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FEDERAL ELECTION
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BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)

2003 OCT -8 A 11: 28

Bush-Cheney 2000, Inc. and)
David Herndon, as Treasurer)

MUR 5199

SENSITIVE

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED: Find probable cause to believe that Bush-

Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. §§ 434(b)(2)(J),
434(b)(4)(G) and (I), 434(b)(3)(G) and 434(b)(6)(A), and approve the attached
conciliation agreement.

II. BACKGROUND

The central issue in this matter is whether Bush-Cheney 2000, Inc. and David
Herndon, as Treasurer ("the Respondents"), violated the Federal Election Campaign Act
of 1971, as amended ("the Act"), by failing to report recount receipts and disbursements
to the Federal Election Commission ("the Commission").¹ The Commission found
reason to believe that the Respondents violated 2 U.S.C. §§ 434(b)(2)(J) and
434(b)(4)(G) and (I) by failing to report the Committee's recount receipts and
disbursements with the Commission, and violated 2 U.S.C. §§ 434(b)(3)(G) and
434(b)(6)(A) by failing to itemize its recount receipts and disbursements, where
appropriate.

¹ The facts relevant to this matter occurred prior to the effective date of the Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. 10-155, 116 Stat. 81 (2002). Unless specifically stated to the contrary, all citations to the Act, and all statements of applicable law herein, refer to the Act and its implementing regulations as they existed prior to the effective date of BCRA.

On July 17, 2003, this Office mailed the General Counsel's Brief to counsel representing the Respondents. The General Counsel's Brief is incorporated herein by reference. On September 8, 2003, after this Office granted a request for an extension of time totaling 35 days, the Respondents submitted a 9-page response ("Response").

III. ANALYSIS

The thrust of Respondents' argument is that this MUR is nothing more than form over substance, and furthermore that the Act and Regulations do not dictate the conclusion that recount activity run through a bank account of a registered political committee must be reported as activity of that committee. While it is true that respondents could have avoided reporting obligations to the Commission by organizing themselves differently, the recommendation here hinges not on any technicality, but rather on the basic proposition that all receipts and disbursements of a political committee must be reported by that committee. The Commission's Advisory Opinions, which are entitled to deference, make it crystal clear that this proposition applies as equally to recount activity conducted through the political committee as it does to any other activity. As discussed more fully in the General Counsel's Brief, the respondents here failed to report to the Commission over \$13 million in receipts and \$14.5 million in disbursements.

The Act and the Commission's regulations require authorized committees of candidates for Federal office, such as Bush-Cheney 2000, Inc., to report all of their receipts and disbursements. *See* 2 U.S.C. §§ 434(b)(2)(A)-(K) and 434(b)(4)(A)-(I);

1 11 C.F.R. §§ 104.3(a)(3)(i)-(xi) and 104.3(b)(2)(i)-(vii). The Commission's Advisory
2 Opinions clarify this legal obligation as it pertains to recount accounts. In Advisory
3 Opinion 1978-92, the requester asks, *inter alia*, if current officers and/or staff of a
4 political committee can organize and operate a separate recount committee. The
5 Commission responded that a separate organizational entity established solely for
6 purposes of funding a recount effort would not become a "political committee" under the
7 Act since its receipts and disbursements would not be contributions or expenditures, and
8 that such an organization would not be required to file reports with the Commission. The
9 Commission explained that the fact that persons connected with the political committee
10 were the organizers and principals in a "separate recount committee" would not change
11 the result.

12 By contrast, and in response to questions involving the *political committee*
13 receiving and expending funds for recount purposes, the Commission stated that if a
14 registered political committee, as defined in 2 U.S.C. § 431(d), establishes any bank
15 account for recount purposes, the receipts and disbursements of those accounts would be
16 reportable transactions of the political committee, *i.e.*, the account will be considered a
17 part of the political committee. Thus, for purposes of determining a political committee's
18 obligation to report recount receipts and disbursements, the pivotal issue is whether or not
19 the *political committee* established the account.³

20 Whether the political committee established the bank account is a question of fact.
21 Here, the facts are undisputed. The Respondents admit that Bush-Cheney 2000, Inc.

³ Subsequently, in Advisory Opinion 1998-26, the Commission confirmed that "*a principal campaign committee* receiving donations designated for [recount purposes] should establish a separate bank account and the receipts and disbursements of the account would be reportable transactions of the committee, within the categories of "other receipts and other disbursements" respectively," citing 2 U.S.C. §§ 434(b)(2)(J) and (4)(G); 11 C.F.R. §§ 104.3(a)(3)(x) and (b)(2)(vi) (*italics added*).

