AGENDA DOCUMENT NO. 02-37

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 8, 2002

AGENDA ITEM
For Meeting of: 5-16-02

MEMORANDUM

TO: The Commissioners

THROUGH: James A. Pehrkon
Staff Director

FROM: Robert J. Costa
Deputy Staff Director

Joseph F. Stoltz
Assistant Staff Director
Audit Division

Thomas J. Nurthen
Audit Manager

Brenda E. Wheeler
Lead Auditor

SUBJECT: Final Audit Report Bauer for President 2000, Inc.

Attached for your approval is the subject final audit report. Also attached is the legal analysis provided by the Office of General Counsel. The Audit Division and the Counsel's office are in disagreement with finding II.A.4. Apparent Impermissible Contributions – Personal Loan.

The Office of General Counsel's legal analysis concludes the regulation at 11 CFR §110.10(b) does not specifically address jointly held bank accounts. Counsel relies on Agenda Document #81-181 (Attached) where a distinction is suggested in footnote 3 on page 7. Counsel also relies on two enforcement matters that mention a distinction. MURs 2292 and 3505. Therefore, since the Commission ruled favorably in these matters, Counsel argues bank accounts are an exception to the one-half rule for jointly held assets, and since Mr. Bauer had access to and control over the whole of the account, recommends that the Audit Division revise the Audit Report in accordance to the enforcement matters.

The Audit staff agrees with Counsel that the regulation does not make a distinction between jointly held bank accounts and other types of jointly held assets. However, rather than looking to other precedents, we have concluded that no distinction is intended for the purpose of defining personal funds that a candidate may use in his campaign. The 1981 agenda document was primarily a discussion of the problem of loans made to the candidate where the lending institution requires the spouse's signature either because the collateral is jointly owned or for other reasons. Under the regulation at the time, such a signature requirement could have been read to create a contribution from the spouse even if the candidate's interest in the collateral was less than or equal to the amount borrowed. The agenda document recommended that a rule making be instituted. The result of the ensuing rule making was some changes to the then existing 11 CFR 110.10(b) and the addition of section (b)(3) that lays out the rule for jointly held assets. That regulation was promulgated in 1983.

Neither the Regulation nor the Explanation and Justification (E&J)[1] (Attached) makes any mention of treating assets in the form of balances held in joint bank accounts any differently than any other jointly held asset. The lack of any distinction in the regulatory history leads the Audit staff to conclude that no such distinction was intended. Finally, although it does not carry any regulatory weight, the *Campaign Guide for Candidates and Committees* not only does not suggest any such distinction, it provides as an example of a jointly held asset, a checking account.

Making the suggested distinction also appears to complicate a situation that on its face is very straightforward. Under the plain wording of the Regulation all jointly held assets are treated consistently. By creating different classes of jointly held assets, the issue of conversion of one type of asset to another comes into play. For example, jointly held real estate that is sold and the proceeds placed in a jointly held bank account. The asset may well have been jointly owned at the time the candidate began his campaign, but only 50% of the value would be available to the candidate when the asset was real estate. Once converted to cash and placed in a joint account, under the suggested interpretation, 100% of the value would be available to the candidate.

The two enforcement matters cited by the General Counsel both reference Agenda Document #81-181 and were before the Commission February 1988 and March 1995, respectively.

In light of the forgoing discussion, the suggestion put forth in the legal analysis has not been incorporated into the audit report pending Commission consideration of the issue.

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[1] The *Explanation and Justification* (48 FR 19021, April 27, 1983) mentions three situations that prompted revisions to the regulations; one involved the drawing of funds from assets such as jointly held bank accounts. What resulted was a revision that added subsection (3) to the "personal funds" definition at 11 CFR §110.10(b). Subsection (3) permits a candidate to use the full value of his or her share of assets jointly owned with a spouse without the spouse being considered a contributor. If there is no instrument of conveyance indicating the candidate's ownership share, then the 50% rule prevails.

Recommendation

The Audit staff recommends the report be approved as proposed by the Audit Division.

It is requested that this matter be placed on the Open Session agenda for May 16, 2000. If you have any questions, please contract Brenda Wheeler or Thomas Nurthen at extension 1200.

Attachments:

Proposed Audit Report on Bauer for President 2000, Inc.
Legal Analysis, dated May 6, 2002
Agenda Document #81-181
Explanation and Justification for 11CFR 110.10 (b) (48 FR 19021, April 27, 1983)
Committee's Response to the Preliminary Audit Report

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

REPORT OF THE AUDIT DIVISION ON BAUER FOR PRESIDENT 2000, INC.

I. BACKGROUND

A. AUDIT AUTHORITY

This report is based on an audit of Bauer for President 2000, Inc. (the Committee). The audit is mandated by Section 9038(a) of Title 26 of the United States Code. That section states that "After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received payments under section 9037". Also, Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission's Regulations state that the Commission may conduct other examinations and audits from time to time, as it deems necessary.

In addition to examining the receipt and use of Federal funds, the audit seeks to determine if the campaign has materially complied with the limitations, prohibitions, and disclosure requirements of the Federal Election Campaign Act of 1971 (the Act), as amended.

B. AUDIT COVERAGE

The audit covered the period from the Committee's inception, February 4, 1999 through May 31, 2000. The Committee reported an opening cash balance of $-0-; total receipts of $16,374,904; total disbursements of $16,027,417; and a closing cash balance of $40,207. In addition, a limited review of the Committee's disclosure reports filed through December 31, 2001 was conducted for purposes of determining the Committee's matching fund entitlement based on its financial position.

C. CAMPAIGN ORGANIZATION

The Committee maintains its headquarters in Arlington, VA. The Treasurer was Constance G. Mackey from February 4, 1999 until May 19, 1999. The current Treasurer, Francis P. Cannon, was designated May 20, 1999.

The Committee registered with the Federal Election Commission (the Commission) on February 4, 1999 as the principal campaign committee for Gary L. Bauer, candidate for the Republican Party's nomination for the office of President of the United States. During the audit period, the Committee maintained depositories in California, Iowa, Louisiana, New Hampshire, Virginia and Washington, D.C. To handle its financial activity the Committee utilized 13 bank accounts. From these accounts the Committee made approximately 3,974 disbursements. In addition, the Committee received approximately 147,000 contributions from 59,000 contributors. These contributions totaled approximately $7,510,000.

Mr. Bauer was determined eligible to receive matching funds on May 27, 1999. The Committee made 20 requests for matching funds and received $5,052,748 from the United States Treasury. This amount represents 30% of the $16,890,000 maximum entitlement that any candidate could receive. For matching fund purposes, the Commission determined that Mr. Bauer's candidacy ended on February 4, 2000, the date he publicly announced his withdrawal. On March 1, 2001, the Committee received its final matching fund payment to defray qualified campaign expenses and to help defray the cost of winding down the campaign.

D. Audit Scope And Procedures

In addition to a review of expenditures made by the Committee to determine if they were qualified or non-qualified campaign expenses, the audit covered the following general categories:

1. the receipt of contributions from prohibited sources, such as those from corporations or labor organizations (see Finding II.A.2. and Finding II.E.);

2. the receipt of contributions or loans in excess of the statutory limitations (see Finding II.A.1., 3. and 4.);

3. proper disclosure of contributions from individuals, political committees and other entities, to include the itemization of contributions when required, as well as, the completeness and accuracy of the information disclosed (see Finding II.C.);

4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed (see Finding II.D.);

5. proper disclosure of campaign debts and obligations (See Finding II.C.);

6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (see Finding II.B.);

7. adequate recordkeeping for campaign transactions;

8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by the Committee to disclose its financial condition and to establish continuing matching fund entitlement (see Finding III.A.);

9. the Committee's compliance with spending limitations; and,

10. other audit procedures that were deemed necessary in the situation (see Finding III.B.)

As part of the Commission's standard audit process, an inventory of campaign records was conducted prior to the audit fieldwork. The inventory was to determine if the Committee's records were materially complete and in an auditable state. Based on a review of the records, fieldwork commenced immediately.

Unless specifically discussed below, no material non-compliance was detected. It should be noted that the Commission may pursue further any of the matters discussed in this report in an enforcement action.

II. AUDIT FINDINGS AND RECOMMENDATIONS — NON-REPAYMENT MATTERS

A. APPARENT IMPERMISSIBLE CONTRIBUTIONS

Section 431(8)(A)(i) of Title 2 of the United States Code states in part, that a contribution includes a gift, subscription, loan, advance, or deposit of money or anything of value for the purpose of influencing a Federal election.

Section 441a(a)(1)(A) of Title 2 of the United States Code states, in part, no person shall make contributions to any candidate and his authorized committees with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 441a(a)(2)(A) of Title 2 of the United States Code states, in part, no multicandidate political committee shall make contributions to any candidate and his authorized committees with respect to any election for Federal office which, in the aggregate, exceed $5,000.

Section 100.7(a)(1)(i)(A) and (B) of Title 11 of the Code of Federal Regulations states in part, that a loan, which exceeds the contribution limitations, shall be unlawful whether or not it is repaid. A loan is a contribution at the time it is made and is a contribution to the extent that it remains unpaid. The aggregate amount loaned to a candidate or committee by a contributor, when added to other contributions from that individual to that candidate or committee, shall not exceed the contribution limitations set forth at 11 CFR part 110.

Section 100.7(a)(1)(iii)(A) and (B) of Title 11 of the Code of Federal Regulations provides, in part, any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution. If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the good and services at the time of the contribution and the amount charged the political committee. Usual and normal charge for goods or services means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution.

Section 100.7(a)(2) of Title 11 of the Code of Federal Regulations states the entire amount paid to attend a fundraiser or other political event and the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution.

Section 110.10(b)(1) and (3) of Title 11 of the Code of Federal Regulations defines personal funds of the Candidate to mean any assets which, under applicable state law, at the time he or she became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had either legal and rightful title or an equitable interest. A candidate may use a portion of assets jointly owned with his or her spouse as personal funds. The portion of the jointly owned assets that shall be considered as personal funds of the candidate shall be that portion which is the candidate's share under the instrument(s) of conveyance or ownership. If no specific share is indicated by an instrument of conveyance or ownership, the value of one-half of the property used shall be considered as personal funds of the candidate.

Sections 9035.2(a)(1) and (c) of Title 11 of the Code of Federal Regulations state, no candidate who has accepted matching funds shall knowingly make expenditures from his or her personal funds, or funds of his or her immediate family, in connection with his or her campaign for nomination for election to the office of President which exceed $50,000, in the aggregate. This section shall not operate to prohibit any member of the candidate's immediate family from contributing his or her personal funds to the candidate, subject to the limitations of 11 CFR part 110. The provisions of this section also shall not limit the candidate's liability for, nor the candidate's ability to pay, any repayments required under 11 CFR part 9038. If the candidate or his or her committee knowingly incurs expenditures in excess of the limitations of 11 CFR 110.8(a), the Commission may seek civil penalties under 11 CFR part 111 in addition to any repayment determinations made on the basis of such excessive expenditures. For purposes of this section, personal funds have the same meaning as specified in 11 CFR 110.10.

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any corporation to make a contribution or expenditure in connection with any election to federal office and that it is unlawful for any candidate, political committee or any other person knowingly to accept or receive any contribution prohibited by this section.

1. Donor List

The Candidate formed Campaign for Working Families PAC (CWF) in 1996. CWF registered as a political committee with the Commission in November 1996 and qualified for multicandidate status in August 1997. During the 2000 election cycle, CWF reported $2,728,839 in receipts. CWF maintains a donor list and markets the list in the *SRDS Direct Marketing List Source*. According to the December 1998 through December 1999 issues, CWF's donor list, which consists of 137,120 donors and responders, rents for $115 per 1,000 names with a minimum order of 5,000 names. The publication identifies the list manager as Pinnacle List Company.

