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May 5, 2003

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Ms. Tracey L. Ligon
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: MUR 5199: Bush-Cheney 2000, Inc. and David Herndon, as Treasurer

Dear Ms. Ligon:

Enclosed please find additional factual and legal materials in response to the Factual and Legal Analysis we received from the Commission in this Matter Under Review. We also note the period of conciliation in Vice Chairman Smith's letter and look forward to speaking with you in the next several days.

Sincerely,

Benjamin L. Ginsberg

BLG/jmt

Enclosures

cc: The Commissioners

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5199
Bush-Cheney 2000, Inc.	)	
And David Herndon, as Treasurer	)	

ADDITIONAL FACTUAL AND LEGAL MATERIAL IN RESPONSE TO THE COMMISSION'S ANALYSIS SUPPORTING REASON TO BELIEVE

The Commissioners' entire Factual and Legal Analysis rests on the incorrect assertion on its first page that "[t]he Bush Cheney Recount Fund apparently did not register or file reports with the Internal Revenue Service". *Id.* at 1, line 23. In fact, all the Recount Fund's activity – all the activity at issue in this MUR -- was timely filed under P.L. 106-230 and is publicly available in its entirety on the IRS website. http://eforms.irs.gov/search_result.asp

Armed with that factually inaccurate premise, the members of the Federal Election Commission have chosen to jumpstart on the eve of the 2004 presidential campaign an April 2001 complaint against Bush-Cheney 2000, Inc. filed by the Democratic National Committee Chair.

Moreover, the Analysis ignores that the Recount Fund has acted at all times as an entity separate from Bush-Cheney 2000, Inc., including registering and filing complete and timely reports of the all the activity at issue here with the IRS. Contrary to the Analysis, the Recount Fund, from its beginnings as a segregated account with zero balance, operated as an independent entity. It registered and reported (with the IRS) separately and independently from Bush-Cheney 2000, Inc. and the Bush-Cheney Compliance Committee; it did not draw funds from either, and it did not supplement either. The Recount Fund was, contrary to the Analysis, operated as a separate, isolated bank account whose sole purpose was funding the recount effort after the November 2000 election.

Thus, the Commission's finding even differs from its precedents and prior policy determinations on the reporting of recount funds for congressional races and, surprisingly, raises an

issue not even mentioned as part of the Commission's thorough, two-year long audit of the Respondents.

Much of the remainder of the Commission's Analysis similarly omits or miscasts key facts while using the enforcement process to make new law for publicly financed Presidential recount funds – a case of first impression if there ever was one. Similarly, we are aware of no precedent – and the Analysis does not cite or refer to any – of the Commission pursuing an enforcement action against a recount fund for failure to report its receipts and disbursements with the Commission.

We request that the Commission revisit its determination.

At most, this is a matter of form over substance since the Analysis fails to take into account the sea change created by the passage and implementation of P.L. 106-230 and the Recount Fund's filing in compliance with that change. Of course, the full implementation of that law came during the two years the Commission has not acted on this case. And while Respondents maintain that they did not have a filing requirement either at the time of the recount or when the complaint was filed, *see* Response of Bush-Cheney 2000, Inc., filed July __, 2001, out of an abundance of caution, the Recount Fund did file with the IRS in July 2002, and thereby met any substantive objections that could be raised by this complaint.

Thus, perhaps inadvertently, the Commissioners' decision at this time after so lengthy a delay has thrust them uncharacteristically into the political thicket. If penalizing the Recount Fund for filing with the IRS instead of the FEC is such a matter of principle, why did the Commissioners not act for two years and four months after the activity in question, 22 months after the complaint was filed and nine months after the Recount Fund reported fully to the IRS all the information sought here by the FEC? Why revive this matter now at the start of the 2004 presidential campaign with a so large penalty.

Despite this delay, the Analysis' misstatement on Page 1 illustrates its almost total omission of the effects of the implementation of P.L. 106-230. The Analysis (and thus the Commissioners' finding) fails to take into account the transition that occurred with its final implementation in July 2002 – that committees are not required to file with both the FEC and IRS. The Recount Fund filed with the IRS but not the FEC, and now the Commission appears to be placing Bush-Cheney in the midst of a turf war with the IRS. All the information the Commission now wants disclosed is publicly available through the IRS and has been since July 2002.

Legal Analysis

The Analysis, without support, fails to take into account the new IRS rule that political committees that do not report to the FEC now register and report with the IRS; applies an inaccurate reading of existing law to the unprecedented subject of Presidential recounts; and ignores its prior determinations and policy findings that recount committees do not have to report their activity to the FEC.

I. This Matter involves two novel areas of the law involving issues never addressed previously by the Commission and not taken fully into account in the Analysis.

The issue of whether the Bush Cheney Recount Fund had a Federal Election Commission reporting obligation is a case of first impression for two reasons – neither recognized in the Analysis that forms the basis for the Commission's finding: (1) P.L. 106-230's IRS registration and reporting requirement for political committees that do not have to register and report with the FEC, and (2) this involved a recount of a publicly financed Presidential campaign, and not a congressional campaign.

A. In the 22 Months Since This Complaint Was Filed and Answered, the IRS Implemented A New Law and the Recount Fund Registered and Reported Under It.

