



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Via Facsimile & First Class Mail

FEB 13 2012

Rebecca H. Gordon, Esq.
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RE: MUR 6524
Biden for President, Inc. and
Melvyn Monzack, in his official capacity as
Treasurer

Dear Ms. Gordon:

In the normal course of carrying out its supervisory responsibilities, the Federal Election Commission became aware of information suggesting that Biden for President, Inc. and Melvyn Monzack, in his official capacity as Treasurer ("BFP"), may have violated the Federal Election Campaign Act of 1971, as amended ("the Act"). On September 6, 2011, BFP was notified that it was being referred to the Commission's Office of General Counsel for possible enforcement action under 2 U.S.C. § 437g. On January 24, 2012, the Commission found reason to believe that the BFP violated 11 C.F.R. § 110.1(l)(4)(ii). Enclosed is the Factual and Legal Analysis that sets forth the basis for the Commission's determinations.

In order to expedite the resolution of this matter, the Commission has authorized the Office of the General Counsel to enter into negotiations directed toward reaching a conciliation agreement prior to a determination by the Commission as to whether there is probable cause to believe that BFP violated the Act.]

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In the meantime, this matter will remain confidential in accordance with 2 U.S.C. §§ 437g(a)(4)(B) and 437g(a)(12)(A) unless you notify the Commission in writing that you wish the matter to be made public.

Please note that BFP has a legal obligation to preserve all documents, records and materials relating to this matter until notified that the Commission has closed its file in this matter. See 18 U.S.C. § 1519. You may submit a written request for relevant information gathered by the Commission in the course of its investigation of this matter. See Agency Procedure for Disclosure of Documents and Information in the Enforcement Process, 76 Fed. Reg. 34986 (June 15, 2011).

We look forward to your response.

On behalf of the Commission,



Caroline C. Hunter
Chair

Enclosures
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

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

MUR 6524

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") summarizing the audit's findings 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, as amended (the "Act") and referred the violation to the Office of General Counsel for potential enforcement action.¹

For the reasons set forth below, the Commission finds reason to believe that Biden for President, Inc. and Melvyn Monazck, in his official capacity as Treasurer, violated 11 C.F.R. § 110.1(l)(4)(ii).

II. FACTUAL AND LEGAL ANALYSIS

A. BACKGROUND

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

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

5 BFP was unable, however, to produce copies of the redesignation letters. BFP explained
6 that the letters were inadvertently lost when the Committee changed its office location in the
7 Spring of 2008 and that the computer used to prepare the letters had been "wiped clean" and sold
8 when the Committee liquidated its assets after Mr. Biden withdrew from the presidential
9 campaign. *Id.*

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

21 Although BFP was unable to produce copies of the letters demonstrating timely
22 redesignations to the general election, it produced copies of signed letters demonstrating that
23 these same contributions were redesignated subsequent to the 60-day period mandated by the

1 Commission's regulations. *Id.* at 12. These redesignations were made to Mr. Biden's then
2 Senatorial committee, Citizens for Biden ("CFB"), after Mr. Biden withdrew from the
3 Presidential election on January 3, 2008, and was therefore ineligible for the general election. *Id.*
4 The Committee maintains that these letters demonstrate that timely and proper redesignations
5 were made because the letters "reflected an understanding by the contributor and BFP that the
6 excessive portion had been properly resolved and expressed the donative intent of the
7 contributor." *Id.* at 14.

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

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

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

B. LEGAL ANALYSIS

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

Under the Commission's regulations, 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 funds in the account to cover all potential refunds until the legality of the contribution is established. 11 C.F.R. § 103.3(b)(3) and (4). Alternatively, a committee may "presumptively redesignate" the excessive portion of a contribution to another election campaign, provided that, within 60 days of receipt of the contribution, the committee notifies the contributor of the amount of the contribution that was redesignated and of the option to request a refund. 11 C.F.R. § 110.1(b)(5)(ii)(B) and (C). If a committee "chooses to rely on a redesignation presumption," the treasurer "must 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. . . ." 11 C.F.R. § 110.1(l)(4)(ii). In the absence of retaining such copies, the contribution will not be considered redesignated. 11 C.F.R. § 110.1(l)(5).

Although Section 110.1(l)(5) provides that the presumptive designations will not be deemed effective unless a committee retains the notices, the Commission determined that, under the unique circumstances presented here, the Committee provided sufficient support to demonstrate that the contributions at issue were presumptively redesignated. FAR at 4, 9, 15.

1 The Commission also determined, however, that, because the Committee was unable to produce
2 copies of the notices, *see* p.p. 2-3 above, BFP did not comply with the recordkeeping
3 requirements set forth in section 110.1(l)(4)(ii). *Id.*

4 Based on the Commission's finding that the Committee provided sufficient evidence to
5 show that it obtained presumptive redesignations for the excessive contributions at issue, BFP
6 argues that the Commission cannot find reason to believe that the Committee violated the Act.
7 ~~Response of BFP at 1.~~ BFP claims that the failure to meet the recordkeeping requirement under
8 Section 110.1(l)(4)(ii) "is not a stand-alone violation" and "[t]he exclusive consequence of non-
9 compliance is spelled out in Section 110.1(l)(5), which provides that the failure to retain
10 evidence can render ineffective an otherwise effective redesignation. . . ." *Id.* at 4.²

11 There is no support for BFP's argument in the plain language of the Commission's
12 regulations. Although the Commission decided not to treat the contributions as excessive, that
13 finding does not negate BFP's failure to abide by the plain recordkeeping requirements of the
14 Commission's regulations.

15 **III. CONCLUSION**

16 Based on the foregoing, the Commission finds reason to believe that Biden for President,
17 Inc. and Melvyn Monazck, in his official capacity as Treasurer, violated 11 C.F.R.
18 § 110.1(l)(4)(ii).

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.*