

BEFORE THE FEDERAL ELECTION COMMISSION

2012 FEB 24 PM 4: 57

In the Matter of)
)
Obama for America and Martin Nesbitt,)
in his official capacity as treasurer)
)

CELA
MURs: 6078/6090/6108/6139/6142/6214

GENERAL COUNSEL'S REPORT #2

I. ACTIONS RECOMMENDED

(1) Find reason to believe that Obama for America and Martin Nesbitt, in his official capacity as treasurer, ("OFA" or "the Committee") violated 2 U.S.C. § 434(b) by failing to report properly the dates of receipt for contributions it received through a joint fundraising representative, the Obama Victory Fund (the "Victory Fund"), as the date received by the Victory Fund (the "original date of receipt"); (2) :

f) and failing to report correctly the original dates on which \$85,158,116 in contributions were received by its joint fundraising representative in violation of 2 U.S.C. § 434(b); and (3) :

II. INTRODUCTION

In August 2010, the Federal Election Commission ("the Commission") found reason to believe that OFA violated the Federal Election Campaign Act of 1971, as amended, ("the Act" or "FECA") by accepting during the 2007-2008 election cycle an unknown number of excessive contributions in violation of 2 U.S.C. § 441a(f). See OFA Factual and Legal Analysis, dated September 7, 2010 ("F&LA").¹ In the F&LA, relying on information compiled by the Reports Analysis Division ("RAD"), the Commission found that OFA may have accepted between \$1.89

¹ The Commission dismissed allegations that OFA violated 2 U.S.C. §§ 441e and 441f.

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1 and \$3.5 million in excessive contributions. The Commission also found that OFA might have
2 misreported the original date of receipt for certain primary election contributions made through
3 its joint fundraising representative, the Victory Fund,² which caused those contributions to
4 appear as "primary-after-primary" excessive contributions (*i.e.*, primary contributions made after
5 the date of the primary election). *Id.* at 8 n.3. The Commission authorized an investigation and a
6 Section 437g audit to determine the extent of OFA's violations.

7 In response to the Commission's findings, OFA acknowledged that it had accepted
8 excessive contributions. OFA argued, however, that it had resolved the vast majority of these
9 excessive contributions through refunds, redesignations, and reattributions. See OFA Letter from
10 Judith Corley dated November 12, 2010 (responding to RTB findings). OFA also asserted that
11 \$1.6 million in primary contributions received through the Victory Fund were not excessive. *Id.*
12 In fact, OFA explained, these contributions appeared to be "primary-after-primary" excessive
13 contributions because, as it conceded, OFA misreported these contributions' original date of
14 receipt. *Id.* OFA characterized the violations as *de minimis* relative to its overall receipts. But it
15 provided no explanation of how its compliance systems had failed to detect or resolve excessive
16 contributions of over \$1 million, or why it had failed to resolve hundreds of thousand dollars in
17 excessive contributions that had been questioned by RAD in Requests for Additional Information
18 sent to the Committee in 2007-2009. *Id.* Further, the only explanation OFA offered as to why it
19 misreported the original date of receipt for contributions received through the Victory Fund was

² The Victory Fund was established pursuant to 11 C.F.R. § 102.6. Its participants were OFA and the Democratic National Committee.

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1 that the campaign staff understood it was reporting the transfers in the correct manner. *Id.* See
2 also OFA Letter from Judith Corley to OGC dated March 1, 2011.

3 During the ensuing Section 437g audit, the Commission's Audit Division provided OFA
4 with lists of additional unresolved excessive contributions discovered by its review of the
5 Committee's disclosure reports and accounting databases. OFA took corrective action by
6 refunding approximately \$870,000 in previously unresolved excessive contributions (OFA had
7 resolved approximately \$490,000 in excessive contributions prior to the Commission's findings).
8 At the conclusion of the Section 437g audit, OFA was given the opportunity to question or
9 challenge the Audit Division's findings and conclusions. In response, OFA identified nine
10 additional contributions that had been resolved and requested pre-probable cause conciliation
11 "regarding [OGC's] remaining conclusions." See OFA Letter from Robert F. Bauer to OGC
12 dated August 31, 2011.

