



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
- SECRETARIAT

2000 AUG 18 P 3:54

MEMORANDUM

AGENDA ITEM
For Meeting of: 9-14-00

TO: The Commission

THROUGH: James A. Pehrkonig *JAP*
Staff Director

FROM: Lawrence M. Noble *LN*
General Counsel

Kim Leslie Bright *KL*
Associate General Counsel

Rhonda J. Vosdinger *RJV*
Assistant General Counsel

Delanie DeWitt Painter *DAP*
Attorney

SUBJECT: Buchanan for President, Inc. – Statement of Reasons (LRA # 512)

The Office of General Counsel has prepared the attached draft Statement of Reasons, which concludes that Patrick J. Buchanan and Buchanan for President, Inc.¹ (collectively “the Committee”) must repay a total of \$63,750 to the United States Treasury for matching funds received in excess of the candidate’s entitlement for matched contributions later determined to have been non-matchable.² 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii); Attachment 1.

¹ The Committee was formerly incorporated in the state of Virginia but was terminated on September 1, 1996. However, the Committee’s Statement of Organization and disclosure reports through the July 2000 Quarterly Report list its name as Buchanan for President, Inc.

² The repayment determination set forth in the draft Statement of Reasons is an additional repayment determination based on facts not used as the basis for the previous repayment determination which arose from the 26 U.S.C. § 9038(a) audit of the Committee. See 11 C.F.R. §§ 9038.2(f); 9039.3(b)(4).

This Office notes that litigation between the Committee’s former treasurer and several Buchanan committees including the Committee is currently pending in Fairfax, Virginia. *Mackenzie v. Buchanan for President, Inc. et al.*, No. CL-1999-0185230 (Cir. Ct. Va. filed Dec. 22, 1999). The claims by the various parties in the litigation include breach of contract, negligence and fraud, and all of the parties are seeking monetary damages. However, the litigation should have no effect on this repayment matter. Once a candidate receives notice of the Commission’s repayment determination, the candidate shall give precedence to the repayment over all

The repayment amount results from two recommended repayment determinations: \$62,116 for matching funds related to improper reattributions, and \$1,634 for matched contributions that were later refunded.

On June 16, 1998, the Commission opened an inquiry pursuant to 26 U.S.C. § 9039(b) and 11 C.F.R. § 9039.3 ("9039 inquiry") to determine whether the Committee owed a repayment for matching funds it received for non-matchable contributions. *See* 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). The Commission initiated the 9039 inquiry because the audit of the Committee pursuant to 26 U.S.C. § 9038 indicated that a number of apparently improper reattributions had been submitted for matching. During the 9039 inquiry, this Office sent surveys to contributors to verify contributions and reattributions.

Based on the results of the 9039 inquiry, on July 15, 1999, the Commission determined that the Committee must repay a total of \$63,750 for matching funds received in excess of the candidate's entitlement for matched contributions later determined to have been non-matchable. On October 12, 1999, the Committee submitted a written response to the repayment determination and requested the opportunity to address the Commission in open session. *See* 11 C.F.R. § 9038.2(c)(2)(ii). The oral hearing was held on March 1, 2000. On March 17, 2000, the Committee submitted additional materials.³ Throughout the repayment process, the Committee made a number of requests for documents from the Commission.⁴

In its written response, at the oral hearing and in the additional materials submitted after the oral hearing, the Committee made a number of arguments disputing the repayment determination. The Committee contests the sampling method used to calculate the repayment of \$62,116 for improperly reattributed contributions and argues that sampling is not an appropriate method to calculate the repayment, fails to meet due process requirements, and was not the only feasible method of reviewing the reattributions. The Committee also questions the Commission's calculations and contends that the Commission should seek repayment based on the lower bound of the estimate, 5.88% of the population (9.57% -3.69%), rather than using the midpoint of the estimate. Moreover, the Committee argues that it was improper not to consider the responses of nine contributors that the reattributee gave them money, which the Committee maintains, made the reattributees "equitable owners" of the contributions. The Committee also asserts that it

other outstanding obligations of his or her committee, except for federal taxes. 11 C.F.R. § 9038.2(a)(3). Here, the candidate has already been notified of the Commission's July 15, 1999 repayment determination. Moreover, repayments may be made from the personal funds of the candidate without regard for the \$50,000 limitation of 11 C.F.R. § 9035.2, contributions and federal funds in the Committee's accounts and any additional funds raised subject to the limitations and prohibitions of the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455. 11 C.F.R. § 9038.2(a)(4); *see* 11 C.F.R. § 9038.2(d).

³ The Commission granted the Committee an extension of time from March 8, 2000 until March 17, 2000 to submit the additional documentation.

⁴ The Audit staff and Data Division assisted this Office in locating and preparing documents responsive to the Committee's numerous requests.

cannot effectively challenge the repayment determination because this Office provided only the survey responses from contributors considered to be errors but no information concerning any additional interviews with the contributors. The Committee also challenges five specific sample items considered to be improper reattributions based on its interpretation of the survey responses.⁵ Finally, the Committee questions the calculation of the repayment of \$1,634 for refunded contributions.

