607 Fourteenth Street N.W.
Washington, D.C. 20005-2003
PHONE: 202.628.6600
FAX: 202.434.1690
www.perkinscoie.com

November 30, 2010

BY HAND

Mr. Joseph F. Stoltz
Assistant Staff Director
Audit Division
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Re: **Chris Dodd for President, Inc.**
Response to Preliminary Audit Report

Dear Mr. Stoltz:

On behalf of our client, Chris Dodd for President, Inc. ("the Committee"), we write in response to the Preliminary Report of the Audit Division ("the PAR"). We appreciate the additional time provided for our response.

INTRODUCTION

Now completing his last term in the Senate before returning to private life, Senator Chris Dodd ran for President for the first time in the 2008 primary election. He did not immediately resolve to seek public funds. Rather, he made that decision late in 2007, which required the Committee quickly to revise its internal control and compliance procedures. The Committee's core compliance functions were handled in-house.

Senator Dodd dropped out of the race on the night of the Iowa caucuses. As the PAR's Statement of Net Outstanding Campaign Obligations shows, the Committee was substantially in debt on Caucus Night. Moreover, after the election, the Committee faced the novel situation of having to dispose of its general election contributions. These circumstances, and the abrupt end of the Senator's campaign, contributed to some of the lapses noted in the PAR.

The Committee disputes in part the PAR's two adverse findings. First, the PAR overstates the amount of excessive and prohibited contributions accepted by the Committee. Second, it exaggerates the misstatements on the Committee's reports. In each case, the error seems largely to involve the Committee's permitted use of brokerage accounts to keep its general election contributions.

63870-0001/LEGAL19643667.1

The Committee provides this response and supporting documentation to address these issues, and otherwise to comply with the auditors' recommendations.

DISCUSSION

I. The PAR Overstates the Amount of Excessive and Prohibited Contributions Received by the Committee

A. The Committee did not receive a prohibited contribution from the Firefighters' union.

The Committee paid $32,233 to FIRE PAC, the separate segregated fund of the International Association of Firefighters ("IAFF"), for use of a "wrapped" bus decorated to promote Senator Dodd's candidacy. Initially, the IAFF rented the bus as a partisan communication; FIREPAC paid for the wrap as an independent expenditure. After learning of the wrapped bus, the Committee sought to acquire its use to promote Senator Dodd's candidacy. The PAR assumes that the Committee received a prohibited contribution from the IAFF because it failed to pay within 60 days for the portion of the expense that was attributable to the bus rental. *See* PAR at 8 (citing 11 C.F.R. § 100.93(b)(2), (d)).[1]

The PAR assumes that the Committee received a prohibited contribution from the IAFF – a union treasury fund. But the invoice directed the Committee to pay FIRE PAC – the IAFF's separate segregated fund. The Committee cannot be found to have received a prohibited union treasury contribution, when it was told to pay the PAC.

Moreover, even if the Committee should have paid the IAFF, the 60-day timetable in section 100.93 should not apply. The rule applies only to noncommercial forms of transportation. *See* 11 C.F.R. § 100.93(a)(1)(ii). But here, the transaction involved a form of advertising that the campaign sought to convert for its own use. The primary purpose of the wrapped bus was not to transport people from place to place, but rather to serve as an unusual form of campaign visibility, like the C-SPAN bus or the Ron Paul blimp. Analyzed in this way, the proper question is whether the campaign paid for the use of the bus within a commercially reasonable time. *Cf.* 11 C.F.R. § 114.9(d).

Finally, the PAR does not adequately consider the circumstances that led to the delay in payment. While the payment remained outstanding, the Committee was in a deficit position with many competing obligations that it sought to manage as best it could. In the end, the Committee,

[1] The PAR does not contend that FIREPAC coordinated its independent expenditure with the Committee. It simply alleges that the Committee failed timely to pay under 11 C.F.R. § 100.93, after being invoiced for the wrapped bus.

in an abundance of caution, chose to pay the full cost of the bus rental and wrap, even though there was a strong argument that it could have paid less.

B. The Committee did not receive many of the excessive contributions identified by the PAR.

Finding 2 of the PAR asserts that the Committee received $295,050 in excessive contributions potentially payable to the Treasury.[2] Of this amount, $244,050 involves contributions for which the Committee supposedly "has not obtained the required redesignation letters". PAR at 4. The other $51,000 is said to result from excessive PAC contributions. *Id.*

The true amounts are lower. Of the $295,050 in asserted, excessive contributions, only $59,200 remained unresolved on receipt of the PAR.

