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October 28, 2011

Jeff Jordan
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Federal Election Commission
999 E Street, NW
Washington DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
2011 OCT 31 AM 11:33
OFFICE OF GENERAL
COUNSEL

Re: AR 11-05

Dear Mr. Jordan:

We are writing on behalf of Biden for President ("BFP") and Melvyn Monzack, in his official capacity as Treasurer to BFP (collectively, "Respondents"), in response to the letter the Office of General Counsel ("OGC") sent to Respondents, dated September 6, 2011, in the above-referenced matter. The OGC should recommend that the Commission find no reason to believe that BFP violated the Federal Election Campaign Act (the "Act"), and the Commission should dismiss the matter.

I. Factual and Procedural Background

Federal law requires the Commission to audit every presidential campaign that receives public funds for the primary election.¹ As a publicly-funded presidential campaign, BFP was subject to this mandatory audit. During the audit, the Audit Division asked BFP to provide copies of letters sent to contributors whose contributions had been presumptively redesignated to the 2008 general election.² As documented in the Final Audit Report ("FAR"), BFP staffers were unable to locate the letters, which were inadvertently lost when BFP moved offices in the spring of 2008. BFP staff further explained that the letters were prepared using a template on a BFP computer, which was subsequently "wiped clean" and sold when BFP liquidated its assets at the

¹ See 26 U.S.C. § 9038(a).

² See Final Audit Report of the Commission on Biden for President, Inc., at 4. BFP had obtained signed redesignations of these contributions to Citizens for Biden, the candidate's senatorial campaign.

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October 28, 2011

Page 2

end of the campaign. And not long after BFP ceased its operation in connection with the 2008 election, but before the November election, the staff member responsible for sending the notices and maintaining the necessary records unfortunately passed away.³

In lieu of providing the letters, BFP provided compelling circumstantial evidence throughout the course of the audit to show that the notice letters were, in fact, sent. This evidence included:⁴

- A library of "cure" letters and other compliance-related letters. The FAR also notes that BFP's Contribution Review Procedures made reference to the process for obtaining a presumptive redesignation.
- Confirmations from BFP staffers that the now-deceased staffer had specific recollections of sending the redesignation letters, and confirmation from these staffers that the now-deceased staffer was meticulous and conscientious in performing her duties.
- Signed declarations from contributors who recalled receiving a presumptive redesignation notice from BFP.
- A declaration from a BFP staffer who reported directly to the now-deceased staffer, who recalled regularly sending presumptive redesignation letters.

In light of this compelling evidence, the Commission "concluded there was information to support BFP's assertions that it sent presumptive redesignation letters for these contributions" and "because BFP was able to demonstrate that it obtained signed redesignations of the contributions to the senatorial campaign, Citizens for Biden, the Commission agreed that no payment to the U.S. Treasury for such redesignated contributions is required."⁵

II. Legal Discussion

Commission regulations permit a campaign to presumptively redesignate all or part of a contribution that exceeds the primary election limit, provided that (1) the contribution is made before the primary election; (2) the contribution is not designated for a particular election; (3) the contribution would exceed the primary election limit; (4) the redesignated portion would not cause the contributor to exceed the general election limit; (5) the contributor is notified of the amount that is redesignated and that the contributor may request a refund; and (6) such

³ *Id.*, at 13-14.

⁴ *See id.*

⁵ *See id.*, at 4.

notification is provided to the contributor, in writing, within 60 days of the campaign's receipt of the contribution.⁶ In addition to these six conditions, Commission rules impose a seventh: "[i]f a political committee chooses to rely on the redesignation presumption ... the treasurer shall retain a full-size photocopy of the check or written instrument, of any signed writings that accompanied the contribution, and of the notices sent to the contributors as required by 11 CFR 110.1(b)(5)(ii)(B)"⁷ If a political committee does not satisfy this requirement, the "redesignation or reattribution shall not be effective, and the original designation or attribution shall control."⁸

As the OGC noted in a pre-hearing memorandum, the relevant question at issue in the audit was "whether the additional declarations provided by [BFP] are sufficient to establish that the Committee timely sent the presumptive redesignations" or, in other words, whether section 110.1(l)(4)(ii) is the exclusive means by which to demonstrate the effectiveness of a redesignation.⁹ The OGC initially took the latter position.¹⁰ But, in the FAR, the Commission concluded that substantial compliance was sufficient, finding that "there was information to support BFP's assertions that it sent presumptive redesignation letters for these contributions."¹¹ The BFP FAR is consistent with the more nimble, practical approach that the Commission has recently shown with respect to other recordkeeping requirements. For example, while Commission regulations require state parties to maintain monthly logs of the percentage of time each employee spends in connection with a Federal election, the Commission recently found that partial timesheets and an affidavit are sufficient proof of employee activity, in lieu of the monthly logs.¹²

⁶ See 11 C.F.R. § 110.1(b)(5)(ii)(B).

