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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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December 10, 2002

MEMORANDUM

AGENDA ITEM

For Meeting of: 12-12-02

SUBMITTED LATE

TO: The Commissioners

THROUGH: James A. Pehrkon
Staff Director

Robert J. Costa
Deputy Staff Director

FROM: Thomas J. Nurthen
Audit Manager

SUBJECT: Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee,
Inc. final audit report

The Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc. final audit report was circulated to the Commission on December 4, 2002 (Agenda Document No. 02-92). On December 5, 2002, the legal analysis and narrative portion of the response were circulated (Agenda Document No. 02-92-A). I regret to inform you that the narrative portion of the response circulated was to the exit conference and not the preliminary audit report.

Attached please find the correct narrative response to the preliminary audit report. I apologize for any inconvenience this may have caused.

If you have any questions, please contact Tom Nurthen at extension 1200.

Attachment:

Narrative portion of the response to the preliminary audit report



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2002 AUG 29 P 5: 16

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August 29, 2002

Benjamin L. Ginsberg
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BY HAND

Mr. Thomas J. Nurthen
Audit Division
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Response of Bush-Cheney 2000, Inc. & Bush-Cheney Compliance Committee, Inc.
to the Preliminary Audit Report of the Audit Division

Dear Mr. Nurthen:

Attached is the response of Bush-Cheney 2000, Inc. and Bush-Cheney Compliance Committee, Inc. to the Preliminary Audit Report of the Audit Division. We appreciate the opportunity to present these factual and legal arguments and supporting attachments in response to the Audit Division's findings and recommendations.

Please do not hesitate to contact us with any questions.

Respectfully submitted,

A large, handwritten signature in black ink, appearing to be 'Benjamin L. Ginsberg' and 'William J. McGinley' written together.

Benjamin L. Ginsberg
William J. McGinley

Attachments

**Response of
Bush-Cheney 2000, Inc. and Bush-Cheney Compliance Committee, Inc.
to the
Preliminary Audit Report of the Audit Division**

I. INTRODUCTION.

This response is filed on behalf of Bush-Cheney 2000, Inc ("BC2000") and Bush-Cheney Compliance Committee, Inc. ("BCCC") to the Preliminary Audit Report ("PAR") of the Federal Election Commission's ("Commission") Audit Division. The Committees' response follows the numerical order of the Audit Staff's findings and recommendations as set forth in the PAR.

II. RESPONSE TO FINDINGS AND RECOMMENDATIONS.

A. AUDIT STAFF ALLEGATIONS.

1. Bypassing the Required Formal Rulemaking Process, the Audit Staff Attempts to Impose a New and Incorrect Standard for Allocating Phone Bank Costs.

According to the existing regulations, the costs of a phone bank are to be allocated according to, either a "benefit reasonably expected to be derived" standard or a "time/space" allocation. No more precise guidance exists in the law or Commission precedents.

In 2000, fifteen state parties reviewed this "shorthand" regulatory standard that leaves much to the judgment of the entity paying for the phone bank. They determined, based on the actual words of the script involved, that all their candidates -- federal, state and local -- from the top to the bottom of the Republican ticket would benefit. They also determined, out of an abundance of caution to avoid making an in-kind contribution, that George W. Bush, twice mentioned fleetingly in his role as the Party's titular head as the top of its ticket, should pay 25% of the cost in each state. They made this decision despite the fact that he is mentioned only in the context of being the head

of the "great Republican team" and the fact that neither his own candidacy nor the office he is seeking is ever mentioned.

Now comes the Audit Staff in its Findings and Recommendations with an attempt to impose arbitrarily a new numerical standard for phone bank allocations that can, as a matter of law, only come through the formal rulemaking process. On top of that, the standard the Audit Staff seeks to impose would be inaccurate and incorrect. And in any event, there certainly was no notice before the activity at issue began that any such standard would be imposed.

As for its arbitrary determination that BC2000 should have paid 50% of the phone bank's cost, the Audit Staff itself concedes that there is no statutory authority, regulatory authority, Advisory Opinions, matters under review or any other authority upon which to base its subjective conclusion. When asked specifically for "any matters under review, advisory opinions, regulations or potential rulemakings" that would provide any authority for requiring a 50-50 allocation rather than a 75-25 allocation, the Audit Staff responded that it "*did not believe* that there were any such matters being considered, specific Advisory Opinions or potential rulemaking relative to this matter." Preliminary Audit Report ("PAR") at 5 (emphasis added). Lacking any legal support, this Finding that amount allocated to BC2000 for this state party get-out-the-vote ("GOTV") telephone script was incorrect must be rejected.