1 established the recount account. *See* Response, p.3 ("Bush-Cheney formed BCRF");
2 Response to the Complaint, p.2. ("The Fund was established in mid-November as a part
3 of Bush-Cheney 2000."). This factual conclusion is further supported by the additional
4 reasons set forth fully in the General Counsel's Brief, pp. 4-6, including the fact that the
5 recount account was a previously established account of the political committee, and bore
6 the name of the political committee's corporate identity, *i.e.*, Bush-Cheney 2000, Inc. –
7 Recount Fund.

8 The Respondents make much of the fact that the Act and the Commission's
9 regulations do not define the term separate organizational entity. They argue that the
10 absence of such a definition precludes a determination that the Respondents were
11 required to report the Committee's recount receipts and disbursements to the
12 Commission. However, a definition of what constitutes a separate organizational entity is
13 not necessary where, as here, the Commission has set forth, through its Advisory
14 Opinions, a dispositive statement that a recount account is considered to be a part of the
15 political committee whenever the political committee establishes the account.⁴ *See*
16 Advisory Opinions 1998-26 and 1978-22.

17 The Commission's interpretation of the Act and its regulations, as expressed in its
18 Advisory Opinions, is entitled to deference. In *FEC v. Ted Haley Congressional Comm.*,
19 852 F.2d 1111 (9th Cir. 1988), the court stated that "The interpretation of statutes and
20 regulations by an agency charged with their administration is entitled to due deference

⁴ There have been other circumstances in which the Commission's opinion has been based on whether a political committee is taking the proposed action. *See* Advisory Opinion 1990-23 (requester queried whether principal campaign committee could establish "separate segregated account" to receive and disburse funds solely in connection with reapportionment matters; Commission did not allow principal campaign committee to set up such an account, but noted that its decision should not be construed to prohibit the candidate from establishing the fund or entity independent of political committee).

1 and should be accepted unless demonstrably irrational or clearly contrary to the plain
2 meaning," citing *Nevitt v. United States*, 828 F.2d 1405, 1406-7 (9th Cir. 1987). The
3 Supreme Court has also held that the Commission "is precisely the type of agency to
4 which deference should presumptively be afforded. *FEC v. Democratic Senatorial*
5 *Campaign Comm.*, 454 U.S. 27, 37 (1982). Here, the Commission's conclusion in
6 Advisory Opinions 1998-26 and 1978-22 that a bank account established by a political
7 committee is an account of that political committee is rational. The ensuing conclusion
8 that receipts and disbursements of such an account are reportable transactions of the
9 political committee is the natural dictate of the language of the Act and Commission's
10 regulations. See Relevant Legal Framework in General Counsel's Brief, p. 3.

11 The Respondents' failure to report over \$13,000,000 of its receipts and over
12 \$14,500,000 of its disbursements to the Commission is a violation of the Act. Their
13 failure to comply with the Act's disclosure requirements left the official public record
14 devoid of information about over \$27,000,000 of the Committee's financial activities for
15 twenty months. Moreover, the Respondents derived certain benefits from conducting the
16 recount activities through Bush-Cheney 2000, Inc. For example, the Respondents were
17 able to use Bush-Cheney 2000, Inc.'s payroll account to pay recount payroll.⁵

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⁵ After the general election, the Respondents routinely transferred funds from their recount account to their payroll account to cover payroll costs associated with the recount.

1 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

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V. RECOMMENDATIONS

1. Find probable cause to believe that Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. § 434(b)(2)(J) and 2 U.S.C. § 434(b)(4)(G) and (I).
2. Find probable cause to believe that Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. § 434(b)(3)(G) and 2 U.S.C. § 434(b)(6)(A).
3. Approve the attached conciliation agreement.
4. Approve the appropriate letter.


Date

10/9/03


Lawrence H. Norton
General Counsel


Gregory R. Baker
Associate General Counsel


Lorenzo Holloway
Assistant General Counsel


Tracey L. Ligon
Attorney

Attachment

1. Proposed Conciliation Agreement



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel *FA*

DATE: October 8, 2003

SUBJECT: MUR- 5199 - General Counsel's Report #2

The attached is submitted as an Agenda document
for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

SENSITIVE ☒
NON-SENSITIVE ☐

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

96 Hour TALLY VOTE ☐

DISTRIBUTION

COMPLIANCE ☒

Open/Closed Letters ☐
MUR ☐
DSP ☐

STATUS SHEETS ☐
Enforcement ☐
Litigation ☐
PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