the opportunity in my official capacity as Treasurer for Bart McLeay for U.S. Senate, Inc. ("Corporation") to respond to your letter dated June 29, 2015 ("June 29 letter") on behalf of the Federal Election Commission ("Commission") regarding the stated failure of the Corporation to "submit 48-Hour Notices" resulting in a Reason To Believe finding ("RTB finding") by the Commission.

As an initial matter, I recognize and appreciate the Commission's vital role in the federal election process. I am fully committed to cooperating and assisting the Commission in this matter.

Adoption of Corporation and Candidate Challenges and Non-Waiver

The Commission will appreciate that, because I am responding in my official capacity as Treasurer of the Corporation and thus viewed as binding the Corporation and potentially the former candidate, Bartholomew L. McLeay ("McLeay"), I must necessarily make clear that I adopt and incorporate herein by this reference, and do not waive, any and all challenges made by the Corporation or the Candidate regarding any issue raised in the June 29 letter or otherwise related to the primary election held on May 13, 2014 ("2014 campaign issues") including but not limited to the challenges and objections made in the Declaration of Bartholomew L. McLeay ("Candidate Declaration") included herein and made apart of the undersigned and Corporation's response to the June 29 letter.

For example, I am aware the Corporation and the Candidate challenge and object to the imposition of the civil monetary penalty identified in the June 29 letter on the ground it is not based on an authorized schedule of penalties lawfully established by the Commission and further, even if same was so established, the failure to give a 48–Hour Notice does not apply to the loans made by the Candidate. For the reasons stated above, I join in, adopt and incorporate by reference herein each of those challenges as my own in addition to other challenges available to the Corporation or the Candidate and as stated below.

Further Challenge and Alternative

Having made clear the foregoing about my adopting the challenges and objections of the Corporation and Candidate, I am nevertheless grateful to the Commission for giving me the chance to address the "RTB finding" in the June 29 letter from another technical perspective and, in that regard, with utmost respect, I challenge in my official capacity as Treasurer and on behalf of the Corporation the proposed civil money penalty in the June 29 letter on the further basis of "factual error" and "miscalculation of the calculated civil money penalty" as described below.

For these purposes, in the absence of the Commission accepting the challenges and objections of the Corporation and Candidate as adopted herein which would result in no payment obligation or civil money penalty, I submit the Commission should alternatively consider applying a different calculation, consistent with its approach to the governing statutory framework in the June 29 letter, that would lead to an amount not exceeding **$6,692.00**. **FN 1**

Exhibit A

A. Non-Filed Notices

The June 29 letter stated "the civil penalty is $110 for each non-filed notice" during any 48 hour time frame in the applicable period. Analysis of the Commission's computation shows it understandably decided to "combine" several contributions in analyzing the number of non-filed notices. *See* Attachment 1(identifying 8 non-filed notices from a list of 14 contributors).

Dividing Attachment 1 into separate 48-hour periods, it shows the Commission could find under its analysis there would be a total of 5 non-filed notices allegedly missing (4/24 - 4/25; 4/28-4/29; 4/30; 5/6-5/7; 5/9). The financial impact of reducing the number of notices from 8 to 5 is shown further below but is admittedly relatively small (8-5 non-filed notices = 3 X $110 = $330.00). **FN2**

B. Section 30104(a)(6) claim

1. *48-Hour Notice*

The undersigned acknowledges and, as part of this alternative compromise calculation, will assume to be true for discussion purposes the Commission's contention regarding filing of 48-Hour Notices for 12 of the 14 listed items in Attachment 1 under 52 U.S.C. § 30104(a)(6) ("Subpart A").

2. *24-Hour Notice (Expenditure From Personal Funds)*

The remaining two of the listed "48-Hour Notice contributions" in the June 29 letter were two loans made by the Candidate using personal funds. I will, again for this alternative compromise calculation, assume for discussion purposes they are subject to 52 U.S.C. § 30104(a)(6)(B)(i)(II) ("Subpart B").

The Candidate is listed as the contributor on Attachment 1 under his full name but absent his middle initial, "Bartholomew McLeay," for loans in the amount of $48,000.00 (April 29, 2014) and $50,000.00 (May 7, 2015). **FN 3**

C. Discussion

As the Commission is well aware, Section 30104(a)(6) has two subparts relating to contributions. Subpart A contains the 48-Hour Notice provision, referring to a 48-hour notice to be given for a contribution including a loan of $1,000 or more received by an authorized committee of the candidate. Subpart B refers to a 24-Hour Notice when a candidate makes a contribution or loan to the candidate's authorized committee.

The Commission commendably applies these provisions together in certain circumstances in an effort to be fair and reasonable.

Instruction FEC Form 10 properly instructs, with respect to the 24-Hour Notice, the candidate's "committee for the U.S. Senate must file this form." Instruction FEC Form 6 correspondingly observes, "The 48 Hour Notice requirement does not apply to contributions previously disclosed on reports filed by the committee" (i.e. 24 Hour Notice reports).

In other words, the FEC Instruction forms helpfully direct candidate committees to file the 24-Hour Notice on behalf of their candidates and further explain, by doing so, they obviate the need for filing a 48 Hour Notice. **FN 4**

The Commission in its RTB finding in the June 29 letter alleges I failed to give prompt notice as required by Section 30104(a)(6) with regard to the two loans made by the Candidate. I will say again that I reserve and join in all challenges and do not waive any right or objection as stated above but, for purposes of this alternative compromise calculation, acknowledge FEC Form 10 shows the civil money penalty for the 48-Hour Notices identified here would not have been found on the two loans if the Candidate's "committee for the U.S. Senate" would have filed the 24-Hour Notices.

In other words, because the Notices relate to precisely the same two loans made by the Candidate, FEC Form 10 instructs the filing of the former would have negated the need for filing the latter. Applying the same principle, the Commission from its perspective could determine, by accepting the alternative

compromise calculation, it shows the public the Commission is reasonable in deciding not to impose two punishments in a cumulative manner for a single act that, if it had been properly performed once, would have avoided both penalties

Employing the Administrative Fine Calculator identified by the Commission in the June 29 letter and selecting, again for purposes of this alternative compromise calculation only, "Total receipts" in 48-Hour increments and selecting "Non-Filer" and "Elections Sensitive Report" for the two loans with regard to 24-Hour Notice, the calculation reveals a total of **$6,692.00** as shown in the chart below.

D. Chart

48- Hour Computation

Name	Contribution Group	48-Hour	Penalty
M., SCOTT	$1,000		
V., CHARLES	$1,200		
V., JOE	$2,475		
B., LES	$1,000	$5,675	$677
K., GEORGE J	$1,000	$1,000	$210
H., ROBERT P	$1,350.06	$1,350.06	$245
F., WILLIAM H	$1,000		
R., JOE	$1,000		
G., MICHAEL	$1,000		
K., T EDWARD	$1,400		
M., DAVID C	$1,000	$5,400	$650
O., DAN	$1,000	$1,000	$210
Subtotal (12 of 14 Items in June 29 letter)			**$1,992**
24- Hour Notices Computations			
("Total receipts;" "Non-Filer" and "Elections Sensitive Report" with caveat above)			
Bartholomew McLeay	**$48,000**	**$48,000**	**$1,400**
Bartholomew McLeay	**$50,000**	**$50,000**	**$3,300**
TOTAL			**$6,692**

D. Conclusion

The Commission makes clear it does not take into account most outside influences when addressing a failure to comply with notice provisions in Section 30104(a)(6). That is understandable. I would like to inform the Commission nevertheless the Candidate worked tirelessly in the period in question (April 24, 2015 to May 9, 2014) and was focused on meeting people, interacting with the media and seeking to get out the vote for the election. The Corporation was organized to allow him to freely do so and not worry about personally monitoring the filing of specific notices identified in the June 29 letter at that critical juncture in the campaign. That was the job of the undersigned and the campaign staff.

I have served as a certified public accountant with a proud and distinguished record and many accomplishments for over 40 years. While again reserving all challenges and objections as stated above, I want to the Commission to know any error ultimately found that could result in a civil money penalty would have been entirely inadvertent.

Respectfully Submitted,

Robert C. McChesney, *in official capacity as*
Treasurer Bart McLeay for U.S. Senate, Inc.

FN 1 – I am aware of the admonition in the June 29 letter that "[a]ny offer to settle or compromise a debt owed to the Commission ... will be rejected," but this alternative provides a specific method for determining the debt amount in the event the Commission does not accept the other challenges made herein (which are and remain specifically reserved).

FN 2 - Information in Attachment 1 shows the calculated number would not be different if a 24-Hour Notice rule applied to the Candidate loans as discussed below.

FN 3 - *The Corporation has timely and fully paid all known creditors and debts besides loans from the Candidate. See* Candidate Declaration

FN 4 - Instructions for FEC Form 10 (Subpart B) similarly provide: "[W]ere the same expenditure triggers the requirement to file both Form 6 and Form 10, the campaign need only [fully and timely] file Form 10... to fulfill the Form 6 filing requirement."

16092710104

In Re: C00547406
AF#:3011

DECLARATION OF BARTHOLOMEW L. MCLEAY

I, Bartholomew L .McLeay, declare:

1. I am President of Bart McLeay for U.S. Senate, Inc. ("Corporation") and a former candidate for the U.S. Senate in the primary election held on May 13, 2014 ("primary election"). I make this declaration to respond to matters in a letter dated June 29, 2015 ("June 29 letter") from the Federal Election Commission ("Commission") to Robert C. McChesney in his official capacity as Treasurer of the Corporation ("Treasurer").

2. On or about April 29, 2014, I made an expenditure of personal funds by making a loan to the Corporation in the amount of $48,000.00 for operational purposes to satisfy debt incurred or expected obligations of the Corporation. On May 7, 2015, I made an expenditure of personal funds by making a loan to the Corporation in the amount of $50,000.00, again for operational purposes to satisfy debt incurred or expected obligations of the Corporation.

3. The Corporation is the principal campaign committee of your Declarant's U.S. Senate campaign. Loans made by your Declarant to the Corporation remain outstanding. All other creditors of the Corporation and known debts have been paid in full.

4. Your Declarant on behalf of himself and the Corporation reiterate the views expressed in the July 30, 2015 letter ("July 30 letter") delivered to the Commission by the Treasurer regarding the vital role and important public service the Commission plays in the election process. Your Declarant is aware the Commission informed the Treasurer the Commission would "only consider challenges that are based on at least one of three grounds" specified in the June 29 letter. Acknowledging such limitation, and in an abundance of caution, and with due respect to the Commission, your Declarant on behalf of himself and the Corporation, in addition to incorporating herein the challenges to the RTB findings and other challenges in the July 30 letter, also expressly challenges and objects to the imposition of a civil money penalty identified in the June 29 letter or otherwise on the ground it is not based on an authorized schedule of penalties properly or legally established by the Commission and, alternatively, the failure to give a 48–Hour Notice as alleged does not apply to the above loans.

I hereby declare under penalty of perjury of the laws of the State of Nebraska that the foregoing is true and accurate to the best of my knowledge and belief

Executed in Omaha, Nebraska this 29th day of July, 2015.

Bartholomew L. McLeay

16027101105

July 30, 2015

Office of Administrative Review
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Attention: Rhiannon R. Magruder,
Reviewing Officer

Dear Ms. Magruder,

Pursuant to a letter dated June 29, 2015 from Honorable Ann M. Ravel, I intend to be represented by legal counsel (identified below) and authorize said counsel to receive notifications and communications relating to this challenge and imposition of the calculated civil money penalty.

For administrative purposes, in order to ensure prompt reply to the Federal Election Commission, I would ask you also to copy any response to the letter dated July 30, 2015, from the undersigned and any other future correspondence to all of the following addressees including delivery by email whenever possible:

Robert C. McChesney in his capacity as
Treasurer for Bart McLeay for U.S. Senate, Inc.
P.O. Box 540788
Omaha, NE 68154

Robert C. McChesney
c/o McChesney Martin Sagehorn, P.C
101 S. Chestnut St., Suite 1
PO Box 1269
North Platte, NE 69103
rmcchesney@cpas-mms.com

Counsel

L.Steven Grasz, Esq.
Husch Blackwell, LLP
13330 California Street
Suite 200
Omaha, NE 68154
Phone: 402.964.5000
steve.grasz@huschblackwell.com

16027101065

Bartholomew L. McLeay, Esq.
c/o Kutak Rock LLC
1650 Farnam Street
Omaha, NE 68102
402.346.6000
bart.mcleay@kutakrock.com

Respectfully Submitted,

Robert C. McChesney, in official capacity as
Treasurer Bart McLeay for U.S. Senate, Inc.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 7, 2015

Robert C. McChesney, Treasurer
Bart McLeay for U.S. Senate Inc.
P.O. Box 540788
Omaha, NE 68154

16092710108

C00547406
AF#: 3011

Dear Mr. McChesney:

On July 31, 2015, the Commission's Office of Administrative Review ("OAR") received your written response ("challenge") for Bart McLeay for U.S. Senate Inc. and you, in your official capacity as Treasurer, which is being reviewed by OAR. If you have any questions regarding your challenge, please contact this Office on our toll free number (800) 424-9530 (press 0, then ext. 1660) or (202) 694-1660.

Sincerely,

Rhiannon Magruder

Rhiannon Magruder
Reviewing Officer
Office of Administrative Review

FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20463

September 29, 2015

REVIEWING OFFICER RECOMMENDATION
OFFICE OF ADMINISTRATIVE REVIEW ("OAR")

AF# 3011 – Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer (C00547406)

Summary of Recommendation

Make a final determination that the respondents violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty.

Reason-to-Believe Background

In connection with the 2014 Nebraska Primary Election held on May 13, 2014, the respondents were required to file 48-Hour Notices of Contributions/Loans ("48-Hour Notices") for contributions of $1,000 or more received between April 24, 2014 and May 10, 2014.

On June 26, 2015, the Commission found reason to believe ("RTB") that the respondents violated 52 U.S.C. § 30104(a) for failing to timely file 48-Hour Notices for fourteen contributions totaling $112,425.06 and made a preliminary determination that the civil money penalty was $12,122 based on the schedule of penalties at 11 C.F.R. § 111.44. A letter was mailed to the respondents' address of record from the Reports Analysis Division ("RAD") on June 29, 2015 to notify them of the Commission's RTB finding and civil money penalty.

Legal Requirements

The Federal Election Campaign Act ("Act") requires that the principal campaign committee of a candidate must notify the Commission, in writing, of any contribution of $1,000 or more received after the 20th day but more than 48 hours before an election. The principal campaign committee must notify the Commission within 48 hours of receipt of the contribution. The 48-hour notification shall be in addition to all other reporting requirements under the Act. 52 U.S.C. § 30104(a)(6)(A) and 11 C.F.R. § 104.5(f). All reports required to be filed by the principal campaign committee of a candidate for the office of U.S. Senator shall be filed with the Secretary of the Senate. 52 U.S.C. § 30102(g) and 11 C.F.R. § 105.2. The treasurer shall be personally responsible for the timely filing of reports. 11 C.F.R. § 104.14(d).

Summary of Respondents' Challenge

On July 31, 2015, the Commission received separate written responses ("challenges") from the Candidate and incorporated Committee, and the Committee's Treasurer. The challenge includes a declaration of each respondent and designation of counsel for future representation.

The Candidate's declaration states that he is a former candidate and serves as the President of the incorporated Committee. He explains:

> "On or about April 29, 2014, I made an expenditure of personal funds by making a loan to the [Committee] in the amount of $48,000.00 for operational purposes to satisfy debt incurred or expected obligations of the [Committee]. On May 7, 2015, I made an expenditure of personal funds by making a loan to the [Committee] in the amount of $50,000.00, again for operational purposes to satisfy debt incurred or expected obligations of the [Committee]...Loans made by [the Candidate] to the [Committee] remain outstanding. All other creditors of the [Committee] and known debts have been paid in full."

In addition to adopting the challenges in the Treasurer's response, summarized below, the Candidate challenges that the 48-Hour Notice requirements do not apply to candidate loans.

The Treasurer's response states that he adopts the challenges contained in the Candidate's response, as summarized above. He also suggests that if the Candidate's challenges are not accepted and the fine not waived, the Commission should consider reducing the civil money penalty due to a factual error in calculating the civil money penalty. The Treasurer explains the penalty should be recalculated for the following reasons:

1. "The [RTB] letter stated "the civil penalty is $110 for each non-filed notice" during any 48 hour time frame in the applicable period. Analysis of the Commission's computation shows it understandably decided to "combine" several contributions in analyzing the number of non-filed notices...Dividing [the contributions] into separate 48-hour periods, it shows the Commission could find under its analysis there would be a total of [five] non-filed notices allegedly missing (4/24- 4/25; 4/28-4/29; 4/30; 5/6-5/7; 5/9). The financial impact of reducing the number of notices from [eight to five] is shown further below but is admittedly relatively small (8-5 non-filed notices= 3 X $110 = $330.00)."

2. Two of the fourteen cited contributions are loans from the Candidate's personal funds subject to 52 U.S.C. § 30104(a)(6)(B). With respect to these loans, the Committee was required to file [24-Hour Notices of Expenditure of Personal Funds ("24-Hour Notices")] using FEC Form 10. Further, the 48-Hour Notice requirement does not apply to contributions that were previously disclosed. "In other words, the FEC Instruction forms helpfully direct candidate committees to file the 24-Hour Notice on behalf of their candidates and further explain, by doing so, they obviate the need for filing a 48-Hour Notice...[The Treasurer acknowledges] FEC Form 10 shows the civil money penalty for the 48-Hour Notices identified here would not have been found on the two loans if the [Committee] would have filed the 24-Hour Notices. In other words, because the Notices relate to precisely the same two loans made by the Candidate, FEC Form 10 instructs the filing of the former would have negated the need for filing the latter. Applying the same principle, the Commission from its perspective could determine, by accepting the alternative compromise calculation, it shows the public the Commission is reasonable in deciding not to impose two punishments in a cumulative manner for a single act that, if it had been properly performed once, would have avoided both penalties."