Based on this Office's review of the Committee's written response, the arguments presented at the oral hearing and the additional materials submitted after the oral hearing, this Office recommends that the Commission determine that Patrick J. Buchanan and Buchanan for President, Inc. must repay \$62,116 for matching funds related to improper reattributions and \$1,634 for matched contributions that were later refunded. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). The Committee has failed to demonstrate that no repayment, or a lesser repayment is required. 11 C.F.R. § 9038.2(c)(2). The contributions do not appear to be drawn on joint accounts; thus, the reattributions are not matchable under 11 C.F.R. § 9034.2(c)(1)(ii). Moreover, the Committee's reliance on the "equitable ownership" language at 11 C.F.R. § 9034.2(c)(2) is unavailing because that provision only applies to the matching fund requirements for contributions drawn on trust or escrow accounts; however, there is no indication, other than the Committee's unsupported and untimely assertions, that any of the checks at issue in this matter were drawn on trust or escrow accounts. See 11 C.F.R. § 9034.2(c)(2).

The Committee has also failed to demonstrate that the use of sampling was inappropriate or that the sampling technique was not valid. The use of statistical sampling to project certain components of a large universe is an appropriate technique to determine repayments to the government and was necessary in this inquiry because verification of each of the 7,220 matched contributions related to reattributions in the population would be pragmatically impossible. Moreover, the dollar unit sampling method which the Commission has used in its review of matching fund submissions since 1980, and which was used to calculate this repayment, is valid and reliable. See 11 C.F.R. § 9036.4(b). Further, it was consistent with Commission policy to calculate the repayment amount using the mid-point of the sample error range (9.57% ±3.69%) rather than the lower end of the estimate.

In addition, the Commission's repayment procedures protected the Committee's due process rights. The Committee received ample notice of the Commission's actions, and took advantage of the opportunity to seek administrative review of the repayment determination by submitting written materials and making an oral presentation before the Commission. 11 C.F.R. § 9038.2(c)(2). Moreover, the Committee had sufficient information to challenge both the sampling technique and the treatment of specific sample items as errors. Indeed, the analysis of the sample and the contributor responses to the questionnaire was structured to err, if at all, in the Committee's favor. Further, each of the five specific sample items the Committee challenges was

⁵ At the oral hearing and in the additional materials submitted following the oral hearing, the Committee makes several arguments regarding the repayment of \$62,116 for improperly reattributed contributions that it did not raise in its written response to the repayment determination and which were, therefore, waived. See 11 C.F.R. § 9038.2(c)(2)(i).

non-matchable because the contributor and the reattributee did not have a joint account, see 11 C.F.R. § 9034.2(c)(1), and the Committee has failed to demonstrate that any of them were properly reattributed or matchable.

Finally, the repayment determination of \$1,634, for matching funds based on contributions that were subsequently refunded, must be repaid because refunded contributions are not matchable. See 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii)(non-matchable contributions are subject to repayment); see also 11 C.F.R. §§ 9036.1(b)(6), 9036.2(b)(1)(iv) (committees must submit a list of all refunds with their threshold submission and with subsequent matching fund submissions). The total amount of matching funds approved for the refunded contributions was \$1,634 ($5 \times \$250 \times .928$) + ($2 \times \$250 \times .948$). The repayment calculation used the amount of matching funds actually paid for the refunded contributions, as determined by the error rates applicable to the submission of those contributions for matching, is consistent with the Commission's calculation of similar repayments in other matters. See Memorandum from Lawrence M. Noble to the Commission dated July 8, 1999, "Alexander for President, Inc., Buchanan for President, Inc., Clinton/Gore '96 Primary Committee, Inc.: Matching Fund Error Rates (LRA # 559)" at 1-3 and 8-9.

RECOMMENDATIONS

The Office of General Counsel recommends that the Commission:

1. Determine that Patrick J. Buchanan and Buchanan for President, Inc., must repay \$62,116 within 30 days to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(1) and 11 C.F.R. § 9038.2(b)(1)(iii) for matching funds related to improper reattributions;
2. Determine that Patrick J. Buchanan and Buchanan for President, Inc., must repay \$1,634 within 30 days to the United States Treasury pursuant to 26 U.S.C. § 9038(b)(1) and 11 C.F.R. § 9038.2(b)(1)(iii) for matched contributions that were later refunded;
3. Approve the attached Statement of Reasons; and
4. Approve the appropriate letters.

Attachment

Draft Statement of Reasons (with Attachments A-Z)

1 **BEFORE THE FEDERAL ELECTION COMMISSION**
2

In the Matter of)

Patrick J. Buchanan and)
Buchanan for President, Inc.)

) LRA # 512
)
)

3
4 **STATEMENT OF REASONS**

5 **I. INTRODUCTION**

6 On , 2000, the Federal Election Commission ("the Commission") determined
7 that Patrick J. Buchanan and Buchanan for President, Inc. (collectively "the Committee") must
8 repay a total of \$63,750 to the United States Treasury for matching funds received in excess of
9 the candidate's entitlement for matched contributions later determined to have been non-
10 matchable. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). This repayment arose from a
11 Commission inquiry under 26 U.S.C. § 9039(b) and 11 C.F.R. § 9039.3 ("the 9039 inquiry").
12 The Commission's repayment results from Commission determinations that the Committee must
13 repay: \$62,116 for matching funds related to improper reattributions, and \$1,634 for matched
14 contributions that were later refunded. The Committee is ordered to repay \$63,750 to the United
15 States Treasury within thirty (30) calendar days after service of this determination. 11 C.F.R.
16 §§ 9038.2(c)(3) and (d)(2). This Statement of Reasons sets forth the legal and factual basis for
17 the Commission's repayment determination upon administrative review. *See* 26 U.S.C.
18 § 9038(b)(1), 11 C.F.R. §§ 9038.2(c)(3) and (f), 9039.3(a)(2) and (b)(4).

