RESPONSE
OF
MIKE BRAUN FOR INDIANA
TO
THE INTERIM AUDIT REPORT

Mike Braun for Indiana ("Committee") is in receipt of the Federal Election Commission's Interim Audit Report regarding the audit of the Committee's records from August 7, 2017 – December 31, 2019. The Committee, through counsel, hereby responds to the preliminary findings and recommendations of the Audit Division staff resulting from that audit.

BACKGROUND

Many of the misstatements of financial activity, failures to file, and other issues identified in the Interim Audit Report are traceable to the harm suffered by the Committee because of its former treasurer's failure to perform FEC accounting and reporting services properly. Therefore, prior to responding to each of Audit Division's findings and recommendations, the Committee first wants to provide some background that not only led to the hiring of the Committee's current treasurer, but also led to many of the findings detailed in the Interim Audit Report.

In 2017, the Committee hired the former treasurer to serve as its treasurer because he was, at least ostensibly, an experienced FEC compliance professional who had worked for many federal candidate committees over many years. This former treasurer had represented that he was able and willing to do the accounting and reporting work he was hired and paid to do; however, as both the Committee and the Audit Division team are now aware, at some point during the 2018 election cycle this individual began making mistakes and failing to perform his services as warranted (and for which he was being paid). He ultimately vanished, and he has not been able to be located since the end of 2018.

Following the former treasurer's disappearance, the Committee quickly retained another individual to serve as treasurer. The new treasurer immediately began to uncover various accounting and reporting problems while attempting to prepare and file the Committee's 2018 Year-End Report on short notice and with minimal documentation. Notably, the current treasurer began to correct mistakes, errors, and other problems in the Committee's accounts and reports long prior to the commencement of this FEC audit.

Unfortunately, there are documents that the Committee believes existed at some point (such as reattribution and redesignation letters, best efforts letters, etc.), but the Committee cannot confirm whether any copies were retained by the former treasurer or otherwise exist. For the practical purposes of this audit, the Committee can confirm that no such copies were provided to the new treasurer, and the Committee has no choice but to proceed with this audit with the limited documentation from the 2018 election cycle that it has in its possession.

RESPONSES TO FINDINGS

IAR FINDING 1. MISSTATEMENT OF FINANCIAL ACTIVITY

During audit fieldwork, a comparison of MBFI's reported financial activity with its bank records revealed a misstatement of receipts and disbursements in calendar year 2018.

MBFI overstated receipts by $6,293,350 and disbursements by $6,294,482. The Audit staff recommends that MBFI amend its disclosure reports or file a Form 99 (Miscellaneous Electronic Submission) to correct the misstatement.

THE COMMITTEE'S RESPONSE TO FINDING 1

The transactions described here were misreported by the former treasurer, but not in the manner described in the Interim Audit Report. The Candidate's lines of credit were in the name of the Candidate, and they were repaid by the Candidate from his personal funds at the end of 2018, but without first being deposited into the Committee's bank account(s). Accordingly, the repayments from the Candidate's personal funds should have been reported as in-kind contributions from the Candidate to the Committee, as the funds were paid out of the Candidate's personal funds from his personal account(s).

It is also worth noting that the Commission has a record indicating that the former treasurer proactively contacted the Committee's analyst in the Commission's Reports and Analysis Division about how to disclose the repayments, and the former treasurer was apparently advised to contact their software provider for guidance on the issue. Of course, per the explanation above, the former treasurer did not ultimately report the repayments from the Candidate's personal funds correctly.

The current treasurer has since conferred with the software provider and legal counsel, and they are all in agreement that the proper reporting of the payments is as an in-kind contribution. The Committee has prepared amendments to the report(s) to more clearly disclose the source(s) of the funds.

Finally, it should be noted that, while the transaction(s) were not reported on the correct lines of the FEC report, all the transactions were publicly disclosed.

IAR FINDING 2. FAILURE TO FILE 48-HOUR NOTICES

During audit fieldwork, the Audit staff identified that MBFI failed to file or untimely filed 48-hour notices for ten contributions totaling $262,600. This amount includes seven contributions totaling $9,100 for which MBFI misreported contribution dates. The Audit staff recommends that MBFI submit documentation demonstrating that the notices for thecontributions in question were filed timely, that the contributions were received outside of the 48-hour notice reporting period or provide any additional comments it deems necessary with respect to this matter. The Audit staff also

recommends that MBFI amend its disclosure reports or file a Form 99 (Miscellaneous Electronic Submission) to correct the misreported contribution dates.