The Treasurer then details the proposed recalculation of the civil money penalty, separating the contributions subject to 48-Hour Notice requirements from the two candidate loans subject to 24-Hour Notice requirements. The Treasurer indicates he used the Commission's Administrative Fine Calculator on its website to calculate the final proposed fine of $8,684.

Analysis

The respondents contend that 48-Hour Notice requirements do not apply to candidate loans from personal funds. They further contend that the two cited loans from the Candidate's personal funds are subject to 52 U.S.C. § 30104(a)(6)(B), in which the Committee would be required to file 24-Hour Notices of Expenditure of Personal Funds ("24-Hour Notices") on FEC Form 10 instead of 48-Hour Notices of Contributions/Loans ("48-Hour Notices") on FEC Form 6. However, in *Davis v. FEC*, 554 U.S. 724 (2008), the Supreme Court ruled that provisions of the Bipartisan Campaign Reform Act ("BCRA") known as the *Millionaires' Amendment* (section 304(b) of BCRA) were unconstitutional. As a result, the Commission has stopped enforcing these requirements and 24-Hour Notices are no longer required. *See* 73 Fed. Reg. 79597 (December 30, 2008). The respondents' statements relating to 24-Hour Notices are moot.

The Reviewing Officer confirms that the 48-Hour Notice requirements do apply to a committee's receipt of candidate loans. The Commission's regulations, publications, and website explain 48-Hour Notice reporting requirements. Candidate loans are specifically included in the definition of a contribution at 11 C.F.R. § 100.52. In addition, page 81 of the *Campaign Guide for Congressional Candidates and Committees* explains that 48-Hour Notice requirements "[apply] to all types of contributions to any authorized committee of the candidate, including...loans from the candidate..." Further, on April 8, 2014, the Commission's Information Division sent an email to "information@bartmcleay.com," the email address disclosed on the Committee's Statement of Organization. The email included a link to the 2014 Nebraska Pre-Primary Report Prior Notice on the Commission's website. The notice detailed the reporting requirements in connection with the 2014 Nebraska Primary Election, including the 48-Hour Notice requirement for contributions of $1,000 or more received from April 24, 2014 through May 10, 2014. Within the Prior Notice, there was a link to the Supplemental Filing Information for Congressional Committees page of the Commission's website, which states:

> "The principal campaign committee must file notices if any authorized committees receive any contribution **(including in-kind gifts or advances of goods or services; Loans from the candidate or other non-bank sources; and guarantees or endorsements of bank loans to the candidate or committee)** of $1,000 or more per source, during the period less than 20 days but more than 48 hours before any election in which the candidate is running. *See* 11 CFR 104.5(f)." (emphasis included)

The respondents also contend the Commission made a factual error in the RTB finding with respect to calculating the civil money penalty. The respondents first state that the Commission miscalculated the number of missing notices. When determining the number of missing notices, the Commission first calculates the 48-hour deadline for each of the contributions not disclosed on a 48-Hour Notice. Based on these deadlines, the Commission then determines the number of days for which a 48-Hour Notice is missing. The cited contributions were received on eight separate days, resulting in eight separate 48-Hour Notice

deadlines. Therefore, the Reviewing Officer confirms the number of missing 48-Hour Notices is eight.

The respondents also state the Commission should consider adjusting the portion of the penalty relating to the two candidate loans, suggesting this portion of the penalty should be calculated based on its failure to report the expenditures from the Candidate's personal funds on 24-Hour Notices instead of the Committee's failure to report the receipt of the candidate loans on 48-Hour Notices. The proposed calculation uses the schedule of penalties for reports at 11 C.F.R. § 111.43. The respondents contend that this recalculation "... shows the public the Commission is reasonable in deciding not to impose two punishments in a cumulative manner for a single act that, if it had been properly performed once, would have avoided both penalties." However, the Commission did not impose two punishments. As stated above, the reporting requirements of the *Millionaires' Amendment* are not currently in effect. The Commission only imposed a penalty with respect to the Committee's failure to file 48-Hour Notices upon *receiving* the loans from the Candidate. 11 C.F.R. § 104.5(f). Therefore, the Commission appropriately calculated this portion of the penalty using the schedule of penalties for 48-Hour Notices at 11 C.F.R. § 111.44.

The Reviewing Officer confirms that the Commission correctly calculated the civil money penalty assessed at RTB pursuant to 11 C.F.R. § 111.44. The calculation is $110 plus 10 percent of the amount of the contributions not reported on each 48-Hour Notice. The respondents failed to file 48-Hour Notices for fourteen contributions received on eight separate days, totaling $112,425.06. Therefore, the amount of the civil money penalty is ($110 x 8) + (.10 x $112,425.06) or $12,122, as assessed at RTB.

Negligence is specifically included at 11 C.F.R. § 111.35(d) as an example of a circumstance that will not be considered reasonably unforeseen and beyond the respondents' control. Their challenge fails to address any of the three valid grounds at 11 C.F.R § 111.35(b). These are: (i) the RTB finding is based on factual errors; and/or (ii) the improper calculation of the civil money penalty; and/or (iii) they used best efforts to file on time but were prevented from doing so by reasonably unforeseen circumstances that were beyond their control and they filed the report no later than 24 hours after the end of these circumstances. 11 C.F.R. § 104.14(d). Therefore, the Reviewing Officer recommends that the Commission make a final determination that the respondents violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty.

OAR Recommendations

1. Adopt the Reviewing Officer recommendation for AF# 3011 involving Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, in making the final determination;

2. Make a final determination in AF# 3011 that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty; and

3. Send the appropriate letter.

Attachments

Attachment 1 –
Attachment 2 –
Attachment 3 – Declaration from RAD
Attachment 4 – Declaration from OAR
Attachment 5 – 73 Fed. Reg. 79597 (December 30, 2008)

DECLARATION OF KRISTIN D. ROSER

1. I am the Chief of the Compliance Branch for the Reports Analysis Division of the Federal Election Commission ("Commission"). In my capacity as Chief of the Compliance Branch, I oversee the initial processing of the Administrative Fine Program. I make this declaration based on my personal knowledge and, if called upon as a witness, could and would testify competently to the following matters.
2. I hereby certify that documents identified herein are true and accurate copies of the following sent by the Commission to Bart McLeay for US Senate, Inc.:
   A) Request for Additional Information for the 2014 July Quarterly Report, dated March 16, 2015, referencing the missing 48-Hour Notices (sent via regular mail to the address of record);
   B) Reason-to-Believe Letter, dated June 29, 2015 referencing the missing 48-Hour Notices (sent via overnight mail to the address of record).
3. I hereby certify that I have searched the Commission's public records and find that Bart McLeay for US Senate, Inc. has not yet filed the missing 48-Hour Notices with the Commission.
4. Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct and that all relevant telecoms for the matter have been provided. This declaration was executed at Washington, D.C. on the 5th day of August, 2015.

Kristin D. Roser

Kristin D. Roser
Chief, Compliance Branch
Reports Analysis Division
Federal Election Commission

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RQ-2

March 16, 2015

ROBERT C. MCCHESNEY, TREASURER
BART MCLEAY FOR US SENATE INC
PO BOX 540788
OMAHA, NE 68154

Response Due Date
04/20/2015

IDENTIFICATION NUMBER: C00547406

REFERENCE: JULY QUARTERLY REPORT (04/24/2014 - 06/30/2014)

Dear Treasurer:

This letter is prompted by the Commission's preliminary review of the report referenced above. This notice requests information essential to full public disclosure of your federal election campaign finances. **An adequate response must be received at the Senate Public Records Office by the response date noted above. Failure to adequately respond by the response date noted above could result in an audit or enforcement action.** Additional information is needed for the following 1 item(s):

- Schedule A of your report indicates that your committee may have failed to file one or more of the required 48-hour notices regarding "last minute" contributions received by your committee after the close of books for the 12 Day Pre Primary Report (see attached). A principal campaign committee must notify the Commission, in writing, within 48 hours of any contribution of $1,000 or more received between two and twenty days before an election. These contributions are then reported on the next report required to be filed by the committee. To ensure that the Commission is notified of last minute contributions of $1,000 or more to your campaign, it is recommended that you review your procedures for checking contributions received during the aforementioned time period. The failure to file 48-hour notices may result in civil money penalties or legal enforcement action. (11 CFR § 104.5(f))

If any contribution of $1,000 or more was incorrectly reported, you must amend your original report with the clarifying information.

Please note, you will not receive an additional notice from the Commission on this matter. Adequate responses must be received by the Commission on or before the due date noted above to be taken into consideration in determining whether audit action will be initiated. Failure to comply with the provisions of the Act may also result in an enforcement action against the committee. Any response submitted by your committee

BART MCLEAY FOR US SENATE INC

will be placed on the public record and will be considered by the Commission prior to taking enforcement action. **Requests for extensions of time in which to respond will not be considered.**

A written response or an amendment to your original report(s) correcting the above problems should be filed with the Senate Public Records Office. Please contact the Senate Public Records Office at (202) 224-0322 for instructions on how and where to file an amendment. If you should have any questions regarding this matter or wish to verify the adequacy of your response, please contact me on our toll-free number (800) 424-9530 (at the prompt press 5 to reach the Reports Analysis Division) or my local number (202) 694-1395.

Sincerely,

Benjamin G. Holly

Ben Holly
Senior Campaign Finance Analyst
Reports Analysis Division

417

Missing 48-Hour Notices
Bart McLeay for US Senate, Inc. (C00547406)

Contributor Name	Date	Amount	Election
McPheeters, Scott	4/24/14	$1,000.00	P2014
Vacanti, Charles	4/24/14	$1,200.00	P2014
Vacanti, Joe	4/24/14	$2,475.00	P2014
Baledge, Les	4/25/14	$1,000.00	P2014
Kubat, George J.	4/28/14	$1,000.00	P2014
McLeay, Bartholomew	4/29/14	$48,000.00	P2014
Horgan, Robert P.	4/30/14	$1,350.06	P2014
Fleming, William H.	5/6/14	$1,000.00	P2014
Rogers, Joe	5/6/14	$1,000.00	P2014
Gottschalk, Michael	5/7/14	$1,000.00	P2014
Kizer, T. Edward	5/7/14	$1,400.00	P2014
McKinnis, David C.	5/7/14	$1,000.00	P2014
McLeay, Bartholomew	5/7/14	$50,000.00	P2014
O'Neill, Dan	5/9/14	$1,000.00	P2014

Attachment 4
2 Pages

DECLARATION OF RHIANNON MAGRUDER

1) I am the Reviewing Officer in the Office of Administrative Review for the Federal Election Commission ("Commission"). In my capacity as Reviewing Officer, I conduct research with respect to all challenges submitted in accordance with the Administrative Fine program.

2) The principal campaign committee of a candidate must file notifications disclosing contributions of $1,000 or more which are received after the 20th day but more than 48 hours before an election. These notifications (also called 48-Hour Notices) must be filed with the Commission within 48 hours of the committee's receipt of the contribution(s).

3) It is the practice of the Reports Analysis Division to document all calls to or from committees regarding a letter they receive or any questions relating to the administrative fine regulations, including due dates of reports and filing requirements.

4) I hereby certify that I have searched the Commission's public records and that the documents identified herein are the true and accurate copies of:

   a) Statement of Organization filed by Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer. The document was filed on July 18, 2013 and lists "information@bartmcleay.com" as the Committee's official email address.

5) Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed at Washington, D.C. on the 29th day of September, 2015.

Rhiannon Magruder

Rhiannon Magruder
Reviewing Officer
Office of Administrative Review
Federal Election Commission

FEC FORM 1

STATEMENT OF ORGANIZATION

RECEIVED
SECRETARY OF THE SENATE
PUBLIC RECORDS
13 JUL 18 PM 4:55
Office Use Only

1. NAME OF COMMITTEE (in full) ☐ (Check if name is changed) Example: If typing, type over the lines. 12FE4M5

Bart McLeay for US Senate, Inc.

PO BOX 540788

ADDRESS (number and street)

☐ ◄ (Check if address is changed)

OMAHA NE 68154-

CITY ▲ STATE ▲ ZIP CODE ▲

COMMITTEE'S E-MAIL ADDRESS

☐ ◄ (Check if address is changed) information@bartmcleay.com

Optional Second E-Mail Address

COMMITTEE'S WEB PAGE ADDRESS (URL)

☐ ◄ (Check if address is changed) bartmcleay.com

2. DATE 07 12 2013

3. FEC IDENTIFICATION NUMBER ▶ C

4. IS THIS STATEMENT X NEW (N) OR ☐ AMENDED (A)

I certify that I have examined this Statement and to the best of my knowledge and belief it is true, correct and complete.

Type or Print Name of Treasurer Robert C. McChesney

Signature of Treasurer Robert C. McChesney Date 07 15 2013

NOTE: Submission of false, erroneous, or incomplete information may subject the person signing this Statement to the penalties of 2 U.S.C. §437g.

ANY CHANGE IN INFORMATION SHOULD BE REPORTED WITHIN 10 DAYS.

Office Use Only				

For further information contact:
Federal Election Commission
Toll Free 800-424-9530
Local 202-694-1100

FEC FORM 1
(Revised 06/2012)

13970119061

proposed rulemaking for any proposed rule." Because this rule is being issued as a final rule, on the grounds set forth above, a regulatory flexibility analysis is not required under the RFA.

DHS has considered the impact of this rule on small entities and has determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of $100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 12866

This amendment does not meet the criteria for a "significant regulatory action" as specified in Executive Order 12866.

E. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

List of Subjects in 8 CFR Part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

Amendments to the Regulations

■ For the reasons stated in the preamble, DHS amends part 217 of title 8 of the Code of Federal Regulations (8 CFR part 217), as set forth below.

PART 217—VISA WAIVER PROGRAM

■ 1. The general authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

■ 2. In § 217.2 the definition of the term "Designated country" in paragraph (a) is revised to read as follows:

§ 217.2 Eligibility.

(a) * * *

Designated country refers to Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries. After May 15, 2003, citizens of Belgium must present a machine-readable passport in order to be granted admission under the Visa Waiver Program.

* * * * *

Paul A. Schneider,

Deputy Secretary.

[FR Doc. E8-30818 Filed 12-29-08; 8:45 am]

BILLING CODE 4410-10-P

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 101, 102, 104, 110, 113, 400, 9001, 9003, 9031, 9033

Notice 2008-14; Repeal of Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates

AGENCY: Federal Election Commission.

ACTION: Final rules.

SUMMARY: The Federal Election Commission ("Commission") is removing its rules on increased contribution limits and coordinated party expenditure limits for Senate and House of Representatives candidates facing self-financed opponents. These rules were promulgated to implement sections 304 and 319 of the Bipartisan Campaign Reform Act of 2002, known as the "Millionaires' Amendment." In *Davis v. Federal Election Commission*, the Supreme Court held that sections 319(a) and (b), regarding House of Representatives elections, were unconstitutional. The Court's analysis also applies to the contribution and spending limits in section 304 regarding Senate elections. The Commission, therefore, is removing its rules that implement the Millionaires' Amendment. However, the Commission is retaining certain other rules that were not affected by the *Davis* decision. Further information is provided in the supplementary information that follows.

DATES: *Effective Date:* February 1, 2009.

FOR FURTHER INFORMATION CONTACT: Mr. Robert M. Knop, Assistant General Counsel, or Mr. Neven F. Stipanovic, Attorney, 999 E Street, NW., Washington, DC 20463, (202) 694-1650 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: The Commission is revising its regulations to reflect the Supreme Court's decision in *Davis v. Federal Election Commission*, 128 S. Ct. 2759 (2008). The Commission is deleting rules that implemented the Millionaires' Amendment at 11 CFR 100.19(g), 104.19, 110.5(b)(2), and Part 400. It is making technical and conforming changes to its rules at 11 CFR 100.33, 101.153, 101.1, 102.2(a)(1)(viii), 113.1(g)(6)(ii), 9001.1, 9003.1(b)(8), 9031.1, and 9033.1(b)(10). It is retaining unchanged its rules at 11 CFR 110.1(b)(3)(ii)(C), 116.11, 116.12, and 9035.2(c).

The Commission published a Notice of Proposed Rulemaking ("NPRM") on October 20, 2008, in which it sought public comment on the proposed rule implementing the *Davis* decision. *See Notice of Proposed Rulemaking on Increased Contribution and Expenditure Limits for Candidates Opposing Self-financed Candidates*, 73 FR 62224 (Oct. 20, 2008). In addition, the Commission sought public comment on its proposal to retain 11 CFR 116.11 and 116.12, which concern the repayment of candidate's personal loans. *Id.* at 62226. The comment period ended on November 21, 2008.

The Commission received four comments on the proposed rule, including a comment from the Internal Revenue Service ("IRS") stating that the proposed rules did not conflict with the Internal Revenue Code or IRS regulations.

For the reasons explained below, the Commission has decided to delete its rules that implemented the Millionaires' Amendment, and to retain and revise certain other rules that were not invalidated by the *Davis* decision. The

Commission's final rules are identical to the proposed rules in the NPRM.

Under the Administrative Procedure Act, 5 U.S.C. 801(a)(1), agencies must submit final rules to the Speaker of the House of Representatives and the President of the Senate and publish them in the Federal Register at least 30 calendar days before they take effect. The final rules that follow were transmitted to Congress on December 19, 2008.

