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FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

AUDIT REFERRAL: 11-05
DATE REFERRED: January 11, 2011
DATE ACTIVATED: December 27, 2011

EXPIRATION OF SOL: February 19, 2013

SOURCE: Internally Generated

RESPONDENTS: Biden for President, Inc. and Melvyn Monzack, in
his official capacity as Treasurer

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. § 441a(a)(1)(A)
2 U.S.C. § 441a(f)
11 C.F.R. § 103.3(b)(3) and (4)
11 C.F.R. § 110.1(b)(5)(H)(B) and (C)
11 C.F.R. § 110.1(l)(4)(ii) and (5)

INTERNAL REPORTS CHECKED: Audit Documents
Disclosure Reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter was generated by a referral to the Office of General Counsel from the
Commission's Audit Division following an audit of Biden for President, Inc.'s ("BFP" or
"Committee") activity from December 15, 2006 through January 3, 2008. The Final Audit
Report ("FAR") concludes that the Committee failed to keep records supporting the timely
resolution of excessive contributions in violation of the Federal Election Campaign Act of 1971,

1 as amended (the "Act"), and referred the violation to this Office for potential enforcement
2 action.¹

3 For the reasons set forth below, the Office of General Counsel recommends that the
4 Commission open a Matter Under Review, find reason to believe that Biden for President, Inc.
5 and Melvyn Momazck, in his official capacity as Treasurer, violated 11 C.F.R. § 110.1(l)(4)(ii),
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8 **II. FACTUAL AND LEGAL ANALYSIS**

9 **A. BACKGROUND**

10 BFP was the principal authorized campaign committee of Joseph R. Biden, Jr., in
11 connection with his candidacy for the 2008 Democratic nomination for President. Pursuant to
12 26 U.S.C. § 9038(a), the Commission conducted a mandatory audit of BFP's activity from
13 December 15, 2006 through April 30, 2008.

14 The audit identified a projected total of \$1,092,899 in excessive contributions received by
15 BFP between January 2007 and April 2008. FAR, at 8, 12. BFP asserted that it had timely
16 resolved these contributions by sending notices to the contributors informing them that the
17 excessive amounts would be redesignated to the general election. *Id.* at 13.

18 BFP was unable, however, to produce copies of the redesignation letters. BFP explained
19 that the letters were inadvertently lost when the Committee changed its office location in the
20 Spring of 2008 and that the computer used to prepare the letters had been "wiped clean" and sold

¹ See Audit Referral, Attachment 1. The Commission made six separate findings in the FAR. The Audit Division referred to the Office of General Counsel Finding 2 only in part, concerning BFP's failure to keep records supporting the timely redesignation of \$1,092,899 in excessive contributions.

1 when the Committee liquidated its assets after Mr. Biden withdrew from the presidential
2 campaign. *Id.*

3 BFP also explained that the staff member who was responsible for sending the
4 compliance letters was now deceased, and submitted a declaration from a staff member who was
5 supervised by the deceased staffer stating that the staff member recalls sending out redesignation
6 letters within 60 days of receiving the apparently excessive contributions. *Id.* at 14. According
7 to a declaration submitted by BFP, the deceased staff member stated, before her death, that she
8 had a specific recollection of timely sending the redesignation letters, and other BFP staff state
9 that she was "meticulous and conscientious in performing her duties." *Id.* at 13. In further
10 support of its position, the Committee points out that it maintained a complete library of
11 compliance letters and "its Contribution Review Procedures" contains a template for
12 redesignation letters. *Id.* Finally, BFP provided declarations from four contributors who recalled
13 receiving redesignation letters. *Id.* at 14.

14 Although BFP was unable to produce copies of the letters demonstrating timely
15 redesignations to the general election, it produced copies of signed letters demonstrating that
16 these same contributions were redesignated subsequent to the 60-day period mandated by the
17 Commission's regulations. *Id.* at 12. These redesignations were made to Mr. Biden's then
18 Senatorial committee, Citizens for Biden ("CFB"), after Mr. Biden withdrew from the
19 Presidential campaign on January 3, 2008. *Id.* The Committee maintains that these letters
20 demonstrate that timely and proper redesignations were made because the letters "reflected an
21 understanding by the contributor and BFP that the excessive portion had been properly resolved
22 and expressed the donative intent of the contributor." *Id.* at 14.