THE COMMITTEE'S RESPONSE TO FINDING 2

As mentioned above, at some point in 2018 the former treasurer stopped performing the Committee's accounting and compliance services properly, unbeknownst to anyone involved with the Committee. The Committee's current treasurer has performed an in-depth review of the dates of contributions and the dates of filing of required notices. The Committee requests that the Audit Division team provide the complete list of the contributions believed to have been mis-dated for purposes of the 48-hour notices, as the Committee believes that it has corrected the dates of all contributions and has correctly reported in the amendments the correct dates of all contributions. Although the former treasurer's failure to file 48-hour notices is uncorrectable at this point, the Committee will amend the reports to report the correct dates of all contributions if the Audit Division's team will provide to the Committee a list of 48-hour notices that were either not timely filed or not filed at all.

IAR FINDING 3. DISCLOSURE OF OCCUPATION AND/OR NAME OF EMPLOYER

During audit fieldwork, a review of contributions from individuals requiring itemization indicated that 1,363 contributions totaling $1,464,449 lacked or inadequately disclosed the required occupation and/or name of employer information. MBFI did not sufficiently demonstrate "best efforts" to obtain, maintain and submit the required information. In response to audit fieldwork, MBFI provided some documentation of "best efforts," however, MBFI has not filed amendments to disclose and report the missing informationand establish "best efforts." The Audit staff recommends that MBFI amend its reports or file a Form 99 (Miscellaneous Electronic Submission) to disclose the missing information.

THE COMMITTEE'S RESPONSE TO FINDING 3

The Committee has researched all donors whose contributions require "best efforts" to obtain and report employer/occupation information. Amended reports have been prepared and the Committee has obtained and will report employer/occupation information for most donors for which the Audit Division identified as missing information. As of this writing, there are only 387 remaining donors with "Information Requested" for the 2018 election cycle. The Committee will continue its ongoing "best efforts" to obtain and report the employer/occupation information for the remaining 387 donors from the 2018 election cycle.

IAR FINDING 4. RECEIPT OF APPARENT PROHIBITED CONTRIBUTIONS – LOANS

During audit fieldwork, a review of loan documents provided by MBFI, indicated apparent prohibited loans and lines of credit totaling $8,549,405. This included five loans and eleven lines of

credit from banks, totaling $7,049,405, that do not appear to bemade in the ordinary course of business. These loans were not made on a basis that assured repayment and, therefore, appear to be prohibited contributions from the banks. Additionally, the Audit staff identified two checks from one corporation totaling $1,500,000 that were reported as loans.

The Audit staff recommends that MBFI demonstrate the loans and lines of credit were made in the ordinary course of business and were made on a basis that assured repayment. Also, MBFI should submit documentation demonstrating that the contributions in question, reported as loans, were not made from a prohibited source or, if prohibited, were resolved through the timely issuance of refunds. Absent evidence that these contributions were made with permissible funds, MBFI should refund these contributions to the contributor or disgorge the contributions to a government agency or eligible charitable organization.

THE COMMITTEE'S RESPONSE TO FINDING 4

Regarding the deposit of funds into the campaign account from the Candidate's company, those funds were the personal funds owed by the Company to the Candidate, and the Candidate paid taxes on the amount as income to him. Please note that the Committee is willing to submit additional evidence from Gary Brick, the Candidate's CPA, to substantiate the fact that such funds were the personal funds of the Candidate; however, since this evidence may contain sensitive financial information, the Committee's submission may be dependent on the Audit Division's ability to exclude the document(s) from the public record.

Regarding the Audit Division's finding that various unsecured lines of credit (collectively, the "Loans") that the Candidate obtained from FDIC-insured commercial lending institutions were not made in the ordinary course of business, the Committee fervently disagrees with this finding for several reasons: (i) the Audit Division simply fails to recognize that unsecured lines of credit are not unique to candidates for public office; (ii) under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment; and (iii) prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness.