Explanation and Justification

The Millionaires' Amendment[1] of the Bipartisan Campaign Reform Act of 2002, Public Law No. 107–155 ("BCRA"), increased certain contribution limits and coordinated party expenditure limits for Senate and House of Representatives candidates facing opponents who spent significant amounts of personal funds. When a self-financed opponent spent personal funds above a certain threshold amount, the Millionaires' Amendment permitted a candidate to accept individual contributions under increased contribution limits. 2 U.S.C. 441a(i) and 441a–1(a). When certain other threshold amounts were reached, the Millionaires' Amendment also allowed national and state political party committees to make unlimited coordinated party expenditures on behalf of the candidate in the general election. *Id.*

On June 26, 2008, the Supreme Court invalidated the Millionaires' Amendment. In *Davis*, the Supreme Court reviewed a challenge by a self-financed candidate who triggered the Millionaires' Amendment in the 2004 and 2006 elections for the House of Representatives. 128 S. Ct. 2759. The Supreme Court held that the House of Representatives provision of the Millionaires' Amendment was unconstitutional because it violated the plaintiff's First Amendment rights. *Id.* at 2775. The Supreme Court invalidated the entire BCRA section 319 relating to House elections, including the increased contribution limits in section 319(a) and its companion disclosure requirements in section 319(b). The Court reasoned that the Millionaires' Amendment imposed a substantial burden on the plaintiff's exercise of his First Amendment right to use personal funds for campaign speech, and that the burden was not justified by any governmental interest in eliminating corruption or the perception of corruption. *Id.* at 2772–73.

The Commission's interim rules implementing the Millionaires' Amendment were approved on December 19, 2002, and have been in effect during the 2004 and 2006 election cycles, and the beginning of the 2008 election cycle. *See Interim Final Rules on Increased Contribution and Coordinated Party Expenditure Limits for Candidates Opposing Self-Financed Candidates* ("*Interim Final Rules*"), 68 FR 3970 (Jan. 27, 2003).

On July 25, 2008, the Commission issued a Public Statement that, in light of the *Davis* decision, it would no longer enforce the Millionaires' Amendment. *See* Press Release, Public Statement on the Supreme Court's Decision in *Davis* v. *FEC*, July 25, 2008, *http://www.fec.gov/press/press2008/220080725millionaire.shtml*. As of June 26, 2008, the increased contribution limits and reporting requirements were no longer in effect, and political party committees were no longer permitted to make increased coordinated party expenditures on behalf of self-financed candidates. *Id.*

A. Removal of 11 CFR Part 400—Increased Limits for Candidates Opposing Self-Financed Candidates

The Commission is deleting 11 CFR Part 400 in its entirety because the statutory foundation of Part 400 was invalidated by the Supreme Court's decision in *Davis*.

The Commission's rules at 11 CFR Part 400 had implemented the Millionaires' Amendment. *See Interim Final Rules* at 3975. Specifically, the rules at Part 400: (1) Provided the notification and reporting requirements for Senate and House of Representatives candidates (subpart B); (2) explained when the increased contribution limits apply (subpart C); (3) explained how to calculate the increased contribution limits (subpart D); and (4) explained how candidates' authorized committees must dispose of excess contributions (subpart E). In *Davis*, the Supreme Court decided that increased contribution limits and disclosure requirements for House of Representatives candidates in BCRA sections 319(a) and (b) were unconstitutional. Thus, the Commission's rules at 11 CFR Part 400 that implemented BCRA sections 319(a) and (b) are no longer valid.

The Supreme Court in *Davis* struck down only BCRA sections 319(a) and (b) governing House of Representatives elections. The Commission, however, has concluded that the Supreme Court's analysis in *Davis* also precludes enforcement of the Commission's rules implementing BCRA sections 304(a) and (b), which provide increased contribution limits and disclosure requirements for Senate elections. In *Davis*, the Court concluded that increased contribution limits for a House of Representatives candidate facing a self-financed candidate impermissibly burdened the First Amendment right of the self-financed candidates to spend their own money for campaign speech. 128 S. Ct. at 2771. There is no basis to conclude that the constitutional implications would be different for similarly situated candidates in Senate elections, governed by BCRA sections 304(a) and (b), than in the respective House of Representatives elections, governed by BCRA sections 319(a) and (b).

Two commenters agreed with the Commission that Part 400 is unenforceable in both Senate and House of Representatives elections. These commenters explained that the Supreme Court's rationale for rejecting section 319(a)'s contribution limits for House of Representatives candidates applied equally to Senate candidates, and they urged the Commission to remove Part 400 entirely from its regulations. Another commenter urged the Commission to retain these rules because the commenter disagreed with the Supreme Court's holding in *Davis*.

The Commission's rules at Part 400 implemented the Millionaires' Amendment provisions for both House and Senate elections. The Commission, therefore, is deleting 11 CFR Part 400 in its entirety.

B. Amendments to Other Provisions

1. Part 100—Definitions

a. 11 CFR 100.19(g)—File, Filed, or Filing.

The Commission is deleting paragraph (g) from 11 CFR 100.19 because the statutory foundation of this provision has been invalidated by the Supreme Court's decision in *Davis*. Section 100.19 defines "file, filed, or filing" and specifies when a document is considered timely filed. Paragraph (g) had stated that a candidate's notification of expenditures from personal funds under 11 CFR 400.21 and 400.22 is considered timely filed if sent by facsimile or electronic mail to all appropriate parties within 24 hours of the time the thresholds set forth in 11 CFR 400.21 and 400.22 are exceeded, thereby triggering the reporting requirement.

As explained above, the Commission is deleting 11 CFR Part 400 in its entirety because the Supreme Court invalidated the Millionaires'

[1] Section 304 of BCRA added a new subsection (i) to 2 U.S.C. 441a, which addressed Senate elections. Section 319 of BCRA added a new section 441a–1 to the Act, which addressed elections for the House Representatives. The Senate provisions also added new notification and reporting requirements in 2 U.S.C. 434.

Amendment. The Commission is deleting paragraph (g) from section 100.19 because the candidate's notifications under 11 CFR 400.21 and 400.22 are no longer required.

b. 11 CFR 100.33—Personal Funds. The Commission is revising the definition of "personal funds" in 11 CFR 100.33 by deleting the cross-reference to section 400.2, which the Commission is removing through this rulemaking. The Commission is retaining the remainder of section 100.33 because the definition of "personal funds" in section 100.33 applies generally to other Title 2 rules that use the term "personal funds." [2] *See Interim Final Rules*, 68 FR at 3972. The Commission also notes that the definition of "personal funds" at 11 CFR 9003.2(c)(3), which applies to Title 26 of the United States Code, remains unchanged. *See* 73 FR at 62227.

2. 11 CFR 101.1—Candidate Designations

The Commission is deleting the sentence in paragraph (a) of 11 CFR 101.1 that required Senate and House of Representatives candidates to state, on their Statements of Candidacy on FEC Form 2 (or, if the candidates are not required to file electronically, on their letters containing the same information), the amount by which the candidates intended to exceed the threshold amount as defined in 11 CFR 400.9. The *Davis* decision invalidated the statutory foundation for this requirement.

3. 11 CFR 102.2—Statement of Organization: Forms and Committee Identification Number

The Commission is retaining and revising 11 CFR 102.2(a)(1)(viii), which had required principal campaign committees to provide both their electronic mail addresses and their facsimile numbers on FEC Form 1. Paragraph (viii) was promulgated by the *Interim Final Rules* to facilitate the notification of expenditures from personal funds under Part 400. *See Interim Final Rules*, 68 FR at 3972. Although the notifications under Part 400 are no longer required, the electronic mail addresses provided by committees facilitates the exchange of information between committees and the Commission for other purposes under the Federal Election Campaign Act of 1971, as amended ("FECA"). Continuing to require committees' electronic mail addresses, therefore, will continue to benefit the committees as well as the Commission. Consistent with its delegated authority to require political committees to provide an "address" when filing a statement of organization under 2 U.S.C. 433(b)(1), the Commission is retaining the requirement that committees report their electronic mail addresses on FEC Form 1. The Commission, however, is deleting the requirement that committees provide their facsimile numbers because it does not routinely communicate with committees via facsimile machine.

4. 11 CFR 104.19—Special Reporting Requirements for Principal Campaign Committees of Candidates for Election to the United States Senate or United States House of Representatives

The Commission is removing and reserving 11 CFR 104.19 because the statutory foundation of this section was invalidated by the Supreme Court's decision in Davis. Section 104.19 had required principal campaign committees of Senate and House of Representatives candidates to report information necessary to calculate their "gross receipts advantage," which is defined at 2 U.S.C. 441a(i)(1)(E) (Senate) and 441a-1(a)(2)(B) (House of Representatives). This reporting requirement was promulgated to ensure that the candidates in the same House or Senate election had sufficient and timely information to calculate the "opposition personal funds amount" under 11 CFR 400.10. *See Interim Final Rules*, 68 FR at 3972.

5. 11 CFR 110.1(b)(3)(ii)(C)—Net Debts Outstanding

The Commission is retaining 11 CFR 110.1(b)(3), which restricts the ability of candidates and their authorized committees to accept contributions after the election. Together with sections 116.11 and 116.12, paragraph (b)(3) of section 110.1 implements 2 U.S.C. 441a(j), the statutory provision added by BCRA that restricts the repayment of candidate's personal loans after the election. *See* Explanation and Justification, below, for 11 CFR 116.11 and 116.12.

Candidates and their authorized committees cannot accept contributions for an election after the election is over unless the candidate still has net debts outstanding from that election. 11 CFR 110.1(b)(3)(i). This rule was promulgated long before BCRA added the loan repayment restriction in 2 U.S.C. 441a(j). After the election is over, candidates and their authorized committees may accept contributions up to the amount of their "net debts outstanding," as defined in 11 CFR 110.1(b)(3)(ii). To conform with the fundraising restrictions in 11 CFR 116.11, the Commission added paragraph (C) to section 110.1(b)(3)(ii), which excludes the amount of personal loans that exceed $250,000 from the definition of "net debt outstanding." *See Interim Final Rules*, 68 FR at 3973. The Commission is retaining the rule at 11 CFR 110.1(b)(3)(ii)(C) for the same reasons it is retaining the current rules at 11 CFR 116.11 and 116.12, as explained below.

6. 11 CFR 110.5—Biennial Contribution Limitations

The Commission is deleting paragraph (b)(2) of section 110.5 because the statutory foundation for this provision has been invalidated by the Supreme Court's decision in *Davis*. Paragraph (b)(2) stated the circumstances under which the biennial limits on contributions by individuals do not apply to contributions made under 11 CFR Part 400. As explained above, the Commission is removing 11 CFR Part 400 because the *Davis* decision invalidated the Millionaires' Amendment. Accordingly, the exception to the individual contribution limits under section 110.5(b)(2) is no longer valid. The Commission, therefore, is deleting 11 CFR 110.5(b)(2).

The Commission is also amending 11 CFR 110.5 paragraphs (b), (d), and (e), by revising the spelling of the word "bi-annual" to "biennial." This change makes the spelling consistent with the title of section 110.5, which uses the word "biennial."

7. 11 CFR 116.11 and 116.12—Repayment of Candidate Loans

The Commission is retaining sections 116.11 and 116.12 of the regulations that concern the repayment of candidates' personal loans made to their campaign committees. The Commission sought public comment on retaining these provisions in light of the Supreme Court's decision in *Davis*. No comments were received.

BCRA added a new provision prohibiting candidates and their authorized committees from using contributions made after the election to repay loans from the candidates to their own authorized committees to the extent the contributions total over $250,000. *See* 2 U.S.C. 441a(j). These loans are referred to as "personal loans." The Commission's current rules at 11 CFR 116.11 and 116.12 implement 2 U.S.C. 441a(j). Section 116.11 prohibits an authorized committee from using contributions made after an election to repay any personal loan by a candidate that exceeds $250,000. Section 116.12 addresses the repayment

[2] *See e.g.*, 11 CFR 100.83(c), 106.3(b)(1), and 110.10.

of candidate's personal loans that, in the aggregate, are equal to or less than $250,000.

The Commission concludes that the *Davis* decision did not invalidate the personal loan provision in BCRA and, thus, it is retaining the rules that implement that provision. The Commission does not have authority, on its own, to declare a duly enacted law to be unconstitutional.

The Court in *Davis* did not address the validity of the personal loan provision, and the plaintiff did not challenge that provision of BCRA. 128 S. Ct. 2759. Although that provision is in the same statutory subsection of BCRA (section 304(a)) as other provisions that the Supreme Court in *Davis* held to be unconstitutional, the personal loan provision is placed in a separate subsection within 2 U.S.C. 441a. This statutory provision has a wider application than other provisions of the Millionaires' Amendment. It applies equally to all candidates and regardless of whether the Millionaires' Amendment provisions also apply to those candidates. Most notably, while other provisions of the Millionaires' Amendment apply only to Senate and House of Representatives candidates, the loan repayment provision applies to candidates for all Federal offices, including presidential candidates. Because this statutory provision has wider application than the Millionaires' Amendment, the Commission implemented it by adding new sections 116.11 and 116.12, rather than by including these rules in 11 CFR Part 400 with the Millionaires' Amendment regulations. *See Interim Final Rules* at 3973.

The Commission's decision to retain sections 116.11 and 116.12 is consistent with its approach in a recent advisory opinion, which was requested after the Supreme Court invalidated the Millionaires' Amendment in *Davis*. *See* Advisory Opinion 2008–09 (Lautenberg).[3] Senator Lautenberg loaned money to his principal campaign committee in connection with his primary election. The Senator asked the Commission whether the personal loan provision applied to his personal loan in light of the *Davis* decision. The Commission concluded that it did apply because the *Davis* decision did not address the constitutionality of the personal loan provision. 128 S. Ct. 2759. The Commission explained that, unlike the BCRA provisions found to be unconstitutional in *Davis*, the personal loan provision applies equally to all candidates, regardless of whether they or their opponents have triggered the Millionaires' Amendment.

The Commission also concluded in Advisory Opinion 2008–09 that the personal loan provision was severable from the Millionaires' Amendment. As the Commission explained there, BCRA section 401 provides that the invalidation of one provision of BCRA will not affect the validity of any other provisions of BCRA, nor the application of such provisions to other persons and circumstances. 2 U.S.C. 454. It is a well-settled principle of statutory construction that "[u]nless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *Buckley* v. *Valeo*, 424 U.S. 1, 108–109 (1976) (quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932)). In *Buckley*, the Supreme Court struck down certain provisions of FECA's section 202, but expressly upheld other provisions within the same subsection of the statute.

In Advisory Opinion 2008–09, the Commission found that it was not at all "evident" from the text, function, or legislative history of the Millionaires' Amendment that Congress intended the personal loan provision to be inextricably tied to the increased contribution limits of section 304(a) of BCRA. Section 304(a) was codified in two separate provisions of 2 U.S.C. 441a, one providing for the increased contribution limits and the other limiting repayment of personal loans. Functionally, the personal loan provision can operate effectively without the provisions invalidated by the Supreme Court in Davis. Because the loan repayment provision's operation does not depend upon the invalidated increased contribution limits or reporting provisions, its validity is not affected by their invalidation. Moreover, legislative history shows that Congress in several instances addressed the personal loan provision separately from the unconstitutional provisions regarding increased contribution limits. *See, e.g.*, 147 Cong. Rec. S2450–51 (daily ed. Mar. 19, 2001) (statement of Senator Domenici); 147 Cong. Rec. S2461–62 (daily ed. Mar. 19, 2001) (statement of Senator Domenici).

The Commission, therefore, is retaining the rules at 11 CFR 116.11 and 116.12 that restrict the repayment of personal loans made by candidates to their authorized committees.

[3] Advisory Opinion 2008–09 (Lautenberg) is available at *http://saos.nictusa.com/saos/searchao.*

C. Technical and Conforming Amendments to Other Regulations

1. 11 CFR 100.153—Routine Living Expenses; 11 CFR 113.1(g)(6)(ii)—Personal Use.

The Commission is amending 11 CFR 100.153 and 113.1(g)(6)(ii) by revising the cross-references to the definition of "personal funds" from 11 CFR 110.10(b) to current 11 CFR 100.33. The Commission deleted 11 CFR 110.10(b) in the *Interim Final Rules*. 68 FR at 3973. The change reflects the Commission's prior removal of the "personal funds" definition from section 110.1(b) to section 100.33.

2. 11 CFR 9001.1—Scope; 11 CFR 9003.1—Candidate and Committee Agreements; 11 CFR 9031.1—Scope; 11 CFR 9033.1—Candidate and Committee Agreements

The Commission is making technical amendments to these sections that update references to its other regulations to reflect the elimination of Part 400.

Certification of No Effect Pursuant to 5 U.S.C. 605(b) (Regulatory Flexibility Act)

The Commission certifies that the attached final rule will not have a significant economic impact on a substantial number of small entities. The basis for this certification is that few, if any, small entities will be affected by this rulemaking, which applies only to Federal candidates and their campaign committees, and political committees of political parties. Such committees are not "small entities" under 5 U.S.C. 601. Candidate and party committees are not independently owned and operated because they are not financed and controlled by a small identifiable group of individuals; rather, they rely on contributions from a variety of persons to fund the committee's activities. The Democratic and Republican parties also have a major controlling influence within the political arena and are dominant in their field. However, to the extent that any party committees representing major or minor political parties or any other political committees might be considered "small entities," the number that would be affected by this rule is not substantial.

The final rule also does not add any new substantive provisions to the current regulations, but rather it removes or retains existing regulations. Therefore, the attached final rule will not have a significant impact on a substantial number of small entities.