13 The results of the Section 437g audit are set forth in the October 14, 2011, Audit Division
14 Memorandum to the Office of General Counsel. See Attachment 1. In summary, the Audit
15 Division made the following findings.

- 16 • OFA accepted \$1,363,529 in excessive contributions that were not resolved through
17 refund, redesignation, or reattribution within the 60-day period set forth in 11 C.F.R.
18 § 110.1(b)(3)(i), see Attachment 1 at 3;
- 19 • To resolve its excessive contributions, OFA (i) refunded \$462,666 and redesignated
20 or reattributed \$26,950 prior to OFA receiving notice of the Commission's
21 investigation; (ii) refunded \$428,534 in late 2010 after receipt of the Commission's
22 RTB notification; (iii) refunded \$421,462 in 2011 after the completion of the
23 Commission's Section 437g audit; and
- 24 • OFA misreported the original date of receipt for at least \$1.9 million in contributions
25 that were transferred from the Victory Fund, which made it appear, erroneously, that
26 these contributions were excessive primary-after-primary contributions.

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1 Based on the results of the investigation and Section 437g audit, we recommend that the
2 Commission make an additional reason to believe finding that OFA violated 2 U.S.C. § 434(b) of
3 the Act when it misreported the original date of receipt for contributions received from the
4 Victory Fund; enter into conciliation with OFA prior to a finding of probable cause to believe
5 that OFA violated the Act by accepting excessive contributions and misreporting the original
6 date of receipt for contributions received through a joint fundraising representative; and approve
7 the attached proposed conciliation agreement.⁴

8 **III. ANALYSIS**

9 The investigation and Section 437g audit revealed that OFA received excessive
10 contributions of \$1,363,529 in violation of 2 U.S.C. § 441a(f), and failed to correctly report the
11 original dates on which \$85,158,116 in contributions were received by OFA's joint fundraising
12 representative the Victory Fund in violation of 2 U.S.C. § 434(b) of the Act.

13 **A. Receipt of Excessive Contributions**

14 During the 2008 election cycle, the Act instructed that no person was permitted to make a
15 contribution to a candidate for federal office or the candidate's authorized political committee
16 that in the aggregate exceeded \$2,300 each for the primary and general elections. 2 U.S.C.

⁴ The 437g audit also revealed that the Committee misreported the redesignation dates of contributions received from 49 individuals (totaling \$71,552). The audit notes that only one of the erroneously redesignated contributions reported actually exceeded the contribution limit, and therefore required redesignation, and it was redesignated, although it was reported incorrectly by the Committee. The Committee acknowledged that they had violated the Act by misreporting the dates of the identified redesignations. See Email from J. Corley to Audit Division dated July 15, 2010. See also Letter from OGC to J. Corley dated July 22, 2011. The Committee asserted that the violations were inadvertent, caused by a temporary employee who misunderstood the redesignation procedures and improperly reported redesignating contributions from donors who had not yet exceeded their contribution limits. See Email from J. Corley dated July 15, 2010 (stating "a data person, acting without direction from the campaign, incorrectly altered the database to show a portion of the earliest contribution(s) from these donors as general election contributions. As a result, the contributions appear in the database to have been redesignated before they were actually excessive."). The Committee also stressed that the erroneous redesignations all involved the same misinformed employee, occurred on the same day, and were corrected once the Committee was made aware of the problem. *Id.* Given the Committee's explanation of the erroneous redesignations and the corrective actions, we are not recommending that the Commission take any action as to these redesignations.

1 § 441a(a)(1)(A). As a corollary, it was unlawful for a candidate for federal office or the
2 candidate's authorized political committee to accept contributions that in the aggregate exceeded
3 \$2,300 each for the 2008 primary and general elections. 2 U.S.C. § 441a(f). Where a committee
4 receives an excessive contribution, the Commission's regulations give the committee 60 days
5 from the date of receipt to identify and refund, redesignate, or reattribute the excessive amount.
6 11 C.F.R. § 110.1(b).