19 **II. INVESTIGATION AND REPAYMENT DETERMINATION**
20

21 Patrick J. Buchanan was a candidate for the Republican Party presidential nomination in
22 the 1996 primary elections. The Committee registered with the Commission on February 16,
23 1995. On May 31, 1995, the Commission determined that Mr. Buchanan was eligible to receive

1 matching funds under the Presidential Primary Matching Payment Account Act, 26 U.S.C.
2 §§ 9031-9042 ("Matching Payment Act"). The Committee received \$10,983,475 in matching
3 fund payments from the United States Treasury.

4 During the Commission's audit of the Committee pursuant to 26 U.S.C. § 9038, the
5 Commission conducted a sample review of the Committee's matched contributions and found that
6 a number of contributions that were apparently improperly reattributed had been submitted for
7 matching. These included reattributions that did not appear to be between individuals with joint
8 accounts, reattributions to numerous individuals, reattributions of the entire amount of
9 contribution checks and possible reattributions to minors. Specifically, the Commission identified
10 7,220 matched contributions from all contributors who were associated with any reattribution
11 submitted for matching. From this universe, the Commission drew a random sample of 324
12 items.¹ The Commission reviewed the sample items and treated reattributions as improper if they
13 were made to an individual or individuals with a different surname from the original contributor or
14 who had the same surname but did not appear to be the contributor's spouse. See Attachment Q
15 at 3. Forty-seven of these sample items appeared to have been improperly reattributed and thus,
16 non-matchable.

17 In addition, the Commission's audit revealed reattribution documents which generally
18 stated that the reattributee "maintain[s] equitable ownership of the account" from which the
19 original contribution was drawn.² See Attachment B at 18. Moreover, it appeared that the

¹ Originally, the sample size was 325 items; however, as discussed *infra* at note 7, one item was subsequently deleted from the sample because it was refunded on May 10, 1999.

² However, thirteen of the contributors associated with the 47 sample items that appeared to be non-matchable did not use the "equitable ownership" language in one or more of their reattribution statements. It was not clear why the reattribution statements use the term "equitable ownership," which appears in the regulations governing matchability of contributions drawn on an escrow or trust account. 11 C.F.R. § 9034.2(c)(2).

1 Committee prepared the reattribution forms and sent them to the contributors with a form cover
2 letter explaining that a maximum of \$250 is matchable for each contribution, and suggesting that
3 if their "contribution can be partially attributed to your spouse, or other member of your family,
4 the Committee can submit it for additional matching funds," apparently to maximize matchable
5 contributions. See Attachment B at 19.

6 On June 16, 1998, the Commission opened the inquiry pursuant to 26 U.S.C. § 9039(b)
7 and 11 C.F.R. § 9039.3 to determine whether any contributions to the Committee were
8 improperly reattributed and whether the Committee owed a repayment for matching funds it
9 received for non-matchable contributions. See 26 U.S.C. § 9038(b)(1); 11 C.F.R.
10 § 9038.2(b)(1)(iii); Attachment A. To verify the contributions and reattributions, the Commission
11 surveyed contributors who had reattributed all or a portion of their contributions, questioning
12 whether the reattributees "had the right to withdraw funds from any of your bank accounts."³
13 Attachment B at 15-17. Follow-up letters and telephone calls were made to contributors who did
14 not respond to the questionnaire or who returned only a partial response.

15 The Commission received responses for 39 of the 47 sample items.⁴ Based on the
16 responses, eight of the sample items appear to have been matchable, and 31 of the sample items
17 should not have been matched and are considered "errors." The Commission did not require a

³ In addition, the questionnaire asked the contributors to verify the amounts and dates of their contributions, state whether the contribution checks were drawn on an escrow or trust account, verify the amounts, dates and name(s) of the reattributee(s) for each reattribution, provide the current mailing address for each reattributee, and indicate whether the reattributee gave the contributor any money to make the contribution or reattribution. *Id.*

⁴ The Commission did not obtain information concerning the remaining eight sample items because two were related to contributors who are now deceased, and six sample items are associated with four contributors who refused to respond completely to the survey.

1 repayment for sample items for which there was no response or for which there was an inadequate
2 response to the questionnaire.

3 Based on the results of the 9039 inquiry, on July 15, 1999, the Commission determined —
4 that Mr. Buchanan and the Committee must repay a total of \$63,750 for matching funds received
5 in excess of the candidate's entitlement for matched contributions later determined to have been
6 non-matchable, including \$62,116 related to the improper reattributions and \$1,634 for matched
7 contributions that were later refunded.⁵ See Attachment B. In the Notice of Repayment
8 Determination, the Commission explained that the reattributions associated with the 31 "errors"
9 were not proper and were not matchable. See 11 C.F.R. §§ 110.1(k), 9034.2(c)(1). Specifically,
10 the contribution checks were drawn on the original contributors' accounts, and because the
11 responses to the questionnaires indicated that the reattributee(s) did not have the right to
12 withdraw funds from the contributor's bank accounts, there was no indication that the
13 reattributees were joint owners of the contributor's accounts. See 11 C.F.R. § 9034.2(c)(1).
14 Thus, the contributed funds appear to have belonged to the contributor rather than to the
15 reattributee. See *id.*