List of Subjects

11 CFR Part 100

Elections.

11 CFR Part 101

Political candidates, Reporting and recordkeeping requirements.

11 CFR Part 102

Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 104

Campaign funds, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 110

Campaign funds, Political committees and parties.

11 CFR Part 113

Campaign funds.

11 CFR Part 400

Campaign funds, Elections, Political candidates, Political committees and parties, Reporting and recordkeeping requirements.

11 CFR Part 9001

Campaign funds.

11 CFR Part 9003

Campaign funds, Reporting and recordkeeping requirements.

11 CFR Part 9031

Campaign funds.

11 CFR Part 9033

Campaign funds, Reporting and recordkeeping requirements.

■ For the reasons set out in the preamble, the Commission is amending Subchapters A, C, E, and F of Chapter I of Title 11 of the *Code of Federal Regulations* as follows:

PART 100—SCOPE AND DEFINITIONS (2 U.S.C. 431)

■ 1. The authority citation for part 100 continues to read as follows:

Authority: 2 U.S.C. 431, 434, 438(a)(8), and 439a(c).

§ 100.19 [Amended]

■ 2. In § 100.19, paragraph (b) is amended by removing the reference to "(g)" and adding in its place "(f)" in paragraph (b) introductory text and (b)(2), and by removing paragraph (g).

■ 3. Section 100.33 is revised to read as follows:

§ 100.33 Personal funds.

Personal funds of a candidate means the sum of all of the following:

(a) *Assets.* Amounts derived from any asset that, under applicable State law, at the time the individual became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had—

(1) Legal and rightful title; or

(2) An equitable interest;

(b) *Income.* Income received during the current election cycle, of the candidate, including:

(1) A salary and other earned income that the candidate earns from bona fide employment;

(2) Income from the candidate's stocks or other investments including interest, dividends, or proceeds from the sale or liquidation of such stocks or investments;

(3) Bequests to the candidate;

(4) Income from trusts established before the beginning of the election cycle;

(5) Income from trusts established by bequest after the beginning of the election cycle of which the candidate is the beneficiary;

(6) Gifts of a personal nature that had been customarily received by the candidate prior to the beginning of the election cycle; and

(7) Proceeds from lotteries and similar legal games of chance; and

(c) *Jointly owned assets.* Amounts derived from a portion of assets that are owned jointly by the candidate and the candidate's spouse as follows:

(1) The portion of assets that is equal to the candidate's share of the asset under the instrument of conveyance or ownership; provided, however,

(2) If no specific share is indicated by an instrument of conveyance or ownership, the value of one-half of the property.

§ 100.153 [Amended]

■ 4. Section 100.153 is amended by removing the reference to "11 CFR 110.10(b)" and adding in its place "11 CFR 100.33".

PART 101—CANDIDATE STATUS AND DESIGNATIONS (2 U.S.C. 432(e))

■ 5. The authority citation for part 101 continues to read as follows:

Authority: 2 U.S.C. 432(e), 434(a)(11), 438(a)(8).

■ 6. Section 101.1(a) is revised to read as follows:

§ 101.1 Candidate designations (2 U.S.C. 432(e)(1)).

(a) *Principal Campaign Committee.* Within 15 days after becoming a candidate under 11 CFR 100.3, each candidate, other than a nominee for the office of Vice President, shall designate in writing, a principal campaign committee in accordance with 11 CFR 102.12. A candidate shall designate his or her principal campaign committee by filing a Statement of Candidacy on FEC Form 2, or, if the candidate is not required to file electronically under 11 CFR 104.18, by filing a letter containing the same information (that is, the individual's name and address, party affiliation, and office sought; the District and State in which Federal office is sought, and the name and address of his or her principal campaign committee at the place of filing specified at 11 CFR part 105). Each principal campaign committee shall register, designate a depository, and report in accordance with 11 CFR parts 102, 103, and 104.

* * * * *

PART 102—REGISTRATION, ORGANIZATION, AND RECORDKEEPING BY POLITICAL COMMITTEES (2 U.S.C. 433)

■ 7. The authority citation for part 102 continues to read as follows:

Authority: 2 U.S.C. 432, 433, 434(a)(11), 438(a)(8), 441d.

■ 8. In § 102.2, paragraph (a)(1)(viii) is revised to read as follows:

§ 102.2 Statement of organization: Forms and committee identification number (2 U.S.C. 433 (b), (c)).

(a) * * *

(1) * * *

(viii) If the committee is a principal campaign committee of a candidate for the Senate or the House of Representatives, the principal campaign committee's electronic mail address.

* * * * *

PART 104—REPORTS BY POLITICAL COMMITTEES AND OTHER PERSONS (2 U.S.C. 434)

■ 9. The authority citation for part 104 continues to read as follows:

Authority: 2 U.S.C. 431(1), 431(8), 431(9), 432(i), 434, 438(a)(8) and (b), 439a, 441a, and 36 U.S.C. 510.

§ 104.19 [Removed and Reserved]

■ 10. Section 104.19 is removed and reserved.

PART 110—CONTRIBUTION AND EXPENDITURE LIMITATIONS AND PROHIBITIONS

■ 11. The authority citation for part 110 continues to read as follows:

Authority: 2 U.S.C. 431(8), 431(9), 432(c)(2), 437d, 438(a)(8), 441a, 441b, 441d, 441e, 441f, 441g, 441h, and 36 U.S.C. 510.

■ 12. In § 110.5, paragraphs (b)(1), (d), and (e) are revised, and paragraph (b)(2) is removed and reserved to read as follows:

§ 110.5 Aggregate biennial contribution limitation for individuals (2 U.S.C. 441a(a)(3)).

* * * * *

(b) *Biennial limitations.* (1) In the two-year period beginning on January 1 of an odd-numbered year and ending on December 31 of the next even-numbered year, no individual shall make contributions aggregating more than $95,000, including no more than:

(i) $37,500 in the case of contributions to candidates and the authorized committees of candidates; and

(ii) $57,500 in the case of any other contributions, of which not more than $37,500 may be attributable to contributions to political committees that are not political committees of any national political parties.

* * * * *

(d) *Independent expenditures.* The biennial limitation on contributions in this section applies to contributions made to persons, including political committees, making independent expenditures under 11 CFR part 109.

(e) *Contributions to delegates and delegate committees.* The biennial limitation on contributions in this section applies to contributions to delegate and delegate committees under 11 CFR 110.14.

PART 113—USE OF CAMPAIGN ACOUNTS FOR NON-CAMPAIGN PURPOSES

■ 13. The authority citation for part 113 continues to read as follows:

Authority: 2 U.S.C. 432(h), 438(a)(8), 439a, 441a.

§ 113.1 [Amended]

■ 14. Section 113.1(g)(6)(ii) is amended by removing the reference to "11 CFR 110.10(b)" and adding in its place "11 CFR 100.33".

PART 400—[REMOVED]

■ 15. Under the authority of 2 U.S.C. 437d(a)(8), part 400 is removed.

PART 9001—SCOPE

■ 16. The authority citation for part 9001 continues to read as follows:

Authority: 26 U.S.C. 9009(b).

§ 9001.1 [Amended]

■ 17. Section 9001.1 is amended by removing the number "400" and adding in its place the number "300" in both instances in which "400" appears.

PART 9003—ELIGIBILITY FOR PAYMENTS

■ 18. The authority citation for part 9003 continues to read as follows:

Authority: 26 U.S.C. 9003 and 9009(b).

§ 9003.1 [Amended]

■ 19. In § 9003.1, paragraph (b)(8) is amended by removing the number "400" and adding in its place the number "300".

PART 9031—SCOPE

■ 20. The authority citation for part 9031 continues to read as follows:

Authority: 26 U.S.C. 9031 and 9039(b).

§ 9031.1 [Amended]

■ 21. Section 9031.1 is amended by removing the number "400" and adding in its place the number "300" in both instances in which "400" appears.

PART 9033—ELIGIBILITY FOR PAYMENTS

■ 22. The authority citation for part 9033 continues to read as follows:

Authority: 26 U.S.C. 9003(e), 9033 and 9039(b).

§ 9033.1 [Amended]

■ 23. In § 9033.1, paragraph (b)(10) is revised by removing the number "400" and adding in its place the number "300".

Dated: December 23, 2008.

On behalf of the Commission,

Donald F. McGahn, II,

Chairman, Federal Election Commission.

[FR Doc. E8-31032 Filed 12-29-08; 8:45 am]

BILLING CODE 6715-01-P

DEPARTMENT OF THE TREASURY

Office of the Comptroller of the Currency

12 CFR Part 3

[Docket ID OCC-2008-0025]

RIN 1557-AD13

FEDERAL RESERVE SYSTEM

12 CFR Parts 208 and 225

[Regulations H and Y; Docket No. R-1329]

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 325

RIN 3064-AD32

DEPARTMENT OF THE TREASURY

Office of Thrift Supervision

12 CFR Part 567

[Docket No. OTS-2008-0019]

RIN 1550-AC22

Minimum Capital Ratios; Capital Adequacy Guidelines; Capital Maintenance; Capital: Deduction of Goodwill Net of Associated Deferred Tax Liability

AGENCIES: Office of the Comptroller of the Currency, Treasury; Board of Governors of the Federal Reserve System; Federal Deposit Insurance Corporation; and Office of Thrift Supervision, Treasury.

ACTION: Final rule.

SUMMARY: The Office of the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve System (Board), the Federal Deposit Insurance Corporation (FDIC), and the Office of Thrift Supervision (OTS) (collectively, the Agencies) are amending their regulatory capital rules to permit banks, bank holding companies, and savings associations (collectively, banking organizations) to reduce the amount of goodwill that a banking organization must deduct from tier 1 capital by the amount of any deferred tax liability associated with that goodwill. For a banking organization that elects to apply this final rule, the amount of goodwill the banking organization must deduct from tier 1 capital would reflect the maximum exposure to loss in the event that such goodwill is impaired or derecognized for financial reporting purposes.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 30, 2015

L. Steven Grasz, Esq.
Husch Blackwell, LLP
13330 California Street
Suite 200
Omaha, NE 68154

Bart McLeay for U.S. Senate Inc.
C00547406
AF#: 3011

16092710126

Dear Mr. Grasz:

On June 26, 2015, the Federal Election Commission ("Commission") found reason to believe ("RTB") that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer ("respondents"), violated 52 U.S.C. § 30104(a) for failing to file 48-Hour Notices for fourteen contributions totaling $112,425.06. The Commission also made a preliminary determination that the civil money penalty was $12,122 based on the schedule of penalties at 11 C.F.R. § 111.44.

After reviewing your written response and any supplemental information submitted by you and Commission staff, the Reviewing Officer has recommended that the Commission make a final determination. A copy of the Reviewing Officer's recommendation is attached.

You may file with the Commission Secretary a written response to the recommendation within 10 days of the date of this letter. Your written response should be sent to the Commission Secretary, 999 E Street, NW, Washington, DC 20463 or via facsimile (202-208-3333). Please include the AF # in your response. Your response may not raise any arguments not raised in your original written response or not directly responsive to the Reviewing Officer's recommendation. 11 C.F.R. § 111.36(f). The Commission will then make a final determination in this matter.

Please contact me at the toll free number 800-424-9530 (press 0, then press 1660) or 202-694-1660 if you have any questions.

Sincerely,

Rhiannon Magruder

Rhiannon Magruder
Reviewing Officer
Office of Administrative Review

HUSCH BLACKWELL

Steve Grasz
Senior Counsel

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steve.grasz@huschblackwell.com

October 8, 2015

VIA FEDERAL EXPRESS
AND FACSIMILE (202) 208-3333

Commission Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Robert C. McChesney in his official capacity as Treasurer for Bart McLeay for U.S. Senate, Inc. and Bart McLeay for U.S. Senate, Inc., C00547406, AF#: 3011

Dear Commission Secretary:

This acknowledges receipt of a letter dated September 30, 2015 ("September 30 letter") from Rhiannon McGruder, Reviewing Officer, Office of Administrative Review for the Federal Election Commission ("Commission") in reply to a letter dated July 30, 2015 with attachments ("July 30 letter") delivered on behalf of the Treasurer and the Corporation in response to a letter dated June 29, 2015 ("June 29 letter") from Honorable Ann M. Ravel on behalf of the Commission. The September 30 letter instructs any further response by the Treasurer and Corporation should be directed to you at the address shown above.

Definitions used in the July 30 letter are used herein. The Treasurer and Corporation reassert and incorporate by reference, and do not waive any objection or challenge made or adopted by the Treasurer, the Corporation or the Candidate in the July 30 letter.

A. Background

The September 30 letter acknowledges the Treasurer and Corporation made "challenges" seeking to have the penalty reduced to zero ("waived") but did not

acknowledge the reasons behind such challenges. The Treasurer on behalf of the Corporation expressly stated in the July 30 letter that he adopted and incorporated by reference, and did not waive, any and all challenges made by the Corporation and Candidate, including the challenges and objections stated in the Candidate's Declaration, expressly stating "For example, I am aware the Corporation and the Candidate challenge and object to the civil monetary penalty in the June 29 letter on the ground [1] it is not based on an authorized schedule of penalties lawfully established by the Commission and, further, even if same was so established, [2] the failure to give a 48-Hour Notice does not apply to the loans made by the Candidate" (bracketed numbers added).

The September 30 letter (if at all) only indirectly addressed points 1 and 2 above. They will be further discussed in turn below.

1. The Civil Monetary Penalty in the June 29 letter is Unlawful and Unenforceable on the Ground It is Not Based on an Authorized Schedule of Penalties Lawfully Established by the Commission as Required by Law

The September 30 letter recognizes the reason to believe (RTB) finding by the Commission made in the June 29 letter was "based on the schedule of penalties at 11 C.F.R. § 111.44." The September 30 letter also states, "The proposed calculation uses the schedule of penalties for reports at 11 C.F.R. § 111.43" as the basis for its penalty determination. For the reasons shown below, these facts conclusively prove the civil monetary penalty assessed against the Treasurer and the Corporation must be vacated and stricken.

The Treasurer and the Corporation believe they can best express their objection and challenge to the civil monetary penalty against them on the basis it was not lawfully established by the Commission by attaching a draft complaint ("complaint") and draft brief in support of a motion for summary judgment ("brief") they expect to file in a Nebraska federal court unless the Commission enters an order vacating and striking any civil monetary penalty in the June 29 letter, September 30 letter or otherwise against the Treasurer or Corporation. The draft complaint and brief are incorporated by reference herein and expressly made a part of this response to the September 30 letter.[1]

[1] The draft complaint and summary judgment brief are also attached to assure the Treasurer and the Corporation will fully recover attorney fees and costs if the Commission forces them to file and prosecute this action instead of vacating the civil monetary penalty as requested herein.

The Commission should read the draft complaint and brief in their entirety but the following is a general summary:

> The Commission is a powerful federal agency charged with the duty of establishing the penal code related to federal elections. Congress directed the Commission to adopt a formal schedule of civil money penalties ("penalties schedule") to be applied to election-related infractions. Only the Commission, acting together in a public forum, is empowered to perform this critical agency function.
>
> The penalties schedule under then existing law expired on December 31, 2013. Congress granted authority to the Commission to establish a new penalties schedule going forward, but the Commission never published the subject on an agenda available to the public before any Commission meeting and has never put the matter to a public vote at any Commission meeting in an open forum as required by law for all Commission business. A Commission staff member "posted" on a government website a version of the expired penalties schedule on January 21, 2014, three weeks after its expiration but without a public vote by the Commission with advance notice to the public. The Commission readily acknowledges a three week 'gap' in its administrative fine program ("AFP program") between December 31, 2013 and January 21, 2014, as a direct result of the expiration of the penalties schedule, but the gap is actually greater. There has never been a public vote of the Commission after required public notice establishing the penalties schedule for the 2014 primary election or since.
>
> McChesney is Treasurer and acted on behalf of Corporation. The Commission purported to assess a civil money penalty under the expired penalties schedule against McChesney in his official capacity and the Corporation itself for McChesney's alleged failure to timely notify the Commission regarding certain contributions including two loans from the Candidate in the last few weeks of the 2014 primary election.
>
> The Corporation timely challenged the Commission's action on the ground the penalties schedule had not been established by the Commission as required under the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. §30101 et seq. ("Act"). The Corporation [will bring] this action

under the Administrative Procedures Act, 5 U.S.C. § 551 et seq. ("APA") seeking, among other things, to set aside the Commission's action in assessing a civil money penalty.

The Treasurer and the Corporation want to add one additional point beyond the draft complaint and brief. After recent inquiry by the Treasurer and Corporation, the Commission staff provided documents suggesting the commissioners met in secret or through private channels not open to the public to allegedly approve the 2014 penalties schedule. Beyond the seriously flawed and highly suspicious process suggested in the documentation, the Commission's action on its face violates the law.

The law requires the Commission to give advance public notice of all of its official actions and to vote in a public forum on all Commission business. The Commission regularly publishes an agenda to the public in advance including rule and regulation changes and records its actions from public meetings in an audio recording and written minutes made available to the public. The minutes are later approved in a public meeting held by the Commission.

There is no greater duty or power of the Commission than the critical role of establishing the penal code for federal elections. Yet, none of the above safeguards allowing for public involvement and participation occurred with regard to the 2014 penalties schedule. Instead, the Commission allegedly met in secret, deliberately withheld and hid their activities from public eye and then botched their improper private voting process. The Commission staff produced to the Treasurer and the Corporation unsigned ballots as *proof* the commissioners approved the 2014 penalty schedule in their secret meeting. Even beyond the illegal action taken by the commissioners, the ballots on their face required a date and signature to be valid, yet they were unexecuted. The same is true for draft rules produced by Commission staff which showed a space for Commissioner Chair Goodman to sign on January 13, 2014, but the line was left blank and unexecuted.