Of the $244,050 in asserted unredesignated and unrefunded contributions,[3] the available documentation shows that only $14,900 awaited refund or disgorgement upon receipt of the PAR:

- For $74,800, the Committee timely obtained written redesignations. A schedule of these contributions and copies of the signed redesignation letters are attached as Exhibit B.
- For $7,300, the Committee had issued refunds and disgorgements that cleared the bank. A schedule of these contributions and copies of the supporting documentation are attached as Exhibit C.
- For $144,950, the Committee issued refund checks which later became stale-dated. A schedule of these contributions, copies of the original refund check stubs and a copy of a disgorgement check in this same amount to the U.S. Treasury are attached as Exhibit D.[4]

[2] Finding 1 correctly states that the Committee did not receive matching funds in excess of entitlement. The Committee does not dispute Finding 1, except to note that the Statement of Net Outstanding Campaign Obligations presents incorrect amounts for "General Election Cash in Bank" and "General Election Accounts Payable." The NOCO Statement uses the fair market value of the brokerage account in which these funds were kept, instead of the basis value of the account. While this error does not affect the Committee's net financial position, it is significant in light of Findings 2 and 3, which we discuss later herein.

[3] The auditors identified the contributions that were supposed to comprise the $244,050 in a spreadsheet provided to the Committee after submission of the PAR. A copy of the spreadsheet is attached as Exhibit A.

[4] While the Committee agrees that the stale-dated refund checks must be disgorged, many do not provide an appropriate basis for a finding of excessive contributions, in that they were lawfully received and timely refunded.

- For $2,100, the Committee's data indicates that the check identified by the auditors was returned for non-sufficient funds, and hence requires no refund. *See* Exhibit E.

Upon receipt of the PAR, the Committee lacked evidence of refunds or timely redesignations for $14,900.[5] A schedule of these contributions, copies of refund checks aggregating $12,100, and a copy of a disgorgement check for the remaining $2,800 to the U.S. Treasury, are attached as Exhibit F.

And of the $51,000 in asserted excessive PAC contributions, no more than $44,300 awaited refund or disgorgement. $6,700 were not excessive:

- The National Apartment Association PAC is said to have made a $1,500 excessive contribution to the Committee. But neither Commission nor Committee records show any such contribution. The PAC gave $5,000 for the primary election on March 30, 2007, but did not give for the general election. *See* Exhibit G.

- SIA PAC is said to have made a $2,700 excessive contribution. But the PAC did not give to the Committee. The PAC did make a $5,000 contribution to the Senate re-election campaign on October 25, 2006, which was transferred to the Committee for the primary election. *See* Exhibit H.

- The Hartford Advocates Fund is said to have made excessive contributions of $5,000 and $2,500, respectively, to the Committee. The PAC gave $5,000 to the Senate re-election committee on October 3, 2006, which was transferred to the Committee for the primary election. And the PAC gave $5,000 to the Committee on March 22, 2007, for the general election. But neither Commission nor Committee records show an additional $2,500 contribution. A copy of a refund check for the general election contribution is attached with the other supporting documentation as Exhibit I.

With regard to the $44,300 in asserted PAC excessives, the Committee complies with the auditors' recommendations by issuing refunds. Copies of the refund checks are attached as Exhibit J.

C. The changing value of the Committee's brokerage account did not result in any excessive contribution

On careful review, it becomes clear that much of the PAR's excessive contribution finding has nothing to do with lack of written redesignations. Rather, the PAR relies instead on the fact that

[5] These contributions were from donors for whom the Committee had no current address, and to whom it could not issue refunds.

the brokerage account in which the Committee kept general election contributions declined in value during the audit period. Page 4 of the PAR claimed that the Committee "received contributions totaling $244,050 for which it has not obtained the required redesignation letters." This claim, as shown above, is incorrect. But page 6, footnote [a] of the PAR says that investment account "losses are the basis for the excessive contributions of $244,050 discussed in Finding 2." Because the fair market value of the brokerage account in fall 2008 was less than the total amount of general election contributions, the PAR seems to contend that the redesignated contributions were not fully resolved, and that the Committee received a prohibited contribution as a result.[6]

As Commission rules expressly permitted, the Committee kept general election contributions in an investment account with Morgan Stanley. *See* 11 C.F.R. § 103.3(a).[7] The same broker maintained another investment account for the Senate campaign. When Senator Dodd dropped out of the presidential race, the Committee worked to obtain written redesignations of its general election contributions to the Senate campaign. At the same time, the Committee sought a Commission advisory opinion to extend the time for obtaining redesignations and making refunds, and to get permission to transfer the redesignated funds to the Senate campaign.[8] After obtaining written redesignations for $351,210 in general election contributions, and after obtaining the advisory opinion, the Committee directed its broker to transfer those contributions to the Senate campaign's brokerage account. The broker did this by journal entry.