16 The Commission used the survey information concerning the 47 sample items to calculate
17 the percentage of improper reattributions in the total population ("error rate") and the associated
18 repayment amount for these non-matchable contributions. The Commission projected an error
19 rate of 9.57% non-matchable items in the population with a sampling error of $\pm 3.69\%$ and a

⁵ In a separate repayment matter that arose from the Commission's audit of the Committee pursuant to 26 U.S.C. § 9038(a), the Commission made a determination following an administrative review on March 16, 2000, that the Committee must repay \$29,328 to the United States Treasury for non-qualified campaign expenses including inadequately documented disbursements, duplicate payments and non-campaign related disbursements. The repayment was made on April 12, 2000. In the Audit Report, the Commission also determined that a payment of \$27,431 was due to the United States Treasury for stale-dated checks, but the Committee has not yet made that payment. See 11 C.F.R. § 9038.6.

1 confidence level of 95%. See Attachment B at 24-29. This error rate, when used to estimate the
2 total dollar value of errors in the population, resulted in a projected error amount of \$62,116
3 which must be repaid for non-matchable contributions. *Id.*

4 The remaining repayment amount, \$1,634, was based on the Committee's refund of
5 \$2,000 to two contributors who each made a \$1,000 contribution and subsequently completed
6 several reattribution forms.⁶ The Committee had submitted these contributions and associated
7 reattributions for a total of \$1,750 in matching funds in two matching fund submissions, and based
8 on its review of the matching fund submissions, the Commission certified a total of \$1,634 in
9 matching funds for these contributions.⁷ The total amount of matching funds certified for the
10 refunded contributions, \$1,634, must be repaid because the contributions have been refunded.
11 See 26 U.S.C. § 9038(b)(1); 11 C.F.R. §§ 9034.2(a)(1), 9034.3(i), 9038.2(b)(1)(iii).

12 On October 12, 1999, the Committee submitted a written response to the repayment
13 determination and requested the opportunity to address the Commission in open session in order
14 to demonstrate that no repayment or a lesser repayment is required.⁸ See Attachment E;
15 11 C.F.R. § 9038.2(c)(2)(ii). The Commission granted the Committee's request for an oral
16 hearing and the hearing was held on March 1, 2000. See Attachment F.

17 Throughout the repayment process, the Committee made a number of requests for
18 documents from the Commission. After receiving the repayment determination, the Committee

⁶ The contributors stated in a letter dated May 17, 1999 that they requested refunds after Commission staff contacted them "because of an apparent misunderstanding about a form we were sent by the campaign after we made the contributions." Attachment B at 20-22.

⁷ A reattribution of \$250 of one of these contributions was originally one of the sample items. Because it has been refunded, this item is not being treated as an error and has been deleted from the sample.

⁸ On September 30, 1999, the Commission granted the Committee a 15-day extension of time, until October 12, 1999, to respond to the Commission's repayment determination. Thus, the response was timely.

1 requested in a letter dated August 24, 1999, two specific memoranda sent between the
2 Commission's Office of General Counsel and Audit Division and "any documents including
3 memoranda, oral contacts, questionnaires, etc. that form the basis of the Audit Staff's factual
4 conclusions that certain of the 48 sample items appear to be 'improperly reattributed.'"
5 Attachment C. On October 8, 1999, the Commission provided the requested memoranda, with
6 attachments, and copies of the surveys completed by contributors related to the sample items
7 which were considered to be improperly reattributed.⁹ Attachment D.

8 The Committee requested additional documents from the Commission prior to the oral
9 hearing. By letter dated February 7, 2000, the Committee requested information concerning the
10 Commission's sampling procedures, specifically, the database containing the population of 7,220
11 observations, the database or spreadsheet of the sample results, the basis for the calculation of the
12 3.69% margin of error, and an explanation for each of the exclusions from the sample.
13 Attachment G. On February 16, 2000, Commission staff provided the requested materials to the
14 Committee.¹⁰ Attachment H.

⁹ The Commission did not provide copies of internal reports prepared by an investigator in the Commission's Office of General Counsel, electronic messages, or communications between Commission staff of the Office of General Counsel and the Audit Division, which are protected from disclosure by the attorney work product privilege. Attachment D. Moreover, the Commission did not provide documents the Committee should have in its possession, such as contribution checks, or documents that appeared to be beyond the scope of the request. *See id.*

¹⁰ The Commission provided a spreadsheet of the population of 7,220 items, two spreadsheets listing each of the sample items, and the script of the inputs and results of the computer program used to calculate the error rate, margin of error and repayment amount. When the Committee informed Commission staff that its software was not compatible with two of the spreadsheets, Commission staff converted the spreadsheets to a compatible format and sent them to the Committee by electronic mail on February 18, 2000. By facsimile transmission dated February 18, 2000, the Committee stated that it had not received "an explanation for each of the exclusions from the sample." Attachment I at 1. On February 25, 2000, Commission staff responded that the materials provided fully complied with the request for documents, and explained that the color-coded spreadsheets of sample items provided to the Committee on February 16, 2000 list each sample item and include a legend explaining the reasons for each of the exclusions from the sample of observations. Attachment J.