On January 3, 2000, the Committee received $70,000 from The Lukens Cook Company (Lukens).[1] A written agreement, dated December 30, 1999, signed by representatives of the Committee and Lukens stipulated that for compensation of $70,000 Lukens had "exclusive rights to market, rent or exchange the complete Bauer for President donor file either in part or in total," for a period of 8 1/2 months starting January 15, 2000 through October 1, 2000. The complete file, according to the agreement, consisted of 63,281 donors and 20,000 non-donors. The agreement also granted CWF (through the Committee) "five full uses" of the donor file during a specific time period to "**fulfill its exchange obligation to Campaign for Working Families.**" (Emphasis added).

The agreement, at item 6, references a prior agreement. It states, "per prior agreement, at the termination of this agreement, on October 1, 2000, Lukens shall retain a permanent joint ownership right to that portion of the Bauer for President donor file **that did not originate as donors to Campaign for Working Families.**" (Emphasis added). This language indicates that the Committee had access to a CWF donor file.

Other than a payment representing the purchase of campaign materials and equipment[2], the Committee did not make any additional payments to CWF. Further, the Committee has not reported any debt owed to CWF relative to this transaction even though it is apparent from the language in the agreement that an obligation existed at some point in time.

On November 15, 2000, the Audit staff issued a written request for information and documentation concerning the Committee's "exchange obligation" to CWF. The Committee did not respond to this inquiry. The matter was then addressed at the exit conference. Committee representatives stated they were continuing to gather information and were not prepared to respond. Further, the Committee did not submit

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1 Lukens also served as one of the Committee's direct mail vendors. During the audit period, the Committee paid Lukens $258,699 for direct mail service.

2 A donor list was not part of this purchase.

any documentation during the response period subsequent to the exit conference.[3] As a result, on March 8, 2001, the Audit staff requested subpoenas and interrogatories be issued to the Committee, CWF, Lukens and the Pinnacle List Company (Pinnacle). The Commission approved the subpoenas and interrogatories on April 5, 2001.

The entities were asked to produce documentation and/or answer questions relative to the CWF mailing list made available to the Committee. In response, the Committee and CWF provided an exchange agreement. Under the agreement Pinnacle coordinated use of CWF's file (by the Committee) and kept the exchange history. The Committee received a complete copy of CWF's donor (87,013) and non-donor (51,507) files. The first use occurred on February 5, 1999. In exchange, the Committee would provide CWF with a complete copy of its donor and non-donor files at the end of the campaign. When the Committee wanted to use the CWF files, it submitted a "request to mail form" accompanied by a copy of the mailing. Upon approval by CWF, the Committee pulled "selects"[4] from its copy of the CWF files and provided the output counts to Pinnacle. Finally, all CWF names remained the sole property of CWF, any and all Committee names remained the property of the Committee.

The provision of a mailing list at less than the usual and normal charge is an in-kind contribution within the meaning of 11 CFR §100.7(a)(1)(iii)(A). Furthermore, in Advisory Opinion 1981-46 the Commission addressed list exchanges and determined, "if the exchange of names is of equal 'value' according to accepted industry practice, the exchange would be considered full consideration for services rendered. Thus, no contribution or expenditure would result and the transaction would not be reportable under the Act." The Commission also took the position that, "when the Committee provides names to another political committee in exchange for its own future use of a corresponding number of names which are of equal value, that this constitutes an arms (sic) length business transaction between the committees and is not a reportable contribution under the Act."

According to Pinnacle, the list manager for both the Committee and CWF, the Committee used the CWF files 22 times during the period February 5, 1999 through February 28, 2000, for an aggregate mailing of 957,338 names. Therefore, in order for the exchange to be considered equal and not result in a contribution by CWF, the Committee would have to make available (to CWF) use of "pure" Committee donor file names (i.e., names not included in CWF's donor and non-donor files at the time CWF's list was obtained by the Committee) that, based on the number of CWF uses, in the aggregate, had value equal to the value of the 957,338 names used by the Committee.

CWF provided documentation that demonstrated "in exchange" it used the Committee's donor file, consisting of 25,547 names, a total of 8 times during the

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3 Committees are provided ten business days subsequent to an exit conference to provide documentation relative to potential audit findings. The Committee did not avail itself this opportunity to respond to any matter discussed at the exit conference.

4 Selects are characteristics that identify segments or subgroups within a list.

period June 2000 to February 2001 for an aggregate mailing of 174,501 names. As of May 2001, the Committee's exchange obligation to CWF was 782,837 names (957,338 – 174,501).

According to industry sources, CWF rents its mailing list for $115 per 1,000 names (minimum of 5,000 names). The Committee rents its mailing list for $130 per 1,000 names. Therefore, the fair market value that an entity would pay for the use of 957,338 names from CWF's donor files would be $110,094 (957,338 / 1,000 x $115). Likewise, the fair market value that an entity would pay for the use of 174,501 names from the Committee's donor files would be $22,685.

The preliminary audit report stated that it was the opinion of the Audit staff that the "exchange" between CWF and the Committee did not represent an arm's length transaction according to industry standards. As a result, CWF made and the Committee received an apparent excessive in-kind contribution of $87,409 ($110,094 - $22,685). The Audit staff recommended the Committee provide evidence that CWF did not make and the Committee did not accept an excessive in-kind contribution of $87,409. Such evidence was to demonstrate that the exchange was of equal value according to industry standards. Absent such evidence, a refund $87,409 was to be made to CWF and evidence provided. If funds were not available to make the refund, the Committee was to disclose on Schedule D (Debts and Obligations) as debt owed to CWF until such time that funds become available.

In response to the preliminary audit report, the Committee's Counsel asserted:

> "[the] Audit Staff makes no effort to determine the 'value' of the 'future' use of the names expected to be generated by the Committee at the time the exchange agreement was made. Instead, its analysis rests on a comparison of CWF's 'actual use' of the Committee's list versus the Committee's actual use of CWF's list. What CWF chose to do during the term of the agreement, however, does not establish the value of its right to the 'future use' of the potential Committee's list, at the time of the exchange agreement, which is the relevant time for the valuation of the exchange. The Committee submits that, judged by industry standards, CWF's right to use the potentially very large number of new names that the parties anticipated that the Committee would generate more than equaled the value of the right to use the names CWF proposed to provide to the Committee. Moreover, use of the list by the Committee added value to the CWF list."

Counsel is correct in stating that the Audit staff made no effort to determine the "value" of the "future" use of the names expected to be generated by the Committee. Such an effort could never produce a reliable result. Counsel appears to be saying that had the campaign been more successful, its fundraising efforts would have generated more names to exchange with CWF, resulting in an equal exchange of names between the Committee and CWF. The Audit staff analyzed only the facts as they existed and concluded the exchange between the Committee and CWF was not equal and resulted in an excessive contribution.

As previously stated, the Commission, in AO 1981-46, recognized two acceptable industry standards of list exchange: first, if the exchange of names is of equal 'value' according to accepted industry practice; and, second, when a committee provides names to another political committee in exchange for its own future use of a corresponding number of names which are of equal value. Counsel offers no evidence that the exchange of names between the Committee and CWF was of equal value. Counsel merely suggests that had the Committee generated more names, the exchange would have been in accordance with industry standards. The fact remains the exchange was not equal. As a result, the Committee has not demonstrated that CWF did not make and the Committee did not accept an excessive in-kind contribution of $87,409.

2. Rental of Donor List

As previously stated in Section II.A.1., Lukens rented the Committee's complete donor file for the period January 15, 2000 through October 1, 2000 for $70,000. Lukens paid the Committee on January 3, 2000. At that time of this payment, the Candidate was actively campaigning and received his first matching fund payment of $1,969,167, also on January 3, 2000. In accordance with 11 CFR §100.7(a)(2), the entire amount paid as the purchase price for a fundraising item sold by a political committee is a contribution. However, the Commission has published a number of advisory opinions relative to the sale or rental of committee assets. In those advisory opinions, the Commission generally has viewed such ventures by on-going committees simply as another form of fundraising for political purposes in which the proceeds result in contributions subject to the Act (Advisory Opinions 1983-2, 1981-7, 1980-70, 1980-34, 1980-19, 1979-76, and 1979-17). The Commission also has recognized a narrow, limited exception, where the asset involved was a political committee's mailing or contributor list that had a unique quality and was developed by the political committee in the normal course of its operations primarily for its own use, rather than as an item to be sold to others as part of a campaign fundraising activity (Advisory Opinions 1982-41, 1981-53, 1981-46 and 1979-18).

The rental of the Committee's complete donor file to Lukens does not appear to fall under the narrow, limited exception described in the four advisory opinions cited above. It appears questionable that this donor file can be considered developed by the Committee in the normal course of its operations. Of the 63,281 donors and 20,000 non-donors rented to Lukens, only 25,547 names (31%) were not names obtained from CWF. Furthermore, at the time the donor file was rented to Lukens

(January 2000), the Committee had still not paid CWF and the exchange process did not begin until June 2000, approximately 6 months after the list was rented to Lukens.

More importantly, the rental to Lukens fails to meet the operative language contained in the exception that the donor file was "primarily for its own use, rather than as an item to be sold to others as part of a campaign fundraising activity." As previously stated, in January 2000, the Committee was still active and raising funds. The same day the Committee received $70,000 from Lukens (January 3rd), it received its first matching fund payment of $1,969,127. No state primary or caucus had occurred.

It is the opinion of the Audit staff that the funds received from Lukens are subject to the prohibitions and limitations of the Act. As a result, Lukens made and the Committee received a prohibited contribution of $70,000.[5]

In the preliminary audit report, the Audit staff recommended that the Committee provide evidence that Lukens did not make and the Committee did not accept a prohibited contribution of $70,000. Such evidence was to demonstrate that Lukens is not a corporation and that the $70,000 payment by Lukens did not result in a contribution to the Committee. For example, documentation was to demonstrate that Lukens used or marketed the list during the rental period. Further, the documentation was to show that the Committee's donor file was developed in the normal course of its operations and primarily for its own use, rather than as an item to be sold to others or for use in a campaign fundraising activity. Absent such evidence, it was recommended that the Committee disgorge $70,000 to the United States Treasury.

In response, the Committee's Counsel neither submitted any documentation requested nor made a payment to the United States Treasury. Rather the response maintains:

> "The Audit Staff's conclusion that the Committee's list was not 'developed for its own use,' but rather as a fundraising item, is unsupportable in light of Mr. Bauer's active candidacy in the 2000 Presidential election. Moreover, the Audit Staff has misconstrued the arrangement between Lukens and the Committee with respect to the rental of names. In any event, the Audit Staff's suggestion that names obtained initially from third parties do not qualify 'as developed' by the Committee is contrary to industry practice, a practice that has not been questioned previously by the Commission."

Counsel offered no evidence that the Committee's list was

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5 According to Dun & Bradstreet, Lukens incorporated in the State of Virginia on July 27, 1987. According to the Corporation Division of the Virginia Secretary of State's Office, Lukens is not listed as a corporation. However, its current business license was issued by the City of Alexandria. The name on the business license is The Lukens Cook Company, Inc.

"developed for its own use," rather than as a fundraising item. Nor did Counsel offer any documentation to support its own statement that the Audit staff "misconstrued the arrangement between Lukens and the Committee with respect to the rental of names."

Factually, this transaction and the agreement between Lukens and the Committee demonstrates that an asset of the Committee that is normally used to solicit contributions, was placed with a vendor to be marketed to all interested parties. As a result, the proceeds from this specific transaction represent a contribution to the Committee, subject to the limitations and prohibitions of the Act. As a result, the Committee has not demonstrated that Lukens did not make and it did not receive and prohibited contributions of $70,000.

