



FEDERAL ELECTION COMMISSION  
Washington, DC 20463

May 29, 2008

MEMORANDUM

To: Thomasenia P. Duncan  
General Counsel

Through: Patrina M. Clark *PC*  
Staff Director

From: John D. Gibson *JG*  
Chief Compliance Officer

Joseph F. Stoltz *JFS*  
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Lead Auditor

Subject: Texans for Henry Cuellar Congressional Campaign (A07-20) - Referral  
Matters

**AUDIT REFERRAL # 08-10**

On May 29, 2008, the final audit report on Texans for Henry Cuellar Congressional Campaign (THC) was forwarded to the Commission.

The final audit report includes the following two matters that meet the criteria for referral to your office:

- Receipt of Contributions that Exceed Limits (Finding 1) - THC received \$36,300 in excessive contributions from twelve individuals and one partnership. Excessive contributions totaling \$14,000 from ten contributors lacked the requisite contributor notifications of the presumptive redesignations/reattributions. The remaining \$22,300 appeared to require refunds. In response to the interim audit report, THC provided copies of seven non-negotiated refund checks totaling \$22,300 and redesignation/retribution letters sent to the contributors for the remainder.

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- **Receipt of Contributions from Prohibited Sources (Finding 2)** - A review of contributions identified two contribution checks, totaling \$13,000, which, without additional information from the contributor were treated as having been received from corporate sources. If the contributions are from permissible sources, portions of each, totaling \$10,500, would be added to the excessive contributions in Finding 1. Of the \$10,500 added to the excessive finding, \$2,100 could have been resolved provided the necessary notification letter was sent to the contributor advising of the presumptive action taken by THC. In response to the interim audit report, THC provided copies of two non-negotiated refund checks totaling \$8,800. THC failed to establish the remaining contributions were from permissible sources.

All work papers and related documentation are available for review. Should you have any questions regarding this matter, please contact Paula Nurthen or Alex Boniewicz at 694-1200.

**Attachments:**

**Receipt of Contributions that Exceed Limits (Finding 1)**

**Receipt of Contributions from Prohibited Sources (Finding 2)**

cc: Lorenzo Holloway  
Lawrence Calvert

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## **Finding 1. Receipt of Contributions that Exceed Limits**

### **Summary**

THC received \$36,300 in excessive contributions from twelve individuals and one partnership. Some of these excessive contributions resulted from improper election designations and/or contributor attributions. Excessive contributions totaling \$14,000 from ten contributors lacked the requisite contributor notifications of the presumptive redesignations/reattributions. The remaining \$22,300 appeared to require refunds. In response to the interim audit report, THC provided copies of seven non-negotiated refund checks totaling \$22,300 and redesignation/retribution letters sent to the contributors for the remainder.

### **Legal Standard**

**A. Authorized Committee Limits.** An authorized committee may not receive more than a total of \$2,000 per election from any one person as adjusted by the Consumer Price Index (CPI). 2 U.S.C. §441a(a)(1)(A), (c) and (f); 11 CFR §§110.1(a) and (b) and 110.9(a).

Based on the respective CPIs, the contribution limit for any one person for the 2006 election cycle was \$2,100 and \$2,300 for the 2008 election cycle.

**B. Contributions by Partnerships.** A contribution by a partnership is attributable to the partnership and proportionally to each partner. The contribution shall not exceed the limitations at 11 CFR 110.1(b), (c) and (d). 11 CFR §110.1(e).

**C. Handling Contributions That Appear Excessive.** If a committee receives a contribution that appears to be excessive, the committee must either:

- Return the questionable check to the donor; or
- Deposit the check and:
  - o Keep enough money in the account to cover all potential refunds;
  - o Keep a written record explaining why the contribution may be illegal;
  - o Include this explanation on schedule A if the contribution has to be itemized before its legality is established;
  - o Seek a retribution or a redesignation of the excessive portion, following the instructions provided in Commission regulations (see below for explanations of retribution and redesignation); and
  - o If the committee does not receive a proper retribution or redesignation within 60 days after receiving the excessive contribution, refund the excessive portion to the donor. 11 CFR §§103.3(b)(3), (4) and (5) and 110.1(k)(3)(ii)(B).

