FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

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MEMORANDUM

TO: The Commissioners
Staff Director
Deputy Staff Director
Acting General Counsel

FROM: Office of the Commission Secretary

DATE: August 28, 2001

SUBJECT: Statement of Reasons for MUR 4944

Attached is a copy of the Statement of Reasons for MUR 4944 signed by Chairman Danny L. McDonald, Vice-Chairman David M. Mason, Commissioner Karl J. Sandstrom, Commissioner Bradley A. Smith, and Commissioner Scott E. Thomas.

This was received in the Commission Secretary's Office on Tuesday, August 28, 2001 at 11:40 a.m.

cc: Vincent J. Convery, Jr.
Information Division
Press Office
Public Disclosure

Attachment

FEDERAL ELECTION COMMISSION
Washington, DC 20463

In the Matter of

Hillary Rodham Clinton	)	
Hillary Rodham Clinton for U.S. Senate Committee, Inc.	)	
and William J. Cunningham, III, as treasurer	)	**MUR 4944**
Washington Mutual Home Loans, Inc., as the successor to	)	
PNC Mortgage Bank N.A.	)	

STATEMENT OF REASONS

CHAIRMAN DANNY L. McDONALD
VICE CHAIRMAN DAVID M. MASON
COMMISSIONER KARL J. SANDSTROM
COMMISSIONER BRADLEY A. SMITH
COMMISSIONER SCOTT E. THOMAS

At issue in the above matter was a mortgage loan agreement entered into by former President William J. Clinton and now Senator Hillary Rodham Clinton with PNC Mortgage to purchase a home in Chappaqua, New York. The Clintons' home was purchased for $1.7 million, with a down payment of $340,000, or 20% of the purchase price. The remaining $1.36 million of the purchase price will be paid under the terms of a 30-year mortgage loan, due November 1, 2029. The loan was structured as interest-only for the first three years, with no origination or add-on fees. The interest rate on the loan is a fixed rate of 7.5% for the first three years, and an adjustable rate determined by the one-year Treasury Index rate plus 2.75% for the remaining years.

On July 24, 2001, the Commission found no reason to believe that Hillary Rodham Clinton or Washington Mutual Home Loans, Inc., as successor to PNC Mortgage Bank, N.A. ("PNC"), violated 2 U.S.C. § 441b(a), or that Hillary Rodham Clinton for U.S. Senate Committee, Inc. or William J. Cunningham, III, as treasurer, violated 2 U.S.C. §§ 441b(a) or 434(b). We write this statement to explain our reasons for reaching these conclusions and rejecting the General Counsel's recommendations in the First General Counsel's Report, dated July 9, 2001 ("GCR").

I.

We first address the allegation that Senator Clinton's committee violated 2 U.S.C. § 434(b). 2 U.S.C. § 432(e)(2) states, "Any candidate . . . who receives a contribution, or any loan for use in connection with the campaign of such candidate for election, or makes a disbursement in connection with such campaign, shall be considered, for purposes of this Act,[1] as having received the contribution or loan, or as having made the disbursement, as the case may be, as an agent of the authorized committee or committees of such candidate." *See also* 11 C.F.R. 101.2 and 102.7(d). Such a loan must be reported by the candidate's committee pursuant to 2 U.S.C. § 434(b)(2) and (3). Thus, in order for Senator Clinton to have acted as an agent for her committee, thereby triggering a reporting requirement under section 434(b), she would have had to have received the loan from PNC "for use in connection with [her] campaign."

We conclude that in order for a loan that is made directly to a candidate to be considered "for use in connection with the [candidate's] campaign," there must be a greater nexus between the loan and the campaign than what the facts have presented here. It is undisputed that the money that PNC lent to the Clintons was used solely for the purchase of their new home. There is no indication that this loan "freed up" funds then used by Mrs. Clinton for campaign expenses. Compare Re: Advisory Opinion Request 1976-84, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 6032. The mere fact that a candidate decides to move to a particular location at a particular time for campaign-related reasons does not transform a loan the candidate receives for use in connection with the new home into a loan for use in connection with a campaign.[2]

[1] The Federal Election Campaign Act of 1971, as amended (the "Act").