7 The audit revealed – and OFA acknowledges – that, from 2007-2008, OFA accepted a
8 total of \$1,363,529 in contributions that exceeded the limits set forth in 2 U.S.C. § 441a(a)(1)(A)
9 and were not resolved within 60 days. A large portion of these excessive contributions resulted
10 from OFA accepting multiple contributions from the same donors but failing to recognize that
11 the aggregate totals exceeded the legal limits because those individuals were mistakenly assigned
12 multiple donor ID numbers by OFA's accounting system. The investigation revealed that OFA
13 had accepted at least \$425,334 in excessive contributions from 586 individual contributors who
14 were assigned multiple donor IDs.

15 Prior to receiving notice of the Commission's reason to believe finding, OFA refunded,
16 redesignated, or reattributed \$489,616 in excessive contributions, although outside of the 60-day
17 time period permitted by the Act for resolving potential excessive contribution violations. See
18 2 U.S.C. § 441a(a)(1)(A) and 11 C.F.R. §§ 103.3(b)(3), 110.1(b)(3)(i). This \$489,616 included
19 untimely refunds of \$462,666, redesignations of \$6,900, and reattributions totaling \$20,050.

20 After receiving notice of the Commission's reason to believe finding, and based on
21 RAD's analysis of OFA's disclosure reports and the Audit Division's analysis of OFA's
22 accounting records, OFA refunded an additional \$873,913 in excessive contributions. This
23 amount included \$448,579 that OFA refunded in response to the reason to believe findings based

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on RAD's initial review of OFA's disclosure reports, and \$425,334 that OFA refunded after the Audit's supplemental review of OFA's internal records to identify donors with multiple IDs.

In sum, as shown in Chart A below, the audit determined that excessive contributions totaling \$1,363,529 were refunded, redesignated, or reattributed outside of the time permitted by the regulations to resolve such violations.

Chart A. - Audit Results

Untimely Refunded/Redesignated/Reattributed Excessive Contributions	
Refunded Pre RTB	\$489,616
Redesignated Pre RTB	\$6,900
Reattributed Pre RTB	\$20,050
Refunded Post RTB - RAD List (12/31/2010)	\$448,579
Refunded Post RTB - Multiple Donor ID Review (6/2011)	\$425,334
Total	\$1,363,529

B. Misreporting of Joint Fundraising Transfers

The Act requires all political committees to publicly report all of their receipts and disbursements. See 2 U.S.C. § 434. Each report must disclose for the reporting period and calendar year the total amount of all receipts and the total amount of all disbursements. See 2 U.S.C. § 434(b)(2), (4) and 11 C.F.R. § 104.3(a), (b). The Act requires that an authorized committee of a candidate report the amount of all receipts from transfers by affiliated committees, as well as the identity of the affiliated committee and date(s) of transfer. See 2 U.S.C. § 434(b)(2)(F), (3)(D); 11 C.F.R. §§ 102.17(c)(3)(iii) and 102.17(c)(8)(i)(B). See also 11 C.F.R. §§ 104.3(a)(4) and 104.8.

Commission regulations permit political committees to engage in joint fundraising with other political committees or with unregistered committees or organizations. See 11 C.F.R. § 102.17. After a joint fundraising representative distributes the net proceeds, a participating political committee is required to report its share of funds received as a transfer-in from the

1 fundraising representative. *See* 11 C.F.R. § 102.17(c)(8)(i)(B). For contribution reporting and
2 limitation purposes, the date a contribution is received by the joint fundraising representative –
3 not the date received by the recipient political committee – is the date that the contribution is
4 received by the participating political committee. *See* 11 C.F.R. §§ 102.17(c)(3)(iii) and
5 102.17(c)(8).⁵

6 During the 2008 election cycle, OFA received \$85,158,116 in transfers from the Victory
7 Fund. These transfers were made on various dates between June 30 and November 3, 2008.
8 OFA correctly reported the dates it received transfers from its joint fundraising representative.
9 But OFA did not correctly report the original dates of receipts required by 2 U.S.C. § 434(b)(2),
10 (4) and 11 C.F.R. §§ 104.3(a), (b) and 102.17(c).