In the PAR, the Audit Staff can cite only to 11 C.F.R. 106.1(a)(1), a general rule on the allocation of expenses between candidates, although the script in question was paid for by state parties and supports a state party and its entire slate of federal, state and local candidates.¹ The actual words of the regulation provide only the vague and broad "according to the benefit reasonably expected to be derived" and "in the case of a publication or broadcast communication

¹ While no regulation squarely addresses this issue, 11 C.F.R. 106.5 governing the allocation of federal and non-federal expenses by party committees would appear more applicable to this situation. *See below.*

[which this telephone script by a state party is not] ... the proportion of space or time devoted to each candidate as compared to the total space or time devoted to all candidates.”²

The bottom line is that the PAR is based on nothing more than the staff's subjective judgment. The Audit Staff's finding must be rejected given clear Commission precedent that changes to a regulation's meaning and enforcement policy such as imposing an allocation formula must be done only through the rulemaking process, and not on an ad hoc basis in the Presidential audit process. Secondly, even if the Commission concluded the Audit Staff had the authority to amend a regulation, its analysis of the script's allocation is incorrect based on the words of the script itself.

- a. Commission precedents require a formal rulemaking for the promulgation of a rule such as that sought by the Audit Staff.

The Commission has previously dealt with the imposition of the staff's subjective judgment for legal authority, and correctly followed the direction of the statute, stating: “Rulemaking is not simply the preferred method for filling in gaps in the FECA. It is the required method.” Statement of Reasons of Commissioners Wold, Elliot, Mason and Sandstrom, On the Federal Election Commission Audits of the 1996 Presidential Candidates, at 3 (“Statement of Reasons”); see also 2 U.S.C. 437f(b) (“Any rule of law which is not stated in this Act or chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to the procedures established in section 438(d) of this title.”).

In the 1996 audits of both the Republican and Democratic presidential campaigns, the Audit Staff also sought to bypass the Commission's rulemaking process and impose its own interpretation of a “shorthand expression” in the Regulations. As a majority of Commissioners stated in rejecting that approach, a phrase “cannot be used as a shorthand expression of the Commission's

² As shown below, use of the time/space method supports the 75/25 allocation and not the Audit Staff's 50/50 determination.

interpretation of the statutory standard because the advisory opinions from which the phrase is drawn do not convey a clear and consistent application of the statutory standard, and the phrase, standing alone, is both too vague and too broad to have a sufficiently definite meaning.” Statement of Reasons at 2.

In this instance, there is even less authority since, as the Audit Staff admits, there is not even an Advisory Opinion on how to interpret the regulations’ “shorthand expressions” for allocating telephone scripts. PAR at 5; CF 11 C.F.R. 106.4(e) and (g) (setting forth precise standards for allocating poll results); 11 C.F.R. 114.9(e) (payment for use of corporate aircraft). Thus, the Audit Staff asks the Commission to do precisely what 2 U.S.C. 437f(b) states it cannot. *See also United States Defense Committee v. FEC*, 861 F. 2d 765 (2d Cir. 1988)(citing 2 U.S.C. 438(d)) (“A rule of law may initially be proposed by the Commission only as a rule or regulation pursuant to very elaborate procedures involving submission of the rule or regulation to the Congress.”)

It is undeniably true, given the Audit Staff’s admission that there has never been any Commission consideration of a precise phone bank allocation formula rule, that the regulated community had no notice and no opportunity to comment on this “standard” the Audit Staff introduces here.

It is well-settled that only a formal rule or regulation that goes through the rulemaking process can be relied upon as firm Commission precedent. Indeed, the Commission has long held that even formal Advisory Opinions can be relied upon authoritatively only by the parties involved in the exact fact pattern discussed in the opinion; other parties can use it only as informal guidance in other factual situations. In the same vein, the Commission has found that the staff cannot create ad hoc standards for a repayment determination. Statement of Reasons at 1-4. At the least, if the Commission decided to change course and adopt the Audit Staff’s ad hoc standard here, it would first have to provide all campaigns, party committees and other groups with sufficient notice and

explanation of the departure. See *Bush-Quayle '92 Primary Committee v. FEC*, 104 F.3d 448, 453 (U.S. App. D.C. 1997) (“An agency interpretation that would otherwise be permissible is, nevertheless, prohibited when the agency has failed to explain its departure from prior precedence. . . . We have held, ‘an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored, and if an agency glosses over or swerves from prior precedents without discussion it may cross the line from the tolerably terse to the intolerably mute.’”) (citations omitted).