[2] Given the number of candidates who move to new locations after reapportionment and redistricting changes, FEC intrusion into such matters could prove unwieldy, at best. Moreover, there are a number of issues arising from a candidate's personal situation (divorce, whether children attend public or private schools, business disputes, criminal actions against family members) that may become campaign issues, but the Commission will not necessarily therefore deem expenses arising from such controversies to be campaign expenses. *See* Advisory Opinions 1998-1, 1997-12, and 1996-24, Fed. Elec. Camp. Fin. Guide (CCH), ¶¶ 6258, 6240, 6207 (certain expenses deemed personal such that campaign funds may not be used). Thus, the fact that Mrs. Clinton's residence was an issue discussed in the early stages of the campaign does not transform her purchase of a personal residence into a campaign expenditure. *See* Commissioners David M. Mason, Karl J.

The Commission's regulations provide further support for concluding the loan at issue is not for use in connection with a campaign.[3] 11 C.F.R. 113 distinguishes between uses of excess campaign funds that are permissible and uses that are personal and therefore prohibited. Mortgage payments are an example of a personal use. 11 C.F.R. 113.1(g)(1)(i)(E). It is reasonable to infer that if the repayment of money Senator Clinton had borrowed for the purchase of the home would constitute a personal use – as the mortgage payments on her Chappaqua home unquestionably would – then the initial making of the loan for that particular purpose would be an obligation entered into for her personal, not campaign-related, use as well. Loans for which a candidate's home serves as collateral, but which are used for purposes other than paying for a new home, are not relevant to the analysis here. In contrast, a loan the proceeds of which were used for direct campaign expenses would be subject to the Act, regardless of whether the loan was secured by a mortgage on a personal residence.

While the Commission's regulations at 11 C.F.R. 113.1(g)(6)[4] treat some payments to a candidate for personal living expenses as a "contribution," we do not think that result applies in the circumstances at hand. Payments made "irrespective of the candidacy" are not to be treated as a "contribution." In this regard, the analysis is similar to that above (i.e., whether the loan is "in connection with the campaign"). We believe the facts suggest PNC would have made this loan irrespective of Mrs. Clinton's candidacy. From the bank's perspective, there was a good business opportunity. Although the timing of the loan, and

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Sandstrom, Bradley A. Smith, Scott E. Thomas, Statement of Reasons in MUR 4960 (In re Hillary Rodham Clinton for U.S. Senate Exploratory Committee, et al.) dated Dec. 21, 2000 ("While it is true that Mrs. Clinton needed to establish residency in New York . . . she could have done so by securing a smaller and less costly residence or possibly without acquiring a personal residence at all. Thus, the cost of moving into the home the Clintons purchased was not shown to be a campaign expense.").

[3] We briefly note that the General Counsel's Report states that "[t]he mortgage loan proceeds at issue do not fall under the definition of 'personal funds' in 11 C.F.R. 110.10(b)." (p. 35) That definition is tied to two safe harbors for candidates: (1) a candidate may make unlimited expenditures from personal funds under 11 C.F.R. 110.10(a), and (2) payments by a candidate from his or her personal funds for the candidate's routine living expenses which would have been incurred without candidacy, including the cost of food and residence, are not expenditures under 11 C.F.R. 100.8(b)(22). Since we find no basis for including the Clintons' purchase of a new home within the Act's definition of expenditure to begin with, whether or not the Clintons' mortgage loan proceeds fall within the definition of "personal funds" does not affect our analysis.

[4] 11 C.F.R. 113.1(g)(6) states, "Notwithstanding that the use of funds for a particular expense would be a personal use under this section, payment of that expense by any person other than the candidate or the campaign committee shall be a contribution under 11 C.F.R. 100.7 to the candidate unless the payment would have been made irrespective of the candidacy."

therefore the market interest rates relevant to the loan, would most likely have been different had Senator Clinton not been a candidate, there is no indication that the former President and First Lady would have been any less successful in negotiating a mortgage loan agreement with PNC had Senator Clinton not been a candidate. The likely success or failure of Senator Clinton's candidacy was immaterial to the PNC loan officer's assessment of the Clintons' future financial resources, which were estimated to be quite substantial. *See* GCR at Attachment 2, p. 32 and Attachment 4, pp. 7-8. From the Clintons' perspective, there was a reasonable basis for acquiring a private home in anticipation of leaving the White House, and the evidence shows the loan did not serve to "free up" funds for Mrs. Clinton to put into her campaign.