1 Following the March 1, 2000 oral hearing, the Committee made several additional
2 requests for documents. In a facsimile transmission dated March 2, 2000, the Committee's
3 counsel requested "a handbook, manual or other material that describes the Dollar Unit Sampling
4 method employed . . . in this Repayment Determination. . . . or any other material describing the
5 Dollar Unit Sampling method used," as well as "any internal instructions or materials issued to the
6 Audit Staff that provide guidance regarding how to conduct Dollar Unit Sampling analysis."
7 Attachment K. The Committee also requested "any documents or materials prepared by Ernst &
8 Whinney that recommend use of Dollar Unit Sampling or describe the purpose or goals of the
9 method." *Id.* The Commission staff provided responsive documents to the Committee on
10 March 3, 2000, with a cover letter explaining that "there is no internal handbook or manual
11 describing the computer program or the dollar unit sampling procedures." Attachment L.
12 However, the Commission staff provided responsive materials that explained dollar unit sampling,
13 including two reports prepared by Ernst & Whinney in 1979 concerning the Commission's
14 sampling program, excerpts from two books used by the Commission's Audit staff¹¹ and
15 computer code from the original computer program used for dollar unit sampling of matching
16 fund submissions at the Commission.¹² *See id.*

17 On March 10, 2000, the Commission staff hand-delivered additional responsive documents
18 to the Committee with a cover letter explaining that the "same dollar unit sampling review process
19 that is used to review matching fund submissions was used to draw the sample that is the basis of
20 the repayment determination." Attachment M. The Commission staff provided the computer

¹¹ JOHN H. MCCRAY, DOLLAR UNIT SAMPLING FOR AUDITORS (1978) and DONALD M. ROBERTS, STATISTICAL AUDITING (1978).

¹² Commission staff also informed the Committee that staff were continuing to examine the agency's files for additional responsive documents. *See id.*

1 code for the current dollar unit sampling computer program used for review of matching fund
2 submissions and for the sample projection that is the basis of the repayment determination;¹³
3 examples of matching fund submission review forms; documents used in the review of the
4 Committee's matching fund "Submission 07;"¹⁴ and a document prepared by the Commission's
5 Audit staff entitled "Procedures for Reviewing Matching Fund Submission 99 (Sub99)," with
6 several attachments, including a flow chart of the review process.¹⁵ *See id.*

7 On March 17, 2000, the Committee submitted additional materials following the oral
8 hearing.¹⁶ *See* Attachment P.

9 III. COMMITTEE'S RESPONSE TO REPAYMENT DETERMINATION

10 The Committee disputes the Commission's repayment determination of July 15, 1999. In
11 its written response dated October 12, 1999, the Committee contends that the determination is
12

¹³ The computer code was redacted to delete file names and access logicals.

¹⁴ A "matching fund submission" is the package of documents submitted by a publicly-financed presidential primary candidate to the Commission as the basis for a payment of matching funds and includes, *inter alia*, a list of contributors and supporting documentation such as contribution check copies. *See* 11 C.F.R. Part 9036. Each candidate may make a number of submissions. Commission staff review each submission for compliance with the submission requirements of the regulations and the Commission's *Guideline for Presentation in Good Order*, and if the submission is acceptable, review the contributions in the submission for matchability. 11 C.F.R. § 9036.4. "Submission 07" was the Committee's seventh non-threshold submission and covered the period from January 26, 1996 through February 24, 1996.

¹⁵ This unofficial internal document, prepared by Commission staff, describes the procedures used to draw and review the sample that is the basis of the repayment determination. *See* Attachment M at 2. Surveys were sent to contributors associated with the sample items identified as errors through this process. *Id.* The document includes preliminary figures; the correct numbers were provided to the Committee in the Notice of Repayment Determination, Attachment B, and other documents. *Id.* On March 6, 2000, the Committee requested an additional document entitled "PPS Sampling Operations Manual" referred to in the 1979 Ernst & Whinney report or any "other similar document." Attachment N. Commission staff were unable to locate this document but provided two related documents prepared by the Commission: the 1979 *Guideline for Presentation in Good Order*, which was based on the dollar unit sampling system recommended by Ernst & Whinney, and the 1988 matching fund submission review procedures. *See* Attachment M at 2.

¹⁶ While the Commission's regulations do not provide for the submission of additional documentation subsequent to the oral presentation, the Commission has permitted presidential committees five business days to submit additional documentation related to the issues raised at the oral presentation. The Committee's additional

1 based on "methods of questionable validity and reliability" and is "rife with errors." Attachment E
2 at 10. The Committee reiterated and elaborated upon its arguments and also raised several new
3 arguments at the oral hearing on March 1, 2000 and in the additional materials submitted after the
4 oral hearing on March 17, 2000. See Attachments F and P.

5 **A. IMPROPER REATTRIBUTIONS**

6 The Committee contests the sampling method used to calculate the repayment amount of
7 \$62,116 for non-matchable contributions related to improper reattributions and argues that
8 sampling is not an appropriate method to calculate the repayment amount in this matter.

9 Attachment E at 2-7. The Committee contends that the use of sampling for "onerous repayment
10 determinations fails to meet the requirements of due process" because the Commission has not
11 demonstrated that sampling was "the only feasible method" and that a full audit was "a practical
12 impossibility," and because the cases cited in the Notice of Repayment Determination involved
13 audits with larger populations than 7,220.¹⁷ Attachment E at 3; see Attachment P at 2.