In the instant case, the Audit Staff has failed to cite any Commission precedent for its new ad hoc standard for allocating the costs of the phone bank script in the manner it suggests. Allocated phone scripts have been a feature of every Presidential campaign (and most congressional campaigns) since the Federal Election Campaign Act went into effect. Never before has the Commission (or even staff) set the standard the Audit Staff does here. As such, BC2000 did not have any notice prior to the 2000 general election that the Audit Staff, or the Commission, would employ this standard as a basis for seeking a repayment. Fundamental fairness and the Commission’s precedents dictate that such a formula cannot be introduced and adopted here. The Commission should look to the plain language of the regulations themselves for guidance on this issue. See Statement of Reasons at 2-4.

b. Even if imposed here, the Audit Staff’s determination of the allocation formula is fatally flawed.

Furthermore, the Audit Staff’s arbitrary finding that BC2000 should have paid half the cost is wrong and far from “a natural dictate of the language of the statute itself”, see Statement of Reasons at 3. Neither do the regulations, whether based on 11 C.F.R. 106.1 (“Allocation of expenses between candidates”) or 106.5 (“Allocation of expenses between federal and non-federal activities by party committees”) provide any authority for the Audit Staff. At issue is a GOTV telephone script utilized by fifteen Republican state party committees for which the state parties paid

\$1,495,973 and BC2000 paid \$498,658. This 75-25 allocation is reasonable and supported by both a time/space allocation and the actual wording of the 20-second script.³ The script benefits all the candidates – federal, state and local – on the Republican ticket so that under the “reasonably expected to be derived” standard, a 25% payment by BC2000 is actually more than necessary and was used out of an abundance of caution.

The script’s first paragraph references the impending election, exhorts the listener to take advantage of the opportunity to elect “new leadership”, a term that references all the federal, state and local candidates on the Republican ticket, and states that electing Republicans will “change the tone of government”, a reference to all federal, state and local offices. The first sentence of the second paragraph discusses negative attacks “against our candidates” – an unambiguous reference to federal, state and local candidates on the ticket. The only mention of then-Governor Bush in the first paragraph comes in the last sentence and refers to his role as titular head of the Party leading “our great Republican team”. There is no direct mention of the fact that he is a candidate or the office he is seeking. The second paragraph begins by mentioning the “other side”, a term that refers to the Democrats’ federal, state and local candidates and the political party itself. It discusses

³ The script reads:

Hello, this is _____ calling to remind you Tuesday is election day. This is our chance to make a difference – to send a signal that we want new leadership that trusts people, not government. We can change the tone of government by looking beyond partisanship to get things done. It is the kind of leadership being offered by Governor George W. Bush and our great Republican team.

The other side has been running non-stop negative attacks against our candidates. Please don’t let their tactics succeed. Please get all your family and friends and get them out this coming Tuesday, November 7th, to vote for Governor George W. Bush and all of our great Republican team.

Thank you very much.

negative attacks “against our candidates” – an unambiguous reference to all federal, state and local candidates on the slate -- and asks the listener to reject their negative tactics. The only mention of then-Governor Bush in the script’s last four sentences again comes in the context of being the leader of “all of our great Republican team”. Accordingly, then-Governor Bush is only referred to in the context of urging a vote for him as head of “our great Republican team,” and is only mentioned in two of the script’s ten lines – or 20% of the script while the remaining 80% of the script is devoted to discussing the entire Republican ticket of federal and nonfederal candidates. In terms of sentences, his name appears in two of eight sentences or 25%. In terms of time, the saying of his name would take for less than 20% of the 20-second script.