The Commission's prior applications of the statute and regulations support our conclusion here. In Advisory Opinion 1982-64, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5705, the Commission addressed a situation where a former candidate who had received a bank loan to pay personal living expenses wished to have his campaign committee assume the debt to the bank and raise funds to repay the loan. The Commission stated that had the candidate pursued his original plan to repay the bank loan from personal funds, "the fact that [the candidate] obtained the loan to defray personal living expenses during [the] campaign would not have any consequences under the Act." *Id.* at 10,954. This construction stemmed from the Commission's regulation at 11 C.F.R. 100.8(b)(22), which provides that living expenses paid by a candidate from personal funds are not "expenditures" for purposes of the Act. By contrast, where a third party other than a bank would be making a loan to a candidate to pay for personal living expenses arising during an effort to seek election, the Commission considered the loan to be a "contribution." *See* Advisory Opinion 1978-40, Fed. Elec. Camp. Fin. Guide (CCH), ¶ 5341 (loans from ten individuals to pay "personal and family living expenses" deemed "contributions").

The distinction in these advisory opinions between a bank loan and a loan from some other third party, for purposes of the Act's application, is supported by the fact that bank loans made in the ordinary course of business (even if for the purpose of influencing an election) are exempted from the definition of "contribution" (2 U.S.C. § 431(8)(B)(vii)), whereas other loans are not (2 U.S.C. § 431(8)(A)(i)). This statutory contrast reflects a common sense judgment that standard bank loans do not raise the concerns that underlie the campaign finance regulatory regime. Treating such loans for a candidate's home purchase or other personal living expenses as not "in connection with the campaign" and as made "irrespective of the candidacy" is well founded, in our view.

II.

Even if the loan at issue were made in connection with an election (which, as stated above, we do not conclude it was), it would be exempt from 2 U.S.C. § 441b(a) so long as it was made in accordance with applicable banking laws and regulations and in the ordinary course of business.[5] Pursuant to 11 C.F.R. 100.7(b)(11), a loan will be deemed to be made in the ordinary course of business if it: "Bears the usual and customary interest rate of the lending institution for the category of loan involved; is made on a basis which assures repayment; is evidenced by a written instrument; and is subject to a due date or amortization schedule." *See also* 2 U.S.C. § 431(8)(B)(vii).

We find no reason to believe the mortgage loan was either in violation of applicable banking laws and regulations or outside the ordinary course of business for PNC. As explained below, the loan at issue satisfies each of 11 C.F.R. 100.7(b)(11)'s factors for determining whether a loan will be deemed to be made in the ordinary course of business. Moreover, the exceptions granted to the Clintons that are not directly addressed by the factors set forth in 11 C.F.R. 100.7(b)(11) provide no basis for concluding that the loan was outside the ordinary course of business for PNC.

PNC has provided sufficiently detailed information for us to conclude that this loan's interest rate "[b]ears the usual and customary interest rate of the lending institution for the category of loan involved." On the date that the Clintons and PNC agreed to a rate of 7.5% for the first three years with no origination or add-on fees, with an adjustable rate thereafter, PNC offered interest rates for adjustable rate mortgages ranging from 6% to

[5] 2 U.S.C. § 441b(a) states, "It is unlawful for any national bank . . . to make a contribution or expenditure in connection with any [federal] election . . . or for any candidate . . . knowingly to accept or receive any contribution prohibited by this section . . . ." For purposes of 2 U.S.C. § 441b(a), "the term 'contribution or expenditure' shall include any . . . loan, advance, deposit, or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate . . . in connection with any election . . . ." 2 U.S.C. § 441b(b)(2).

7.75%. GCR at Attachment 4, p. 6. Fees waived for the Clintons totaled .625%. As explained in the Smith Report,[6]

> Instead of a three year mortgage rate of 7.125%, the Clintons elected to pay a rate of 7.5% in exchange for closing fees which were .75% lower. Loan fees included an origination fee of 1% and a large loan add-on fee of .375% for a total of 1.375%. The loan officer waived .625% of the total, which covered all of the add-on fee and .25% of the origination fee. This left origination fees of .75%, which were covered by the Clintons' rate buy-up.
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> As noted in the Adams' Report,[7] full or partial fee waivers were granted in 22 out of 53 cases by [the loan officer] during that 60 day period [between August 26, 1999 and October 25, 1999]. Of the 22, 12 borrowers, including the Clintons, also opted to accept a higher interest rate for lower fees. Four of the 12 were loans in excess of $1 million with add-on fees, and all four received fee waivers, one for .25% and three, including the Clintons, for .625%.

GCR at Attachment 4, p. 14. The General Counsel's Report notes that "Mr. Smith may have based his conclusions on information not presently available to this Office" (*see* GCR, p. 21, n. 15), but we find no reason to doubt the accuracy of the data that Mr. Smith presented in his report, and find it is unnecessary to prolong this investigation to obtain more detailed information.