14 Moreover, the Committee claims that the Commission's use of sampling rather than a "more
15 complete review" was not warranted because it is analogous to a state agency's use of a test
16 period to extrapolate the amount of tax due over a period of years that was rejected by a New
17 York state court because records were available for a complete audit.¹⁸ Attachment E at 4-5,

documentation was due on March 8, 2000. The Commission granted the Committee's request for an extension of
time; thus, the additional materials were due on March 17, 2000. See Attachment O; Attachment N.

¹⁷ At the oral hearing, counsel for the Committee argued that in a full audit, Commission staff would review
only 1,000 items, which would not be "a number that is so burdensome and onerous as to justify sampling."
Attachment F at 6-7, see 32-35. The Committee also claims confusion about the population size; however, the
correct population size is 7,220. See Attachment B at 23-29.

¹⁸ The Committee also cited a New York state case which applied the same reasoning to reject the use of
sampling to calculate Medicaid overpayments. *Allen v. Comm'r of Social Services*, 500 N.Y.S.2d 204 (N.Y. App.
Div. 1986).

1 citing *Mohawk Airlines v. Tully*, 429 N.Y.S.2d 759 (N.Y. App. Div. 1980); *Names in the News v.*
2 *New York State Tax Commission*, 429 N.Y.S.2d 755 (N.Y. App. Div. 1980); *Chartair, Inc. v.*
3 *State Tax Comm'n*, 411 N.Y.S.2d 41 (N.Y. App. Div. 1978).

4 Further, the Committee asserts that due process requires both that the sampling method be
5 "valid and reliable" and that the Committee have the opportunity to review both the sampling
6 method and supporting documentation.¹⁹ Attachment E at 5. The Committee contends it either
7 did not receive information it requested or was not timely provided with information. *Id.* at 5-7.

8 In addition, the Committee questions the Commission's calculations.²⁰ The Committee
9 argues that the +/- 3.69% margin of error is "imprecise by statistical norms." Attachment P at 7-8
10 and 21-23; Attachment E at 7. Although the Committee acknowledges, in its additional materials,
11 that the "acceptable level of precision is a matter of opinion or policy," it asserts that because of
12 the purpose of the estimate, the estimate should have been made more precise by expanding the
13 sample. Attachment P at 8 and 22. Alternatively, the Committee contends that the Commission

¹⁹ The Commission provided documents to the Committee in response to several Committee requests; however, the Committee maintains in the additional materials submitted after the oral hearing that it still has insufficient documents to evaluate the Commission's statistical analysis. Attachment P at 3 and 20-21. The Committee contends that the documents provided by the Commission do not establish the validity and reliability of the sampling analysis because they do not provide information about "sample design and execution" and whether the method was "properly implemented." Attachment P at 6 and 20-21. The Committee asserts that it lacked "materials showing that probability weights were calculated for each item in the population and that the sample was then drawn accounting for these weights," such as "input data files in addition to the program execution logs (or other evidence that the [Commission]'s computer programs were run with proper inputs) and program output files." *Id.* at 7 and 20-21.

²⁰ Although the Committee claimed at the oral hearing that the Commission's sampling method was biased toward larger contributions, it later appeared to retreat from this position. Attachment F at 9-12; Attachment P at 3 and 20. The Committee acknowledged that "a sample of 324 items is large enough . . . to be representative of the population," but argued that the Commission's sample was not representative because the average contribution was \$90 while the average sample item was \$155. Attachment P at 3-4 and 20; see Attachment F at 9-12. However, the Committee subsequently admitted in the additional materials submitted following the oral hearing that its consultants determined, based on documents provided by the Commission, that the "apparent anomalous disparity between the average contribution amounts in the population and in the sample could be explained as a manifestation of the D[ollar] U[nit] S[ampling] method." Attachment P at 5 and 20.

1 should "request repayment of the lower bound of the estimate," 5.88% of the population (9.57% -
2 3.69%) to be "reasonably confident" that the repayment "does not exceed the true population
3 value." Attachment P at 8-9 and 22; Attachment E at 7; Attachment F at 15-18 and 67-70. —

4 Further, the Committee asserts that the fact that the midpoint is used for matching funds payments
5 is not relevant because the purpose of matching funds payments differs from that of repayment
6 determinations, which "tak[e] away money to which a campaign initially was entitled."

7 Attachment P at 9-10.

8 Moreover, the Committee argues that the survey results were not correctly interpreted and
9 that it was not proper to consider particular contributions as "errors." Attachment E at 6-10;
10 Attachment P at 14-16; Attachment F at 18-20. For example, it asserts that it was not proper to
11 consider reattributions as errors if the retributee did not have the right to withdraw funds from
12 the contributor's bank account because the Commission "refused to consider the responses of
13 contributors indicating that the retributee gave the contributor the money to make the donation"
14 which, the Committee maintains, "contradicts regulations providing that contributions are
15 matchable if reattributed to persons who owned the contributed funds who had the requisite
16 donative intent."²¹ Attachment E at 7; Attachment P at 15; Attachment F at 18-20. The
17 Committee also argues that the Commission concluded "that lack of equitable ownership of a
18 bank account precluded a proper retribution, failing to consider the possibility of equitable

²¹ In the additional materials submitted following the oral hearing, the Committee claims that 11 C.F.R. § 110.1(k) permits reattributions and "contains no requirement that the retributee share the retributor's bank account" and that 11 C.F.R. §§ 9034.2 and 9034.3 "contain no requirement that the reattributions be made only between spouses or joint tenants of bank accounts." Attachment P at 15 (emphasis in original).