3. Purchase of Assets

The Committee purchased office equipment, furniture, supplies and printed materials from CWF for $15,372 on June 28, 1999. The Bill of Sale, although not dated, was annotated "prepared by CWF 3/16/99" and faxed to the Committee on June 28, 1999.

Since the Committee did not pay CWF until June 28, 1999, CWF made a contribution to the Committee equal to the value ($15,372) of the assets for the period March 16, 1999, through June 28, 1999.[6] Consequently, an excessive contribution of $14,372 ($15,372 [value of assets] - $5,000 [limit] + $4,000 [contribution on 1/29/99]) occurred as a result of this transaction.

In the preliminary audit report, the Audit staff recommended that the Committee provide evidence to demonstrate that CWF did not make an excessive contribution of $14,372. Additionally, the Audit staff requested the terms of the agreement between the two parties, if any, and the date that the Committee took possession of the assets.

In response, the Committee disputed the Audit staff's conclusion. The Committee's Counsel asserted that it, "has not yet located additional documentation, although efforts to do so have been made and will continue to be made. The material will be supplied promptly upon receipt."

To date, the Committee has not provided evidence or documentation demonstrating that CWF did not make an excessive contribution of $14,372. Nor has the Committee provided documentation regarding the terms of any agreement between the parties or the date the Committee took possession of the assets. As a result, the Audit staff's position that CWF made and the Committee accepted an excessive contribution of $14,372 remains unchanged.

4. Personal Loan

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[6] Although requested, the Committee did not provide documentation demonstrating the exact date it took possession of the above items.

On October 15, 1999, the Candidate loaned the Committee $45,000. The "loan memorandum" signed by the Candidate and by the treasurer of the Committee stated the loan was due and payable upon demand. The loan issued by check (number 3095), signed by the Candidate, was drawn on an account titled Gary L. Bauer and Carol Bauer. The Committee repaid the loan on January 11, 2000. Absent evidence to the contrary, in order for the loan to be considered entirely from the Candidate, the account from which the loan originated must have an unspent fund balance of at least $90,000 on the date the loan was made.

Using bank records made available, the Audit staff calculated that the maximum amount of unspent funds in the account on October 15, 1999 was $63,128. Therefore, the Candidate's equitable share was $31,564 ($63,128 / 2). The difference between the amount of the loan and the Candidate's equitable share represents a contribution from Mrs. Bauer in the amount of $13,436 ($45,000 - $31,564). Consequently, Mrs. Bauer's contribution exceeded the limitation by $12,436 ($13,436 - $1,000).

It should be noted that six checks apparently written prior to the check that transmitted the loan had not cleared the account. The value of these checks will reduce the amount of unspent funds in the account as well as the Candidate's equitable share and, therefore, increase the amount of the excessive contribution attributed to Mrs. Bauer.

This matter was discussed with the Committee at the exit conference held subsequent to fieldwork. Workpapers detailing the Audit staff's analysis were given to Committee representatives.

In the preliminary audit report, the Audit staff recommended that the Committee provide evidence that demonstrated an excessive contribution of $12,436 from Mrs. Bauer did not result from the $45,000 loan. Such documentation should have included a copy of an instrument of conveyance or ownership showing that the Candidate's share is more than one-half. Further, within the same 60 day period, the Audit staff recommended that the Committee make available copies of canceled checks, numbered 3081 to 3083, 3085, 3086 and 3094 as well as copies of bank statement(s) that indicated these checks had cleared the bank. Any increase to the amount of the excessive contribution would be determined subsequent to our review of the above canceled checks.

In response the Committee's Counsel cited Section 110.10(b)(1)(i) of the Code of Federal Regulations which, "provides that personal funds means any assets which, under applicable state law, the candidate had legal right to access or control and to which the candidate had legal and rightful title. Under State law, Mr. Bauer had a legal right to all the funds in the account." Counsel further argued that; "Mr. Bauer also had a right to the full amount of assets under the agreement with the bank governing the account, the 'instrument of ownership'." Finally, Counsel asserted, "Mr. Bauer's act – drawing a check on a joint account – cannot cause Mrs. Bauer to

violate the contribution limitation."

The Audit staff does not disagree with Counsel's interpretation of 11 CFR 110.10(b)(1)(i). However, Counsel's response ignores section (b)(3) that addresses jointly owned assets and that portion that is the candidate's share under the instrument of conveyance or ownership. The Explanation and Justification for 110.10(b)(3), (Federal Register, Vol. 48, No 82 Wednesday April 27, 1983) states in order to address the concept of "personal funds" in joint ownership situations, these new provisions permit a candidate to use the full value of his or her share of assets jointly owned with a spouse without the spouse being considered a contributor. As mirrored in the body of Regulations for section 110.10(b)(3), the Explanation and Justification states, "if there is no written instrument indicating the candidate's ownership share of the property, the candidate will be considered to own one-half of the value of the property under these rules." The Explanation and Justification further states this 50% rule would apply in community property states, as well as in non-community property states.

The Committee has not provided evidence that demonstrated the Candidate's ownership share of the funds in the account exceeded 50%. Nor has the Committee provide copies the requested canceled checks and respective bank statements. As a result, the Audit staff's position remains unchanged; Mrs. Bauer made an excessive contribution of at least $12,436.

B. Misstatement Of Financial Activity

Section 434(b)(1), (2) and (4) of Title 2 of the United States Code states, in relevant part, that each report shall disclose the amount of cash on hand at the beginning of each reporting period and the total amount of all receipts and all disbursements for the reporting period and the calendar year.

Section 104.18(f) of Title 11 of the Code of Federal Regulations states, in part, if a committee files an amendment to a report that was filed electronically, it shall also submit the amendment in an electronic format. The committee shall submit a complete version of the report as amended, rather than just those portions of the report that are being amended.

The Audit staff's reconciliation of the Committee's reported activity to its bank activity revealed material misstatements with respect to reported disbursements in calendar year 1999 and reported receipts and disbursements in 2000.

For calendar year 1999 reported disbursements were understated $633,113. This understatement was due primarily to Committee not reporting payroll, payroll taxes and 401(k) payments ($364,647)[7], transactions from state accounts ($72,252), vendor payments including wire transfers ($98,746) and interest expense and bank fees ($62,866).

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[7] The Committee failed to report payroll for an entire pay period and did not report any 401(k) payments

For calendar year 2000 reported receipts were understated $223,653. This net understatement was due primarily to the Committee reporting errors with respect to matching fund receipts ($138,334) and offsets to expenditures and interest income ($80,838). During the same period reported disbursements were understated $152,752, due primarily to the Committee not reporting various payments totaling $106,292 and other miscellaneous reporting errors.

Although the Committee did not provide workpapers detailing how the dollar amounts shown on its disclosure reports were calculated, our analysis of the Committee's reporting processes and procedures appear to indicate that these irregularities resulted from the lack of internal reconciliations.

In the preliminary audit report, the Audit staff recommended that the Committee file amended electronic reports for calendar years 1999 and 2000 to correct the misstatements.

In response, the Committee submitted amended electronic reports that materially resolved the misstatements.

C. ITEMIZATION OF RECEIPTS

Section 104.3(d)(1) and (3) of Title 11 of the Code of Federal Regulations states, in part, that when a political committee obtains a loan from, or establishes a line of credit at a lending institution, it shall disclose in the next due report information on Schedule C-P-1. Additionally, political committees shall file in the next report a Schedule C-P-1 each time a draw is made on a line of credit, and each time a loan or line of credit is restructured to change the terms of repayment.

Section 104.3(a)(4)(iv) of Title 11 of the Code of Federal Regulations requires that the reporting committee disclose each person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, the date such loan was made and the amount or value of such loan.

Section 104.3(a)(4)(v) of Title 11 of the Code of Federal Regulations requires that the reporting committee disclose each person who provides a rebate, refund or other offset to operating expenditures where the aggregate amount or value is in excess of $200 within the calendar year, together with the date and amount of any such receipt.

Section 104.18(f) of Title 11 of the Code of Federal Regulations states, in part, if a committee files an amendment to a report that was filed electronically, it shall also submit the amendment in an electronic format. The committee shall submit a complete version of the report as amended, rather than just those portions of the report that are being amended

1. Loans

Candidate loans and other loans, including draws on lines of credit, are required to be reported on Form 3P, page 2 (Detailed Summary of Receipts and Disbursements) for lines 19(a) (Loans Received from or Guaranteed by Candidate) and 19(b) (Other Loans); and, itemized on Schedule A-P (Itemized Receipts) for each respective line number. In addition, outstanding loans and each draw on a line of credit should be disclosed on Schedules C-P (Loans) and C-P-1 (Loans and Lines of Credit from Lending Institutions).

The Committee received a $45,000 loan from the Candidate and established a $3,000,000 line of credit at a lending institution. The Committee made nine draws on the line of credit totaling $4,396,756.[8] Although the loan and line of credit were reported on Schedule C-P and Form 3P, page 2, the Committee did not itemize the loan or the nine draws on the line of credit on Schedule A-P for lines 19(a) and 19(b), as required. Further, three of the 9 draws on the line of credit ($1,901,000) were not disclosed on Schedule C-P-1 for the 1999 Year-End reporting period.

2. Offsets to Expenditures

During the audit period, the Committee received offsets to expenditures totaling $166,977. However, it failed to itemize offsets totaling $88,034 on Schedule A-P for line 20(a) (Offsets to Expenditures - Operating). The majority of the offsets in question were received during the latter part of 1999 through January 2000.

In the preliminary audit report, the Audit staff recommended that the Committee, for the reporting periods affected, file complete electronic reports itemizing the Candidate loan ($45,000), draws of the line of credit ($4,396,756) and offsets to expenditures ($88,034) on Schedules A-P for the appropriate line and the three draws on the line of credit ($1,901,000) on Schedule C-P-1 as required.

In response, the Committee filed amended electronic reports, which correctly disclosed the Candidate loan, the draws on the line of credit and the offsets to expenditures.

D. Itemization Of Disbursements

Section 434(b)(5)(A) of Title 2 of the United States Code states, in part, that each report under this section shall disclose the name and address of each person to whom an expenditure in an aggregate amount or value in excess of $200 within a calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.18(f) of Title 2 Title 11 of the Code of Federal Regulations states, in part, that if a committee files an amendment to a report that was filed electronically, it shall also submit the amendment in an electronic format. The committee

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[8] At no time did the amount owed on the line of credit exceed $3,000,000.

shall submit a complete version of the report as amended, rather than just those portions of the report that are being amended.

The Audit staff conducted a sample review of disbursements and determined that in a material number of instances disbursements requiring itemization were not disclosed on Schedules B-P (Itemized Disbursements). A majority of the exceptions related to disbursements from the operating and state bank accounts.

In the preliminary audit report, the Audit staff recommended that the Committee, for the reporting periods affected, file complete amended electronic reports disclosing all disbursements that required itemization.

In response, the Committee submitted amended electronic reports that materially disclosed the above disbursements.

E. Apparent Prohibited Contributions Resulting From Extensions of Credit by Commercial Vendors

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committee with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any corporation to make a contribution in connection with any election at which presidential and vice presidential electors are to be voted for, or for any candidate, political committee, or other person knowingly to accept or receive any contribution prohibited by this section.

Sections 116.3(a) and (b) of Title 11 of the Code of Federal Regulations state, in relevant part, that a commercial vendor that is not a corporation, and a corporation in its capacity as a commercial vendor may extend credit to a candidate or political committee. An extension of credit will not be considered a contribution to the candidate or political committee provided that the credit is extended in the ordinary course of the commercial vendor's business and the terms are substantially similar to extensions of credit to nonpolitical debtors that are of similar risk and size of obligation.