11 The Commission initially brought this problem to OFA's attention in an October 2008
12 RFAI, which questioned \$1,936,829 in primary contributions that were identified as possibly
13 excessive because OFA received the transfer of funds after the date of the candidate's
14 nomination. *See* Request for Additional Information (Oct. 14, 2008). The RFAI sought
15 clarification as to whether the contributions were "incompletely or incorrectly reported." *Id.*
16 The Commission raised this same issue in the F&LA, noting that certain excessive contributions
17 may have been misreported as having been received after the date of the primary. *See* F&LA
18 at 8 n.3.

19 OFA admits that, contrary to the Commission's regulations, it erroneously reported the
20 dates of transfers from the Victory Fund as the dates of receipt for those contributions and failed
21 to report the original dates of receipt of the contributions by the Victory Fund. Letter from

⁵ The participating political committee is required to report the original date of receipt of the proceeds only after the funds have been transferred from the fundraising representative. *Id.*

1 J. Corley to OGC dated March 1, 2011 (stating "The Committee began reporting transfers from a
2 joint fundraising committee on July 20, 2008. It reported six (6) additional transfers during 2008
3 and 2009 . . . All of the transfers (except one) [citation omitted] were reported in the same way –
4 as of the date of the transfers – based on an understanding of the campaign staff that this was the
5 correct method for reporting."). *See also* Letter from J. Corley to OGC dated November 12,
6 2010 (acknowledging "the overwhelming majority of these 'Primary-after-Primary
7 contributions' were actually received by the joint fundraising committee before President Obama
8 accepted his party's nomination"). By way of explanation, OFA responds only that it was "in
9 regular contact with the FEC's Reports Analysis Division [] to clarify reporting issues[, and] . . .
10 RAD staff never raised any issue with them regarding the method they were using to report the
11 transfers." Letter from J. Corley to OGC dated March 1, 2011.

12 OFA's explanation does not alter the fact that it failed to report the dates on which the
13 Victory Fund originally received contributions totaling \$85,158,116. Accordingly, we
14 recommend that the Commission find reason to believe that OFA violated 2 U.S.C. § 434(b).⁶
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⁶ Concurrent with the Section 437g audit, the Audit Division also conducted a Section 438(b) audit of OFA;

The Section 438(b) audit of OFA reveals separate instances of material non-compliance with the Act, including the apparent failure to file required 48-hour notices for contributions prior to the general election, which would customarily be handled through the Commission's Administrative Fines program as violations of 2 U.S.C. § 434(a). In view of that finding, the admitted reporting violations, and the more than \$1 million in excessive contributions received, we are not recommending that the Commission exercise its prosecutorial discretion and take no further action with regard to these violations. *See Heckler v. Chaney*, 470 U.S. 871 (1985).

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V. RECOMMENDATIONS

1. Find reason to believe that Obama for America and Martin Nesbitt, in his official capacity as treasurer, violated 2 U.S.C. § 434(b);
- 2.
- 3.
4. Approve the attached Factual and Legal Analysis; and
5. Approve the appropriate letters.

1-24-12
Date

Anthony Herman
Anthony Herman
General Counsel

Kathleen M. Guith
Kathleen M. Guith
Acting Associate General Counsel
for Enforcement

Mark Shonkwiler
Mark Shonkwiler
Assistant General Counsel

Camilla Jackson Jones
Camilla Jackson Jones
Attorney

Phillip A. Olaya
Phillip A. Olaya
Attorney

Attachments:

1. Audit Memorandum to Anthony Herman, dated October 14, 2011