



BEFORE THE FEDERAL ELECTION COMMISSION

Mike Braun for Indiana)
Request for Consideration of Legal Question)
)

REQUEST FOR CONSIDERATION OF LEGAL QUESTION

Through counsel Mike Braun for Indiana, (the “Committee”) is seeking the Commissioners’ consideration of a genuine material question of law presented in the Federal Election Commission’s (“FEC” or “Commission”) preliminary audit findings and recommendations delivered to the Committee during an exit conference held on March 4, 2020. Pursuant to the Permanent Program for Requesting Consideration of Legal Questions by the Commission established by the Commission in 76 Fed. Reg. 45798 (August 1, 2011), the Committee requests the Commissioners’ guidance regarding the following question of law:

QUESTION PRESENTED

Is a line of credit issued by a commercial lending institution to a high-net-worth, creditworthy person made outside the “ordinary course of business” within the meaning of 11 C.F.R. § 100.82 simply because it is unsecured, even if the same commercial lending institution regularly issues unsecured lines of credit to other high-net-worth, creditworthy customers in the ordinary course of its business?

BACKGROUND

Mike Braun was elected to the U.S. Senate in 2018, and Mike Braun for Indiana is his authorized candidate committee (the “Committee”). During the 2018 election cycle, Mr. Braun loaned funds to the Committee, some of which originated from unsecured lines of credit (collectively, the “Loans”) that Mr. Braun obtained from FDIC-insured commercial lending institutions.

As part of the Commission’s audit of the Committee’s 2018 activity, the FEC’s Audit Division staff met with representatives of the Committee on March 4, 2020, to summarize their preliminary findings. During this “exit conference,” the Audit Division revealed its finding that the Loans constitute prohibited contributions from commercial lending institutions because, in the Audit Division’s view, the Loans were not made in the “ordinary course of business” since they were not secured by collateral or a guarantor.¹

¹ See Mike Braun for Indiana Exit Conference Outline, Audit Division Staff, Wednesday March 4, 2020 at Finding 4 - Finding 4 – Receipt of Apparent Prohibited Contribution – Bank Loan - 11 C.F.R. §§100.82(e), 100.52(b)(2);

To be clear, 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 Mr. Braun's.

ANALYSIS

1. 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.² 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.³

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

52 U.S.C. §§30118. ("Based upon the documents provided by MBFI, it did not appear that the loans and/or lines of credit were made in the ordinary course of business, because they were not made on a basis that assured repayment."). For the Commission's reference, the Committee is providing copies of this material, including all loan documentation reviewed by the Audit Staff in consideration of this finding.

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

³ 11 C.F.R. § 100.82.

commercial interests), and not for the purpose of influencing the outcome of Mr. Braun's candidacy.

There should be no dispute that the Loans satisfy three of the four elements established by the Commission: (1) the Loans were evidenced by a written instrument; (2) the Loans each bear the customary interest rate of the lending institution; and (3) 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.⁴ While candidates, political committees, and the 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.⁵

2. 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.⁶

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.⁷

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:

⁴ See 11 C.F.R. § 100.82(e)(1)-(2).

⁵ 11 C.F.R. § 100.82(e)(3).

⁶ FEC Advisory Opinion 1980-108 (Anderson).

⁷ FEC Advisory Opinion 1994-26 (Cunningham).

- (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.⁸

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 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.⁹

CONCLUSION

The Audit Division’s preliminary findings assert that the Loans constitute prohibited contributions from commercial lending institutions because, in the Audit Division’s view, the Loans were not made in the “ordinary course of business” since they were not secured by collateral or a guarantor. It is the Committee’s position, however, that the Audit Division has not correctly applied the law or Commission precedents in this matter.

Therefore, the Committee respectfully requests that the Commission clarify the Audit Division’s application of the Commission’s rules, particularly 11 C.F.R. § 100.82(e), and answer the following question: Is a line of credit issued by a commercial lending institution to a high-net-worth, creditworthy person made outside the “ordinary course of business” within the meaning of 11 C.F.R. § 100.82 simply because it is unsecured, even if the same

⁸ *Id.*

⁹ 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.”).

commercial lending institution regularly issues unsecured lines of credit to other high-net-worth, creditworthy customers in the ordinary course of its business?

Thank you in advance for your consideration of this question of law, which is being submitted pursuant to the Commission's Permanent Program for Requesting Consideration of Legal Questions, and for your clarification and guidance based on the facts presented.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris K. Gober", with a long horizontal flourish extending to the right.

Chris K. Gober
Counsel to Mike Braun for Indiana