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1 These letters seeking redesignation to CFB were not presumptive redesignations under
2 the Commission's regulations because the Committee did not send the letters within 60 days of
3 receiving the contributions. *See* 11 C.F.R. § 110.1(b)(5)(ii)(B). The Audit staff believed,
4 however, that these letters were an adequate, though untimely, showing of support for the
5 redesignation of contributions to the 2008 general election. *Id.* at 12.

6 In approving the FAR on December 2, 2010, the Commission concluded, based on the
7 unique circumstances and the evidence provided by BFP, as detailed above, that "there was
8 information to support BFP's assertions that it had sent redesignation letters for these
9 contributions" and therefore BFP would not be required to make a payment to the U.S. Treasury
10 for such redesignated contributions. *Id.* at 4. The Commission also concluded, however, that
11 because the Committee was unable to produce copies of the redesignation letters as the
12 Commission's regulations require, the Committee did not satisfy the recordkeeping requirements
13 of 11 C.F.R. § 110.1(l)(4)(ii). *Id.*

14 On September 6, 2011, this Office notified Respondents of this referral. *See* 74 Fed. Reg.
15 38617 (August 4, 2009). The Committee subsequently submitted its response, arguing that the
16 Commission should not find that BFP violated the Act.

17 **B. LEGAL ANALYSIS**

18 During the relevant time period, the Act prohibited persons from making contributions to
19 a candidate for federal office or the candidate's authorized political committee that in the
20 aggregate exceeded \$2,300. *See* 2 U.S.C. § 441a(a)(1)(A). In addition, the Act then provided,
21 and continues to provide, that no candidate or political committee shall knowingly accept any
22 contributions that exceed the limits established by 2 U.S.C. § 441a. 2 U.S.C. § 441a(f).

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1 Under the Commission's regulations, if a committee receives a contribution that appears
2 to be excessive, the committee must either return the questionable contribution to the donor or
3 deposit the contribution into its federal account and keep enough funds in the account to cover all
4 potential refunds until the legality of the contribution is established. 11 C.F.R. § 103.3(b)(3) and
5 (4). Alternatively, a committee may "presumptively redesignate" the excessive portion of a
6 contribution to another election campaign, provided that, within 60 days of receipt of the
7 contribution, the committee notifies the contributor of the amount of the contribution that was
8 redesignated and of the option to request a refund. 11 C.F.R. § 110.1(b)(5)(ii)(B) and (C). If a
9 committee "chooses to rely on a redesignation presumption," the treasurer "must retain a full-
10 size photocopy of the check or written instrument, of any signed writings that accompanied the
11 contribution, and of the notices sent to the contributors. . . ." 11 C.F.R. § 110.1(l)(4)(ii). In the
12 absence of retaining such copies, the contribution will not be considered redesignated. 11 C.F.R.
13 § 110.1(l)(5).

14 Although Section 110.1(l)(5) provides that the presumptive designations will not be
15 deemed effective unless a committee retains the notices, the Commission determined that, under
16 the unique circumstances presented here, the Committee provided sufficient support to
17 demonstrate that the contributions at issue were presumptively redesignated. FAR at 4, 9, 15.
18 The Commission also determined, however, that, because the Committee was unable to produce
19 copies of the notices, *see* p.p. 2-3 above, BFP did not comply with the recordkeeping
20 requirements set forth in Section 110.1(l)(4)(ii). *Id.*

21 Based on the Commission's finding that the Committee provided sufficient evidence to
22 show that it obtained presumptive redesignations for the excessive contributions at issue, BFP
23 argues that the Commission cannot find reason to believe that the Committee violated the Act.

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1 Response of BFP at 1. BFP claims that the failure to meet the recordkeeping requirement under
2 Section 110.1(l)(4)(ii) "is not a stand-alone violation" and "[t]he exclusive consequence of non-
3 compliance is spelled out in Section 110.1(l)(5), which provides that the failure to retain
4 evidence can render ineffective an otherwise effective redesignation. . . ." *Id.* at 4.²

5 We can find no support for BFP's argument in the plain language of the Commission's
6 regulations. Although the Commission decided not to treat the contributions as excessive, that
7 finding does not negate BFP's failure to abide by the plain recordkeeping requirements of the
8 Commission's regulations.