1 ownership of the funds within the bank account.²² Attachment E at 8; Attachment P at 15
2 (emphasis in original).

3 The Committee also questions the survey process and contends there were flaws in the
4 Commission's treatment of specific reattributions as errors based on the survey responses. See
5 Attachment E at 8-10; Attachment P at 10-13. The Committee asserts that it is "effectively
6 precluded" from challenging the Commission's determination of errors because the Commission
7 provided only the survey response forms for contributors considered to be errors and no
8 information concerning the "additional interviews conducted with those contributors."
9 Attachment E at 8-9.

10 Specifically, the Committee challenges five of the errors. First, the Committee argues that
11 Anna Newton's response indicated that she did not understand the meaning of "retribution" and
12 that her "uninformed response" to the survey should not be treated as an error.²³ Attachment E at
13 9. Second, the Committee avers that Catherine Radecki's retribution should not have been an
14 error because her reattributed contributions were drawn on an escrow or trust account. *Id.*
15 Third, the Committee argues that James Pettit's retribution should not have been an error
16 because he did not respond to the question of whether the retributee had access to his bank

²² The Committee contends that "at least one-third" of the retributees for the sample items treated as errors were "equitable owners of the reattributed contribution" because surveys from the original contributors stated that they received money from the retributees. See Attachment E at 8; Attachment P at 16. It argues that the Commission should accept these survey responses without requiring additional information because there was no evidence that the retributees did not give money to the contributors to make the reattributions, and the Commission has accepted "[a]ll of the contributors' other statements" which "support the Audit Division's position." *Id.* In the additional materials submitted after the oral hearing, the Committee lists the nine retributees who it contends were "equitable owners" of reattributed contributions, including one who is associated with two sample items (Watkins). See Attachment P at 17, n. 40.

²³ In its additional materials submitted after the oral hearing, the Committee claims that although Commission staff explained the meaning of "retribution" to Ms. Newton in a "telephone interview," staff did not attempt to "clarify whether she received funds from her retributee." Attachment P at 13.

1 account. *Id.* at 9-10. Fourth, the Committee contends that John W. Kremer's reattribution was
2 incorrectly treated as an error because he responded that he did not make the reattributions. *Id.*
3 Finally, the Committee contends that Sheila Thomsen made a proper reattribution to her husband,
4 David J. Thomsen.²⁴ *Id.*

5 At the oral hearing and in the additional materials submitted following the oral hearing, the
6 Committee makes several arguments it did not raise in its written response to the repayment
7 determination. *See* 11 C.F.R. § 9038.2(c)(2)(i). First, the Committee argues that reattributions
8 by nine reattributees were matchable because the reattributees gave funds to the original
9 contributors, and "under well settled legal principles such a transaction also creates a trust in
10 which the reattributee has equitable ownership of the money he or she pays to the reattibutor for
11 the purpose of effecting a joint contribution or reattribution."²⁵ Attachment P at 16; *see*
12 Attachment F at 63-65. The Committee asserts that 11 C.F.R. § 9034.2(b) requires only that a
13 check be written on a personal, escrow or trust account representing or containing the
14 contributor's personal funds and that an account contains a reattributee's funds where "the

²⁴ In its additional submission following the oral hearing, the Committee claims that "there is no evidence" other than the Commission staff's statement that a telephone contact had clarified that Sheila Thomsen made the reattribution at issue to her son David A. Thomsen rather than her husband David J. Thomsen, and that her written survey contradicted this conclusion. *See* Attachment P at 13-14.

²⁵ Counsel for the Committee argued at the oral hearing that a reattributee has "an equitable interest" in the original contributor's account, which makes it a trust account if he or she gives the contributor money to make a contribution, that the "person who has money that they're holding for me for a particular purpose is a common law trustee" and that the Committee interpreted the regulatory language concerning equitable interest in an account to mean such a trust. Attachment F at 64-65. In the additional materials submitted after the oral hearing, the Committee cites only 89 C.I.S. Trusts § 2 (1955) as support for this argument, and states that a "trust" is "the relationship in which one person holds 'an equitable right, title, or interest in property, real or personal, distinct from the legal ownership thereof.'" Attachment P at 16, n. 35.

1 retributee paid funds into the reattributor's personal account for the purpose of effecting a joint
2 contribution or retribution."²⁶ Attachment P at 15-16.

3 The Committee's second new argument is that the sample review was biased because the
4 Commission combined results of a written survey with follow-up telephone "interviews" of
5 contributors which may have been improperly conducted and may have biased the responses.
6 Attachment P at 11-12; see Attachment F at 12-13 and 20-21. The Committee asserts that
7 because the Commission has not provided it with documentation memorializing the telephone
8 contacts, it cannot determine if they were proper.²⁷ *Id.* The Committee also claims that it had no
9 information that the interviewers were properly trained to avoid introducing error or bias by
10 "making improper suggestions or coercing respondents into giving responses favorable to the
11 [Commission]."²⁸ Attachment P at 11. Finally, the Committee argues that the survey was not
12 well-designed because additional contacts were necessary to clarify several responses.
13 Attachment P at 12.