Even more striking is a highly suspicious "Certification" produced by the Commission staff. The "Certification" is an unsworn document without a notary stamp or statement that the commissioners actually personally appeared face-to-face before the clerk, a requirement for even the simplest and most basic notarized document at the DMV or home mortgage transaction. This unsworn "Certification" would not be acceptable by the Commission in its own proceedings, much less to record one of the most important and critical votes taken during the term of any commissioner, namely, the enormous power and authority of the Commission to punish people with fines and

monetary penalties and cause potentially significant reputational loss. Even the Treasurer and the Corporation were required to deliver affidavits (notary) or a declaration (made under penalties of perjury) to the Commission in this matter.

The "Certification" further suggests the clerk who allegedly accepted the "votes" of the Commission offered her own "interpretation" of a purported "amendment" made by "email" by one of the commissioners without discussion in the Certification of whether or when the other commissioners or anyone else besides the clerk approved the email amendment. Even if some aspects of this secret, back room vote identified in the Certification are shown to be true, the entire procedure is fatally flawed and in gross violation of statutory authority governing elections and the Commission's own regulations and rules. The Commission's actions allegedly in reliance upon this improper process are expected to be harshly criticized and not legally sanctioned by the court.[2]

2. <u>There is No Evidence the Candidate Loans Were for the Express Purpose of Influencing the Election as Opposed to Satisfying Debt or Operational Purposes</u>

The September 30 letter makes the conclusory statement, "Candidate loans are specifically included in the definition of a contribution at 11 C.F.R. § 100.52" (and further citing page 81 of the *Campaign Guide for Congressional Candidates and Committees).* The September 30 letter failed, however, to cite or consider the applicable statute, 52 U.S.C. 30101 et seq. If it had done so, it would have found only a specific <u>type</u> of loan invokes a 48-Hour Notice and further that such a loan constituting a "contribution" is different than a "loan made by a candidate using personal funds," the latter being separately defined in the statute when it was enacted as an "expenditure from personal funds." This difference is significant.

Section 30104 of Title 52 makes clear that the Commission merely finding a "loan" was made by a candidate to his or her campaign committee is <u>insufficient</u> by itself to render it a "contribution" under the statute. Not any loan will do. The evidence must show the candidate's loan was <u>specifically</u> and solely "for the purpose of influencing" <u>the election</u> and not for some other legitimate purpose such as satisfying expected future debt or campaign operations. 52 U.S.C. 30104 (6)(A). Loans made for purposes <u>other than</u> "influencing the election" are effectively covered by a catch-all provision identified

[2] Fairness and propriety alone dictate the civil monetary penalty assessed against the Treasurer and the Corporation should be vacated and stricken for the reason they have brought this matter to the attention of the Commission.

in the next provision, Section 30101(6)(B)(i)(II), where it refers to a general "loan made by a candidate using personal funds" simply as an "expenditure from personal funds."

The September 30 letter did not find evidence– because it could not– that the Candidate's loans were for the express and sole "purpose of influencing the election," which is a required finding under 52 U.S.C. 30104 (6)(A). Congress recognized there could be other purposes a loan could be made by a candidate to a campaign committee or it would not have specified or required loans to be made for the "purpose of influencing the election" under 52 U.S.C. 30104 (6)(A) before declaring them to be a "contribution." The other loans are deemed an "expenditure of personal funds." The Declaration of the Candidate shows this distinction, stating in relevant part:

> On or about April 29, 2014, I made an expenditure of personal funds by making a loan to the [Committee] . . . for operational purposes to satisfy debt incurred or expected obligations of the [Committee]. On May 7, 2015, I made an expenditure of personal funds by making a loan to the [Committee] . . ., again for operational purposes to satisfy debt incurred or expected obligations of the [Committee]. . . .

The September 30 letter does not cite any evidence or make any finding the Candidate's loans were for the sole and express "purpose of influencing the election" as required by 52 U.S.C. 30104 (6)(A). The Treasurer and the Corporation, on the other hand, have presented evidence directly to the contrary as shown above.

Accordingly, if the Commission does not vacate the civil monetary penalty on the basis the Commission failed to authorize the schedule of penalties upon which the Treasurer and Corporation have been assessed (which the Treasurer and Corporation again strongly urge the Commission to do), the Treasurer and Corporation alternatively request, without prejudice or waiver, the loans of the Candidate be removed from any calculation of the monetary civil penalty assessed in the June 29 letter or September 30 letter. If so, as shown by the calculation contained in the July 30 letter (page 3), the maximum monetary civil penalty that could be assessed against the Treasurer and Corporation is $1,992.00.

Sincerely,

Steve Grasz

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT C. MCCHESNEY, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc.; and Bart McLeay for U.S. Senate, Inc. Plaintiffs, ANN M. RAVEL, in her official capacity as Chair of the Federal Election Commission; and the UNITED STATES OF AMERICA, Defendants.	)	No. _____

PLAINTIFFS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Prepared and Submitted By:

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INTRODUCTION[1]

The Commission is a powerful federal agency charged with the duty of establishing the penal code related to federal elections. Congress directed the Commission to adopt a formal schedule of civil money penalties ("penalties schedule") to be applied to election-related infractions. Only the Commission, acting and voting together in a public forum, is empowered to perform this critical agency function.

The penalties schedule under then existing law expired on December 31, 2013. Congress granted authority to the Commission to establish a new penalties schedule going forward, but the Commission never published this subject matter on an agenda available before any Commission meeting. Nor has the subject of the 2014 penalties schedule ever been put to a public vote at any Commission meeting in an open forum as required by law for all Commission business. A Commission staff member "posted" on a government website a version of the expired penalties schedule on January 21, 2014, three weeks after its expiration but it was not done with a public vote by the Commission or after advance notice to the public. The Commission readily acknowledges a three week "gap" in its administrative fine program ("AFP program") between December 31, 2013 and January 21, 2014, as a direct result of the expiration of the penalties schedule, but the gap is actually greater. There has never been a public vote of the Commission after required public notice establishing the penalties schedule for the 2014 primary election.

McChesney is Treasurer and acted on behalf of Corporation. The Commission purported to assess a civil money penalty under the expired penalties schedule against McChesney in his

[1] Definitions herein include: "McChesney" refers to Robert C. McChesney in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc.; "BMUSSI" refers to Bart McLeay for U.S. Senate, Inc.; "Corporation" collectively refers to McChesney and BMUSSI; "Commission" refers to the Federal Election Commission; "Candidate" refers to U.S. Senate candidate, Bartholomew L. McLeay; "2014 primary election" refers to federal primary election in Nebraska on May 13, 2014.

official capacity and the Corporation itself for the alleged failure to timely notify the Commission regarding certain contributions including two loans from the Candidate in the last few weeks of the 2014 primary election.

The Corporation timely challenged the Commission's action on the ground the penalties schedule had not been established by the Commission as required under the Federal Election Campaign Act of 1971, as amended, 52 U.S.C. §30101 et seq. ("Act"). The Corporation has brought this action under the Administrative Procedures Act, 5 U.S.C. § 551 et seq. ("APA") seeking, among other things, to set aside the Commission's action in assessing a civil money penalty.

There is no genuine issue of material fact and the Corporation is entitled to judgment as a matter of law. For the reasons stated below, Corporation respectfully requests the Court grant summary judgment in his favor.

STATEMENT OF UNDISPUTED MATERIAL FACTS

A. Background

1. [illegible] McChesney is Treasurer of BMUSSI and served in that capacity for the 2014 primary election (Filing No. __ Page ID#__).

2. BMUSSI is a not-for profit corporation designated as the principal campaign committee of the Candidate pursuant to 2 U.S.C. § 432(e). The Candidate was a candidate for the United States Senate in the 2014 primary election. BMUSSI is in good standing under Nebraska law (Filing No. __ Page ID#__).

3. Ravel is the Chair of the Commission, an independent regulatory agency, and is responsible for enforcing the provisions of the law relating to reporting of campaign contributions.

Ravel served as Vice Chair of the Commission in 2014. Commissioner Lee E. Goodman ("Goodman") served as Chair of the Commission in 2014 (Filing No. __ Page ID#__).

4. United States of America is the federal government of the United States and is named as a defendant pursuant to 5 U.S.C. § 702 and 703. Ravel, Commission and United States shall be collectively referred to as "Commission" herein (Filing No. __ Page ID#__).

5. The Commission is comprised of six people charged with administering laws governing federal elections. Its members are appointed by the President and confirmed by the U.S. Senate. No more than three members can be from the same political party. Commission policy is decided in an open forum with a public vote by at least a majority of its members. Congress mandated at least four votes in an open public meeting are required for certain official action of the Commission (Filing No. __ Page ID#__).

6. The Commission is required to establishes and publish a schedule of penalties for federal elections. Congress authorized and directed the Commission to adopt a schedule of penalties ("penalties schedule") for 2014 election-related infractions (Filing No. __ Page ID#__).

B. Commission's Duty to Establish 2014 Penalties Schedule

7. On or about December 26, 2013, Congress amended the Act ("amendment") for the purpose, among other things, to "extend through 2018 the ***authority*** of the . . . Commission to impose civil money penalties on the basis of a schedule of penalties ***established*** **and** published by the Commission" (emphasis added). This amendment was accomplished "by striking 'December 31, 2013' and inserting 'December 31, 2018'" in 2 U.S.C. § 437g(a)(4)(C)(iv) (Filing No. __ Page ID#__).

8. The 2013 term of the Commission expired on December 31, 2013, along with the then existing penalties schedule. The Commission started a new term on January 1, 2014, with a

newly appointed Chair, Goodman (Filing No. __ Page ID#__).

C. No Penalties Schedule Was Enacted in 2014

9. On January 17, 2014, at 8:45 a.m., before any public notice was given by way of the Commission's agenda, and without a public vote of the Commission in an open forum establishing the 2014 penalties schedule, a Commission staff member posted the expired penalties schedule and a new Commission regulation unauthorized by Congress. *See* Federal Register Document, FR Doc. 2014–00960 Filed 1–17–14; 8:45 am (Filing No. __ Page ID#__).

10. On January 21, 2014, again without any public notice or published agenda or any public vote of the Commission in an open forum, Commission staff published Notice 2014–01 ("January 21 notice") under Goodman's name announcing a Final Rule for Extension of Administrative Fines Program ("Final Rule"). *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3303 /Tuesday, January 21, 2014 (Filing No. __ Page ID#__).

11. As of January 21, 2014 when the "Final Rule" was posted, the Commission was aware the former penalties schedule had expired and was of no force or effect after December 31, 2013 and further that it had not been the subject of any public agenda or vote by the Commission. The Final Rule posted by Commission staff acknowledged an existing "gap between the end date of the Commission's current regulations [December 31, 2013] and the effective date of this final rule on January 21, 2014." Because of the gap, the January 21 notice stated campaign reporting rules during the gap period would not be "subject to the AFP." In other words, the Commission knew it was obliged to "establish" a new penalties schedule for 2014 because the old penalties schedule had expired on December 31, 2013 (Filing No. __ Page ID#__).

12. The January 21 notice posted by Commission staff acknowledged the penalties schedule was required by law to be *periodically* established anew by the Commission, but it

complained about the fact that "each time Congress has extended the statute that authorizes the AFP, the Commission has" had to take action to reauthorize a new penalties schedule. Congress expressly created this sunset feature in the amendment to occur in five years or on December 31, 2018. Congress acted with good reason because the sunset provision compelled the Commission, as Congress undoubtedly desired, to periodically conduct a careful review, and debate as needed, the penalties schedule in a public forum concluding with a public vote by the Commission. The January 21 notice, however, purported to strip the sunset feature from the law through the Final Rule without any public involvement or public vote of the Commission, stating it sought "to obviate the need to revise . . . [it] each time Congress extends the statute." (Filing No. __ Page ID#__).[2]

13. The January 21 notice purported to establish the expired penalties schedule for the 2014 primary election in which McChesney acted as Treasurer on behalf of Corporation (Filing No. __ Page ID#__).

14. The January 21 notice posted by Commission staff under Goodman's name declared it was made "without advance notice or an opportunity for comment," would not be subjected to "congressional review," and would be self-implementing upon filing, that is, "effective immediately." The Commission did not by majority vote made in a public forum after public notice establish a penalties schedule for 2014 nor by majority vote in a public meeting of the Commission reauthorize the expired penalties schedule for the 2014 primary election or approve

[2] The January 21 notice was published in the Federal Register claiming the expired penalties schedule for 2014 had taken effect immediately and no other action was needed or would be taken by the Commission regarding the 2014 penalties schedule, despite the absence of any public vote of the Commission and no notice given to the public through a published agenda. The Final Rule read: "Accordingly, this final rule is effective upon publication in the Federal Register."

stripping the sunset feature in Public Law No. 113-72. *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302 /Tuesday, January 21, 2014 (Filing No. __ Page ID#__).[3]

D. Corporation's Timely Objection and Filing of this Action

15. On or about June 29, 2015, Ravel on behalf of the Commission, delivered a letter dated June 2, 2015 ("June 29 letter") to McChesney on behalf of the Corporation claiming the Commission had made a "reason to believe" finding ("RTB finding") that McChesney had failed to timely "submit 48-Hour Notices" allegedly required to be given to the Commission with regard to a small group of contributions ("48-Hour contributions"). McChesney on behalf of Corporation had given notice to the Commission regarding the 48-Hour contributions, albeit late according to the Commission, before he was asked to do so by anyone including the Commission. The Commission stated in the June 29 letter the law required strict compliance and the Commission would not consider any excuse by McChesney or the Corporation based on "negligence," "inexperience" or a "failure to know" regarding the 48-Hour Notices (Filing No. __ Page ID#__).

16. On July 30, 2015, the Corporation delivered a letter ("July 30 letter") making timely objection and challenge to the RTB finding, challenging, among other things, "imposition of the civil monetary penalty in the June 29 letter on the ground it is not based on an authorized schedule of penalties established by the Commission." (Filing No. __ Page ID#__).

17. On September 29, 2015, the Commission responded to the July 30 letter rejecting all of the Corporation's challenges and reiterating that "[n]egligence" will not be considered by the

[3] The January 21 notice stated, "***The Commission finds*** that notice and comment are unnecessary here because **this final rule *merely extends the applicability*** of the existing AFP and deletes one administrative provision; the final rule makes no substantive changes to the AFP" (emphasis added). This statement is unauthorized. The Commission made no such finding in any public meeting open to the general public either prior to, on or after January 21, 2014. The Commission never placed on its Commission agenda and never voted in any Commission meeting open to the public to "extend[] the applicability of the existing AFP" containing the expired penalties schedule for the 2014 primary election.

Commission or deemed "reasonably unforeseen" or "beyond the [Corporation's] control" (Filing No. __ Page ID#__).

18. On October 8, 2015, the Corporation delivered a letter ("October 8 letter") again making a timely objection and challenge to the Commission, challenging and asserting, among other things, the Commission's action against the Corporation was unlawful and without effect because it was not based on an authorized schedule of penalties lawfully established by the Commission. The Corporation delivered a draft complaint and initial draft of this summary judgment brief to the Commission in the October 8 letter (Filing No. __ Page ID#__).[4]

19. On [XX], 2015, the Commission made a final determination regarding the civil money penalty and assessed the Corporation [$___] for alleged violation of the Act (Filing No. __ Page ID#__).

18. On [XX], 2015, the Corporation finalized and filed in this Court the draft complaint previously delivered to the Commission under the APA, seeking relief to set aside the Commission's action in assessing a civil money penalty against the Corporation (Filing No. __ Page ID#__).

19. On [XX], 2015, the Commission filed the administrative record with the Court (Filing No. __ Page ID#__).

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[4] The Corporation, consistent with its objections and challenges in the July 30 letter, also challenged the Commission stating, even if the 2014 penalties schedule was so established, the failure to give a 48-Hour Notice did not apply to the loans made by the Candidate."

[5] Commission staff recently provided the Corporation with documents suggesting commissioners met in secret or communicated through private channels not open to the public on January 13, 2015, where they allegedly approved the 2014 penalties schedule. The documentation is highly suspect. It includes unsigned ballots - which on their face state they must be signed and dated to be valid – and an unsigned draft Final Rule. It also includes an unsworn "certification" allegedly prepared by a clerk who accepted an "email amendment" by at least one commissioner and who did not attest to meeting face-to-face with any commissioner, a requirement mandated for even the most basic notarized documents at the DMV or in home mortgage transactions. Beyond the highly questionable proof, the Commission's action violates the law. The law requires the Commission to give advance public notice of official action and to vote in a public forum on Commission business, which should be especially true for a vital matter such as establishing the penal code for federal elections (Filing No. __ Page ID#__).

ARGUMENT

I. CORPORATION IS ENTITLED TO SUMMARY JUDGMENT UNDER THE APPLICABLE STANDARD OF REVIEW

"'Summary judgment is appropriate when the evidence viewed in the light most favorable to the nonmoving party presents no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.'" *Doe v. Hagar*, 765 F.3d 855, 860 (8th Cir. 2014).