We conclude there is ample evidence that the loan was made on a basis which assures repayment, which is relevant not only for the purposes of 11 C.F.R. 100.7(b)(11), but also for assessing whether there was adequate assurance of repayment to warrant the exception granted to the Clintons for a 20% down payment, or 80% loan-to-value ("LTV") ratio.[8] Not only was the loan well secured by collateral that exceeded the amount of the loan by $340,000 at the time the loan was made, but the loan officer estimated that the

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[6] In response to this investigation, PNC submitted a report entitled "Review of Mortgage Underwriting Standards and Credit Standards and Credit Process at PNC Mortgage Corporation for Loan Number 710009695," written by Marc C. Smith (the "Smith Report"). Mr. Smith is managing partner of Smith Partners, Inc., a management consultant firm, and a former president and CEO of Crestar Mortgage Corp. The Smith Report was submitted to the Board of Directors of PNC Bank Corp. (the "PNC Board") in January 2000. *See* GCR at Attachment 4.

[7] In connection with a threatened shareholder's derivative action, former Third Circuit Judge Arlin M. Adams prepared a report on the Clintons' loan for the PNC Board on October 28, 1999. *See* GCR at Attachment 2.

[8] PNC policy for loans exceeding $1 million normally requires an LTV ratio of 70%. GCR at Attachment 2, p. 9.

Clintons' reserves would equal $1.1 million after closing. GCR at Attachment 2, p. 32.[9] In addition, taking into account a conservative estimate of the Clintons' future income, which did not include Mr. Clinton's income, the loan officer estimated the Clintons' monthly income would be $23,601.00, an adequate amount to service the loan under PNC's requirements. In noting that this estimate of future income did not include Mr. Clinton's income, the loan officer stated, "[A]fter [Mr. Clinton] is out of office, his earnings are expected to be substantial. He will derive income from book writing and public speaking. Previous presidents have made as much as one million dollars for one speech." GCR at Attachment 2, p. 32.

Not only was the Clintons' 80% LTV ratio justified by PNC's assessment of the Clintons' ability to repay a $1.36 million loan,[10] as described above, but there is also sufficient evidence that the Clintons' 80% LTV ratio was not unusual. According to the Smith Report, between April and October 1999, PNC authorized an LTV ratio higher than 70% for 59 loans over $1 million, ranging from 71% to 90%. No fees were levied for these exceptions. GCR at Attachment 4, pp. 15-16. We therefore conclude that the Clintons' 80% LTV ratio was well within the ordinary course of business for PNC.

There are two other factors for determining if the loan will be deemed in the ordinary course: the loan must be evidenced by a written instrument, and subject to a due date or amortization schedule. The Clintons' loan satisfies both these criteria; there is a written mortgage loan agreement between the Clintons and PNC, and the loan has a due date of November 1, 2029.

Although not required for purposes of 11 C.F.R. 100.7(b)(11), PNC has also provided the following information about the parameters for the amortization of the type of

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[9] Although the Clintons' legal liabilities equaled $5,118,605.00 as of August 1999, it was reasonable for the loan officer to exclude this debt from his assessment of the Clintons' financial strength, since the legal expense trust established to pay off this liability paid $5,273,134.00 of the original $10,391,739.00 due within 18 months of its inception. GCR at Attachment 2, p. 33. *See also* GCR at Attachment 2, pp. 50-51.
[10] We note the General Counsel's Report questions "whether other individuals could have received a loan for that amount given the same personal financial condition" (GCR, p. 47), and cites information on PNC's website as of July 11, 2000 (approximately 9 months after the Clintons locked in their mortgage rate), which is based on national averages and which includes the following disclaimer: "PNC Mortgage rates vary by market and product. This does not constitute a loan commitment or a guarantee of interest rates. Requirements will vary for different loan programs or down payments." *See* GCR at Attachment 8, pp. 1-3. The information on PNC's website in July 2000 is too general (and too untimely) to be relevant to our analysis.

loan the Clintons received: "There are no balloon payments at any time during the 30 years and there are no pre-payment penalties. The loans can be amortized at any rate that the client chooses even during the initial [interest-only] fixed period simply by making the corresponding payment." GCR at Attachment 2, p. 20. There is nothing about the way in which PNC permits the Clintons to amortize their loan that raises any question about whether the terms of the loan were outside the ordinary course of business. According to the Smith Report, interest-only payments were elected by more than 90 other customers prior to the Clintons. There were no fees charged for the exception to any customer. Interest-only payment plans are no longer an exception at PNC, but an available option for qualified customers. GCR at Attachment 4, p.16. *See also* GCR at Attachment 2, p.10.