Section 116.3(c) of Title 11 of the Code of Federal Regulations states that in determining whether credit was extended in the ordinary course of business, the Commission will consider:

1. Whether the commercial vendor followed its established procedures and its past practice in approving the extension of credit;

2. Whether the commercial vendor received prompt payment in full if it previously extended credit to the same candidate or political committee; and,

3. Whether the extension of credit conformed to the usual and normal practice in the commercial vendor's trade or industry.

1. America Direct, Inc.

America Direct, Inc. served as a direct mail vendor for the Committee. The Audit staff reviewed 22 invoices totaling $748,032 and noted the following with respect to eight of the invoices.

Five invoices, totaling $108,071, dated between February 17, 1999 and April 1, 1999 were paid by a single check on July 26, 1999. Prior to payment, the invoices were outstanding 117 to 160 days.

Two invoices in the amounts of $62,579 and $31,328 were dated December 6, 1999. The Committee paid the first invoice ($62,579) in two installments. The first payment of $33,000 was made on May 31, 2000 or 177 days subsequent to the date of the invoice. The final payment of $29,579 was made on July 24, 2000 or 231 days subsequent to the date on the invoice. The second invoice ($31,328) was not paid until April 19, 2000 or 135 days subsequent to the date of the invoice.

The final invoice from this vendor was dated December 28, 1999, in the amount of $57,884 and not paid until June 30, 2000 or 185 days subsequent to the date of the invoice.

The terms noted on the invoices were either "due on receipt" or "net 30." Based on records made available and discussions with Committee representatives, it does not appear that the vendor sent subsequent invoices or made additional attempts to collect the amounts due. The Committee did report the amounts due as debts owed by the Committee on Schedules D-P, (Debts and Obligations).

Based upon the above, it is the Audit staff's opinion that the extension of credit by America Direct, Inc. was not in the ordinary course of business and results in a prohibited contribution of $259,862 for the period the invoices remained outstanding.

2. Moore Response Marketing Services

Moore Response Marketing Services, a corporation, also provided the Committee with direct mail services. The Audit staff reviewed nine invoices totaling $611,773 dated between July 1999 and November 1999. It appears that two of the invoices were not paid timely.

According to a memorandum sent to the Committee on November 5, 1999, the vendor was to print, personalize and mail 1,200,000 copies of a booklet entitled, "Why Bauer." On November 11, 1999, the vendor invoiced the Committee $408,001 for services described as "print, personalize and mail 'Why Bauer' package ($380,401) and design 3 print versions copy design, graphic art ($27,600.00)."

The Committee made four payments, totaling $293,956, in a timely manner, leaving a balance due of $114,045. The Committee made additional payments of $30,000 and $20,000 on May 23, 2000 and July 3, 2000 respectively. However, these payments were between 194 and 235 days subsequent to the date of the invoice. As of end of fieldwork, the Committee had not paid the remaining balance of $64,045, but did disclose this amount due the vendor as a debt owed by the Committee on Schedule D-P.

The second invoice from this vendor was dated August 4, 1999 in the amount of $11,713. The Committee's initial payment of $1,669 was made timely. However, the Committee did not pay the remaining balance of $10,044 until February 14, 2000, or 194 days subsequent to the date of the invoice. The terms noted on both invoices were "payable upon receipt." Based on records made available and discussions with Committee representatives, it does not appear that the vendor sent subsequent invoices or made additional attempts to collect the amounts due.

Based upon the above, it is the opinion of the Audit staff that Moore Response Marketing Services' extension of credit was not in the ordinary course of business and resulted in a prohibited contribution of $124,089 ($114,045 + $10,044) for the period the invoices remained outstanding.

3. RST Marketing Associates, Inc. (RST)

RST also direct mail vendor, billed the Committee $1,149,315. Twelve invoices totaling $342,613 were not paid timely.

Seven invoices in amounts ranging from $1,500 to $12,000 remained outstanding between 134 to 164 days. The remaining five invoices in amounts between $40,000 and $93,000 remained outstanding between 103 and 195 days.

According to the terms noted on the invoices, payment was "due in 30 days." Based on records made available and discussions with Committee representatives, it does not appear that the vendor sent subsequent invoices or made additional attempts to collect the amounts due. The Committee did report the amounts as debts owed by the Committee on Schedules D-P, (Debts and Obligations).

Based upon the above, it is the opinion of the Audit staff that RST's extension of credit was not in the ordinary course of business and resulted in a prohibited contribution of $342,613 for the period the invoices remained outstanding.

In the preliminary audit report, the Audit staff recommended that the Committee provide additional documentation, which was to include statements from the vendors that demonstrated the credits extended were in the normal course of the vendor's business and did not represent a prohibited contribution by the vendors. The information provided was to include examples of other non-political customers and clients of similar size and risk for which similar services have been provided and similar billing arrangements have been used. It was also recommended that the Committee provide

information concerning the vendor's billing policies for similar nonpolitical clients and work, advance payment policies, debt collection policies, and billing cycles.

In its response the Committee stated that it:

> "disputes the contention that it received an in-kind contribution from any of the listed vendors or that it received credit other than in the ordinary course of business. The Committee has sought to obtain the documentation indicated by the Commission, but has not yet been able to do so. The Committee will submit such documentation promptly upon receipt. The Committee notes, however, that the Audit staff's conclusion that the extensions of credit of the nature noted here are not in the ordinary course of these businesses conflicts with thirty-years of information in the Commission's files concerning Presidential committees and vendors."

The Committee has not demonstrated that any of the vendors made commercially reasonable attempts to collect payment from the Committee. Furthermore, the Committee did not present evidence from the vendors that demonstrated the credits extended were in the normal course of the vendors' business; as well as, evidence regarding the vendors' billing policies for similar non-political clients, advance payment policies or debt collection policies. The above extensions of credit represent contributions to the Committee.

III. AUDIT FINDINGS AND RECOMMENDATIONS — AMOUNTS DUE TO THE UNITED STATES TREASURY

A. DETERMINATION OF NET OUTSTANDING CAMPAIGN OBLIGATIONS

Section 9034.5(a) of Title 11 of the Code of Federal Regulations requires that within 15 calendar days after the candidate's date of ineligibility, the candidate shall submit a statement of net outstanding campaign obligations which reflects the total of all outstanding obligations for qualified campaign expenses, plus estimated necessary winding down costs.

In addition, Section 9034.1(b) of Title 11 of the Code of Federal Regulations states, in part, that if on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 CFR 9034.5, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations.

Mr. Bauer's date of ineligibility was February 4, 2000. The Audit staff reviewed the Committee's financial activity through May 31, 2000, reviewed disclosure reports through December 31, 2001, analyzed winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations that appears below.

BAUER FOR PRESIDENT 2000, INC.

STATEMENT OF NET OUTSTANDING CAMPAIGN OBLIGATIONS

As of February 4, 2000
As Determined December 31, 2000

ASSETS

Cash in Bank	$217,234 (a)	
Deposits to Vendors	210,639	
Capital Assets	79,777	
Total Assets		$507,650

OBLIGATIONS

Accounts Payable for Qualified Campaign Expenses	$1,899,642	
Loans Payable	1,810,303	
Refund of Excessive Contribution (see Section II.A.1.)	87,409	
Amount Payable to U. S. Treasury		
Prohibited Contribution (see Section II.A.2.)	70,000	
Stale-dated Checks (see Section III.B.)	3,784	
Actual Wind Down Costs (February 5, 2000 - December 31, 2001)	1,176,565	
Total Obligations		($5,047,703)
Net Outstanding Campaign Obligations		**($4,540,053)**

FOOTNOTE TO NOCO

(a) Outstanding checks issued prior to the date of ineligibility and determined to be stale-dated have been added back to the Cash in Bank figure.

Shown below are adjustments for funds received after February 4, 2000, based on the most current financial information available:

Net Outstanding Campaign Obligations (Deficit) as of 2/4/00	($4,540,053)
Net Private Contributions Received 2/5/00 to 12/31/00	715,716
Other Receipts/Income Received 2/5/00 to 12/31/00	42,246
Matching Funds Received 2/5/00 to 12/31/00	2,909,763
SUBTOTAL: Remaining Net Outstanding Campaign Obligations (Deficit) @ 12/31/00	($872,328)
Net Private Contributions Received 1/1/01 to 3/1/01	42,146
Matching Funds Received 1/2/01	58,863
Matching Funds Received 3/1/01	98,668
Remaining Net Outstanding Campaign Obligations (Deficit)	($672,651)

As presented above, the Committee has not received matching fund payments in excess of its entitlement.

B. STALE-DATED COMMITTEE CHECKS

Section 9038.6 of Title 11 of the Code of Federal Regulations states that if the committee has checks outstanding to creditors or contributors that have not been cashed, the committee shall notify the Commission. The committee shall inform the Commission of its efforts to locate the payees, if such efforts have been necessary, and its efforts to encourage the payees to cash the outstanding checks. The committee shall also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

Our bank reconciliation identified 23 checks made payable to contributors totaling $3,784 that had not been negotiated by the payees. As a result, the value of stale-dated checks is payable to the United States Treasury.

In the preliminary audit report, the Audit staff recommended that the Committee provide evidence that the checks were either not outstanding or that they were voided and no obligation existed. If the checks were not outstanding, the evidence provided should have included copies of the front and back of the negotiated checks. If the checks were voided, the evidence should have included statements from the vendors acknowledging that they have been paid in full, or an account reconciliation showing that all billings have been paid. Absent the submission of such evidence, the Audit staff recommended that the Commission determine that stale-dated checks, totaling $3,784, are payable to the United States Treasury.

In response to the preliminary audit report, the Committee issued a check to the United States Treasury in the amount of the $3,784. This check was delivered to the United States Treasury on January 3, 2002.

IV. SUMMARY OF AMOUNTS DUE TO THE UNITED STATES TREASURY

Finding III.B.	Stale-dated Committee Checks	$ 3,784[9]
Finding II.A.2.	Apparent Impermissible Contribution	70,000
Total		$73,784

[9] As noted in Finding III.B., this amount has been paid to the U. S. Treasury.

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

May 6, 2002

MEMORANDUM

TO: Robert J. Costa
Deputy Staff Director

THROUGH: James A. Pehrkon
Staff Director

FROM: Lawrence H. Norton
General Counsel

Gregory R. Baker
Acting Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Susan L. Kay
Attorney

Michelle Abellera
Attorney

SUBJECT: Bauer for President 2000, Inc.-Proposed Audit Report (LRA #543)

I. INTRODUCTION

The Office of General Counsel reviewed the proposed Audit Report ("Report") on Bauer for President 2000, Inc. ("the Committee") submitted to this Office on March 25, 2002. The following memorandum summarizes our comments on the proposed Report.[1] We concur with the findings in the proposed Report that are not discussed in the following memorandum. If you have any questions, please contact Susan Kay, the attorney assigned to this audit.

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[1] The Office of General Counsel recommends that the Commission consider this document in open session since the Report does not include matters exempt from public disclosure. *See* 11 C.F.R. § 2.4.

II. APPARENT IMPERMISSIBLE CONTRIBUTIONS (Finding II.A.)

A. Donors List

The Audit Division concludes that the Committee received an excessive in-kind contribution from Campaign for Working Families PAC ("CWF") when it failed to properly compensate CWF for a donor list. Pursuant to an agreement between CWF and the Committee, the Committee received a complete copy of CWF's donor and non-donor files (137,120 names). In exchange, the Committee agreed to provide CWF with a complete copy of its donor and non-donor files at the end of the campaign. The Committee used CWF's files 22 times during the period from February 5, 1999 through December 24, 1999 for an aggregate use of 957,338 names. CWF provided documentation showing that it used the Committee's donor file, consisting of 25,547 names a total of 8 times from June 2000 to February 2001 for an aggregate use of 174,501 names. Accordingly, the Audit staff concludes that the Committee's exchange obligation to CWF was equal to 782,837 names (957,338-174,501). According to the Audit Division, based on industry sources, CWF rents its mailing list for $115 per 1000 names. The Committee rents its mailing list for $130 per 1,000 names. As a result, CWF made, and the Committee received, an excessive in-kind contribution of $87,409.[2]

In response to the Preliminary Audit Report, the Committee asserts that it participated in a list exchange with CWF of equal value. According to the Committee, the Committee and CWF anticipated that the Committee would generate a very large number of new names. The Committee argues that the value of the future use of the potential names the Committee expected to generate for CWF's use should be considered at the time of the agreement. Thus, even though the exchange did not include a corresponding number of names, the Committee argues that, judged by industry standards, the exchange was of equal value. The Committee also argues that its use of the CWF list added value to the CWF list.

