FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM April 18, 2018

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SUBJECT: Draft Final Audit Report on Kelly for Congress (LRA 1056)

I. INTRODUCTION

The Office of General Counsel has reviewed the Draft Final Audit Report ("DFAR") on Kelly for Congress ("Committee"). The DFAR contains two findings: (1) Receipt of Apparent Prohibited Contribution – Bank Loan; and (2) Receipt of Contributions that Exceed Limits. We concur with the findings but provide comments regarding the Committee's Interim Audit Report ("IAR") response to Finding 1. If you have any questions, please contact Danita Alberico, the attorney assigned to this audit.

II. THE TOTALITY OF THE CIRCUMSTANCES DO NOT INDICATE THAT THE LOAN WAS MADE ON A BASIS THAT ASSURES REPAYMENT

The prohibited contribution at issue in Finding 1 is a $50,000 bank loan obtained by the candidate, John Trent Kelly, on behalf of the Committee from the First American National Bank ("Bank") on May 14, 2015. Interim Audit Report on Kelly for Congress, at 5 (Jan. 12, 2018). The loan was obtained to pay for campaign advertisement expenses. *Id.* Richard Bowen, an associate of Mr. Kelly, guaranteed the loan and provided collateral for the loan in the form of two automobiles. *Id.* The Committee provided Audit staff with documentation from the Bank showing that the cars had a combined National Automobile Dealers Association value of $52,925, as of the date of the loan. *Id.* The loan had an interest rate of 3.875%, with a maturity date of May 14, 2016. *Id.* The Committee repaid the Bank in full for the loan on June 5, 2015. *Id.* The Committee contends that the totality of the circumstances surrounding the loan indicates that the loan was made on a basis that assures repayment per 11 C.F.R. § 100.82(e). Email from Fred Page to Paula Nurthen (Feb. 16, 2018).

We disagree. A loan shall be considered made on a basis that assures repayment if it is obtained using one of two sources of repayment or a combination of the sources of repayment described as follows: (1) **collateral:** the lending institution making the loan perfected a security interest in collateral owned by the candidate or political committee receiving the loan and amounts guaranteed by secondary sources of repayment, such as guarantors and cosigners, do not exceed the contribution limits of Federal Election Campaign Act of 1971, as amended, or (2) **future receipts:** the lending institution making the loan has obtained a written agreement whereby the candidate or political committee receiving the loan has pledged future receipts. 11 C.F.R. §§ 100.82(e)(1)-(2). If the loan does not meet the requirements for the use of collateral or future receipts, then the Commission may consider the totality of the circumstances, on a case-by-case basis, in determining whether a loan was made on a basis that assures repayment. 11 C.F.R. § 100.82(e)(3).

The Committee does not fulfill the requirements for the use of collateral because neither the Committee nor the Candidate owned the automobiles used as collateral, and the amount guaranteed by the secondary source exceeded the contribution limit by $49,900. The loan does not fulfill the requirements for the use of future receipts because the Bank did not receive a pledge of future receipts from the Committee or the Candidate. Because the Committee does not fulfill either of the requirements for the sources of repayment, we do not need to consider whether the loan was made on a basis that assures repayment using a combination of these sources.

The Committee also fails to demonstrate that the totality of the circumstances indicate that its loan was made on a basis that assures repayment. 11 C.F.R. § 100.82(e)(3). The Committee contends that the totality of the circumstances indicate that its loan was made on a basis that assures repayment because the loan was secured by collateral, guaranteed by an individual, and repaid within 30 days. As explained above, the Committee's contentions regarding the collateral and guaranty fail to satisfy the requirements for securing a loan with collateral or a guaranty under 11 C.F.R. § 100.82(e)(1). For the same reasons, those contentions do not satisfy the totality of the circumstances standard under 11 C.F.R. § 100.82(e)(3). Were it

otherwise, the totality of the circumstances standard would create a loophole that effectively swallows the requirements for collateral or a guaranty in 11 C.F.R. § 100.82(e)(1). The Committee's related contention that it ultimately repaid the loan quickly is also not relevant to the question of whether the loan *was made* on a basis that assures repayment. The speed with which the Committee met its repayment obligation has no bearing on how it obtained the loan in the first place. We, thus, conclude that the totality of the circumstances do not indicate that the loan was made on a basis that assures repayment.[1]

[1] There is a question of whether the loan was made in accordance with applicable bank laws since the guarantor of the loan was also a member of the Bank's board of directors. *See* 11 C.F.R. § 100.82(a). Under applicable laws, however, that is not an issue here because the board member was not the loan recipient. *See* 12 C.F.R. § 337.3 and Miss. Code Ann. § 81-5-51 (2010).