The plain language of the Commission regulations cited by both BC2000 and the Audit Staff support the 75/25 split as a “reasonable benefit expected to be derived.” Section 106.1(a)(1) cited by the Audit Staff, provides that expenditures, including in-kind contributions made on behalf of more than one candidate, are to be attributed to each candidate according to the benefit reasonably expected to be derived. The attribution is determined by the proportion of the space or time devoted to each candidate as compared to the total space or time devoted to all candidates. Id.; see 55 Fed. Reg. 26058, 26059 (June 26, 1990) (“If the costs of a phone bank are attributable, in whole or in part, to one or more federal candidates as an in-kind contribution, independent expenditure, or coordinated party expenditure, then those costs should be allocated on a similar basis, according to the number of questions or statements devoted to each candidate.”) (emphasis added). Similarly, section 106.5(e) provides that the allocation should be according to the proportion of the time or space devoted. In the case of a phone bank, the ratio is determined by the number of statements devoted to federal candidates or elections as compared to the total number of statements devoted to all federal and nonfederal candidates. Id.; see 55 Fed. Reg. 26058, 26059 (June 26, 1990) (“Committees are to allocate according to the time or space devoted to federal elections as

compared to the total time or space devoted to federal and nonfederal elections in a particular publication or phone bank.”). Accordingly, the allocation of costs for these communications is determined by the number of statements devoted to each candidate or category of candidates and not upon the number of candidates mentioned in the communication. This means that if a phone bank script devotes 80% of its statements to a slate of federal, state and local candidates and the other 20% to a separate candidate, the costs are subject to an 80/20 split and not a 50/50 split because only two candidates were mentioned in the script.

Therefore, under either the “benefit reasonably expected to be derived” or the time-space allocation method set forth by sections 106.1(a)(1) and 106.5(e), the 75/25 split must be deemed reasonable. Approximately 80% of the script is devoted to discussing either the entire Republican ticket or the Democrats. Governor Bush is mentioned only two times, is never the subject alone of a sentence, and is mentioned only in the context as head of the ticket and not expressly as a candidate for President. In fact, since at most only 20% of the script is devoted to then-Governor Bush, BC2000 out of an abundance of caution actually paid more than its allocable share. Under the current guidance, a 75/25 split is thoroughly justified. If the Commission or the Audit Staff wish to define the meaning of the time-space allocation method with the precision imposed here by the Audit Staff, the proper vehicle is a rulemaking proceeding and not the audit process. Accordingly, the Commission must reject the Audit Staff’s finding and affirm the 75/25 split as the proper allocation of the phone bank costs under current law.

2. Aircraft Used.

Of the hundreds of private planes used by BC2000 under 11 C.F.R. 114.9(e), BC2000 agrees with the Audit Division’s finding that seven of these were actually air charter services. Any use of air charter services as opposed to carriers permitted by Commission regulations was inadvertent.

BC2000 concurs that a repayment is necessary. However, in reviewing the PAR, BC2000 must disagree with the total charter cost amount as calculated by the Audit Staff. Specifically, BC2000 believes the Audit Staff did not use the rates as applied throughout the industry. Rather, the Audit Staff indicates that it calculated the amount due for each flight by multiplying the rates published in the *Air Charter Guide, 27th Edition, Winter 2000* (commonly referred to as the "flight time rate") by the number of hours for each trip, from the beginning of the trip to its end. However, this formula does not employ the usual and normal charter rates actually used in the industry, as well as by each company here. Accordingly, the Audit Staff finding of the total amount due by BC2000 is inaccurate.

Air charter companies calculate their total charge for each flight using different hourly rates depending on the actual use of the aircraft. These rates differ depending upon, for example, whether the aircraft is in the air, on the ground, or being stored overnight. BC2000 has collected the charter rate information from the companies involved here, *see* Exhibit A, and calculated the actual cost for each flight based on each company's business' practices and the actual flights used by BC2000, *see* Exhibit B. The amount owed by BC2000 increased in some cases and decreased in others. Since the Audit Staff based its figures on all the charters being in the air for the entire time used by BC2000, the Audit Staff's total charter amount due (\$126,410.75) needs to be revised down to \$61,439.25, the correct amount based upon the actual charter rates provided by the companies under their usual and normal billing practices and the actual use of the planes by BC2000.

Dalton Air Group: The Audit Staff's charter cost is \$2,616.25, which means BC2000 underpaid the flight \$415.25. However, based upon the rates provided by the company, the correct charter cost is \$11,220.00, meaning BC2000 actually underpaid by \$9,019.00.

Executive Charters: The Audit Staff's charter cost is \$2,100.00, which means BC2000 underpaid \$1,761.50. However, based upon the charter rates provided by the company, the correct charter cost is \$2,050.00, meaning BC2000 actually underpaid by \$1,171.50.