The Audit Division simply fails to recognize that unsecured lines of credit are not unique to candidates for public office.

As evidenced by Exhibit A, which is a copy of an unsecured line of credit issued by BBVA Compass to the undersigned counsel in March 2017, commercial lending institutions provide unsecured lines of credit to creditworthy individuals who, in the bank's own judgment, are very unlikely to default on the loan. And despite being creditworthy in the eyes of BBVA Compass, the undersigned counsel can assure the Commission that he was able to obtain the unsecured line of credit without a net worth that remotely approaches that of the Candidate's.

Under Commission rules, a perfected security is a "safe harbor," not an essential element, for demonstrating assurance of repayment.

As the Commission is aware, the Federal Election Campaign Act of 1971, as amended, prohibits commercial institutions from contributing to a federal candidate's authorized campaign committee. This prohibition includes loans from commercial institutions that are not made in the "ordinary course of business" and outside applicable banking practices, laws, and regulations.[1] The FEC has supplemented this statutory restriction with rules defining the relevant terms, including what does and does not constitute a loan made in the "ordinary course of business." According to current FEC regulations, a loan is made in the "ordinary course of business" if it:

(1) bears the usual customary interest rate of the lending institution;

(2) is made on a basis that assures repayment;

(3) is evidenced by a written instrument; and

(4) is subject to a due date or amortization schedule.[2]

Satisfaction of the four elements is intended to demonstrate that when commercial lending institutions extend credit to federal candidates and political committees, they are doing so in their ordinary course of business (i.e., in their own commercial interests) rather than for the purpose of influencing the outcome of a federal election. In the instant matter, it is the undersigned counsel's understanding and belief that the commercial lending institutions that made the Loans did so in their ordinary course of business (i.e., in their own commercial interests), and not for the purpose of influencing the outcome of the Candidate's candidacy.

There should be no dispute that the Loans satisfy three of the four elements established by the Commission: (i) the Loans were evidenced by a written instrument; (ii) the Loans each bear the customary interest rate of the lending institution; and (iii) the Loans are subject to a due date or amortization schedule. The critical inquiry, therefore, is whether the Loans were made on a basis that assures repayment.

Commission rules provide several express ways for commercial lending institutions to satisfy this remaining element, including obtaining a perfected security interest in collateral such as real or personal property and certificates of deposit, or a written agreement pledging a security in future receipts.[3] While candidates, political committees, and the

[1] *See generally* 52 USC §30118(a)(1)-(2).

[2] 11 C.F.R. § 100.82.

[3] *See* 11 C.F.R. § 100.82(e)(1)-(2).

commercial lending institutions may rely on these express provisions as a "safe harbor," the Commission's rules also contain a fallback provision that permits the Commission to apply a "totality of the circumstances" test to determine whether loans were made on a basis that assures repayment.[4]

Prior Commission advisory opinions and enforcement decisions indicate deference to commercial lending institutions in assuring repayment, including considerations of the candidate's creditworthiness.

Since the Commission's earliest considerations of whether commercial loans were made on a basis that assures repayment, the FEC has clearly analyzed such loans in their full context. In its own advisory opinions, for example, the Commission has noted that the critical inquiry is whether the terms, placed within the larger understanding of the relationship between the lending institution and the borrower, evidence an agreement that mitigates the risk of the loans to such a degree that repayment is assured.[5]

To be clear, the deference ordinarily given to a lending institution's commercial judgment (i.e., their own commercial interest) is not eliminated from the analysis simply because the loans are unsecured. Rather, the Commission must nonetheless give that deference while performing its analysis to determine whether significant risk mitigation still exists in the relationship between the parties to the agreement.[6]

As the Commission highlighted in its *Cunningham* advisory opinion, unsecured lines of credit can be made on a basis that assures repayment. The Commission cited several important contextual factors in that opinion, including:

(1) the long-standing relationship between the commercial lender and the candidate;

(2) that the interest rates and additional contractual clauses were standard form agreement provisions matching agreements given to other customers; and

(3) the terms were not unduly favorable to the candidate.[7]

More recently, the Commission has considered the applicability of its "totality of the circumstances" analysis in the context of enforcement actions. In the *Cantwell* enforcement matter, the Commission considered the prior existing relationship between the candidate and

[4] 11 C.F.R. § 100.82(e)(3).