9 Accordingly, we recommend that the Commission find reason to believe that Biden for
10 President, Inc. and Melvyn Monazck, in his official capacity as Treasurer, violated 11 C.F.R.
11 § 110.1(l)(4)(ii) by failing to retain copies of the notices for the presumptive redesignation of
12 contributions.

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² BFP also states that it is "not aware of any matter where the Commission determined that a respondent complied with the contribution limits but "'violated' the evidentiary requirements associated with redesignations." *Id.*

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V. RECOMMENDATIONS

1. Open a MUR;
2. Find reason to believe that Biden for President, Inc. and Melvyn Monzack, in his official capacity as Treasurer, violated 11 C.F.R. § 110.1(l)(4)(ii);
3. Approve the attached Factual and Legal Analysis;
- 4.
- 5.
6. Approve the appropriate letter.

1/13/12
Date

Anthony Herman
Anthony Herman
General Counsel

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

Roy Q. Lockett
Roy Q. Lockett
Acting Assistant General Counsel

Jim Lee
Jim Lee
Attorney

Attachments:

1. Audit Referral



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OFFICE OF GENERAL
COUNSEL

January 7, 2011

SENSITIVE

MEMORANDUM

To: Christopher Hughey
Acting General Counsel

Through: Alec Palmer
Acting Staff Director *AP*

From: Patricia Carmona *PC*
Chief Compliance Officer

Joseph F. Stoltz *JFS*
Assistant Staff Director
Audit Division

Alex R. Boniewicz *AB*
Audit Manager

By: Paula Nurthen *PN by JFS*
Lead Auditor

Subject: Biden for President, Inc.- Referral Matter

AUDIT REFERRAL # 11-05

On December 2, 2010, the Commission approved the final audit report on Biden for President, Inc. The final audit report includes the following matter that is referable:

Finding 2. Receipt of Contributions that Exceed Limits and Related Recordkeeping Requirements, Records Supporting the Resolution of Excessive Contributions

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

Attachment: Finding 2. Receipt of Contributions that Exceed Limits and Related Recordkeeping Requirements, Records Supporting the Resolution of Excessive Contributions

cc: Lorenzo Holloway

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Finding 2. Receipt of Contributions that Exceed Limits and Related Recordkeeping Requirements

Summary

Records Supporting the Resolution of Excessive Contributions

In addition, the Audit staff identified a separate category of excessive contributions that apparently were not resolved in a timely manner, projected to total \$1,092,899. These excessive contributions were presumptively redesignated to the general election; however, BFP did not provide copies of letters sent to contributors as notification for the election designation. Subsequently, BFP obtained signed redesignations to the Citizens for Biden, the Candidate's senatorial campaign. The staff member who was responsible for maintaining the necessary records is now deceased. Given the Committee's unique circumstances in this matter, the circumstantial evidence presented by BFP, including a declaration from a BFP staffer who attested to sending redesignation notices within 60 days of receipt of an excessive contribution; declarations from contributors who recall receiving redesignation letters; and sample letters from BFP's forms library, the Commission concluded there was information to support BFP's assertions that it had sent presumptive redesignation letters for these contributions. BFP has not, however, satisfied the recordkeeping requirements of 11 CFR §110.1(1)(4)(ii) and (3). Nevertheless, 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. The Commission approved this finding.

Legal Standard

A. Authorized Committee Limits. An authorized committee may not receive more than a total of \$2,300 per election from any one person. 2 U.S.C. §441a(a)(1)(A), (c), and (f); 11 CFR §§110.1(a) and (b) and 110.9.

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

- Return the questionable contribution to the donor; or
- Deposit the contribution into its federal account and keep enough money on account to cover all potential refunds until the legality of the contribution is established. 11 CFR §103.3(b)(3) and (4).

The excessive portion may also be redesignated to another election or reattributed to another contributor as explained below.

C. Redesignation of Excessive Contributions. The committee may ask the contributor to redesignate the excess portion of the contribution for use in another election.

