FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 22, 2010

MEMORANDUM

TO: Patricia Carmona
Chief Compliance Officer

Joseph F. Stoltz
Assistant Staff Director

FROM: Christopher Hughey
Deputy General Counsel

Lawrence L. Calvert, Jr.
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel
For Public Finance and Audit Advice

Albert Veldhuyzen
Attorney

SUBJECT: Draft Final Audit Report on the Jefferson Committee (LRA # 751).

I. INTRODUCTION

The Draft Report of the Audit Division ("Draft Report") on the Jefferson Committee ("Committee") sets forth the Audit Division's basis for concluding that the Committee received impermissible loans (Finding 1), prohibited contributions (Finding 2), excessive contributions (Finding 3), misstated financial activity (Finding 5), did not disclose disbursements (Finding 7), and that the Committee's Treasurer commingled funds (Finding 4).

The Committee disputes the Audit Division's conclusions regarding the commingled funds.[1] The Committee argues that the commingling by the Treasurer was plainly unauthorized by the Candidate and that the Commission's regulations do not prohibit the commingling of

[1] The Committee requested a hearing, and the Commission granted the hearing and scheduled it for March 4, 2010. The Committee, however, withdrew its hearing request, and the Commission canceled the hearing. The Committee submitted written comments, which it asked the Commission to consider in lieu of a hearing presentation.

business and campaign funds. Having reviewed the Committee's written submission on the commingled funds issue, we offer the following comments.

II. COMMINGLED FUNDS (FINDING 4)

On June 24, 2005, the Committee's Treasurer deposited a check of $25,015 from The ANJ Group, LLC[2] into the Committee's bank account, of which the Treasurer subsequently wired $25,000 to iGate, Inc. The Treasurer states that this was done purely for convenience and the transaction was not reported "as a campaign transaction since it did not involve campaign funds." Draft Report at 17. The Committee did not report either the receipt or the disbursement of these funds.

The Draft Report characterizes this transaction as a commingling of funds and states that the ANJ check appears to have been used "to authorize the wire transfer" to iGate.[3] Draft Report, note 11. 2 U.S.C. § 432(b)(3) and 11 C.F.R. § 102.15 prohibit only the commingling of a political committee's funds with "the personal funds of any individual." As the Committee points out, ANJ Group, LLC is not an individual. The draft report infers that the funds at issue are "the personal funds of any individual" because they are the funds of an individual's (or individuals') business. While we understand the Audit Division's concern with the commingling of any funds unrelated to a political committee with funds that belong to the committee, we believe the Committee's conclusion on this point is well taken.

The Federal Election Campaign Act (the "Act") states that "All funds of a political committee shall be segregated from, and may not be commingled with, the personal funds of any individual." 2 U.S.C. § 432(b)(3). Likewise, the regulation provides that, "All funds of a political committee shall be segregated from, and may not be commingled with, any personal funds of officers, members or associates of that committee, or with the personal funds of any other individual." 11 C.F.R. § 102.15.[4]

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[2] The records from the Louisiana Secretary of State show the Candidate's wife, Andrea G. Jefferson, as a manager for The ANJ Group, LLC. According to the indictment in *United States v. Jefferson*, Criminal No. 1:07CR209 (E.D. Va. June 4, 2007) ("Indictment"), "five other Jefferson family members were also listed as members of ANJ, and Defendant JEFFERSON's accountant and campaign treasurer [not the current treasurer] was listed as the registered agent for ANJ." Indictment at 6.

[3] In its response to the Draft Report, the Committee objects to any implication that "ANJ benefitted or somehow needed liquid funds for wire purposes that was immediately replaced by an illiquid ANJ check." *Memo from The Jefferson Committee to the Commission*, dated Sept. 30, 2009. The Committee states that the transfer was an inadvertent act which was plainly unauthorized. We understand that the Audit Division did not mean to imply that the Committee had necessarily authorized the specific actions of the treasurer. Rather, we understand the Audit Division used the word "authorize" in a narrower and more literal sense involving the presentation of the ANJ check to the Committee's bank and authorization of the bank to wire money from the Committee's account to iGate. We suggest the Audit Division consider rephrasing this portion of the report to clarify this point.

[4] An "individual" is one of several types of entities defined in the Act as a "person." The others include any "partnership, committee, association, corporation, labor organization, or any other organization or group of persons, but . . . does not include the Federal Government or any authority of the Federal Government." 2 U.S.C. § 431(11). While the Act does not define the term "individual," the Commission has generally understood the term to refer to a human being, as distinguished from the other types of "persons" listed in the Act.