⁷ *Id.* § 110.1(l)(4)(ii). As Commissioner McGahn noted in the July 15, 2010 hearing, this condition was not included in the 2008 version of the Campaign Guide for Congressional Candidates and Committees (April 2008). See Audio Recording, Report of the Audit Division on Biden for President, Inc., available at <http://fec.gov/agenda/2010/agenda20100715.shtml>.

⁸ *Id.* § 110.1(l)(5).

⁹ OGC Memorandum to John D. Gibson and Joseph F. Stoltz re: Proposed FAR on Biden for President, Inc. (Dec. 8, 2008), at 5.

¹⁰ See *id.*

¹¹ Final Audit Report of the Commission on Biden for President, Inc., at 4.

¹² See Memorandum to Gibson and Stoltz, citing 11 C.F.R. § 106.7(d)(1), Final Audit Report of the Missouri State Democratic Committee (Feb. 3, 2009), at 10 ("... [W]e note that the Commission has recently accepted affidavits and supporting documentation in lieu of documentation required by Commission regulations ... Specifically, the Commission has accepted partial timesheets for seven staff members and one affidavit attesting that staff members spent 25 percent or less of their time in connection with a federal election for purposes of allocating staff salary.").

October 28, 2011

Page 4

12044313482

The Commission's conclusion that the contributions at issue here were not excessive forecloses the possibility of any further enforcement action. Section 110.1(l)(4)(ii) describes "supporting evidence that must be retained for [a] redesignation ... to be effective."¹³ Unlike with other recordkeeping requirements – such as 11 C.F.R. §§ 102.9(a)(4) and (b)(2) – the failure to satisfy section 110.1(l)(4)(ii) is not a stand-alone violation of the Act or Commission regulations. The exclusive consequence of non-compliance is spelled out in section 110.1(l)(5), which provides that the failure to retain evidence can render ineffective an otherwise effective redesignation and lead to a finding that the committee violated the contribution limits.¹⁴ But once the Commission determines that a committee, in this case BFP, has effectively redesignated the contributions and complied with the contribution limits, there is no basis for further enforcement. We are not aware of any matter in which the Commission found that a committee complied with the contribution limits yet also concluded that the committee had "violated" the evidentiary requirements associated with redesignations.¹⁵

We applaud the commonsense approach that the Commission took in the Final Audit Report. The OGC should continue that approach here, and recommend that the Commission *not* find reason to believe that BFP violated the Act.

Very truly yours,



Rebecca H. Gordon
Jonathan S. Berkon
Counsel to Respondents

¹³ Final Rule, Contribution Limitations and Prohibitions, 67 F.R. 69928, 69934 (Nov. 19, 2002).

¹⁴ See *id.* ("Paragraph (l)(5) has also been revised to state that if a political committee fails to retain the notices, then the presumptions for the redesignations ... will not be effective."). See also Final Rule, Contribution and Expenditure Limitations and Prohibitions: Contributions by Persons and Multicandidate Political Committees, 52 F.R. 760, 767 (Jan. 9, 1987) ("Failure to maintain these records will invalidate the redesignation ... and the original designation ... shall control. The Commission is requiring these committees to maintain these records in order to demonstrate that illegal contributions have been cured through the redesignation ... process.").

¹⁵ See, e.g., ADR 066 (Friends of John Sharpless); ADR 069 (Gejdenson Reelection Committee); ADR 101 (Weller for Congress) (July 11, 2003); ADR 103 (Committee to Elect Lindsay Graham); ADR 309 (Keever for Congress); MUR 5055 (McCormick for Congress); MUR 5066 (Banton for Congress); MUR 5236 (Sohmer '98); MUR 5346 (Committee to Reelect Vito Fossella); MUR 5364 (Rod Grams for U.S. Senate); MUR 5429 (Friends of Weiner).