Goods or services provided at less than the usual or normal charge constitute an in-kind contribution. 11 C.F.R. § 100.7(a)(1)(iii)(A). The "usual and normal charge" for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution...." 11 C.F.R. § 100.7(a)(1)(iii)(B). The Commission has taken the position that when a committee provides names to another political committee in exchange for its own future use of a corresponding number of names, which are of equal value, this constitutes an arms length business transaction between the committees and is not a reportable contribution. *See* Advisory Opinion ("AO") 1981-46. However, this conclusion assumes the fact that the future use will

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[2] The fair market value that an entity would pay for the use of 957,338 names from CWF donor files would be $110,094 (957,338/1000 x $115). The fair market value that an entity would pay for the use of 174,501 names form the Committee's donor files would be $22,685. Therefore, the excessive contribution by CWF to the Committee is $87,409 ($110,094-$22,685).

occur. *Id.* If that future use does not occur for any reason, a contribution may result depending on the circumstances of the particular situation and the status of any person who does not provide or obtain the promised future use. *Id.* The Commission has also indicated that the purchase price at a "usual and normal charge" for mailing lists and other goods in the market place must be reasonably capable of objective verification. AO 1989-4. In addition, the Commission views lists as a unique type of committee asset in that each list's value, at least in part, is determined on the basis of the committee's political fundraising efforts or other political use of the list. AO 1983-2.

The Office of General Counsel believes that CWF made an excessive in-kind contribution to the Committee. The exchange agreement was not for a corresponding number of names. *See* AO 1981-46. Furthermore, the names were not of equal value. *Id.* CWF provided the Committee with significantly more names than the Committee provided to CWF. The Committee argued that the examination of the exchange agreement should account for potential use at the time of the agreement. In light of the fact that contracting parties can agree to exchange intangible items, the Office of General Counsel believes that factors other than the actual number of names exchanged may be appropriate to consider. However, a factor such as the potential use of names that may be generated is not reasonably capable of objective verification. *See* AO 1989-4. Although the Committee asserts that the exchange at issue was of equal value according to industry standards, the Committee has not provided any verifiable support for this assertion. The exchange agreement does not refer to any quantifiable number of names the Committee expected to be generated. In addition, the Committee argues that its use of CWF's list added value to CWF's list. However, the Committee has not provided any objectively verifiable support for added value based on the Committee's use of the list.

B. Rental of Donors List

The Audit Division concludes that the Lukens Cook Company ("Lukens") made a $70,000 contribution to the Committee. Lukens entered into an agreement with the Committee for the rental and exchange rights for the Committee's donor file. Pursuant to the agreement, Lukens could exercise the rights to the file between January 15, 2000 and October 1, 2000. The agreement defines rental and exchange rights as the exclusive right to market, rent or exchange the Committee's complete donor file, either in part or total. Under the agreement, the Committee reserved the right to exclude 400 donor names. In addition, during the period of time that Lukens was granted the rental and exchange rights to the Committee's donor file, the Committee could not sell, rent, exchange, barter, or broker the list to any other organization.

Generally, a Committee's sale or commercial use of its assets is fundraising for political purposes which results in contributions subject to the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended ("the Act"). *See* AOs 1990-26, 1989-4, 1988-12, 1983-2, 1981-7, 1980-70, 1980-34, 1980-19, 1979-76, and 1979-17. However, the Commission has allowed isolated sales of committee assets

without inherent contribution consequences when those assets were purchased or developed for the committee's own particular use and when the asset had an ascertainable market value. *See* AOs 1989-4 and 1986-14. Further, the Commission has specifically recognized that where the asset in question was a political committee's mailing or contributor list which has a unique quality and was developed by the political committee in the normal course of its operations and primarily for it own use, rather than as an item to be sold to others or for use in campaign fundraising activity, the sale would not constitute a contribution. *See* AOs 1986-14, 1982-41, 1981-53, 1981-46 and 1979-18. The Commission developed this mailing and contributor list exception because the Commission views such lists as a unique type of asset of the committees involved in that each list's value, at least in part, is determined on the basis of the committee's political fundraising efforts or other political use of the list. AO 1983-2.

In the Preliminary Audit Report, the Audit staff requested additional information from the Committee in order to establish whether the Committee's donor file was developed in the normal course of the Committee's operations and primarily for its own use, rather as an item to be sold to others or for use in campaign fundraising activity. In its response to the Preliminary Audit Report, the Committee argues that the list in question was developed for its own use, not as a fundraising item, and uses Mr. Bauer's candidacy in the 2000 Presidential election as support for its argument. In addition, the Committee argues that the fact that the names were initially obtained from a third party does not disqualify them as names developed by the Committee. Further, the Committee argues that the Audit staff misconstrued the arrangement between Lukens and the Committee with respect to the rental of names.[3]

The Committee's response to the Preliminary Audit Report and the information from the audit do not conclusively establish that the list was developed primarily for the Committee's own use in the normal course of its operations. The facts show that the Committee rented the list at a time when the Candidate should have been actively campaigning for the Republican Party nomination. The Committee received the $70,000 from Lukens for the list on January 3, 2000. This is the same date that the Committee received its first payment of public funds. Since public funds could only be used for the purpose of seeking the nomination, 11 C.F.R. §§ 9032.9(a)(1), (2) and 9034.4(a)(1), the Candidate should have been actively campaigning for that cause at the same time that the Committee received the $70,000 from Lukens.[4] The fact that the Committee rented the list during what is presumed to have been its active campaign indicates that the list may

[3] The Committee does not explain how the Audit staff may have misconstrued the arrangement between Lukens and the Committee.

[4] At this time, the Commission had not declared the Candidate inactive and, therefore, no longer eligible for public funds for the purpose of seeking the Republican Party nomination. 11 C.F.R. § 9033.6(a). The candidate was declared ineligible when he announced his withdrawal from the campaign on February 4, 2000.

not have been developed for its own use.[5] However, these same facts may suggest that the Committee's transfer of the list was a part of its normal course of operations. The Committee's campaign strategy may have shifted prior to the transfer of the list to Lukens. For example, the Committee may have anticipated an early withdrawal from the campaign. Thus, the Committee may no longer have needed to use the list. Therefore, the facts are not sufficient in the context of the audit to draw a definite conclusion about the Committee's transaction with Lukens. Nevertheless, given the questions that are raised in this matter, we believe that it is appropriate to maintain this issue as a finding in the proposed Audit Report.

C. Personal Loan

The Candidate used an account that was jointly held with Mrs. Bauer to make a loan of $45,000 to the Committee. The Audit staff concludes Mrs. Bauer made an excessive contribution as a result of the Candidate's loan to the Committee. According to the Audit Division, the maximum amount of unspent funds in the account on the date of the loan was $63,128. Therefore, the Audit Division concludes that since the Candidate owned half of the funds in the account ($31,564), the difference between the Candidate's share in the account and the amount of the loan represents a contribution from Mrs. Bauer of $13,436 ($45,000 - $31,564). Thus, Mrs. Bauer made an excessive contribution in the amount of $12,436 ($13,436 - $1,000).

An individual, other than the candidate, is limited to contributions aggregating $1,000 per election to a Federal candidate and his authorized political committees. 2 U.S.C. § 441a(a)(1)(A). However, a publicly financed presidential candidate may contribute personal funds in connection with his or her nomination up to $50,000. *See* 11 C.F.R. § 9035.2(a)(1). Personal funds of a candidate are defined, in part, as any assets which, under applicable state law, at the time he or she became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had either: (i) legal and rightful title, or (ii) an equitable interest. 11 C.F.R. § 110.10(b)(1). However, pursuant to 11 C.F.R. § 110.10(b)(3), a candidate may use a portion of assets jointly owned with his or her spouse as personal funds. The portion of the jointly owned assets that shall be considered as personal funds of the candidate shall be that portion which is the candidate's share under the instrument of conveyance or ownership. 11 C.F.R. § 110.10(b)(3). If no specific share is indicated by an instrument of conveyance or ownership, the value of one-half of the property shall be considered as personal funds of the candidate. 11 C.F.R. § 110.10(b)(3); *see* Explanation and Justification for 110.10(b)(3), 48 *Fed. Reg.* 19020 (April 27, 1983).

The Committee argues that section 110.10(b)(1)(i) governs the transaction at issue. The Committee contends that under state law Mr. Bauer had a legal right to all of the funds in the account. The Committee further argues that even under section

[5] The Committee could legally use the list after the sale. However, the information does not indicate whether the Committee continued to use its own list after the rental to Lukens.

110.10(b)(3), the result would be the same because Mr. Bauer also had a right to the full amount of assets under the agreement with the bank governing the account, the "instrument of ownership." Finally, the Committee argues that Mr. Bauer's act of drawing a check on a joint account cannot cause Mrs. Bauer to violate the contribution limitation. The Committee argues that the Act and the Fifth Amendment to the United States Constitution require an act by the party charged with a violation.

Generally, whether a spousal contribution will result from the candidate's use of jointly held property is determined by the instrument of conveyance or ownership or by the one-half-interest rule. 11 C.F.R. § 110.10(b)(3); *see also* AO 1991-10.[6] The Commission's regulations regarding jointly held property do not specifically address joint bank accounts. *See* 11 C.F.R. § 110.10(b)(3). In a memorandum to the Commission dated October 30, 1981, proposing revisions to section 110.10, the Office of General Counsel noted a distinction between jointly held bank accounts and other jointly held property. *See* Agenda document #81-181, page 7, footnote 3. The memorandum noted that with a joint bank account, where joint tenancy is established, each party has access and control over the entire bank account, as either spouse can withdraw any part, or the entire amount of funds from such account. The regulations were never changed to address a distinction between joint bank accounts and other jointly held property. *See* 11 C.F.R. § 110.10(b)(3). However, subsequent enforcement matters, addressing the issue of joint bank accounts followed this distinction. *See* MURs 2292 and 3505. Thus, the Commission treated joint bank accounts as an exception to the one-half interest rule under section 110.10(b)(3) because each account holder has access and control over the whole. *Id.* This Office notes that the bank statement for the account at issue includes both the names of Mr. Gary Bauer and Mrs. Carol Bauer followed by *JTWROS* indicating that the account is a joint account with the right of survivorship. In addition, only Mr. Bauer's signature was needed to withdraw funds from the account indicating he had access and control over the whole account. Therefore, the Office of General Counsel recommends that the Audit Division revise the proposed Audit Report in accordance with these enforcement matters.

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[6] In AO 1991-10, a candidate and spouse jointly held assets in a Kidder Peabody Investor Account. The account required the signatures of both parties for withdrawals, thereby indicating that the candidate did not have legal right of access to or control over the account, without the benefit of a spousal signature. However, the candidate only sought to withdraw 50% of the assets in the account and since there is an exception for the use of jointly owned assets with a spouse, under the Commission regulations, the candidate could use up to one-half of the account for his campaign and therefore make the withdrawal. *See* 11 C.F.R. § 110.10(b)(3).