In the context of a dispute with the Commission, the APA "sets out the standard of review for final agency adjudications brought under 2 U.S.C. § 437g(a)(4)(C)(iii)" [reclassified under 52 U.S.C. 30109 as of July 21, 2015]. *See Combat Veterans for Cong. Political Action Comm. v. Fed. Election Comm'n*, 983 F. Supp. F.2d 1 (D.D.C. 2013) *aff'd sub nom. Combat Veterans for Cong. Political Action Comm. v. Iowa L. Fed. Election Comm'n, 795 F.3d 151 (D.C. Cir. 2015).*

A reviewing court is authorized to set aside agency action under the APA if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. §§ 706(2)(A). "Jury trials and civil discovery are not permitted in APA proceedings." 42 C.F.R. § 137.309.[6]

The Commission has the duty to ***both*** "establish" and "publish" a schedule of penalties under the Act. 52 U.S.C. § 30109 (a)(4)(C)(i)(II). "All decisions of the Commission with respect to the exercise of its duties and powers under the . . . Act shall be made by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c).[7]

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[6] "The APA does not create federal subject matter jurisdiction . . . . Rather, a federal court has federal question jurisdiction under 28 U.S.C. § 1331 over challenges to federal agency action." *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013).

[7] The Commission also "has the power . . . to make . . . rules, pursuant to the provisions of chapter 5 of title 5, as are necessary to carry out the provisions of this Act . . . 52 U.S.C. § 30107(a)(8). Those requirements provide **the Commission** must "**adopt[]**" substantive rules "**as authorized by law**" before they appear in the Federal Register. *See* 5 U.S.C. 552(a) (1) (D) and (E). When a "substantive rule" under 52 U.S.C 30107(a)(8) is involved, not even a simple majority of a quorum of the Commission is enough; "the affirmative vote of 4 members" of the Commission is required. *See* 52 U.S.C. § 30106(c).

Under this standard of review and applicable law, the Corporation should be granted summary judgment. There is no genuine issue of material fact and Corporation is entitled to judgment as a matter of law. Civil discovery is not allowed. The Commission's action must be reviewed by the Court based solely on the administrative record and the specific grounds the agency invoked when it purported to establish a penalties schedule for the 2014 primary election through the January 21 notice.

The Commission, acting a whole and by majority vote in a public forum after a published notice to the public, had the duty to establish the penalties schedule for the 2014 primary election. That was not done. The January 21 notice was insufficient for this purpose and unlawful. The Commission could not establish the penal code for federal elections without public notice or vote taken in a public forum.

By failing to establish the schedule of penalties for the 2014 primary election in accordance with law, the Commission had no lawful authority to assess a civil money penalty against the Corporation. The purported assessment against the Corporation was invalid. Because the penalties were unlawful, they must be set aside. As will be shown below, because the Final Rule purportedly adopting the AFP regulations was promulgated without valid statutory authority since it was without notice and an opportunity to comment, it was ultra vires and should be struck down. Finally, because the Commission violated its own regulation, its action constituted arbitrary and capricious conduct in violation of the APA and was null and void.

II. THE JANUARY 21 NOTICE DID NOT LAWFULLY ESTABLISH THE PENALTIES SCHEDULE FOR THE 2014 PRIMARY ELECTION

The United States Supreme Court recently reaffirmed "the foundational principle of administrative law that a court may uphold agency action only on the grounds that the agency invoked when it took the action," not on a ground that might have supported it. *Michigan v. EPA*,

135 S. Ct. 2699, 192 L. Ed. 2d 674 (2015) (emphasis added) ("When it deemed regulation of power plants appropriate, EPA said that cost was irrelevant to that determination—not that cost-benefit analysis would be deferred until later. Much less did it say . . . that the consideration of cost at subsequent stages will ensure that the costs are not disproportionate to the benefits. What it said is that cost is irrelevant to the decision to regulate. That is enough to decide these cases").

The United States Court of Appeals for the Eighth Circuit similarly rejected a federal agency's after-the-fact attempt to justify its action when it was clear the agency failed to comply with requirements of law in the first instance. *See Sokol v. Kennedy et al.*, 210 F.3d 876, 880 (8th Cir. 2000) ("The defendants now contend that while the terms of [a different] standard were used, the planning team meant [the statutory term] when it used them . . . [W]e conclude that the [federal agency] simply used the wrong standard from the beginning").

This Court also has applied a related long-held view of administrative law. "To review more than the information actually before the agency during the decision-making process risks allowing agencies to make decisions and then supplement the record with *post hoc* rationalizations." *Mulligan v. Huber*, No. 7:05CV5005 (D. Neb. Dec. 9, 2005); *see also San Luis & Delta-Mendota Water Authority v. Jewell*, 747 F.3d 581, 603 (9th Cir. 2014) (same).

The Commission's action against the Corporation involves this Court evaluating a single question during a three week period between December 31, 2013 and January 21, 2014, namely, whether the Commission, in a public forum after proper notice to the public, vote in a public meeting of the Commission to *establish* a schedule of penalties for the 2014 primary election.

The answer is clear; it did not.[8]

[8] The January 21 notice admits a "gap between the end date of the Commission's current regulations [December 31, 2013] and the effective date of this final rule on January 21, 2014" and further acknowledges campaign reporting rules

The January 21 notice shows it purported to be a "final rule" that would "extend[] the applicability of the existing AFP." 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302/Tuesday, January 21, 2014. The January 21 notice also shows it was intended to be effective immediately. *Id.* ("Accordingly, this final rule is effective upon publication in the Federal Register").

The Commission cannot look to another time period or separate Commission action to justify its failure to lawfully establish the penalties schedule for the 2014 primary election. The January 21 notice shows the Commission knew a specific action was needed to "*extend*[] its AFP regulations," including specifically those regulations "found at 11 CFR 111.30 – 111.46," which contain the penalties schedule. The January 21 notice was the vehicle by which the Commission sought to accomplish this task. It was improper and insufficient as a matter of law. Only the Commission, acting in a public forum and by public vote, could perform the duty of establishing the penalties schedule for the 2014 primary election. That did not occur.

The AFP regulations identified in the January 21 notice contain the very schedule of penalties (11 C.F.R. §111.43 (b)) from which civil money penalties were assessed against the Corporation.[9]

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during the "gap" period would not be subject to the AFP." *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302 /Tuesday, January 21, 2014. Commission regulations were purportedly enacted (improperly) consistent with this perspective. *See* 11 C.F.R. §111.30 ("When will subpart B apply? Subpart B applies to violations of the reporting requirements of 52 U.S.C. 30104(a) committed by political committees and their treasurers that relate to the reporting periods that begin on or after July 14, 2000, and that end on or before the date specified by 52 U.S.C. 30109(a)(4)(C)(v) [i.e December 31, 2013]. This subpart, however, does not apply to reports that relate to reporting periods that end between January 1, 2014, and January 21, 2014.").

[9] The Act provides, "[I]n the case of a violation ..., the Commission may ... require the person to pay a civil money penalty in an amount determined ... under a **schedule of penalties** which is **established and** published by the Commission ...." 52 U.S.C. § 30109 (a) (4) (C)(i) (II) (emphasis added). The applicable regulations are found at 11 C.F.R. §111.43 (b) ("the schedules of penalties"). The January 21 notice also purported to unilaterally amend the Act to effectively eliminate the sunset provision, while leaving the impression the action was taken by majority vote of the "Commission." *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302 /Tuesday, January 21, 2014 ("Section 111.30 specifies the end date of the program; each time Congress has extended the statute that authorizes the AFP, *the Commission* has revised the end date in section 111.30 accordingly") (emphasis added). The Commission, acting as a whole and by majority vote, did not take any such action.

Because the Commission did not vote in an open Commission meeting and by public vote, it did not lawfully establish a schedule of penalties by extending the AFP regulations. Nor did the Commission by public vote in an open Commission meeting adopt a new schedule of penalties before issuing the January 21 notice. The civil money penalty assessed against the Corporation was thus not made in accordance with law and must be set aside.

III. THE AFP REGULATION IN THE FINAL RULE IS INVALID AND OF NO EFFECT

"In enacting the APA, Congress made a judgment that notions of fairness and informed administrative decision-making require that agency decisions be made only after affording interested persons notice and an opportunity to comment." *Chrysler Corp. v. Brown*, 441 U.S. 281, 316, 99 S. Ct. 1705 (1979); *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) (same).

A federal agency rule promulgated without valid statutory authority will be struck down as ultra vires under the APA. *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) ("5 U.S.C. § 706(2)(C) . . . of the APA authorizes courts to strike down as ultra vires agency rules promulgated without valid statutory authority").

A federal agency is not given deference when the question is whether it complied with a notice and comment requirement under the law. A *de novo* standard of review is applied by the court and especially when a legislative rule is involved. *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) ("[W]hether and when an agency must follow the law is not an area uniquely falling within its own expertise, and thus the agency's decision is less deserving of deference . . . . [B]ecause the categorization of an agency's action as a legislative or interpretative rule is largely a question of law, a *de novo* standard of review is consistent with the standard of review we generally apply to questions of law in similar contexts . . . . We adopt a de novo standard of review . . . ").

The APA's notice and comment exemptions are narrowly construed. *Iowa League of Cities v. EPA*, 711 F.3d 844 (8th Cir. 2013) ("An agency potentially can avoid judicial review through the tyranny of small decisions. Notice and comment procedures secure the values of government transparency and public participation, compelling us to agree with the suggestion that '[t]he APA's notice and comment exemptions must be narrowly construed.'").[10]

The January 21 Notice purported to extend the AFP regulations containing the expired penalties schedule, stating: "Congress recently amended [the Act] to extend the end date of the statutory authorization for the AFP to December 31, 2018. Accordingly, the Commission is *extending its AFP regulations* through the new statutory expiration date . . . ." *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302 /Tuesday, January 21, 2014 (emphasis added); *see also id.* ("The Commission's *regulations implementing the AFP* can be found at 11 CFR 111.30–111.46") (emphasis added)

Establishing the penalties schedule for the 2014 primary election through enactment of AFP regulations certainly constitutes official Commission business. There are few tasks of the Commission that would be more powerful or important to the federal election process. The AFP regulations, by definition, have a substantial impact on the rights of persons who are subject to them. The APA required the interested public to be given an opportunity to participate before any such rules were promulgated. That did not occur.

[10] *See also S.E.C. v. Feminella*, 947 F.Supp. 722, 727 (S.D. N.Y. 1996) "Under Section 4 of the APA, before adopting a rule, a federal agency is required to publish notice of the proposed rule in the Federal Register... Congress' purpose in enacting Section 4 was that the interested public be given an opportunity to participate, and the federal agency be fully informed, before any rules that have a substantial impact on the rights of persons who are subject to them are promulgated.... It is well established that adherence to this congressional purpose counsels a construction of the 'procedure' exemption 'that excludes from its operation action which is likely to have considerable impact on ultimate agency decisions.'"

Fairness and informed administrative decision-making required that establishing the penalties schedule for the 2014 primary election be made only after affording interested persons clear notice and an opportunity to comment. That was not done.

This Court should "strike down as ultra vires" the Final Rule purporting to extend the AFP regulations containing the expired penalties schedule since it was promulgated without valid statutory authority, in that, it was done without proper notice and an opportunity to comment. *See Iowa League of Cities v. EPA*, 711 F.3d at __.

IV. COMMISSION'S FAILURE TO COMPLY WITH ITS REGULATIONS IS ARBITRARY AND CAPRICIOUS

The Act requires the Commission to prescribe rules and regulations. *See* 52 U.S.C.A. § 30111 (a) (8) ("The Commission shall . . . prescribe rules, regulations, and forms to carry out the provisions of this Act . . . "). "Each agency shall separately state and currently publish in the Federal Register for the guidance of the public . . . substantive rules of general applicability adopted as authorized by law . . . and . . . each amendment, revision, or repeal of the foregoing." 5 U.S.C. § 552(a) (1) (D) and (E) (emphasis added); *see also* 52 U.S.C. § 30107(a)(8) ("The Commission has the power . . . (8) to make, amend, and repeal such rules, pursuant to the provisions of chapter 5 of title 5, as are necessary to carry out the provisions of this Act . . . ").

An agency's failure to comply with its own regulations constitutes arbitrary and capricious conduct in violation of the APA. *Heartwood, Inc. v. United States Forest Service*, 73 F. Supp.2d 962 (S.D. Ill. 1999) ("[T]he failure of an agency to comply with its own regulations constitutes arbitrary and capricious conduct").

"A federal agency is bound to follow its own regulations . . . . Failure on the part of an agency to act in compliance with its regulations is fatal to its actions . . . . Likewise, actions which

are not undertaken in accordance with the law are null and void." *Twp. of S. Fayette v. Allegheny Cnty. Hous. Auth.*, 27 F. Supp. 2d 582 (W.D. Pa. 1998).

The Act requires "[a]ll decisions of the Commission with respect to the exercise of its duties and powers under the . . . Act shall be made by a majority vote of the members of the Commission." 52 U.S.C. § 30106(c).

Commission regulations provide, "Commissioners shall not jointly conduct, determine or dispose of Commission business," with exceptions not applicable, unless "every portion of every Commission meeting . . . [is] open to public observation." 11 C.F.R. § 2.3(a) and (b).

Commission regulations define a "meeting" as the "deliberation of at least four voting members of the Commission in collegia where such deliberations determine or result in the joint conduct or disposition of official Commission business." 11 C.F.R. § 2.2(d).

The Commission was bound to follow its own regulations and its failure to act in compliance was fatal to its actions. This obligation required Commission business to be disposed of only in a meeting held in the open subject to public observation involving the deliberation of at least four voting members of the Commission. That did not occur with regard to the Commission establishing the penalties schedule for the 2014 primary election. The Commission's failure to comply with its own regulations constitutes arbitrary and capricious conduct in violation of the APA. Since the Commission's action against Corporation was not undertaken in accordance with the law, it is null and void.

V. THE COURT SHOULD STRIKE DOWN PENALTIES AGAINST CORPORATION AS UNLAWFUL UNDER THE APA

Unlawful penalties assessed by a federal agency that are not in accordance with law or in excess of statutory authority and limitations, or short of statutory right, under the APA must be set aside. *Union Pacific Railroad Company v. U.S. Dept. of Homeland Sec.*, 738 F.3d 885, 900 (8th

Cir. 2013) ("We therefore conclude all of the [federal agency] penalties assessed against [plaintiff] are 'not in accordance with law' and 'in excess of statutory authority [and] limitations, or short of statutory right.' 5 U.S.C. § 706(2) . . . . Because the penalties are 'unlawful,' they must be "set aside").

The Commission's assessment of penalties against the Corporation were not in accordance with law or, alternatively, were in excess of statutory authority and limitations, or short of statutory right, under 5 U.S.C. § 706(2). Under *Union Pacific*, such penalties are unlawful and must be set aside.[11]

CONCLUSION

There is no genuine issue of material fact and the Corporation is entitled to judgment as a matter of law. The Corporation respectfully requests the Court grant summary judgment in his favor. The Court should enter an order granting the following relief on each of three separate grounds:

(1) The **Penalty assessed should be set aside under the APA since it was not in accordance with law.** The civil money penalty assessed by the Commission should be set aside under the APA because the Commission had not established the penalties schedule for the 2014 primary election in accordance with law or, alternatively, were in excess of statutory authority and limitations, or short of statutory right.

(2) The **Final rule should be stricken as an ultra vires agency rule.** The Final Rule was promulgated without valid authority when it was purportedly enacted without notice and an opportunity to comment and should be struck down under the APA as an ultra vires agency rule.

(3) The **Commission's failure to comply with its regulations was arbitrary and capricious and its action is null and void.** The Commission's attempt to impose a civil penalty on the Corporation when the penalties schedule was not established in compliance with the Commission's own regulation - which required Commission

[11] The Commission's action in establishing the penalties schedule for federal elections must be direct, unambiguous and formally approved by majority vote of the Commission, acting as a whole, after public notice and distribution of a clear published agenda to the general public. The Commission should not be permitted to defend its failure on the basis of negligence, oversight or lack of knowledge (Filing No. __Page ID# __).

business to be disposed of only in a meeting held in the open subject to public observation and involving the deliberation of at least four voting members of the Commission - constitutes arbitrary and capricious conduct in violation of the APA. The Commission's action against the Corporation was thus null and void.

Dated this ___ day of October, 2015.

Respectfully submitted,

ROBERT C. MCCHESNEY, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc.; and Bart McLeay for U.S. Senate, Inc. Plaintiffs.

By: _____

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

ROBERT C. MCCHESNEY, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc.; and Bart McLeay for U.S. Senate, Inc.	)	No. 8:cv- _____
Plaintiffs,	)	**COMPLAINT**
ANN M. RAVEL, in her official capacity as Chair of the Federal Election Commission; and the UNITED STATES OF AMERICA,	)	
Defendants.	)	

COME NOW Plaintiffs, Robert C. McChesney, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc. ("McChesney") and Bart McLeay for U.S. Senate, Inc. ("BMUSSI") (collectively the "Corporation"), pursuant to Fed. R. Civ. P. 3, and hereby files this complaint in the nature of a petition against Defendants, Ann M. Ravel ("Ravel"), in her official capacity as Chair of the Federal Election Commission ("FEC"), and the United States of America ("United States"), stating and alleging as follows:

THE PARTIES

1. McChesney is an individual and citizen of the State of Nebraska appearing in this action in his official capacity as Treasurer of BMUSSI.

2. BMUSSI is a political corporation designated as the principal campaign committee pursuant to 2 U.S.C. § 432(e) for Bartholomew L. McLeay ("Candidate"), a former candidate for the United States Senate in the primary election held in Nebraska on May 13, 2014 ("2014 primary election"). BMUSSI is in good standing under Nebraska law.

3. Ravel is the Chair of the Commission, an independent regulatory agency and, among other things, she is responsible for enforcing the provisions of the law relating to reporting of campaign contributions. Ravel served as Vice Chair of the Commission in 2014. Commissioner Lee E. Goodman ("Goodman") served as Chair of the Commission in 2014.

4. United States of America is the federal government of the United States and is named as a defendant pursuant to 5 U.S.C. §§ 702 and 703. Unless the context otherwise requires, Ravel, FEC, Commission and United States shall be collectively referred to as "Commission" herein.