**D. Presumptive Redesignation of Excessive Contributions.** When an authorized political committee receives an excessive contribution from an individual or a non-multi-candidate committee, the committee may presumptively redesignate the excessive portion to the general election if the contribution:

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

Also, the excessive portion of an undesignated contribution made after the primary, but before the general election may be automatically applied to the primary if the campaign's net debts outstanding from the primary equal or exceed the amount redesignated.

The committee is required to notify the contributor in writing of the redesignation within 60 days of the treasurer's receipt of the contribution and must offer the contributor the option to receive a refund instead. For this action to be valid, the committee must retain copies of the notices sent as required. Presumptive redesignations apply only within the same election cycle. 11 CFR §110.1(b)(5)(ii)(B) & (C) and (l)(4)(ii).

**E. Reattribution of Excessive Contributions.** When an authorized committee receives an excessive contribution, the committee may ask the contributor if the contribution was intended to be a joint contribution from more than one person.

- The committee must, within 60 days of receipt of the contribution, obtain and retain a reattribution letter signed by all contributors; or
- Refund the excessive contribution. 11 CFR §§110.1(k)(3), 110.1(l)(3) and 103.3(b)(3).

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

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

For this action to be valid, the committee must retain copies of the notices sent. 11 CFR §110.1(1)(4)(ii).

**F. Refund or Disgorge Questionable Contributions.** If the identity of the original contributor is known, the committee should either refund the funds to the source of the original contribution or pay the funds to the U.S. Treasury. AO 1996-5.

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### **Facts and Analysis**

THC received excessive contributions totaling \$36,300. Many of these excessive contributions arose from a review of the "legal defense fund"<sup>1</sup> account, which had not been reported (See Finding 3). Of this amount, there were excessive contributions from twelve individuals totaling \$35,400 and from one partnership for \$900. Excessive contributions from ten of the contributors totaling \$14,000 could have been resolved, provided the necessary notification letter was sent to the contributor advising of the presumptive reattribution or redesignation action taken by THC. The remainder of the excessive contributions, \$22,300 (\$36,300 - \$14,000), appeared to require refunds. THC did not maintain sufficient funds in its bank accounts to make the necessary refunds.

At the exit conference, the Audit staff presented to the THC representatives their finding of excessive contributions and provided a schedule detailing the contributions in question. Additional excessive contributions (included above) were identified as a result of documentation submitted subsequent to the exit conference and THC was provided an updated schedule detailing all excessive contributions.

### **Interim Audit Report Recommendation and Committee Response**

The Audit staff recommended that THC:

- Absent evidence the contributions were not excessive, send notices to those contributors that were eligible for presumptive redesignation and/or reattribution (\$14,000) to inform those contributors how the contribution was designated and/or attributed and offer a refund of the excessive portion. Absent a request for a refund by the contributors, these notices would have obviated the need for a refund or payments to the United States Treasury. For notices sent to contributors, it was also recommended that THC provide a copy of each notice and evidence that it was sent. Such notices must demonstrate that both the contributor and the individual to whom the contribution was reattributed were notified; and
- Provide evidence demonstrating that the remaining contributions totaling \$22,300 were not excessive. Such evidence could have included documentation that the contributions were reattributed and/or redesignated in a timely manner or that the excessive contributions were timely refunded; or
- Absent such evidence, refund \$22,300 to the contributors and provide evidence of such refunds (copies of the front and back of negotiated refund checks), or pay the amount to the United States Treasury; or
- If funds were not available to make the necessary refunds, disclose the contributions requiring refunds on Schedule D (Debt and Obligations) until funds became available to make such refunds.

In response to the interim audit report, THC provided copies of seven non-negotiated refund checks totaling \$22,300 and copies of the presumptive redesignation and/or reattribution letters sent to contributors.

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<sup>1</sup> The legal defense fund was begun as a recount fund following the March 2004 primary election which had been subject to a recount. THC apparently maintained this fund throughout the audit period and apparently used it as a campaign account.

## **Finding 2. Receipt of Contributions from Prohibited Sources**

### **Summary**

A review of contributions identified two contribution checks, totaling \$13,000, which, without additional information from the contributor were treated as having been received from corporate sources. If the contributions are from permissible sources, portions of each, totaling \$10,500, would be added to the excessive contributions in Finding 1. Of the \$10,500 added to the excessive finding, \$2,100 could have been resolved provided the necessary notification letter was sent to the contributor advising of the presumptive action taken by THC. In response to the interim audit report, THC provided copies of two non-negotiated refund checks totaling \$8,800. THC failed to establish the remaining contributions were from permissible sources.