AGENDA DOCUMENT #81-181

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

81 NOV 16 P 4:24

MEMORANDUM

TO: COMMISSIONERS

FROM: B. ALLEN CLUTTER
STAFF DIRECTOR

SUBJECT: PROPOSED REVISION OF REGULATIONS PERTAINING TO CANDIDATE'S USE OF PROPERTY IN WHICH SPOUSE HAS AN INTEREST

DATE: NOVEMBER 16, 1981

The attached document is being submitted for discussion at the December 3, 1981, open session.

Attachment

AGENDA ITEM
For Meeting of: 12-3-81
Agenda Item No:
Exhibit No:

8105062702

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 30, 1981

MEMORANDUM TO: The Commission

FROM: Charles N. Steele
General Counsel

SUBJECT: Revision of Regulations Pertaining to Candidate's Use of Property in Which Spouse Has an Interest

I. SUMMARY OF ISSUE AND RECOMMENDATION

The issue presented deals with situations in which a candidate gives funds to his or her campaign when such funds are acquired on the basis of property which is jointly owned with the spouse or in which the signature of the spouse appears on a loan instrument so that the candidate may obtain a loan based on jointly owned property. An example of the former is the drawing of funds from a joint bank account or the sale and use of proceeds of jointly owned stock. An example of the latter is the mortgaging of a family home in order to obtain a campaign loan.

The Act and the Regulations regulating the use by the candidate of his or her personal funds make it difficult for a candidate to utilize what are in reality his or her "own" funds when there is joint ownership. The candidate attempting to draw funds from jointly held assets may have difficulty in interpreting 11 C.F.R. § 110.10(b), the section defining "personal funds." Furthermore, a candidate attempting to use proceeds from a loan secured by jointly held assets will have difficulty in using those funds lawfully because the lending institution may require the signature of the spouse on the security instrument for the collateral or on the promissory note for the repayment of the loan. Under the Act and present Regulations, this signature would constitute a contribution which, depending on the circumstances, may be in excess of the contribution limitations of 2 U.S.C. § 441a.

Because of these difficulties, the General Counsel's office recommends that the Commission issue a notice of proposed rulemaking clarifying the issue of the candidate's use of jointly held assets with a view toward easing the restrictions on a candidate's ability to alienate his or her own interest in such property for the purpose of contributing to his or her own campaign. For example, in the area of candidate loans, it would seem advisable to provide by regulation that, if the candidate has an interest in the collateral for the loan which equals or exceeds the amount of the loan, then no contribution from the spouse whose signature appears on the loan instrument would result if a bank required such a signature.

II. BACKGROUND AND SUPPORT FOR RECOMMENDATIONS

A. Applicable Statutes and Regulations

Section 441a(a)(1)(A) prohibits contributions to any candidate and his authorized political committees with respect to any election for federal office which, in the aggregate, exceed $1,000. Section 431(8)(A)(i) states that the term "contribution" includes a loan. Section 431(8)(A)(vii) states that a loan of money by certain lending institutions "made in accordance with applicable law and in the ordinary course of business" is not a contribution but that such a loan

> shall be considered a loan by each endorser or guarantor, in that proportion of the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors.

2 U.S.C. § 431(8)(A)(vii)(I). Section 100.7(a)(1)(i) of the Regulations states that the term "loan" includes a "guarantee, endorsement, or any other form of security." Section 100.7(a)(1)(i)(C) of the Regulations states that "a loan is a contribution by each endorser or guarantor," that "[e]ach endorser or guarantor shall be deemed to have contributed that portion of the total amount of the loan for which he or she agreed to be liable in a written agreement," and that, "[i]n the event that such agreement does not stipulate the portion of the loan for which each endorser or guarantor is liable, the loan shall be considered a loan by each endorser or guarantor in the same proportion to the unpaid balance that each endorser or guarantor bears to the total number of endorsers or guarantors."

According to 11 C.F.R. § 110.10(a) a candidate for federal office, other than a Presidential or Vice-Presidential candidate receiving public financing, "may make unlimited

expenditures from personal funds." Personal funds are defined in § 110.10(b) as

> (1) Any assets to which at the time he or she became a candidate the candidate had legal and rightful title, or with respect to which the candidate had the right of beneficial enjoyment, under applicable State law, and which the candidate had legal right of access to or control over, including funds from immediate family members; and
> (2) Salary and other earned income from bona fide employment; dividends and proceeds from the sale of the candidate's stocks or other investments; bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy of which the candidate is the beneficiary; gifts of a personal nature which had been customarily received prior to candidacy; proceeds from lotteries and similar legal games of chance.

See also 11 C.F.R. § 9003.2(c)(3).

B. Problems Arising From Application of the Statutes and Regulations

1. Problems Relating to 11 C.F.R. § 110.10(b)(1), the Definition of "Personal Funds"

As mentioned above, a candidate for federal office, other than a Presidential or Vice-Presidential candidate receiving public financing, may spend without limit from his or her personal funds. Section 110.10(b) of the Regulations defines personal funds, but the wording of section 110.10(b)(1) appears to have been misinterpreted regarding the discrete criteria comprising the definition of "personal funds," i.e., "legal and rightful title," "right of beneficial enjoyment," and "legal right of access to or control over." Interpretation of the regulations has also created the undesirable result of disparate treatment of candidates in a community property state as compared to candidates in a non-community property state.

a. 11 C.F.R. § 9003.2(c)(3)(i) is inconsistent with 11 C.F.R. § 110.10(b)(1).

Evidence of misinterpretation of the intended structure of the regulation may be found in the Commission's promulgation during 1980 of a regulation in the section on "General Election

Financing" defining "personal funds." Whereas section 110.10(b)(1) is structured so that "legal right of access to or control over" must be coupled with "legal and rightful title" in the same way that it must be coupled with the "right of beneficial enjoyment," the general election regulation does not maintain this structure. Instead, "personal funds" are defined as:

> (A) Funds to which, at the time the candidate became a candidate, he or she had legal and rightful title; or
> (B) Funds to which, under applicable State law, at the time the candidate became a candidate, he or she had the right of benefical enjoyment and had either a legal right of access or control over.

11 C.F.R. § 9003.2(c)(3)(i)(A) and (B). The general election regulation is contrary to the structure contemplated for the definition of personal funds and embodied in § 110.10(b)(1). This is clearly evidenced by early drafts of proposed § 110.10 (b)(1) which divided the regulation as follows:

> (b) (1) For purposes of this section, "personal funds" means
> (i) any assets to which at the time he or she became a candidate the candidate has legal and rightful title, or with respect to which the candidate has the right of beneficial enjoyment, under applicable state law and
> (ii) which the candidate has legal right of access to or control over, including funds from immediate family members.

See Commission Memorandum No. 648 (July 1, 1976). Thus, a candidate who had legal or rightful title, as well as a candidate having the right of beneficial enjoyment needed access to or control over the assets. This is consistent with the legislative history of the 1974 amendments to 18 U.S.C. § 608 pertaining to the limitations on expenditures by a candidate of personal funds. The Conference Report's language, which was cited with approval by the Supreme Court in Buckley v. Valeo, 424 U.S. 1 at 51, 52, n.57 (1976), stated:

> If a candidate for office of Senator, for example, already is in a position to exercise control over funds of a member of his immediate family before he becomes a candidate, then he could draw upon these funds up to the limit of $35,000. [Former U.S.C. § 608(a) limited the expenditures of a candidate "from his

> personal funds, or the personal funds of his immediate family."] If, however, the candidate did not have access to or control over such funds at the time he became a candidate, the immediate family would not be permitted to grant access or control to the candidate in amounts up to $35,000, if the immediate family member intends that such amounts are to be used in the campaign of the candidate. The immediate family member would be permitted merely to make contributions to the candidate in amounts no greater than $1,000 for each election involved. S. Conf. Rep. No. 93-1237, p. 58 (1974).

Thus, the Conference Report emphasized the concept of "access to or control over" as the criterion to determine whether or not assets were part of a candidate's personal funds. The Commission added the criterion of "legal or rightful title" or in the alternative "right of benefical enjoyment" as a means of further clarifying the concept "personal funds" in terms of an ownership interest, i.e., legal or equitable title. The General Election Financing regulations, however, do not presently retain the structure contemplated for the original regulations dealing with "personal funds."

b. 11 C.F.R. § 110.10(b)(1) has been difficult to interpret, and unequal treatment has been accorded candidates from non-community property states.

The existence and the significance of the problems noted above, i.e., the misinterpretation of the discrete "personal funds" criteria and interpretations leading to a disparity of treatment between candidates in community property states and candidates in non-community dates, may be illustrated by examining the Commission's treatment of community property assets in MUR 149. In that matter, the Office of General Counsel considered the issue of whether or not funds from a bank account in the name of Jane Fonda and proceeds from loans made to Ms. Fonda based on future income which were then transferred to the principal campaign committee of her husband, Tom Hayden, were community assets. After resolving that they were, OGC stated in its legal analysis that the community property laws of California gave Mr. Hayden access to or control over all of Ms. Fonda's money. Citing the language of footnote 57 in Buckley, OGC concluded that the funds were all Tom Hayden's "personal funds."

OGC supplemented this analysis by viewing this situation in the context of § 110.10 1/. After correctly stating that "access to or control over" had to be coupled with either legal title or

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1/ OGC divided its analysis in this manner in view of the fact that the regulation was not promulgated until after the transactions in question were made.

beneficial enjoyment, OGC, in its closing report, asserted that Mr. Hayden had beneficial enjoyment of his spouse's funds by virtue of community property law and stated that this "beneficial enjoyment" "appears to subsume the concept of 'legal...access to or control over'."

A review of the closing report raises a question as to OGC's use of the term "beneficial enjoyment" and OGC's application of community property law. As mentioned above, the regulation appears to have been framed so that the "personal funds" concept would have an ownership interest meaning limited not merely to legal title, but also including equitable title through the use of the term "benefical enjoyment." Equitable title would include such interests as beneficial interests in trusts or stock owned by a person but held in the name of a brokerage house. OGC's use of the term "beneficial enjoyment" in MUR 149 in the context of property actually held in legal title appears to have been incorrect. Secondly, under community property laws, the spouse does not have legal or rightful title over or beneficial enjoyment of the whole of the community property; each spouse is considered to be a legal owner of an equal interest in the property, i.e., a "one-half-to-the-husband, one-half-to-the-wife approach." J.E. Cribbet, Principles of the Law of Property 92 (2nd ed. 1975). 2/ Moreover, by asserting that Mr. Hayden's beneficial enjoyment "subsumed" the concept of "legal access to or control over," the General Counsel's analysis appears inconsistent with the regulation which expressly separates the factors "legal and rightful title," "beneficial enjoyment" and, "legal right of access to or control over."

The Office of General Counsel acknowledged in its closing report in MUR 149 that its analysis and conclusion would lead to a disparity of treatment of candidates in community property states and candidates in non-community property states because of the requirement in the regulation to define "legal and rightful title" or "right to beneficial enjoyment" in accordance with "applicable state law." Unlike community property as interpreted by OGC in MUR 149, property held under any of the three common law estates of ownership would not in its entirety come under the § 110.10(b)(1) definition of "personal funds." A tenant in common would have legal title to half and access to or control over that half.

2/ In dealing with states where community property principles are in effect, the Commission must be careful to ascertain whether or not property owned by either spouse is part of the marital community. Counsel for a respondent may wish to assert that certain property is community property when in fact it is the separate property of the candidate's spouse.

A joint tenant would have legal title to the whole and access to or control over only half. 3/ A tenant by the entireties would have legal title to the whole but access to or control over none of it without the signature of the spouse.

c. Resolution of problems relating to the definition of "personal funds."