JURISDICTION AND VENUE

5. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331(a) for the reason this is a civil action arising under the laws of the United States, namely, The Federal Election Campaign Act of 1971, as amended, 2 U.S.C.§ 437g(4)(C)(3) ("FECA"). This Court further has subject matter jurisdiction pursuant to the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* Subject matter jurisdiction is further founded upon 28 U.S.C. § 1346(a)(2) for the reason this is a civil action which involves a claim against the United States, not exceeding $10,000 in amount, founded upon Acts of Congress, namely, FECA and APA. Subject matter jurisdiction is still further founded upon 28 U.S.C. § 1361 for the reason this action is in the nature of mandamus seeking to compel officers of agencies of the United States, namely, the Commission to perform its duties under the FECA and APA.

6. Subject matter jurisdiction is also founded in this court because the Corporation, consisting of each of McChesney and BMUSSI, is a person against whom an adverse determination was made by the Commission and is thus entitled to obtain a review of the Commission's determination. The Corporation has timely filed a petition in this Court in the form

of this complaint prior to the expiration of the 30-day period which began on [Month, Day 2015], the date Corporation received notification of the final determination by the Commission ("Commission's final determination") pursuant to 2 U.S. C. § 437g(4)(C)(3). The Corporation requests the Commission's final determination be modified or set aside as further described herein.

7. Venue is proper in this Court pursuant to 2 U.S. C. § 437g(4)(C)(3) because this is a district court of the United States for the district in which the Corporation resides and/or transacts business. Venue also is proper 28 U.S.C. § 1391(e) for the reason this is a civil action in which the United States is a defendant and the individual defendant is an officer or employee of the Commission acting in her official capacity and this action is brought in a judicial district in which a substantial part of the events or omissions giving rise to the claims occurred.

INTRODUCTION

8. The Commission is charged with administering certain laws regulating federal elections. It is a powerful body whose members are appointed by the President and confirmed by the Senate. No more than three members can be from the same political party. Commission policy is decided in an open forum with a public vote by all six members. Congress mandated at least four votes in a public meeting are required for any official action of the Commission.

9. The Commission establishes the penal code for federal elections. Congress expressly directed the Commission to adopt a formal schedule of monetary penalties ("penalties schedule") to be applied for election-related infractions. There is no greater core responsibility of the Commission. An individual commissioner has never been authorized to alone set the sanctions or punishment schedule to be imposed by the Commission and the Commission's action must be performed in an open and public forum. Only the Commission, acting together in an

open meeting and by public vote of all six members, is empowered to establish the penalties schedule.

10. The penalties schedule under then existing law expired on December 31, 2013. Congress granted authority to the Commission to establish a new penalties schedule going forward, but the Commission never published this subject matter on an agenda available to the public before any Commission meeting. Nor has the subject of the 2014 penalties schedule ever been put to a public vote at any Commission meeting in an open forum as required by law for all Commission business. A Commission staff member "posted" on a government website a version of the expired penalties schedule on January 21, 2014, three weeks after its expiration but it was not done with a public vote by the Commission or after advance notice to the public. The Commission readily acknowledges a three week "gap" in its administrative fine program ("AFP program") between December 31, 2013 and January 21, 2014, as a direct result of the expiration of the penalties schedule but the gap is actually greater. There has never been a public vote of the Commission after required public notice establishing the penalties schedule for the 2014 primary election.

11. The Candidate was a candidate for the United States Senate in the 2014 primary election. The Candidate did not prevail. More than one year later, the Commission gave notice to McChesney, acting in his official capacity as Treasurer of Corporation, that it intended to assess civil money penalties against him in his capacity as Treasurer (and thus BMUSSI) for allegedly failing to timely notify the Commission regarding a handful of contributions including two loans made by the Candidate in the last few weeks of the 2014 primary election. The Commission informed McChesney his or BMUSSI's "negligence," lack of knowledge regarding the law or inattention in failing to take the required action would not be deemed a valid excuse. The

Commission purported to assess the Corporation a civil money penalty using the expired penalties schedule and to adopt a new rule neither of which had been approved in an open meeting by public vote of the Commission after advance notice to the public, all as required by law. The Corporation timely challenged the Commission's action on the ground it was unlawfully assessed by the Commission's use of the expired penalties schedule not established by the Commission. The Corporation brings this action for declaratory and other relief seeking, among other things, to set aside the Commission's action.

FACTUAL BACKGROUND

A. June 29 Letter and Response

12. The 2014 primary election was held and completed on May 13, 2014. More than one year later, on or about June 29, 2015, Ravel on behalf of the Commission delivered a letter dated June 2, 2015 ("June 29 letter") to McChesney in his official capacity as Treasurer of BMUSSI. The June 29 letter claimed the Commission had "reason to believe" ("RTB finding") that McChesney acting as Treasurer and BMUSSI had failed to timely "submit 48-Hour Notices" allegedly required to be given to the Commission with regard to a small group of contributions and two loans from the Candidate. The Commission stated in the June 29 letter the law required strict compliance and the Commission would not consider any excuse based on "negligence," "inexperience" or a "failure to know" by McChesney (or BMUSSI) in failing to give the notices.

13. On July 30, 2015, the Corporation delivered a letter ("July 30 letter") making timely objection and challenge to the RTB finding, challenging, among other things, "imposition of the civil monetary penalty in the June 29 letter on the ground it is not based on an authorized schedule of penalties established by the Commission."

14. On September 29, 2015, the Commission responded to the July 30 letter rejecting all of the Corporation's challenges and reiterating that "[n]egligence" would not be considered by the Commission or deemed "reasonably unforeseen" or "beyond the [Corporation's] control."

15. On October 8, 2015, the Corporation delivered a letter ("October 8 letter") again making a timely objection and challenge to the Commission, challenging and asserting, among other things, the Commission's action against the Corporation was unlawful and without effect because it was not based on an authorized schedule of penalties lawfully established by the Commission. The Corporation delivered a draft complaint and an initial draft summary judgment brief to the Commission in the October 8 letter.[1]

16. On [XX], 2015, the Commission made a final determination regarding the civil money penalty and assessed the Corporation [$___] for alleged violation of the Act (Filing No. __ Page ID#__).

B. Commission's Duty to Formally Establish 2014 Penalties Schedule

17. On or about December 26, 2013, Congress amended FECA under Public Law No: 113-72 for the purpose, among other things, to "extend through 2018 the ***authority*** of the Federal Election Commission to impose civil money penalties on the basis of a schedule of penalties ***established*** and published by the Commission" (emphasis added). This amendment was accomplished "by striking 'December 31, 2013' and inserting 'December 31, 2018'" in 2 U.S.C. 437g(a)(4)(C)(iv). Public Law No. 113-72 amended the law to read in relevant part:

> (C) (i) [T]he Commission may—
>
> > (II) ... require the person to pay a civil money penalty in an amount determined under a schedule of penalties which is **established** and published by the Commission....

[1]The Corporation, consistent with its objections and challenges in the July 30 letter, also challenged the Commission stating, even if the 2014 penalties schedule had been established, the failure to give a 48-Hour Notice did not apply to the loans made by the Candidate.

(iv) This subparagraph shall apply with respect to violations that relate to reporting periods ... that end on or before December 31, 2018.

18. The 2013 term of the Commission expired on December 31, 2013, along with the expired penalties schedule. The Commission started a new term on January 1, 2014, with a newly appointed Chair, Goodman. As will be shown below, the Commission readily acknowledges the expired penalties schedule terminated on December 31, 2013.

C. Expired Penalties Schedule Was Not Authorized

19. On January 17, 2014, at 8:45 a.m., before any public notice was given by way of the Commission's agenda, and without a public vote of the Commission in an open forum establishing the 2014 penalties schedule, a Commission staff member posted the expired penalties schedule and a new Commission regulation unauthorized by Congress. *See* Federal Register Document, FR Doc. 2014–00960 Filed 1–17–14; 8:45 am.

20. On January 21, 2014, again without any public notice or published agenda or any public vote of the Commission in an open forum, Commission staff published Notice 2014–01 ("January 21 notice") under Goodman's name announcing a Final Rule for Extension of Administrative Fines Program ("Final Rule"). *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3303/Tuesday, January 21, 2014.

21. As of January 21, 2014 when the "Final Rule" was posted, the Commission was aware the former penalties schedule had expired and was of no force or effect after December 31, 2013 and further that it had not been the subject of any public agenda or vote by the Commission. The Final Rule posted by Commission staff acknowledged an existing "gap between the end date of the Commission's current regulations [December 31, 2013] and the effective date of this final rule on January 21, 2014." Because of the gap, the January 21 notice stated campaign reporting

rules during the gap period would not be "subject to the AFP." In other words, the Commission knew it was obliged to "establish" a new penalties schedule for 2014 because the old penalties schedule had expired on December 31, 2013.

22. The January 21 notice posted by Commission staff acknowledged the penalties schedule was required by law to be *periodically* established anew by the Commission, but it complained about the fact that "each time Congress has extended the statute that authorizes the AFP, the Commission has" had to take action to reauthorize a new penalties schedule. Congress expressly created this sunset feature in the amendment to occur in five years or on December 31, 2018. Congress acted with good reason because the sunset provision compelled the Commission, as Congress undoubtedly desired, to periodically conduct a careful review, and debate as needed, the penalties schedule in a public forum concluding with a public vote by the Commission. The January 21 notice, however, purported to strip the sunset feature from the law through the Final Rule without any public involvement or public vote of the Commission, stating (brazenly) it sought "to obviate the need to revise . . . [it] each time Congress extends the statute."[2]

23. The January 21 notice purported to establish the expired penalties schedule for the 2014 primary election in which McChesney acted as Treasurer on behalf of Corporation.

24. The January 21 notice declared it was made "without advance notice or an opportunity for comment," would not be subjected to "congressional review" and would be self-implementing upon filing, that is, "effective immediately." The Commission did not by majority vote made in a public forum after public notice establish a penalties schedule for 2014 nor vote in a public meeting to reauthorize the expired penalties schedule for the 2014 primary election

[2]The January 21 notice was published in the Federal Register claiming the expired penalties schedule for 2014 had taken effect immediately and no other action was needed or would be taken by the Commission regarding the 2014 penalties schedule, despite the absence of any public vote of the Commission and no notice given to the public through a published agenda. The Final Rule read: "Accordingly, this final rule is effective upon publication in the Federal Register."

or approve stripping the sunset feature in Public Law No. 113-72. *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302 /Tuesday, January 21, 2014 (Filing No. __ Page ID#__).[3]

25. The January 21 notice was not authorized. Only the Commission acting in an open and public session by majority vote – after advance notice to the public - can establish the penalties schedule for 2014. It failed to do so. This important function cannot be authorized by the Commission in a back room or secret meeting or buried in a *post hac* technical amendment. The penalties schedule is the penal code for federal elections. The Commission's action in establishing it must be open to the public, direct and formally approved by majority vote of the Commission in a public forum. Failure to comply with these requirements is not subject to a Commission defense of negligence, oversight or lack of knowledge. This is particularly important in this circumstance because the January 21 notice posted notified the public it was made "without advance notice or an opportunity for comment," would not be subjected to "congressional review" and would be self-implementing, that is, "effective immediately." Despite these assertions, there was no public record before the January 21 notice – and none since – showing the Commission by majority vote in a public meeting formally established the expired penalties schedule for the 2014 primary election or approved stripping the sunset feature in Public Law No. 113-72 as the Final Rule purported to do. *See* 11 CFR Part 111, Federal Register/Vol. 79, No. 13 at 3302 /Tuesday, January 21, 2014.[4]

[3]The January 21 notice stated, "***The Commission finds*** that notice and comment are unnecessary here because **this final rule *merely extends the applicability*** of the existing AFP and deletes one administrative provision; the final rule makes no substantive changes to the AFP" (emphasis added). This statement is unauthorized. The Commission made no such finding in any public meeting open to the general public either prior to, on or after January 21, 2014. The Commission never placed on its Commission agenda and never voted in any Commission meeting open to the public to "extend[] the applicability of the existing AFP" containing the expired penalties schedule for the 2014 primary election.

[4]Commission staff recently provided the Corporation with documents suggesting commissioners met in secret or communicated through private channels not open to the public on January 13, 2015, where they allegedly approved the 2014 penalties schedule. The documentation is highly suspect. It includes unsigned ballots - which on their face state they must be signed and dated to be valid – and an unsigned draft Final Rule. It also includes an unsworn

D. Timely Objection

26. The Corporation made and filed a timely challenge and objection with the Commission and otherwise exhausted any required administrative remedy.

27. The Commission has not met its burden of justification applicable to an administering agency's determination of civil money penalties in this circumstance. The Commission's actions were not in accordance with law, were in excess of statutory jurisdiction authority and limitations or, alternatively, short of statutory right, under FECA, and otherwise without observance of procedure required by law.

FIRST CLAIM FOR RELIEF

(Declaratory Judgment Pursuant to 28 U.S.C. § 2201)

28. Corporation reasserts the allegations in paragraphs 1 through 27 as though fully stated herein.

29. A case of actual controversy exists between the Corporation, including both McChesney and BMUSSL, and the Commission pursuant to 28 U.S.C. § 2201 concerning the Commission's final determination. The Corporation, upon the filing of this petition, seeks a declaratory judgment the Commission has no authority to impose a civil money penalty against the Corporation as it has purportedly done on the ground the Commission had not lawfully established the penalties schedule for the 2014 primary election under which the civil money penalty against the Corporation was assessed. The Commission at minimum exceeded its statutory duty to properly administer and enforce FECA. The Commission legally could not establish the required

"certification" allegedly prepared by a clerk who accepted an "email amendment" by at least one commissioner and who did not attest to meeting face-to-face with any commissioner, a requirement mandated for even the most basic notarized documents at the DMV or in home mortgage transactions. Beyond the highly questionable proof, the Commission's action violates the law. The law requires the Commission to give advance public notice of official action and to vote in a public forum on Commission business, which should be especially true for a vital matter such as establishing the penal code for federal elections.

penalties schedule for the 2014 primary election through a secret vote or in a private setting without public notice or participation. Such a critical duty required the formal vote of approval from at least four members the Commission conducted in an open meeting following clear public notice of the proposed action to be taken. That did not occur.

30. The Corporation, upon filing of this pleading, further seeks an order of this Court, pursuant to 28 U.S.C. § 2201, declaring McChesney and BMUSSI's right to be free from any obligation to pay the civil money penalty in the Commission's final determination and further declare and instruct the Commission to strike and otherwise remove any statement, claim or reference to the Commission's final determination relating to the Corporation from any and all official records of the Commission.

31. The Corporation requests and prays the Commission's final determination be modified to declare Corporation does not owe, and is not obliged to pay, any civil money penalty to the Commission and to set aside the Commission's final determination regarding same pursuant to 2 U.S.C. § 437g(4)(C)(3).

SECOND CLAIM FOR RELIEF

(Violation of NEPA Pursuant to 5 U.S.C. § 706(2)(A) (B)(C) and (D))

32. The Corporation reasserts the allegations in paragraphs 1 through 27 as though fully stated herein.

33. The Corporation is a person suffering legal wrong because of the Commission's action in imposing a civil money penalty on the Corporation in the Commission's final determination and for any statement, claim or reference to or regarding the Commission's final determination in the Commission's official records.

34. The Corporation seeks, pursuant to 5 U.S. Code § 706 (2) (A)(B)(C) and (D), for the Court to hold unlawful and set aside the action, findings, and conclusions of the Commission in

the Commission's final determination on the ground they, and each of them, were not in accordance with law, were in excess of statutory jurisdiction authority and limitations or, alternatively, short of statutory right, under FECA, and otherwise without observance of procedure required by law.

35. The Corporation seeks relief in this cause of action other than monetary damages, namely, declaratory and injunctive relief, declaring the Corporation's right to be free from any obligation to pay the civil money penalty in the Commission's final determination and further declare and instruct the Commission to strike or otherwise remove any statement, claim or reference to the Commission's final determination relating to the Corporation from the Commission's official records.

36. The Corporation seeks a mandatory and/or other injunctive decree ordering the Commission to vacate the Commission's final determination and finding the Corporation to be free from any obligation to pay the civil money penalty in the Commission's final determination and to further instruct the Commission to strike and otherwise remove any statement, claim or reference to the Commission's final determination relating to the Corporation from the Commission's official records.

37. The Commission's actions described herein were not reasonable and thus a mandatory and/or injunctive decree in favor of the Corporation is warranted under the circumstances.

THIRD CLAIM FOR RELIEF

(FECA Claim to Modify and Set Aside)

38. The Corporation reasserts the allegations in paragraphs 1 through 27 as though fully stated herein.

39. The Corporation is a person against whom an adverse determination was made by the Commission in the Commission's final determination and the Corporation, consisting of McChesney and BMUSSI, is entitled to obtain a review of the Commission's final determination.

40. The Corporation has timely filed a petition in this Court in the form of this complaint pursuant to 2 U.S. C. § 437g(4)(C)(3) that seeks to: (a) modify the Commission's final determination assessing a civil money penalty against the Corporation and further seeks a finding there is no obligation for Corporation to pay the civil money penalty identified in the Commission's final determination; (b) set aside or modify the Commission's final determination and order the Commission to remove any statement, claim or reference to the Commission's final determination regarding the Corporation from the Commission's official records.