### **Legal Standard**

**A. Receipt of Prohibited Corporate Contributions.** Political campaigns may not accept contributions made from the general treasury funds of corporations. This prohibition applies to any type of corporation including a non-stock corporation, an incorporated membership organization, and an incorporated cooperative. 2 U.S.C. §441b.

**B. Definition of Limited Liability Company.** A limited liability company (LLC) is a business entity recognized as an LLC under the laws of the state in which it was established. 11 CFR §110.1(g)(1).<sup>2</sup>

**C. Application of Limits and Prohibitions to LLC Contributions.** A contribution from an LLC is subject to contribution limits and prohibitions, depending on several factors, as explained below:

1. **LLC as Partnership.** The contribution is considered a contribution from a partnership if the LLC chooses to be treated as a partnership under Internal Revenue Service (IRS) tax rules, or if it makes no choice at all about its tax status. A partnership contribution for the 2006 election may not exceed \$2,100 (as adjusted by the consumer price index) per candidate, per election, and it must be attributed to each lawful partner. 11 CFR §110.1(a), (b), (e) and (g)(2).
2. **LLC as Corporation.** The contribution is considered a corporate contribution—and is barred under the Act—if the LLC chooses to be treated as a corporation under IRS rules, or if its shares are traded publicly. 11 CFR §110.1(g)(3).
3. **LLC with Single Member.** The contribution is considered a contribution from a single individual if the LLC is a single-member LLC that has not chosen to be treated as a corporation under IRS rules. 11 CFR §110.1(g)(4).
4. **An LLC that makes a contribution shall, at the time of the contribution, affirm that it is eligible to make the contribution.** 11 CFR §110.1(g)(5).

<sup>2</sup> In December 2007, the Commission considered an advisory opinion request from a limited liability partnership (LLP), which elected corporate tax treatment. This LLP wanted to know whether the Commission considered it a corporation, and if so, would it be permitted to support a separate segregated fund. Although the Commission declined to act on this request, the fact that such entities may elect corporate tax treatment suggests that these should be treated in a manner similar to LLCs.

**Facts and Analysis**

A review of contributions from individuals identified two contribution checks, totaling \$13,000, on which was imprinted the reference L.P. or Ltd. According to the Texas Secretary of State, each entity, though not incorporated, was registered with the state of Texas as a Domestic Limited Partnership. Since such entities may elect tax treatment as corporations, pending the receipt of a written statement from each entity explaining how it elects to be taxed, the contributions were treated as being from a prohibited source.

If the contributions were from permissible sources, portions of two, totaling \$10,500, would be added to the excessive contributions in Finding 1., as follows:

- A \$10,500 contribution would be excessive by \$8,400 and appeared resolvable only by refund; and,
- A \$2,500 contribution would be excessive in its entirety; however, \$2,100 could have been resolved provided the necessary notification letter was sent to the contributor advising of the presumptive redesignation action taken by THC and the remaining \$400 appeared resolvable only by refund.

The Audit staff advised THC's representatives of this matter by phone and e-mail following the receipt of documentation from a previously undisclosed account. To address this issue, documentation was requested from each entity stating how each elects to file its taxes. THC representatives said that they would obtain the requested documentation.

**Interim Audit Report Recommendation and Committee Response**

The Audit staff recommended that THC:

- Provide evidence demonstrating that the contributions in question were made with permissible funds (a statement from the contributing entity explaining its tax treatment or a copy of IRS Form 8832 entity classification election) and were not excessive; or
- Refund the impermissible funds and/or refund/resolve the excessive contributions as noted above and provide evidence of such refunds (copies of the front and back of the negotiated refund checks); or
- If funds were not available to make the necessary refunds, disclose the refunds due on Schedule D (Debts and Obligations) until funds became available to make the refunds.

In response to the interim audit report, THC provided copies of two non-negotiated refund checks totaling \$8,800. THC failed to establish the contributions are from permissible sources. Therefore, the entire amount should have been refunded. However, it appears that THC treated each contribution as permissible and attempted to refund the excessive portion.

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