In light of the problems presented, it is recommended that the Office of General Counsel be authorized to prepare a notice of proposed rulemaking to amend §§ 110.10(b)(1) and 9003.2(c)(3) to achieve the following goals: (1) define or clarify, where appropriate, the meaning and relationship of the terms "legal and rightful title, "beneficial enjoyment," and/or "access to or control over," and (2) define "personal funds" in such a way that there would be no disparity of treatment of candidates from different states.

2. Problems Presented By the Application of 2 U.S.C. § 431(8)(B)(vii)(I) and 11 C.F.R. § 100.7 in the Context of Candidate Loans

a. Signature by the spouse may result in the spouse being a contributor.

A candidate in need of funds for his or her campaign may decide to obtain funds from a lending institution which he or she then contributes to his or her committee. For various reasons, the spouse may be a party to the loan transaction as a signatory on one of the loan instruments. The spouse's signature may appear on the promissory note for repayment of the loan as guarantor, endorser, or co-maker. The spouse's signature may also appear on a security instrument for the loan, such as a deed of trust or a mortgage. This may be as a result of the spouse's interest in the property used as security. By asking the candidate's spouse to pledge his or her interest in the secured property, the lending

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3/ In this context there is a disparity within the parameters of joint tenancy. If a couple owns a piece of land as joint tenants, then each spouse has access to or control over half, i.e., each spouse can alienate his half interest in the property without the consent of the other. However, if a couple owns a bank account as joint tenants, each spouse, having drawing rights on the entirety of the funds in the bank account, can be considered to have access to or control over the whole. Thus, even though the ownership of the land and the ownership of the bank account are held in the same type of common law estate, § 110.10(b)(1) would require different treatment of the assets.

institution is assuming that, in the event of default, it will be able to foreclose on the property, free of the claims of other co-owners or interest holders (e.g., inchoate dower interest holders). Whether by signing on the promissory note or signing on a security instrument, the spouse technically becomes a contributor by providing a "guarantee, endorsement, or... other form of security," see 11 C.F.R. § 100.7(a)(1)(i), to the extent provided for under 11 C.F.R § 100.7(a)(1)(i)(C).

b. Banks may require spouse's signature on security instrument.

There are various reasons for the appearance of the spouse's signature on a loan instrument. If a married candidate obtains a loan and uses his or her property to secure it, the bank may ask for the signature of the spouse on the mortgage or deed of trust so that the bank can protect itself against the spouse's assertion of a dower or curtesy interest in the event that the candidate dies. 4/

Many states require that the wife join in a mortgage or deed of property if that property is partially protected from the husband's creditors by the homestead laws. 5/ No conveyance may occur without the wife's signature.

4/ Dower is the interest (usually one-third) of the real estate owned by the husband during marriage which the law in many states gives to the widow to provide her with a means of support after her husband's death. During the husband's lifetime, "the wife's rights consist merely of the possibility that she may become entitled to dower and, thus, the right is inchoate. R. Kratovil & R. J. Werner, Real Estate Law § 514 (7th ed. 1979). Upon the husband's death, the dower becomes "consummate" and the widow acquires a life estate in the land assigned to her and she may occupy the land or rent it to a tenant. Id. at § 515. Curtesy is an analogous interest of the husband in the wife's property.

5/ The homestead is that interest in land owned and occupied by a family that is exempt from execution for general debts of the head of the family. In other words, the states, by creating homestead exemptions, intended to place property designated as a homestead out of the reach of general creditors and thus insure that, regardless of whether or not the head of the family is solvent or insolvent, the family will always have a home for itself. 40 Am. Jur. 2d Homestead § 4 (1968). By requiring that the wife sign a mortgage instrument to the home, the state is insuring that the wife is cognizant of any attempt to convey property that, if not conveyed, would serve as a protection against the total forfeiture of the assets of the head of the family.

This requirement exists to protect the wife against "the improvidence of the husband." R. Kratovil and R. J. Werner, Real Estate Law § 532 (7th Ed. 1979).

Lending institutions will also often require a signature on a security instrument of those other persons who are co-tenants with the candidate as to property used to secure the loan, i.e., joint tenants, tenants by the entireties, tenants in common, or co-owners of community property. b/

Joint tenants are tenants who have "one and the same interest [in property], acquired by one and the same deed, commencing at one and the same time," and held "by one and the same undivided possession." Kratovil and Werner, at § 486. In characterizing a joint tenant's ownership interest, every tenant may be said to own "the undivided whole of the property," not a "fractional interest." C. H. Smith and R. E. Boyer, Survey of the Law of Property 56 (2nd ed. 1971). However, for purposes of making a conveyance or other form of non-testamentary disposition, any one of the joint tenants may convey only that share in the joint tenancy which would be his or hers if the tenancy were divided into equal shares. Thus, if the candidate were to sign a security instrument based on property owned in joint tenancy with another, the bank, in the event of default on the loan, would take the property as a tenant in common with the other joint tenant. If the bank wishes to insure that it will take the property free of the interests of the other co-tenant, the bank will want to have the signature of the other co-tenant on the security instrument.

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b/ In compliance matters and referrals from RAD, the issue of common ownership and signatures by others most often arises in a husband and wife situation. Of course, problems have arisen and may arise involving common ownership by a candidate and other immediate family members or even common ownership by a candidate and non-family members; and signatures by persons other than a spouse have been noted. However, problems presented in situations involving common ownership by spouses and signatures by spouses are more acute. In addition to the fact that signature and common ownership problems most often arise in husband-wife situations, the aspects of dower and curtesy, homestead rights, tenancy by the entireties, and community property require that the husband and wife situation be given the special consideration that this memorandum provides. At this juncture, therefore, OGC is not making recommendations with respect to other common ownership situations. The Commission could raise these issues as well in a notice of proposed rulemaking.

Tenants by the entireties hold property in the same manner as joint tenants, but only husband and wife may be tenants by the entireties. A husband and a wife as a unit own the whole of the property. Because they are a unit, neither spouse may convey or otherwise dispose of any interest in the property without the signature of the other spouse. Thus, banks will insist on the signature of both spouses on an instrument securing a loan based on property held in a tenancy by the entireties.

Co-owners who are not joint tenants, tenants by the entireties, or owners of community property are tenants in common. Tenants in common share the possession and rents of the whole property. However, unlike joint tenancy, their ownership interest need not be equal, e.g., one tenant may own three-fourths of the property and the other tenant may own one-fourth of the property. "Except for their sharing of possession and rents,... the situation is almost as if each tenant in common owned a separate piece of real estate. Each tenant in common may convey or mortgage his share, and the share of each tenant in common is subject to the lien of judgments against him." Kratovil and Werner, at § 498. Thus, if a bank wishes to insure that it will take the property free of the interests of the other co-tenants, it will want to have the signatures of the other co-tenants on the security instrument.7/

Community property is that property acquired during marriage by the efforts of the husband and the wife (when not acquired as the separate property of either). The principle of community property is that

> the husband is as much entitled to share equally in acquisitions by the wife through her industry as she is entitled to share equally in acquisitions by the husband and each spouse owns one-half of all that is earned or gained, even though one earned or gained more than the other or actually earned or gained nothing. Kratovil and Werner, at § 526

There are eight states in which husband and wife may hold community property. In two of these states, Nevada and Texas, the husband may convey community property without the wife's signature, except if the conveyed property is the home. In other states, the wife must join in the deed. Thus, if the candidate wishes to secure a loan with community property, the lender may insist on the spouse's signature on the security instrument.

7/ If a candidate is a tenant in common with others, the Bank may, in satisfaction of a debt secured by the property, become a tenant in common with the other owners.

c. Banks may seek spouse's signature on a promissory note.

Apart from having the spouse act as part of the loan transaction through the vehicle of a security instrument, the bank may routinely ask that the spouse's signature appear on the promissory note as well. This makes the spouse personally liable for the payment of the debt, and not merely subject to the loss of the secured property in the event of default. Thus, the bank will often ask for the spouse's signature as a co-maker, jointly and severally liable on the note. Moreover, as to property jointly owned by the husband and wife, the signature of the candidate's spouse on the promissory note will itself serve to enable the bank to seek that spouse's half of a piece of jointly owned property (not the secured property) as well as that half owned by the candidate in the event of default. Finally, the bank realizes that, in the event of the candidate, spouse's death, much of the property of the candidate will pass to the spouse by will, by dower or curtesy right, or by the right to take the intestate share. The bank will still want to be able to draw on that property which, at one time, belonged to the candidate. 8/

d. Resolution of problems presented by the application of 2 U.S.C. § 431(8)(B)(vii)(I) and 11 C.F.R. § 100.7.

In all of the foregoing situations, the signature of the spouse creates an encumbrance upon that spouse's property rights, either to have the spouse's interest in the jointly-owned property subject to forfeiture or to have his or her personal assets subject to liability on the note. It is arguable that this amounts to a pledging of assets for the benefit of a campaign and a resultant contribution by the spouse to the candidate. However, there are some situations where such a conclusion would be unwarranted, in the General Counsel's view. For example, if a candidate obtained a $100,000 loan from a bank for the benefit of the campaign, the bank secured the loan with a deed of trust on the $200,000 home owned by the candidate and the candidate's spouse in joint tenancy, and the spouse co-signed the security instrument and the note, there would be little, if any, basis for arguing

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8/ Of course, the incurring of a personal obligation by a candidate spouse on a promissory note could result, in some instances, in the bank obtaining payment of the debt by going against the personal property of the spouse. However, where a specific price of property is used as collateral, a bank must ordinarily seek satisfaction by obtaining it. Thus, if the bank requires the signature of the spouse on the promissory note, the Commission could consider the signature as merely incident to the spouses required signature on the security instrument.

that the spouse had made a contribution under these circumstances because only $100,000 went to the campaign and the candidate's own obligation on the note and interest in the property securing the note was sufficient to insure repayment of this amount. Accordingly, the General Counsel recommends that the Commission promulgate regulations to allow a candidate to more easily alienate his or her share of property without the risk of a violation of § 441a by the spouse and by the recipient campaign committee. Such regulations would state that if a candidate's share in collateral or in listed property serving as a basis for the loan equaled or exceeded the amount of loan proceeds going to the candidate's committee, such proceeds would be considered as coming from the candidate and not from the spouse who may have co-signed on the note or security instrument. 9/

In order to implement this policy, the instructions on the back of Schedule C should probably be amended so that it is made clear to the principal campaign committee exactly what details are required in reporting the terms of such candidate loans. In addition to requiring the name of the original lender, the interest rate, the fact that the loan was secured, and the due date or amortization schedule, the instructions should require a brief description of the collateral used, e.g., a parcel of land, the owners of the collateral or the property used as a basis for the loan, the type of ownership (e.g., tenants by the entireties, tenants in common, etc.), the percentage of such property owned by each owner, the value of the property, the names of all signatories on both the

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9/ Admittedly, the statute itself, at 2 U.S.C. § 431(8)(B)(vii)(I), states that a loan by a lending institution "shall be considered a loan by each endorser or guarantor" (emphasis added), and § 431(8)(A)(i) states that a loan is a contribution. However, the General Counsel believes that the Commission could promulgate a regulation defining "personal funds" which would construe the statute in a way allowing the result contemplated above.