WHEREFORE, the Corporation, consisting of each of McChesney and BMUSSI, prays that the Court enter judgment in their favor and each of them, and enter a judgment against Ravel, in her official capacity as Chair of the Commission, and the United States, and each of them, and any officer, agent or employee under her/their/its supervision or control, with regard to the First, Second and Third Claim for Relief as applicable, as follows:

(a) Declaring the Commission did not have authority to impose a civil money penalty on the Corporation, since the Commission had not established under law the penalties schedule for the 2014 primary election in which the Corporation was assessed a civil money penalty, and that the Commission exceeded its statutory duty to properly administer and enforce FECA;

(b) Declaring the Corporation's right to be free from any obligation to pay the civil money penalty in the Commission's final determination and further declaring the Corporation's right to have any statement, claim or reference to the Commission's

final determination stricken and otherwise removed from the Commission's official records;

(c) Entering a mandatory injunction compelling the Commission to vacate the Commission's final determination finding the Corporation's alleged obligation to pay any civil money penalty and further compelling the Commission to strike or otherwise remove any statement, claim or reference to the Commission's final determination in the Commission's official records.

(d) Ordering the Commission to pay the Corporation any losses or damages for which recovery is permitted by law or in equity plus it costs, reasonable attorney fees and other expenses pursuant to 28 U.S.C. § 2412.

(e) Providing such other or further relief to the Corporation as the Court finds just or equitable or allowed by the pleadings.

Dated this ___ day of October, 2015.

Respectfully submitted,

ROBERT C. MCCHESNEY, in his official capacity as Treasurer of Bart McLeay for U.S. Senate, Inc., and Bart McLeay for U.S. Senate, Inc., Plaintiffs,

By:_____

L. Steven Grasz, Esq. (NE #19050)
Husch Blackwell LLP
13330 California Street
Suite 200
Omaha, NE 68154
Phone: 402.964.5000
steve.grasz@huschblackwell.com

Attorney for Plaintiff

REQUEST FOR SPEEDY HEARING

Pursuant to Fed. R. Civ. P. 57, the Corporation requests that the Court order a speedy hearing of this action and advance it on the calendar.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2015 DEC 30 AM 10: 13

December 30, 2015

MEMORANDUM

SENSITIVE

To: The Commission

Through: Alec Palmer
Staff Director

From: Patricia C. Orrock PCO
Chief Compliance Officer

Rhiannon Magruder RM
Reviewing Officer
Office of Administrative Review

Subject: Recommendation to Ratify Reason to Believe Finding in AF# 3011 – Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer (C00547406)

In light of the court of appeals' decision in *Combat Veterans for Congress Political Action Committee v. Federal Election Commission*, 795 F. 3d 151 (D.C. Cir. 2015), the Office of Administrative Review ("OAR") requested guidance from the Office of General Counsel ("OGC") regarding the procedures to be used in a pending administrative fine case where the Commission found RTB using a no-objection voting procedure. On December 22, 2015, OGC provided its analysis and recommended that the Commission ratify the prior RTB vote in a pending administrative fine case.

On June 26, 2015, the Commission found reason to believe ("RTB") that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer violated 52 U.S.C. § 30104(a) for failing to timely file 48-Hour Notices for fourteen contributions totaling $112,425.06 and made a preliminary determination that the civil money penalty was $12,122 based on the schedule of penalties at 11 C.F.R. § 111.44.[1] The Commission found RTB using a no-objection voting procedure; therefore, OAR recommends that the Commission ratify its June 26, 2015 RTB finding that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer violated 52 U.S.C. § 30104(a) and the preliminary determination that a civil money penalty of $12,122 be assessed.

[1] On July 31, 2015, the Commission received their written response ("challenge"). After reviewing the challenge, the Reviewing Officer Recommendation ("ROR") dated September 29, 2015 was forwarded to the Commission and the respondents. As of this date, OAR has not circulated a Final Determination Recommendation to the Commission.

OAR Recommendation

Ratify the Commission's June 26, 2015, 2015 reason to believe finding that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer violated 52 U.S.C. § 30104(a) and the preliminary determination that a civil money penalty of $12,122 be assessed.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Recommendation to Ratify Reason to Believe Finding in Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer (C00547406)	)	AF 3011

CERTIFICATION

I, Shawn Woodhead Werth, Secretary and Clerk of the Federal Election Commission, do hereby certify that on February 04, 2016, the Commission decided by a vote of 6-0 to take the following actions in AF# 3011:

1. Ratify the Commission's October 7, 2015 reason to believe finding that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer violated 52 U.S.C. § 30104(a) and the preliminary determination that a civil money penalty of $12,122 be assessed.

Commissioners Goodman, Hunter, Petersen, Ravel, Walther, and Weintraub voted affirmatively for the decision.

Attest:

February 4, 2016
Date

Shawn Woodhead Werth
Secretary and Clerk of the Commission

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

2016 MAR -8 AM 10: 12

March 8, 2016

MEMORANDUM

SENSITIVE

To: The Commission

Through: Alec Palmer
Staff Director

From: Patricia C. Orrock
Chief Compliance Officer

Rhiannon Magruder
Reviewing Officer
Office of Administrative Review

Subject: Final Determination Recommendation in AF# 3011 – Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer (C00547406)

On June 26, 2015, the Commission found reason to believe ("RTB") that the respondents violated 52 U.S.C. § 30104(a) for failing to timely file 48-Hour Notices for fourteen contributions totaling $112,425.06 and made a preliminary determination that the civil money penalty was $12,122 based on the schedule of penalties at 11 C.F.R. § 111.44.[1]

On July 31, 2015, the Commission received their written response ("challenge"). After reviewing the challenge, the Reviewing Officer Recommendation ("ROR") dated September 29, 2015 was forwarded to the Commission, a copy was forwarded to the respondents, and is hereby incorporated by reference. They submitted no evidence that a factual error was made in the RTB finding, that the penalty was miscalculated at RTB, or that they used best efforts to file on time. 11 C.F.R. § 111.35(b). Therefore, the Reviewing Officer recommended that the Commission make a final determination that the respondents violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty.

Within 10 days of transmittal of the recommendation, they may file a written response with the Commission Secretary which may not raise any arguments not raised in their challenge

[1] In light of the Court of Appeals' decision in *Combat Veterans for Congress Political Action Committee v. Federal Election Commission*, 795 F. 3d 151 (D.C. Cir. 2015), OAR recommended that the Commission ratify the June 26, 2015 RTB finding. On February 4, 2016, the Commission ratified its June 26, 2015 RTB finding that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, Treasurer violated 52 U.S.C. § 30104(a) and the preliminary determination that a civil money penalty of $12,122 be assessed.

or not directly responsive to the ROR. 11 C.F.R. § 111.36(f). On October 9, 2015, the Commission received the written response to the ROR. *See* Attachment 1 - Response to ROR.

In response to the ROR, the respondents contend the schedule of penalties at 11 C.F.R. § 111.44 was not lawfully established by the Commission.[2] They further state:

> The Treasurer and the Corporation believe they can best express their objection and challenge to the civil monetary penalty against them on the basis it was not lawfully established by the Commission by attaching a draft complaint ("complaint") and draft brief in support of a motion for summary judgment ("brief") they expect to file in a Nebraska federal court unless the Commission enters an order vacating and striking any civil monetary penalty in the June 29 letter. September 30 letter or otherwise against the Treasurer or Corporation. The draft complaint and brief are incorporated by reference herein and expressly made a part of this response to the September 30 letter. (2)

In addition, the respondents contend that the candidate loans were made "for operational purposes" and not for the purpose of influencing the election. Therefore, the respondents contend the candidate loans should not be considered contributions, and 48-Hour Notice reporting requirements do not apply. The respondents conclude by stating:

> Accordingly, if the Commission does not vacate the civil monetary penalty on the basis the Commission failed to authorize the schedule of penalties upon which the Treasurer and Corporation have been assessed (which the Treasurer and Corporation again strongly urge the Commission to do), the Treasurer and Corporation alternatively request, without prejudice or waiver, the loans of the Candidate be removed from any calculation of the monetary civil penalty assessed in the June 29 letter or September 30 letter. If so, as shown by the calculation contained in the July 30 letter (page 3), the maximum monetary civil penalty that could be assessed against the Treasurer and Corporation is $1,992.00. (6)

The Office of Administrative Review ("OAR") requested guidance from the Office of the General Counsel ("OGC") to confirm 1) the Commission appropriately assessed a civil money penalty pursuant to 11 C.F.R. § 111.44 and 2) the Commission appropriately treated the receipt of the candidate loans as contributions pursuant to 11 C.F.R. § 100.52. OGC concluded that 1) the schedule of penalties was lawfully established and 2) the legal argument regarding the candidate loans is not a proper defense in an Administrative Fine Program challenge under the Commission's regulations. *See* Attachment 2 - Request for Guidance Sent to and Response Received from OGC.

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[2] The response also references a statement made in the ROR which indicates the proposed penalty was calculated using the schedule of penalties at 11 C.F.R. § 111.43. For clarification, OAR made this statement in reference to the *respondents'* proposed penalty adjustment outlined in the original challenge to the RTB finding. As addressed in the ROR, the Commission appropriately assessed the penalty at RTB using the schedule of penalties at 11 C.F.R. § 111.44.

The respondent's original challenge and response to the ROR provided no evidence that a factual error was made in the RTB finding, that the penalty was miscalculated at RTB, or that they used best efforts to file on time. 11 C.F.R. § 111.35(b). Therefore, the Reviewing Officer recommends that the Commission make a final determination that the respondents violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty.

OAR Recommendations

1. Adopt the Reviewing Officer recommendation for AF# 3011 involving Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, in making the final determination;

2. Make a final determination in AF# 3011 that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty; and

3. Send the appropriate letter.

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	AF 3011
Final Determination Recommendation:	)	
Bart McLeay for U.S. Senate Inc. and	)	
Robert C. McChesney, in his official	)	
capacity as Treasurer (C00547406)	)	

CERTIFICATION

I, Shawn Woodhead Werth, Secretary and Clerk of the Federal Election Commission, do hereby certify that on March 21, 2016, the Commission decided by a vote of 6-0 to take the following actions in AF 3011:

1. Adopt the Reviewing Officer recommendation for AF# 3011 involving Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, in making the final determination.

2. Make a final determination in AF# 3011 that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, violated 52 U.S.C. § 30104(a) and assess a $12,122 civil money penalty.

3. Send the appropriate letter.

Commissioners Goodman, Hunter, Petersen, Ravel, Walther, and Weintraub voted affirmatively for the decision.

Attest:

March 24, 2016
Date

Shawn Woodhead Werth
Secretary and Clerk of the Commission

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 22, 2016

L. Steven Grasz, Esq.
Husch Blackwell, LLP
13330 California Street
Suite 200
Omaha, NE 68154

Bart McLeay for U.S. Senate Inc.
C00547406
AF#: 3011

16092710173

Dear Mr. Grasz:

On June 26, 2015, the Commission found reason to believe ("RTB") that the respondents violated 52 U.S.C. § 30104(a) for failing to timely file 48-Hour Notices for fourteen contributions received between April 24, 2014 and May 9, 2014, totaling $112,425.06. By letter dated June 29, 2015, the Commission sent notification of the RTB finding that included a civil money penalty calculated at RTB of $12,122 in accordance with the schedule of penalties at 11 C.F.R. § 111.44. On July 31, 2015, the Office of Administrative Review received your written response challenging the RTB finding.

The Reviewing Officer reviewed the Commission's RTB finding with its supporting documentation and your written response. Based on this review, the Reviewing Officer recommended that the Commission make a final determination that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, violated 52 U.S.C. § 30104(a) and assess a civil money penalty in the amount of $12,122 in accordance with 11 C.F.R. § 111.44. The Reviewing Officer Recommendation ("ROR") was sent to you on September 29, 2015. On October 9, 2015, the Commission received your written response to the ROR.

The Reviewing Officer reviewed your response to the ROR. On March 8, 2016, the Reviewing Officer recommended that the Commission make a final determination that Bart McLeay for U.S. Senate Inc. and Robert C. McChesney, in his official capacity as Treasurer, violated 52 U.S.C. § 30104(a) and assess a civil money penalty in the amount of $12,122 in accordance with 11 C.F.R. § 111.44. A copy of the Final Determination Recommendation is attached. On March 21, 2016, the Commission adopted the Reviewing Officer's recommendation and made a final determination that Bart McLeay for U.S. Senate Inc. and

Robert C. McChesney, in his official capacity as Treasurer, violated 52 U.S.C. § 30104(a) and assessed a civil money penalty in the amount of $12,122.

At this juncture, the following courses of action are available to you:

1. If You Choose to Appeal the Final Determination and/or Civil Money Penalty

If you choose to appeal the final determination, you should submit a written petition, within 30 days of receipt of this letter, to the U.S. District Court for the district in which the committee or you reside, or transact business, requesting that the final determination be modified or set aside. See 52 U.S.C. § 30109(a)(4)(C)(iii). Your failure to raise an argument in a timely fashion during the administrative process shall be deemed a waiver of the respondents' right to present such argument in a petition to the district court under 52 U.S.C. § 30109. 11 CFR § 111.38.

2. If You Choose Not to Pay the Civil Money Penalty and Not to Appeal

Unpaid civil money penalties assessed through the Administrative Fine regulations will be subject to the Debt Collection Act of 1982 ("DCA") as amended by the Debt Collection Improvement Act of 1996 ("DCIA"), 31 U.S.C. § 3701 *et seq.* If you do not pay this debt within 30 days (or file a written petition to a federal district court - see below), the Commission will transfer the debt to the U.S. Department of the Treasury ("Treasury") for collection. Within 5 days of the transfer to Treasury, Treasury will contact you to request payment. Treasury currently charges a fee of 28% of the civil money penalty amount for its collection services. The fee will be added to the amount of the civil money penalty that you owe. Should Treasury's attempts fail, Treasury will refer the debt to a private collection agency ("PCA"). If the debt remains unpaid, Treasury may recommend that the Commission refer the matter to the Department of Justice for litigation.

Actions which may be taken to enforce recovery of a delinquent debt by Treasury may also include: (1) offset of any payments, which the debtor is due, including tax refunds and salary; (2) referral of the debt to agency counsel for litigation; (3) reporting of the debt to a credit bureau; (4) administrative wage garnishment; and (5) reporting of the debt, if discharged, to the IRS as potential taxable income. In addition, under the provisions of DCIA and other statutes applicable to the FEC, the debtor may be subject to the assessment of other statutory interest, penalties, and administrative costs.

In accordance with the DCIA, at your request, the agency will offer you the opportunity to inspect and copy records relating to the debt, the opportunity for a review of the debt, and the opportunity to enter into a written repayment agreement.

3. If You Choose to Pay the Civil Money Penalty

If you should decide to pay the civil money penalty, follow the payment instructions on page 4 of this letter. You should make payment within thirty (30) days of receipt of this letter.

NOTICE REGARDING PARTIAL PAYMENTS AND SETTLEMENT OFFERS

4. Partial Payments

If you make a payment in an amount less than the civil money penalty, the amount of your partial payment will be credited towards the full civil money penalty that the Commission assessed upon making a final determination.

5. Settlement Offers

Any offer to settle or compromise a debt owed to the Commission, including a payment in an amount less than the civil money penalty assessed or any restrictive endorsements contained on your check or money order or proposed in correspondence transmitted with your check or money order, will be rejected. Acceptance and deposit or cashing of such a restricted payment does not constitute acceptance of the settlement offer. Payments containing restrictive endorsements will be deposited and treated as a partial payment towards the civil money penalty that the Commission assessed upon making a final determination. All unpaid civil money penalty amounts remaining will be subject to the debt collection procedures set forth in Section 2, above.

The confidentiality provisions at 52 U.S.C. § 30109(a)(12) no longer apply and this matter is now public. Pursuant to 11 C.F.R. §§ 111.42(b) and 111.20(c), the file will be placed on the public record within 30 days from the date of this notification.

If you have any questions regarding the payment of the civil money penalty, please contact Rhiannon Magruder on our toll free number (800) 424-9530 (press 0, then ext. 1660) or (202) 694-1660.

On behalf of the Commission,

Matthew S. Petersen
Chair

ADMINISTRATIVE FINE PAYMENT INSTRUCTIONS

In accordance with the schedule of penalties at 11 C.F.R. § 111.44, the civil money penalty is $12,122 for 48-Hour Notices.

You may remit payment by ACH withdrawal from your bank account, or by debit or credit card through Pay.gov, the federal government's secure portal for online collections. Visit www.fec.gov/af/pay.shtml to be directed to Pay.gov's Administrative Fine Program Payment form.

This penalty may also be paid by check or money order made payable to the Federal Election Commission. It should be sent by mail to:

Federal Election Commission
PO Box 979058
St. Louis, MO 63197-9000

If you choose to send your payment by courier or overnight delivery, please send to:

U.S. Bank - Government Lockbox
FEC #979058
1005 Convention Plaza
Attn: Government Lockbox, SL-MO-C2GL
St. Louis, MO 63101

PAYMENTS BY PERSONAL CHECK

Personal checks will be converted into electronic funds transfers (EFTs). Your account will be electronically debited for the amount on the check, usually within 24 hours, and the debit will appear on your regular statement. We will destroy your original check and keep a copy of it. In case the EFT cannot be processed for technical reasons, you authorize us to process the copy in lieu of the original check. Should the EFT not be completed because of insufficient funds, we may try to make the transfer twice.

PLEASE DETACH AND RETURN THE PORTION BELOW WITH YOUR PAYMENT

FOR: Bart McLeay for U.S. Senate Inc.

FEC ID#: C00547406

AF#: 3011

PAYMENT AMOUNT DUE: $12,122

16092710176

FEDERAL ELECTION COMMISSION
Washington DC 20463

THIS IS THE END OF ADMINISTRATIVE FINE CASE # 3011

DATE SCANNED 4/18/16

SCANNER NO. 2

SCAN OPERATOR OH

16092716017