The Committee argues that section 102.15 is inapplicable in this situation as it only addresses the commingling of individual as opposed to business funds. The Committee's argument that 11 C.F.R. § 102.15 is inapplicable has merit because that regulation only mentions the commingling of an individual's funds, not business funds. Likewise the statute, found at 2 U.S.C. § 432(b)(3), only pertains to individual funds. The regulatory and legislative histories of both provisions give no indication that anything other than an individual's funds was contemplated in their drafting.[5] Furthermore, when the Commission has previously addressed the commingling provisions, the facts pertained exclusively to the commingling of personal funds of individuals. *See e.g.* MUR 5898, GCR #2.

Arguably, a single-member LLC's funds, like that of a sole proprietorship, could be regarded as those of an individual. However, as noted, the ANJ Group, LLC, is a multi-member LLC. Under Louisiana law, the LLC is a separate legal entity from any of the member individuals and any LLC funds could not be considered the individual funds of any member.[6] Consequently, at face value, the anti-commingling provision of section 432(b)(3) does not apply to these funds, because they came to the Committee from ANJ, a Louisiana multi-member LLC.[7]

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[5] The Act defines the term "personal funds" at 2 U.S.C. § 431(26), but that definition, added by BCRA in 2002, tracks a preexisting Commission regulation implementing a candidate's ability to spend personal funds on his or her own campaign; the definition itself repeatedly makes clear that it refers to the personal funds of a candidate. By contrast, the anti-commingling provision at 2 U.S.C. § 432(b)(3), which predates Section 431(26) by many years, refers to "the personal funds of any individual." It is unclear whether, as a matter of law, the definition of "personal funds" at 2 U.S.C. § 431(26) can be applied directly to 2 U.S.C. § 432(b)(3). However, Section 432(b)(3)'s reference to "personal funds *of any individual*" (emphasis added) indicates that similar, though not identical, concepts, would apply. Put simply, funds would seem to be an individual's if the individual has a legal right of access to or control over them and either title to or an equitable interest in them. *Cf.* 11 C.F.R. 100.33(a) (definition of personal funds of a candidate).

[6] Louisiana law provides that the LLC is a separate legal entity similar to a corporation:

> A limited liability company has the power provided for a corporation organized under our Business Corporation Law and a partnership under the Civil Code, as set forth in La. R.S. 12:1301, et seq. La. R.S. 12:1303. As such, it is a separate legal entity distinct from its member owners . . . . A membership interest in a limited liability company shall be an incorporeal movable. *A member shall have no interest in limited liability company property (emphasis added). Northeast Realty v. Misty Bayou*, So. 2d 938; 2006 La. App. LEXIS 84(2006).

[7] There is also an argument that the anti-commingling provisions of the Act would not apply because the funds at issue were the proceeds of illegal bribes, and regardless of whether Congressman Jefferson actually received them, they never belonged to him. The particular transaction at issue here (at least, the transfer from ANJ to the Committee) was the subject of count 12 of the Indictment, which charged Representative Jefferson with violating 18 U.S.C. §§ 2 and 1957 by knowingly participating in the transfer of proceeds of an unlawful activity – specifically, bribery. Indictment at 57. Bribe proceeds are illegally obtained funds that do not belong to the individual who solicited them. Rather, once they became illegal, title to them arguably vested in the United States. A Federal court ruled that "an employer suffers a loss in the amount of secret profits accepted by its agent and is entitled to restitution in that amount." *U.S. v. Gaytan*, 342 F.3d 1010, 1012 (9th Cir. 2003). *See also United States v. Carter*, 217 U.S. 286, 305-06, 54 L. Ed. 769, 30 S. Ct. 515 (1910); *U.S. v. Iovenelli*, 403 F.2d 468, 469 (7th Cir. 1968). Like ANJ, the United States is not an individual.

We believe that the Committee has a reporting obligation that arises out of this transaction as the transaction resulted in the Committee receiving funds and making a disbursement. The former treasurer's statement that he did not report the transaction because it did not have to do with the campaign is unavailing; committees must report all receipts and all disbursements of whatever type. *See* 2 U.S.C. § 434(a)(1). Although it is late in the audit process, we would concur with a finding regarding the reporting of this transaction, provided that the misreporting was material. But we believe the Committee has a point regarding the applicability of section 432(b)(3). Consequently, we recommend that the Audit Division revise the Draft Report accordingly.