- The committee must, within 60 days of receipt of the contribution, obtain and retain a signed redesignation letter which informs the contributor that a refund of the excessive portion may be requested; or

- Refund the excessive amount. 11 CFR §§110.1(b)(5), 110.1(l)(2) and 103.3(b)(3).

Notwithstanding the above, 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 committee may presumptively redesignate the excessive portion of a general election contribution back to the primary election if the amount redesignated does not exceed the committee's primary net debt.

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. Presumptive redesignations apply only within the same election cycle between the committee's primary and general elections. 11 CFR §110.1(b)(5)(i)(B) & (C) and (l)(4)(ii).

D. 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(l)(4)(ii) and (5).

E. General Election Contributions. If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR §§110.1(b)(5) or 110.2(b)(5), or

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reattributed in accordance with 11 CFR §110.1(k)(3), as appropriate. 11 CFR §102.9(c)(3).

F. Sampling. In conducting an audit of contributions, the Commission uses generally accepted statistical sampling techniques to quantify the dollar value of related audit findings. Apparent violations (sample errors) identified in a sample are used to project the total amount of violations. If a committee demonstrates that any apparent sample errors are not errors, the Commission will make a new projection based on the reduced number of errors in the sample. Within 30 days of service of the final audit report, the committee must submit a check to the United States Treasury for the total amount of any excessive contributions not refunded, reattributed, or redesignated in a timely manner, or take any action required by the Commission with respect to sample-based findings. 11 CFR §9038.1(f).

Facts and Analysis

The Audit staff's sample review of contributions from individuals indicated that BFP apparently received a significant number of excessive contributions that either were unresolved or were resolved but not in a timely manner. Each matter is addressed separately below.

B. Records Supporting the Resolution of Excessive Contributions

The Audit staff also identified excessive contributions that were resolved but apparently not in a timely manner, totaling \$1,092,899. The projected dollar value of the excessive contributions was \$1,055,399¹. Additional errors totaling \$37,500 were identified as the result of a separate review of contributions not included in the sample population. All of these excessive contributions were presumptively designated to the general election; however, BFP did not provide copies of letters sent to contributors as notification for the election designation. BFP did provide the Audit staff with letters obtaining redesignations of these general-designated contributions to the Candidate's senatorial campaign, CFB. The letters were all signed by the contributors and mailed after the Candidate's date of ineligibility (1-3-08), well after the receipt of these contributions. Although these letters were not presumptive redesignations as specified in the Commission's regulations, the Audit staff considered these letters to be an adequate, though untimely, substitute to support the "general election" designation of the contributions.

This result is consistent with the notice provision of presumptive redesignations. A presumptive redesignation does not require a written authorization from the contributor. Rather, BFP may send a notice of the redesignation to the contributor and inform the contributor of his or her option to request that the contribution be refunded. The Audit staff determined that the signed forms authorizing the redesignation of Presidential contributions to the Senate election(s) also served to put the contributor on notice that BFP had presumed that the portion of the otherwise excessive Presidential primary election contribution was redesignated to the Presidential general election. The

¹ A Monetary Unit Sample was used with a 95% confidence level. For untimely resolved excessive contributions, the estimate is subject to a sampling error of \$348,491.

contributions to the Presidential primary election, however, were excessive until the Presidential general election to Senate election redesignation forms were sent. Given that these redesignation forms were sent much later than 60 days after the receipt of the excessive Presidential primary contributions, the Audit Staff maintained they were untimely as to the redesignations from the Presidential primary to the Presidential general election.

At the exit conference, the Audit staff provided BFP representatives with a schedule of the errors for the untimely resolved excessive contributions. A discussion ensued regarding the adequacy of letters used to support redesignations of contributions to the general election.

On September 26, 2008, BFP submitted its response to the matters presented at the exit conference. The response acknowledged that the untimely redesignation issue arises from BFP's inability to provide presumptive redesignation letters. Although confident that such letters were timely sent, BFP staff were unable to locate the letters or evidence that they were sent and believe they were inadvertently lost when its location changed in the spring of 2008. BFP further explained the letter would have been prepared using a template on a BFP computer that was subsequently "wiped clean" and sold when its assets were liquidated following the Candidate's withdrawal from the presidential campaign.