[5] FEC Advisory Opinion 1980-108 (Anderson).

[6] FEC Advisory Opinion 1994-26 (Cunningham).

[7] *Id.*

the lending institution. Importantly, the Commission's analysis emphasized how the candidate's personal net worth far exceeded the actual value of the line of credit, and the Commission ultimately concluded that the banking institution validly relied on the very favorable ratio between the candidate's net worth and the value of the line of credit to determine that the risk of non-repayment was small.

The analysis and conclusion reached in the *Cantwell* enforcement matter is instructive in the instant case because it is another clear example of the Commission deferring to the lending institution's commercial judgment (i.e., their own commercial interest) as to whether the candidate is creditworthy. Stated differently, in the *Cantwell* enforcement matter, the Commission accepted the lending institution's conclusion that the loan agreement sufficiently mitigated the risk of non-repayment because it bore the signature of a high-net-worth, creditworthy individual who, in the bank's own judgment, was very unlikely to default on the loan.[8]

In summary, it is the Committee's position that the Audit Division has not correctly applied the law or Commission precedents with respect to Finding 4.

IAR FINDING 5. RECEIPT OF CONTRIBUTIONS IN EXCESS OF THE LIMIT

During audit fieldwork, the Audit staff reviewed contributions from individuals and political committees to determine if any exceeded the contribution limit. Based on these reviews, MBFI received apparent excessive contributions totaling $1,173,557. This included apparent excessive contributions from individuals totaling $985,345 and from political committees totaling $188,212. These errors occurred as a result of MBFI not resolving the excessive portions of contributions in a timely manner and by designating contributions for Primary or General debt that had already been extinguished. The Auditstaff recommends that MBFI provide documentation demonstrating that the contributions were not excessive, or if excessive, were resolved in a timely manner. Absent such a demonstration, MBFI should send letters to those contributors whose contributions are eligible for presumptive redesignation and/or reattribution, obtain a signed authorization letter from the contributor, or refund any remaining excessive amounts.

THE COMMITTEE'S RESPONSE TO FINDING 5

As with other issues identified in the Interim Audit Report, the Committee hired and paid an experienced FEC compliance professional to handle the reattribution, redesignation, and refund requirements of the campaign. When the current treasurer took over the accounting and compliance duties in early 2019, he found a number of refund checks that had been prepared but not sent to donors, with some information suggesting that the former treasurer had initiated the reattribution and redesignation tasks required of a treasurer. It is

[8] FEC Matter Under Review 5198 (Cantwell) ("Bank approved the increase in the line of credit to $600,000 as it was partially secured and guaranteed by the candidate's signature.").

unknown the extent to which those normal and customary procedures were completed. All reattributions and redesignations were completed by the current treasurer in 2019 after he took over the accounting and reporting duties, and refunds were sent to donors at that time. The Committee will, within thirty days, provide to the Commission donor confirmations regarding the reattribution and redesignation of their contributions per the reconciliations performed by the current treasurer two years ago.

Notwithstanding the foregoing, to the extent that the facts and conclusions in Finding 5 relate to the $250,000 loan repayment limit found in Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and 28 U.S.C. § 2284 or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding in light of a recent decision of the federal court regarding the constitutional validity of the provision of law on which the Audit Division is relying on.

Specifically, in *Ted Cruz for Senate v. Federal Election Commission*, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021), a three-judge district court convened pursuant to Section 403 of the Bipartisan Campaign Reform Act of 2002 ("BCRA") and 28 U.S.C. § 2284 and issued an opinion on June 3, 2021, striking down the prohibition on federal candidates using post-election contributions to repay personal loans over $250,000 (the "loan repayment limit"). Since many of the facts and conclusions of Finding 5 may involve and may be impacted by the loan repayment limit, the Commission's conclusions may rely on an unconstitutional provision that renders Finding 5 invalid, or at least a portion of it.

Given the significant impact that the *Ted Cruz for Senate* ruling may have on Finding 5, the Committee believes it is imperative for the Commission's Audit staff to reconsider its preliminary audit findings, reissue a revised Interim Audit Report, and give the Committee the opportunity to respond to the revised Interim Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 5 until that occurs.