Kleiner, Perkins, Caufield & Byers: The Audit Staff's total charter cost for the two flights is \$20,925.00, or a BC2000 underpayment of \$16,681.00. However, based upon the charter rates provided by the company, the correct total charter cost is \$27,450.00, which means BC2000 actually underpaid by \$23,206.

Koury Aviation: The Audit Staff's total charter cost for the two flights is \$37,537.50, which means BC2000 underpaid \$23,281.50. However, based upon the charter rates provided by the company, the correct total charter cost for the two flights is \$19,290.50, which means BC2000 actually underpaid by \$5,034.50.

McRae Aviation: The Audit Staff's total charter cost for the three flights is \$84,150.00, which means BC2000 underpaid \$79,484.00. However, based upon the charter rates provided by the company, the correct total charter cost for the three flights is \$24,250.00, which means BC2000 actually underpaid by \$19,584.00.

Portmans Equipment Company: The Audit Staff's charter cost is \$1,400.00, which means BC2000 underpaid \$834.50. Since Portmans Equipment Company does not maintain a rate sheet, BC2000 agrees with the Audit Staff's calculations for this flight.

Swift Transportation, Inc.: The Audit Staff's charter cost is \$5,400.00, which means BC2000 underpaid \$3,953.00. However, based upon the charter rates provided by the company, the correct charter cost is \$4,331.25, which means BC2000 actually underpaid by \$2,884.25.

Accordingly, BC2000 owes an additional \$61,439.25 for charter planes inadvertently reimbursed at the first class rate. This amount represents the correct total underpayment amount based upon the charter rates provided by each company for the actual flights listed above.

B. INCOME RECEIVED.

1. Interest Income.

BC2000 agrees with the Audit Staff's finding concerning the amount of interest income earned.

2. Other Income.

BC2000 agrees with the Audit Staff's finding concerning the payment from Red October to BC2000 for the use of certain media film footage.

Accordingly, a check in the amount of \$255,003 made payable to U.S. Treasury is attached. (See Exhibit C).

This check equals the amount requested in Recommendation 2 of the PAR for the repayment of the interest and Red October income.

C. MEDIA EXPENDITURES – GARCIA LKS.

BC2000 has located the documentation requested by the Audit Staff to support the \$1,050,000 in transfers from National Media to Garcia LKS ("Garcia") to purchase media time. Specifically, this documentation includes station invoices detailing the time and day of the radio and television spots, evidence of payment for these services, support for Garcia's fees (as a percentage of the buy) and documentation for Garcia's associated expenses:

Station Invoices and Checks: Garcia received invoices from the various television and radio stations which ran BC2000 spots totaling \$1,009,089.78. Of this amount, \$857,728.29 worth of media time was invoiced and checks totaling \$859,850.20 were sent to the media outlets. The invoices also itemize Garcia's fees of \$151,003.73 for purchasing the television and radio spots. Garcia deducted these amounts before sending the checks to the stations. Copies of the invoices and checks are attached hereto as Exhibit D.

Garcia's Out-of-Pocket Expenses: Garcia also incurred out-of-pocket expenses for these services totaling \$30,830.69. (See Exhibit E.)

Refunds: Attached as Exhibit F is documentation supporting the \$2,196.28 in refunds from stations which Garcia has now refunded to BC2000. (See Exhibit G.) Also attached is a letter from Garcia to BC2000 also itemizing a refund of \$7,957.62 for the remaining balance from the transfers. (See Exhibit G).

This documentation supports the transfers from National Media to Garcia for the purpose of purchasing media spots for BC2000.

D. EXPENDITURE LIMITATION: RECOUNT FUND PAYROLL AND OVERHEAD EXPENSES.

At the start of the unprecedented Presidential recount of November 2000, BC2000 faced a decision never before faced by a taxpayer funded Presidential campaign – whether to charge the taxpayers for any costs of the recount period or whether to reflect accurately the focus of virtually all staff members and pay for the entire operation with privately raised funds.

With no Commission authority available for this most unanticipated situation, the campaign decided to avoid any chance taxpayer fund would inadvertently be used. Instead it chose to rely on contributions raised according to Commission rules for funding recounts but limiting the amounts to \$5,000 per person. Given the rapid shutdown of state offices, BC2000 began using non-taxpayer funds on November 11, 2000 for all payroll and overhead costs through December 7, 2000.