As a matter of law, the Bush-Cheney Recount Fund registered and reported in a timely fashion with the Internal Revenue Service pursuant to P.L. 106-230 which governs Section 527

committees that do not register with and report to the FEC. P.L. 106-230 requires. See Rev. Rul. 2000-49 ("Persons required to report under . . . [FECA] as a political committee . . ." are not required to register or file periodic reports) (citing 26 U.S.C. §§ 527(i)(5), (6) & 527(j)(5) (2000)). During 2000 and 2001, P.L. 106-230 required a political organization that was not registered and reporting with the FEC to register with the IRS by filing Form 8871, *Political Organization Notice of Section 527 Status*, report of its receipts and disbursements on Form 8872, *Political Organization Report of Contributions and Expenditures*, and to file an annual information return on Form 990, *Return of Organization Exempt From Income Tax*, and a tax return on Form 1120-POL, U.S. Income Tax Return for Certain Political Organizations.

The Analysis on page 4 fails to take into account the totality of the new statutory scheme passed by Congress to regulate filings of Section 527 committees, such as the Recount Fund. Since the passage of P.L. 106-230, the issue of whether a Presidential Recount Fund must file with the FEC no longer, if it ever did, "turns on whether the recount fund was established within the political committee or established as a separate organizational entity." Analysis at 4. The Recount Fund operated since its formation as a separate recount committee, accepting contributions outside the limits from permissible sources, 11 C.F.R. 100.7(b)(20); not taking any funds from either Bush-Cheney 2000 or the Bush-Cheney Compliance Committee, and not filing reports of receipts and disbursements with the FEC. As a result, any obligation the Recount Fund might have to register and report publicly, was met by its July 2002 filing with the IRS.

B. No Commission Precedents Require a Recount Committee of a Publicly Funded Presidential Campaign to File with the FEC.

Even if P.L. 106-230 had not gone into effect, there are no Federal Election Commission precedents governing a separate recount fund established by a publicly financed Presidential campaign. The entire Analysis that forms the basis for the Commissioners' decision fails to cite any statute or regulation or advisory opinion that is directly on point for this unique situation. In trying

to pigeon hole the first presidential recount since 1876 into its precedents on congressional recounts, the Commissioners try to jam a square peg into a round hole. It does not fit. Even if it were to believe that its previous Advisory Opinions on congressional recounts applied to a separate recount fund established by a publicly funded Presidential campaign,[1] the Commission's own precedents from the 1996 presidential campaign audits state they should not be relied upon to fill the very real gaps in the regulatory scheme. *See* Commissioner Darryl R. Wold, et. al, *Statement of Reasons for the Audits of the Dole and Clinton Presidential Campaigns* 2-4 (June 24, 1999). And if there are not real gaps, as the Analysis surprisingly contends at 8, why can the Analysis not find any reference to a "recount of publicly funded Presidential campaign"?

In fact, there are "gaps" in the regulatory scheme governing a recount for a Presidential campaign. The simple fact is that Presidential campaigns are different. For example, where a congressional campaign can transfer funds from its general election accounts to a recount, *see* FEC AO 1998-26 *supra*, that would not be permitted by a publicly funded Presidential campaign. 26 U.S.C. 9001 et seq. Thus, a Presidential campaign using a segregated bank account with no funds in it accomplishes the same statutory goal as requiring a congressional campaign to form a recount fund in a separate committee.

Most significantly, the Analysis cannot point to any specific requirement that a separate account established solely for a recount of a Presidential campaign report its receipts and disbursements. *CF.* Analysis and Response pp. 2-3. Even were the FEC scheme to apply at the expense of P.L. 106-230, the Analysis can only attempt to dragoon a presidential recount under the reporting statutes by analogy. Again, the Analysis can point to no direct authority for requiring a recount committee of a publicly funded presidential campaign to file with it. *See* Response at 3-4.

[1] *See e.g.* FEC AO 1998-26 permitting the transfer of funds between the principal campaign committee and the recount committee, which would not be permissible under any circumstances with a publicly funded Presidential campaign such as Bush-Cheney 2000.

II. The Commission's Theory is Form Over Substance Because the Recount Fund is Reporting Fully to the Public Through the IRS and the Commission's Own Analysis Admits That It Does Not As a Matter of Policy Require Recount Funds to Register and Report.

The Analysis does not contest that the Bush-Cheney Recount Fund did not use any funds from Bush-Cheney 2000 or the Bush-Cheney Compliance Committee to pay for any recount activities. Nor is there any dispute that all recount activity was conducted from a segregated, independent bank account. Nor does the Commission contest that the Bush-Cheney Recount Fund operated as a true recount committee since there is no dispute that the Recount Fund permissibly raised contributions greater than the limits from sources allowed by the Act (these contributions were limited as a matter of policy by the Recount Fund to a maximum contribution of $5,000 per individual or federal PAC).

Even if the FEC's Advisory Opinions did apply here, the Recount Fund established its independence by filing with the IRS while Bush-Cheney 2000 did not and was not required to. As a matter of policy and law, the Commission has found that separate congressional recount funds have no requirement to disclose or report their receipts, disbursements or any other activities. *See* Analysis at 2; FEC AOs 1998-26 and 1978-92. In other words, the Commission has no public policy reason for mandating that all activities in federal recounts be reported under the Act or regulations. And there is no reason for requiring the Recount Fund here to report.

At worst, in the midst of the first Presidential recount in 124 years, Bush-Cheney got the paperwork wrong. And the Analysis seems to base its severe finding on there being a significant difference between being a completely separate bank account and a separate entity. On that thin reed, the Commissioners now seek a draconian penalty that partisans will attempt to turn into a

political issue at the start of a Presidential campaign. This cannot be for reasons of disclosure to the public – the Commission does not require the reporting of other recounts' activity and, in any event, all the information at issue is available to the public on the IRS web site. So what is this about?

We urge the Commissioners to reconsider their decision.