In addition to the customary exceptions to PNC policy that have already been discussed above, PNC granted the Clintons several other exceptions: a waiver of a second appraisal of the Chappaqua property, and a waiver of the credit report requirement. Both of these waivers seem entirely reasonable under the circumstances, and neither provides a basis for concluding that the Clinton's loan was outside the ordinary course of business. As noted in the Smith Report, "A second appraisal was available from an appraiser for another institution . . . . [T]he appraisal was utilized as ancillary documentation since it was available at no additional cost to the borrower, and it confirmed the PNC appraised value with more than arms length independence." GCR at Attachment 4, p. 10. *See also* GCR at Attachment 4, p. 16. With respect to the waiver of the credit report requirement, the substitution of the President's annual Public Financial Disclosure Report and the Clintons' 1997 and 1998 tax returns was an appropriate accommodation, since credit reports are not available for a sitting President and First Lady. *See* GCR at Attachment 4, p. 15.

Having concluded there is no reason to believe that PNC's loan to the Clintons was made outside the ordinary course of business, we next address several of the General Counsel's concerns about the loan. The General Counsel's Report states that "[t]he Clinton loan arrangement was apparently different from the standard PNC Mortgage loan in a significant number of respects," and then lists the following eight factors:

(1) the loan officer waived .25% of the origination fee;

(2) the loan officer waived the .375% add-on fee;

(3) the apparent effect of these waivers was that the Clintons paid no fees at all at closing;

(4) a senior executive waived the requirement for the credit report;

(5) a senior executive waived the requirement of a second PNC-approved appraisal;

(6) a senior executive waived the requirement of a 30% down payment;

(7) a senior executive allowed the Clintons to make interest-only payments for the first three years; and

(8) certain of PNC Mortgage's internal, technical requirements, such as a second signature for "Market CEO" exceptions, were apparently not followed because of the extremely senior status of the officials handling the loan.

GCR, pp. 43-44.

After discussing each of these factors, the General Counsel's Report states that "In short, it appears that except for the credit report exception, each of these deviations from PNC Mortgage's standard lending practices is far from unusual when taken individually." GCR, p. 45. The General Counsel's Report nonetheless concludes that questions remain about whether the terms of the loan were "in the aggregate" usual and customary, and that "[t]hese questions can only be resolved through investigation." GCR, p. 45.

We conclude that any further investigation to determine whether the terms of the loan were "in the aggregate" usual and customary is unwarranted. We reject the notion that if a bank grants a number of customary exceptions to a borrower that are appropriately tailored to the borrower's financial circumstances, those exceptions will somehow become tainted as "outside the ordinary course" if it turns out no other customer can match the number of exceptions granted to that borrower. We think it is highly unlikely that there is another couple in PNC's history (1) who could not produce a credit report because their positions (in this case, President and First Lady) made it impossible, (2) whose future earning power was highly likely to dramatically increase, (3) who had over $1 million in assets, (4) whose prospective residence had been appraised by a third party within the last 120 days, and (5) whose prospective residence was located in a stable and affluent real estate market such as Westchester County, New York. We are therefore more interested in the nature of the exceptions granted to the Clintons, rather than the number. With the exception of the waiver of the credit report (for which adequate substitute information was provided), PNC has presented adequate evidence that each of the types of exceptions granted to the Clintons was well within the ordinary course of business for PNC.

In sum, after reviewing the facts presented in the report, the complaint, and the responses, we conclude that the mortgage loan obtained by the Clintons for use in the purchase of a home in Chappaqua, New York, was not made "in connection with" Senator Clinton's campaign, nor was it made outside the ordinary course of business for PNC. We therefore find no reason to believe that Senator Clinton or Washington Mutual Home Loans, Inc., as successor to PNC, violated 2 U.S.C. § 441b(a), or that Hillary Rodham Clinton for U.S. Senate Committee, Inc. or William J. Cunningham, as treasurer, violated 2 U.S.C. §§ 434(b) or 441b(a). Accordingly, we have directed the Office of General Counsel to close the file in this matter.

8/24/01 Date	Danny L. McDonald, Chairman
8/23/01 Date	David M. Mason, Vice-Chairman
8/28/01 Date	Karl J. Sandstrom, Commissioner
8/27/01 Date	Bradley A. Smith, Commissioner
8/23/01 Date	Scott E. Thomas, Commissioner