The PAR wrongly uses paper investment losses to generate a finding of excessive contributions.[9] To determine the balance available for transfer, it did not look to the basis value of the account, but instead to the fair market value on the date of transfer.[10] Yet the account was not sold. The

[6] *See* PAR at 10 ("Even if [the Committee] were to obtain the required redesignation letters, it lacks the funds to complete the transfer or refund.").

[7] The Commission has permitted the investment of political committee funds in a variety of investment vehicles. *See* Advisory Opinion 1997-06 (permitting investment in government securities and money market funds); Advisory Opinion 1986-18 (permitting investment in a cash management account maintained by an investment and brokerage firm; Advisory Opinion 1980-39 (permitting investment in an open-end diversified investment trust which is a professionally managed money market fund). The Commission has viewed these transfers as "merely a conversion of one form of cash on hand to another." Advisory Opinion 1999-8.

[8] *See* Advisory Opinion 2008-04. The Committee sought the opinion because of the lack of clear authority in the rules to redesignate or transfer general election contributions from a publicly funded primary committee. The Commission wrote those rules when presidential campaigns normally sought public funds in both the primary and general elections, and eschewed private general election fundraising.

[9] The transfers occurred in fall 2008, when the market was in the midst of an historic collapse.

[10] After the transactions in this audit occurred, it became known that the Audit Division had advanced a position on investment account valuation similar to that seemingly advanced here. *See* Report of the Audit Division on Friends

broker simply made a journal entry when directed to transfer the funds. This is why the Committee disclosed a transfer of $351,210 to the Senate re-election campaign. It was the total amount of contributions for which it had obtained timely written redesignations, and these contributions remained in the account.

Even if investment losses had deprived the Committee entirely of the funds available for a transfer in response to redesignations, the Committee still would not have received an excessive contribution. The purpose of section 102.9(e)(3)'s refund or redesignation requirement is to deprive the Committee of the use of its general election contributions, and hence to preserve the integrity of the primary election contribution limit. This is why the Commission has disallowed candidate proposals to send stale-dated general election refunds to charity: it has deemed that the funds must remain "not usable."[11] This is also why the Commission allows disgorgement to the Treasury, even though §102.9(e) does not expressly provide that option. Here, too, the funds remain unusable.

The PAR does not suggest that the Committee retained any use of these general election contributions. Instead, ignoring the purpose of 102.9(e)(3), it seeks to punish the Committee for an historic decline in the stock market. Under the PAR's view of the law, if the Committee had maintained the $351,210 in a federally chartered depository institution,[12] if the bank had failed (as many did in fall 2008), and if the Committee were eligible only for the standard $250,000 in deposit insurance, then the Committee would have received a prohibited contribution in the amount of $101,210. We know of no Commission authority for such a result, nor of any way for a prudent political committee to guarantee against it.

And yet, as demonstrated above, with the exceptions acknowledged by the Committee, it has made all required refunds. The PAR provides no basis for a finding of excessive contributions based on the redesignated funds kept in the Committee's brokerage account.

II. The PAR Overstates the Level of Misstatement of Financial Activity

After the date of ineligibility, the Committee had some difficulty in preparing its reports. This owed mainly to problems experienced in the use of its financial database, which were explained and documented in the Committee's written response to the Exit Conference. This is why, for

of Weiner (July 22, 2009), at 17 ("Initially, the Audit staff recommended that all investment gains and losses should be reported regardless of whether they had been realized, thus reflecting the investment's market value at the close of the reporting period.").

[11] *See* Advisory Opinion 2003-18 (issued to Sen. Bob Smith).

[12] *See* 11 C.F.R. § 103.2.

example, the Committee failed initially to disclose on its FEC report a matching fund payment received on July 17, 2008, even though the payment was otherwise a matter of public record. This is also why the Committee over-reported a $144,757 loan repayment. The Committee is complying with the PAR's recommendations by filing amendments to correct these misstatements.

Still, the PAR does not correctly present the level of misstatement, again mainly because of its incorrect treatment of the Committee's brokerage account. First, it contends that the Committee overstated its disbursements by reporting the $351,210 transfer of general election contributions discussed above.[13] Second, it contends that the Committee failed to report $202,336 in "realized losses." But as the Committee noted in its response to the Exit Conference, the PAR appears to confuse fluctuations in the account's fair market value, which do not need to be reported, with the actual sale of the portfolio assets.

We appreciate the Commission's attention to these matters.

Very truly yours,

Marc E. Elias
Brian G. Svoboda

cc: Mr. Alex Boniewicz
Mr. Kendrick Smith
Ms. Kathy Damato

Attachments

[13] The auditors take issue with the timing of the transfer's reporting. The Committee reported the transfer as having occurred on September 30, 2008. But, the auditors note, and the Committee has acknowledged, that the broker did not execute the transfer until October. The Committee is amending its report to conform to the auditors' recommendation . But, an early, good-faith disclosure of the transaction should not provide the basis for any future action.