BFP offered the following circumstantial evidence to support that the letters had, in fact, been sent:

- BFP submitted a complete library of "cure" letters, whether for excessive contributions or missing contributor information. In addition, its Contribution Review Procedures made reference to presumptive redesignation and/or reattribution letters and templates for obtaining redesignations and reattributions are provided. BFP files contained other compliance letters sent for problematic contributions and those requesting additional information. BFP noted that it is unlikely that it would send this array of compliance letters and omit presumptive redesignation and/or reattribution letters.
- The individual primarily responsible for sending the compliance letters, including letters to resolve excessive contributions, had specific recollection that presumptive redesignation and/or reattribution letters had been sent. However, this individual is now deceased; therefore, BFP is unable to obtain a signed affidavit. BFP staff confirmed her recollections, and that she was meticulous and conscientious in performing her duties.
- BFP has been contacting recipients of presumptive redesignation and/or reattribution letters and although some do recollect receiving such a letter, none have been able to furnish a copy. Should any be located, copies will be forwarded to the Audit staff. No copies have been provided.
- Finally, BFP concurred with the Audit staff's position that those letters sent to redesignate contributions to Citizens for Biden serve to demonstrate that BFP did not fail to resolve a material number of excessive contributions. According to BFP, these letters reflected an understanding by the contributor and BFP that the

excessive portion had been properly resolved and expressed the donative intent of the contributor.

The Audit staff did not believe that BFP's response was sufficient to document that presumptive redesignation and/or reattribution letters had been sent.

Preliminary Audit Report Recommendation

The Audit staff recommended BFP provide documentation demonstrating that excessive contributions (\$1,092,899) were timely reattributed and/or redesignated. Such documentation was to include evidence that timely presumptive reattribution or redesignation letters were sent; copies of timely signed and dated reattribution/redesignation letters; or, any other documentation which indicated a timely reattribution and/or redesignation was initiated. BFP was invited to provide any other comments it felt were relevant to this issue.

Committee Response to Preliminary Audit Report

In its response to the preliminary audit report, BFP provided information reiterating its earlier response to this issue. Declarations were submitted from four contributors who recalled receiving a presumptive redesignation notice from BFP. The response noted that none of these individuals retained a copy of the notice, because, unlike other "cure" letters, no action was required by the contributor unless he or she objected to the redesignation. In addition, a declaration was submitted from a BFP staff member who worked directly for the now deceased individual responsible for managing BFP's sending and retention of cure letters. His declaration stated that at the direction of his now deceased supervisor, he regularly sent presumptive designation letters to contributors who made primary election contributions in excess of \$2,300. The response concluded by asking the Commission to accept its contention that presumptive designation letters had been sent.

Committee Response to Draft Final Audit Report

In response to the draft final audit report, BFP submitted a revised attestation from the staff member discussed above. His declaration now states that he personally "prepared and sent 'presumptive designation' notices to contributors who had contributed in aggregate more than \$2,300" and that he would send those letters within 60 days of receipt of the contributions.

Audit Staff's Assessment of Committee Responses

The response to the preliminary audit report reiterated points made in BFP's response to the exit conference and included declarations containing information similar to that provided in response to the exit conference. In response to the draft final audit report, the declaration was revised to address the staff member's personal knowledge and the timeliness of the presumptive letters. Though no direct evidence supporting these declarations or establishing that the actions were timely was included as part of those responses, BFP did produce letters of redesignation to CFB, which the Audit Division staff considered adequate but untimely, and therefore, the staff did not recommend a payment to the U.S. Treasury.

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Commission Conclusion

Given the Committee's unique circumstances in this matter; the circumstantial evidence presented by BFP, including a declaration from a BFP staffer who attested to sending redesignation notices within 60 days of receipt of an excessive contribution; declarations from contributors who recall receiving redesignation letters; and sample letters from BFP's forms library, the Commission concluded there was information to support BFP's assertions that it had sent presumptive redesignation letters for these contributions. BFP has not, however, satisfied the recordkeeping requirements of 11 CFR §110.1(1)(4)(ii) and (5). Nevertheless, because BFP was able to demonstrate that it obtained signed redesignations of the contributions to the senatorial campaign, Citizens for Biden, the Commission concluded that no payment to the U.S. Treasury for such redesignated contributions is required. The Commission approved this finding.

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