Now the Audit Staff, with no precedent to support its decision, has decided that the American taxpayers should reimburse the Bush-Cheney Recount Fund, an entity that raised and spent nearly \$13.8 million and has long ceased active operations. The Audit Staff finds that a repayment of \$382,996 is in order.

The Bush-Cheney Recount Fund does not want the taxpayers' money.

The Audit Staff says the payment from the taxpayers' funds to the Bush-Cheney Recount Fund is required.

This puts the Commission in a rather interesting position.

However, the Commission should find that the repayment is not necessary given that:

- The decision on how to fund the recount was made in a unique and wholly unprecedented situation for which no Commission guidance existed;
- BC2000 tried to complete its wind down in a record setting time so that as many staffers as possible could be sent to work on the recounts going on in various states. BC2000 has already provided the Audit Staff with state office leases showing termination on November 11, and in reality most were shut by November 10, 2000. (See Attachment D to Exit Conference Response);
- BC2000 expedited its wind-down activities and concentrated on the recount so that even staffers who may have cut general election checks at some point and done some wind-down tasks during that time were still focused primarily on recount activities. Assessing 24% (or 10 hours a week) of staffers' time to wind down rather than recount is very wrong and can only be a wild guess by individuals who were not there.
- Any and all staffers who were available were sent to states with recounts.

The Audit Staff does concede that it "cannot be argued that the primary focus of BC2000 was not the recount effort." PAR at 15. Nonetheless, the Audit Staff substitutes its judgment of what it thinks was going on in the place of what BC2000 says its staff was actually doing. In fact, the Audit Staff admits that while it is "lacking any better indicator", PAR at 15, it nonetheless uses hind sight to create a subjective, ad hoc formula that includes an evaluation of travel vouchers to second guess BC2000 reasoned judgment to avoid dipping into the federal treasury to pay for the recount. The "travel voucher test", previously unknown as Commission authority, is employed by

the Audit Staff as more accurate than a determination by those assessing their own staff's use of time. It is difficult to see how requiring a refund of taxpayer money to an entity that has ceased to function and does not want the money can be either correct or in the public's interest. If anything, BC2000 should be praised and not punished for erring on the side of guaranteeing that taxpayer funds were not used on the unqualified campaign expense of underwriting the cost of waging the recount.

Finally, the amount of repayment sought is significant because it demonstrates that the BC2000 decision to not have the taxpayers fund any part of the recount was based on principle, rather than the expediency of not having sufficient funds left in its Presidential account. As the Audit Staff concludes, there are sufficient expenditures by BC2000 that could have been paid by the Bush Cheney Compliance Committee so that under all circumstances BC2000's spending is within the limitation of the Act.

E. STALE DATED CHECKS.

As explained in its response to the Audit Staff's Exit Conference Findings, BC2000 agrees with the Audit Staff's finding of \$7,701 in stale dated checks and attached a check in that amount made payable to the U.S. Treasury to that response.

III. BUSH-CHENEY COMPLIANCE COMMITTEE, INC. RESPONSE TO THE AUDIT STAFF'S FINDINGS AND RECOMMENDATIONS.

A. STALE DATED CHECKS.

As explained in its response to the Exit Conference Findings, BCCC agrees with the Audit Staff's finding of \$33,415 in stale dated checks and attached a check in that amount made payable to the U.S. Treasury to that response.

B. DISCLOSURE OF DEBTS AND OBLIGATIONS.

We are puzzled by the PAR's assertion at page 17 that BCCC did not respond to the Audit Staff's findings concerning this matter in its Exit Conference Response. (See Committees' Exit Conference Response at 6 and Exhibit 1, attached as Exhibit H). Please look again and amend your records accordingly.

In its Exit Conference Response, BCCC also disputed any suggestion that Automated Compliance Services ("ACS") did not follow its normal course of business with BCCC. Such a suggestion is simply not supported by the facts. BCCC provided a memorandum from ACS providing evidence that the alleged extension of credit was in the normal course of business. Moreover, BCCC did not list ACS as a debt owed because BCCC and ACS were involved in extended negotiations during the time period in question – it was unclear whether BCCC owed ACS any payments.

In addition, the requested Schedule Ds were filed electronically for the other two vendors prior to BCCC's response to the Exit Conference Findings. BCCC did not amend its Schedule Ds for ACS because the extension of credit was in the normal course of business as discussed above.