It is established judicial precedent that "the interpretation given the statute by the officers or agency charged with its administration" is given "great deference." Udall v. Tallman, 380 U.S. 1, 16 (1965). See also National Conservative Political Action Committee v. Federal Election Commission, 2 Fed. Elec. Camp. Fin. Guide at 50,915, n. 7 (1980). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by [those] charged with the responsibility of setting its machinery in motion; of making the parts work efficiently and smoothly while they are yet untried and new.'" Udall, supra, at 16, citing Power Reactor Developing Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961). Moreover, the Commission's regulations are subject to approval by both houses of Congress, see 2 U.S.C. § 438(d), and thus should be accorded even greater deference.

security instrument and the commercial note, and the capacity in which each signatory signed either agreement. 10/

The General Counsel notes that there are several matters that the Reports Analysis Division either has referred or wishes to refer to the Office of General Counsel dealing with the issue of loans based on property jointly owned by spouses. These include the Billy Tauzin Committee (Log # D-816), the Peter Windrem for Congress Committee (Log # 81G-1), Friends of Congressman Dougherty (Log # 80G-7, D-826), and some other matters which we understand have not yet been referred. The General Counsel intends to analyze these referral items along the lines set forth in this memorandum to determine whether any action is warranted prior to revision of the regulations as outlined in this memorandum.

III. SUMMARY

The analysis above presents several issues concerning how the Commission should treat the situations in which a candidate gives property which is jointly owned with a spouse to his or her campaign or obtains loan proceeds using the signature of the spouse. To deal with these issues, the General Counsel recommends revision of the regulations dealing with "personal funds" to clarify when the drawing on property should be deemed to result in a contribution by the spouse. It is recommended that the discrete terms characterizing "personal funds" be defined or clarified and that the disparity in the treatment of candidates in different states be eliminated. It is also recommended that the Commission promulgate regulations stating that, if a candidate's share in collateral or in listed property serving as a basis for the loan equals or exceeds the amount of loan proceeds going to the committee, no contribution will be deemed to have resulted from the spouse. Furthermore, it is recommended that the instructions on the back of Schedule C be amended in order to enable the Commission to have the necessary information to determine whether or not there is compliance with this regulation. To accomplish the foregoing, the Office of General Counsel should be authorized to prepare a notice of proposed rulemaking for Commission approval.

10/ Presently the forms require a listing of all guarantors and endorsers. Under normal commercial usage, a committee may reasonably interpret this as requiring it to list only those who have signed as guarantors or endorsers on the commercial note. However, as 11 C.F.R. § 100.7(a)(1) provides that a "loan" includes "a guarantee, endorsement, and any other form of security," the form should require the listing of co-makers and those providing security by a signature on a security instrument.

IV. RECOMMENDATIONS

1. Authorize the General Counsel to prepare a notice of proposed rulemaking.

2. Take no further action in compliance matters against candidates, spouses, or their committees where a candidate has not obtained a loan in excess of his or her interest in a piece of property used as collateral or as a basis for the loan.

Explanation and Justification for Regulations on Candidate's Use of Property in which Spouse has an Interest

Effective Date: July 1, 1983

Federal Register notice: 48 FR 19020
(April 27, 1983)

FEDERAL ELECTION COMMISSION

11 CFR Parts 100, 110, and 9003

Candidate's Use of Property in Which Spouse Has an Interest

AGENCY: Federal Election Commission.

ACTION: Final rule; Transmittal of Regulations to Congress.

SUMMARY: The Commission has transmitted regulations to Congress to govern the application of the Federal Election Campaign Act of 1971, as amended (2 U.S.C. 431 *et seq.*), to a federal candidate's use of property in which his or her spouse has an interest. The regulations address the definitions of "contribution" and of "personal funds" of a candidate.

2 U.S.C. 438(d) requires that any rule or regulation proposed by the Commission to implement Chapter 14 of Title 2, United States Code be transmitted to the Speaker of the House and the President of the Senate prior to final promulgation. If neither House of Congress disapproves the regulation within 30 legislative days after its transmittal, the Commission may finally prescribe the regulations in question. The following regulations were transmitted to Congress on April 22, 1983.

EFFECTIVE DATE: Further action, including the announcement of an effective date will be taken after the regulations have been before Congress 30 legislative days in accordance with 2 U.S.C. 438(d).

FOR FURTHER INFORMATION CONTACT: Susan E. Propper, Assistant General Counsel, 1325 K Street NW., Washington, D.C. 20463, (202) 523-4143 or (800) 424-9530.

SUPPLEMENTARY INFORMATION: On July 20, 1982, the Commission published a Notice of Proposed Rulemaking amending and adding to the regulations pertaining to a candidate's use of property in which the spouse has an interest. (47 FR 31390, July 20, 1982) No public comments were received during the thirty day comment period.

Explanation and Justification of Regulations Concerning a Candidate's Use of Property in Which Spouse has Interest

The revisions primarily address two situations involving loans obtained by the candidate for use in a campaign. In the first situation, the loan is acquired on the basis of property owned jointly with the candidate's spouse. In the second situation, the signature of the spouse is required on the loan instrument to waive some statutory non-ownership interest such as dower or curtesy. A third situation covered by these revisions involves the drawing of funds from assets such as jointly held bank accounts or the proceeds from liquidating jointly held stock.

The revisions carve out a narrow area to allow for the use of property in which the candidate's spouse has an interest or

to allow for spousal signature on a loan without violating the contribution limits. This is implemented in 11 CFR 100.7(a)(1)(i) by adding a new subsection (D) which states that a signatory spouse will not be considered a contributor if the value of the candidate's share of the property used as collateral or as a basis for the loan equals or exceeds the amount of the loan to be used for the candidate's campaign. In addition, the standard set out in subsection (D) is applied as an exception to those parts of §§ 100.7(b)(11) and 100.8(b)(12) which classify endorsers and guarantors as contributors.

The revisions also clarify the definition of "personal funds" of a candidate as set out in §§ 110.10(b) and 9003.2(c)(3). By changing the term "right of beneficial enjoyment" to "equitable interest" the Commission is using a term which more specifically applies to an ownership or pecuniary interest that is not one of legal title. By reordering the criteria defining "personal funds," it is made clear that the criteria of "legal and rightful title" and "equitable interest" must each be linked with "legal right of access to or control over." The latter criterion is the standard set out in the legislative history of the 1974 Amendments to 18 U.S.C. 608 pertaining to the limitations of expenditures of personal funds by a candidate, also cited in *Buckley v. Valeo*, 424 U.S. 1, 51, 52, n.57.

Finally, the revisions add a subsection (3) to the "personal funds" definition in 11 CFR 110.10(b) and a subsection (iii) to the "personal funds" definition in § 9003.2(c)(3) in order to address the concept of "personal funds" in joint ownership situations. These new provisions permit a candidate to use the full value of his or her share of assets jointly owned with a spouse without the spouse being considered a contributor. If there is no written instrument indicating the candidate's ownership share of the property, the candidate will be considered to own one-half of the value of the property under these rules. This 50% rule would apply in community property states, as well as in non-community property states.

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Admin

STEPTOE & JOHNSON LLP
ATTORNEYS AT LAW

1330 Connecticut Avenue, NW
Washington, DC 20036-1795

Telephone 202.429.3000
Facsimile 202.429.3902
www.steptoe.com

John J. Duffy
202.429.8020
jduffy@steptoe.com

January 2, 2002

Via Hand Delivery

Mr. David Mason
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Bauer for President 2000, Inc.

Dear Mr. Mason

Bauer for President 2000, Inc. (the "Committee"), by its attorneys, hereby submits its response to the Preliminary Report of the Audit Division.

II. Audit Findings And Recommendations – Non-Repayment Matters

A. Apparent Impermissible Contributions

1. Donor List

The Committee disagrees with the Audit Staff's conclusion that the list exchange between the Campaign for Working Families PAC ("CWF") and the Committee was not of "equal value" according to accepted industry practice, at the time the exchange agreement was entered into by the parties. Indeed, the Audit Staff makes no effort to determine the "value" of the "future" use of the names expected to be generated by the Committee at the time the exchange agreement was made. Instead, its analysis rests on a comparison of CWF's "actual use" of the Committee's list versus the Committee's actual use of CWF's list. What CWF chose to do during the term of the agreement, however, does not establish the value of its right to the "future use" of the potential Committee's list, at the time of the exchange agreement, which is the relevant time for the valuation of the exchange. The Committee submits that, judged by

industry standards, CWF's right to use the potentially very large numbers of new names that the parties anticipated that the Committee would generate more than equaled the value of the right to use the names CWF proposed to provide to the Committee. Moreover, use of the list by the Committee added value to the CWF list.

2. **Rental of Donor List**

The Committee objects to the conclusion that the Committee's sale of its list to the Lukens Cook Company ("Lukens") resulted in a contribution-in-kind. The Audit Staff's conclusion that the Committee's list was not "developed for its own use," but rather as a fundraising item, is unsupportable in light of Mr. Bauer's active candidacy in the 2000 Presidential election. Moreover, the Audit Staff has misconstrued the arrangement between Lukens and the Committee with respect to the rental of names. In any event, the Audit Staff's suggestion that names obtained initially from third parties do not qualify "as developed" by the Committee is contrary to industry practice, a practice that has not been questioned previously by the Commission.

3. **Purchase of Assets**

The Committee disputes this conclusion. The Committee has not yet located additional documentation, although efforts to do so have been made and will continue to be made. The material will be supplied promptly upon receipt.

4. **Personal Loan**

The Committee strongly objects to this conclusion, which is deficient in both fact and law. The Audit Staff contends that Mrs. Bauer, the candidate's wife, made an illegal contribution, because Mr. Bauer, the candidate, loaned the Committee $45,000, using a check drawn on a joint checking account, entitled "Gary L. Bauer and Carol Bauer." Since the account had only $63,128 in unspent funds, the Audit Staff reasoned that "the candidate's equitable share was $31,564" and that the difference between the amount of the loan and the candidate's equitable share represented a contribution from Mrs. Bauer.

Section 110.10(b)(1)(i) provides that personal funds means any assets which, under applicable State law, the candidate had legal right to access or control and to which the candidate had legal and rightful title. This describes exactly Mr. Bauer's interest in the funds in the bank account on which the loan check was drawn. Under State law, Mr. Bauer had a legal right to all of the funds in the account.

In our view, Section 110.10(b)(1)(i) governs this transaction, but even under Section 110.10(b)(3), on which the Audit Staff appears to rely, the result would be the same. Mr. Bauer also had a right to the full amount of assets under the agreement with the bank governing the account, the "instrument of ownership."

Finally, Mr. Bauer's act – drawing a check on a joint account – cannot cause Mrs. Bauer to violate the contribution limitation. The Federal Election Campaign Act of 1971, as amended, and the Fifth Amendment to the United States Constitution, require an act by the party charged with a violation. Mrs. Bauer did nothing. Indeed, the Commission has itself required the signature of a participant in a "joint" account before a contribution can be attributed to him/her. See 11 CFR § 110.1(k)(1).

B. Misstatement Of Financial Activity

On December 31, 2001, the Committee filed amended reports as requested.

C. Itemization Of Receipts

On December 31, 2001, the Committee filed amended reports as requested.

D. Itemization Of Disbursements

On December 31, 2001, the Committee filed amended reports as requested.

E. Apparent Prohibited Contributions Resulting From Extensions Of Credit By Commercial Vendors

The Committee disputes the contention that it received an in-kind contribution from any of the listed vendors or that it received credit other than in the ordinary course of business. The

Committee has sought to obtain the documentation indicated by the Commission, but has not yet been able to do so. The Committee will submit such documentation promptly upon receipt. The Committee notes, however, that the Audit Staff's conclusion that the extensions of credit of the nature noted here are not in the ordinary course of these businesses conflicts with thirty-years of information in the Commission's files concerning Presidential committees and vendors.

III. Audit Findings And Recommendations – Amounts Due To The U.S. Treasury

B. Stale-Dated Committee Checks

On December 31, 2001, the Committee submitted to the Commission a check in the amount of $3,784 with respect to the stale-dated checks.

If you have any questions concerning this matter, please don't hesitate to contact the undersigned.

cc: Mr. Robert J. Costa
Ms. Brenda Wheeler
Mr. Thomas J. Nurthen
Mr. Timothy C. Beall