IAR FINDING 6. DISCLOSURE OF MEMO ENTRIES AND CANDIDATE LOANS

During audit fieldwork, the Audit staff determined that MBFI failed to properly disclose joint fundraising memo entries totaling $933,814 from 13 joint fundraising committees. MBFI also failed to properly disclose the correct loan balances and loan terms for 29 transactions totaling $11,569,963. The Audit staff recommends that MBFI provide documentation demonstrating that the joint fundraising memo entries totaling $933,814 were disclosed correctly and that MBFI properly disclosed the correct loan balance and loan terms for transactions totaling $11,569,963. Absent such documentation, MBFI should amend its disclosure reports or file a Form 99 (Miscellaneous Electronic Submission) to correct the disclosure errors for the joint fundraising memo entries and the loans and lines of credit.

THE COMMITTEE'S RESPONSE TO FINDING 6

Regarding the receipts from joint fundraising committees ("JFCs"), two years ago the current treasurer reviewed all receipts from JFC's and personally contacted all the JFC treasurers from whom the Committee did not have memo entries related to the transfers. He then added those memo entries to the Committee's reports as the information was obtained. Some of the reported JFC transfers were missing memo entries and others were reported on line 11c, not line 12. All have been corrected and will be included in the amendments that have been prepared to be filed.

Regarding the candidate loans, it is currently unclear to the Committee how the Audit Division concluded that the Committee accepted two unreported candidate loans totaling $96,520 since this finding does not correspond to any of the Committee's records. The Committee requests the opportunity to respond to this finding; however, at the time of this writing, it does not have the necessary information to respond.

Notwithstanding the foregoing, to the extent that the facts and conclusions in Finding 6 relate to the conclusions of law that the Audit Division makes in Finding 4 (i.e., that various lines of credit were not made in the ordinary course of business), the Committee disagrees with this finding.

Furthermore, to the extent that the facts and conclusions in Finding 6 relate to the $250,000 loan repayment limit found in Section 403 of BCRA or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission*, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021). Since many of the facts and conclusions of Finding 6 may involve and may be impacted by the loan repayment limit, the Commission's conclusions may rely on an unconstitutional provision that renders Finding 6 invalid, or at least a portion of it.

Given the significant impact that the *Ted Cruz for Senate* ruling may have on Finding 6, the Committee believes it is imperative for the Commission's Audit staff to reconsider its preliminary audit findings, reissue a revised Interim Audit Report, and give the Committee the opportunity to respond to the revised Interim Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 6 until that occurs.

IAR FINDING 7. PROHIBITED CANDIDATE PERSONAL LOAN REPAYMENTS

Based on a review of loans, the Audit staff determined that MBFI made excessive Primary candidate loan and interest repayments totaling $750,669. This amount is in excess of the $250,000 limit permitted for repayment to the Candidate within 20 daysfollowing the Primary election. The Audit staff recommends that MBFI provide additional documentation to demonstrate the Primary

candidate loan and interest repayments were not excessive and/or provide any relevant comments on the matter.

THE COMMITTEE'S RESPONSE TO FINDING 7

To the extent that the facts and conclusions in Finding 7 relate to the $250,000 loan repayment limit found in Section 403 of BCRA or the Committee's acceptance of debt retirement contributions, the Audit Division should amend this finding because of the recent federal court decision in *Ted Cruz for Senate v. Federal Election Commission*, Civil No. 19-cv-908 (D.C. Dist. Ct., June 3, 2021). Since many of the facts and conclusions of Finding 7 involve and are impacted by the loan repayment limit, the Commission's conclusions rely on an unconstitutional provision that renders Finding 7 invalid, or at least a portion of it.

Given the significant impact that the *Ted Cruz for Senate* ruling has on Finding 7 and others, the Committee believes it is imperative for the Commission's Audit staff to reconsider its preliminary audit findings, reissue a revised Interim Audit Report, and give the Committee the opportunity to respond to the revised Interim Audit Report. For this reason, the Committee will refrain from providing any additional response to Finding 7 until that occurs.

CONCLUSION

Thank you for your consideration of this response. If you require additional information, or if we can be of any assistance, then I can be reached at (512) 354-1783.

Sincerely,

Chris K. Gober
Counsel, Mike Braun for Indiana