14 B. REFUNDED CONTRIBUTIONS

15 With respect to the repayment amount of \$1,634 arising from refunded contributions, the
16 Committee questioned the "rationale for requiring repayment of only a portion of the matching

²⁶ The Committee further argues that such transactions result in matchable contributions even if the retributee gave the contributor cash because the reattributed contribution is not submitted to the Committee in the form of cash. Attachment P at 15-16; Attachment F at 19-20. It also argues that the contributions are not unmatchable contributions in the name of another because the retributee's name was submitted to the Commission and the Commission's *Guideline for Presentation in Good Order* provides "for the acceptance of a separate writing as sufficient to comply with the writing required by § 9034.2." *Id.*

²⁷ Specifically, the Committee protests the inclusion of "at least" two of the 31 errors that were "established solely by means of these telephone interviews" (retributees Carlita Brown and Roderick Fox). Attachment P at 12.

²⁸ Because an Internal Revenue Service manual recommends that survey and interview questions should be drafted in written form to avoid ambiguity, the Committee contends the Commission's survey process "introduced bias" to the extent that follow-up telephone calls "were not conducted according to written questions prepared in

1 funds apparently received in connection with these contributions” by applying the “projected error
2 rate that was applied to the initial submissions” to calculate the repayment amount. Attachment E
3 at 2, n.2. At the oral hearing, counsel for the Committee asserted that donative intent should be
4 determined at the time of the contribution and a refund request would not make a contribution
5 non-matchable; however, he admitted that “[o]nce we give them their money back, I don’t
6 disagree that the matching funds have to follow, but . . . the mere fact that they’ve asked for it
7 does not negate their donative intent, and does not undercut the appropriateness of matching
8 funds.” Attachment F at 40-41.

9 **IV. POST-ADMINISTRATIVE REVIEW REPAYMENT DETERMINATION**

10 The Commission determines upon review that Patrick J. Buchanan and the Committee
11 must repay \$62,116 to the United States Treasury for matching funds received in excess of the
12 candidate’s entitlement based on matched contributions related to improperly reattributed
13 contributions. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). In addition, the
14 Commission determines upon review that Patrick J. Buchanan and the Committee must repay
15 \$1,634 to the United States Treasury for matching funds received in excess of the candidate’s
16 entitlement based on refunded contributions $(5 \times \$250 \times .928) + (2 \times \$250 \times .948)$. *Id.*
17 Therefore, the Committee must repay a total of \$63,750 for matching funds received in excess of
18 the candidate’s entitlement based on matched contributions later determined to have been non-
19 matchable. *Id.*

advance,” and “were not conducted by trained, impartial interviewers.” Attachment P at 12-13; Attachment F at 12-13 and 20-21.

1 **A. THE REATTRIBUTIONS WERE IMPROPER AND NON-MATCHABLE**

2 ***I. LAW***

3 The Commission may determine that portions of matching fund payments made to a
4 candidate were in excess of the aggregate amount of the candidate's entitlement and must be
5 repaid. 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1). Payments made on the basis of
6 matched contributions later determined to have been non-matchable are subject to repayment.
7 11 C.F.R. § 9038.2(b)(1)(iii).

8 A matchable contribution is a gift of money made by an individual, by a written
9 instrument, for the purpose of influencing the result of a primary election. 26 U.S.C. § 9034(a);
10 11 C.F.R. § 9034.2(a)(1). A written instrument means a check written on a personal, escrow or
11 trust account representing or containing the contributor's personal funds; a money order; or any
12 other negotiable instrument. 11 C.F.R. § 9034.2(b). The written instrument shall be payable on
13 demand, to the order of, or endorsed to the candidate or the candidate's committee, and shall
14 contain the full name, signature and address of the contributor(s) and the amount and date of the
15 contribution. 11 C.F.R. § 9034.2(c).

16 Checks drawn on a joint checking account are matchable and the contributor is considered
17 to be the owner whose signature appears on the check. 11 C.F.R. § 9034.2(c)(1). To be
18 attributed equally to other joint tenants of the account, the check or accompanying written
19 document shall contain the signature of the joint tenant; if the contribution is to be attributed other
20 than equally among the joint tenants, the check or written document shall also indicate the amount
21 to be attributed to each joint tenant. 11 C.F.R. § 9034.2(c)(1)(i). In the case of a check for a
22 contribution attributed to more than one person, where it is not apparent from the face of the
23 check that each contributor is a joint tenant in the account, a written statement shall accompany

1 the check stating that the contribution was made from each individual's personal funds in the
2 amount so attributed and shall be signed by each contributor. 11 C.F.R. § 9034.2(c)(1)(ii).

3 Where a contribution is reattributed to a joint tenant of the account, the reattribution shall comply
4 with the requirements of 11 C.F.R. § 110.1(k), and the documentation described in 11 C.F.R.
5 § 110.1(l), (3), (5) and (6) shall accompany the reattributed contribution.²⁹ 11 C.F.R.
6 § 9034.2(c)(1)(iii).

7 A contribution to a candidate which does not meet the requirements of 11 C.F.R. § 9034.2
8 is not matchable. 11 C.F.R. § 9034.3. Non-matchable contributions include, for example, in-kind
9 contributions; a subscription, loan, advance or deposit of money or anything of value;
10 contributions made or accepted in violation of 2 U.S.C. §§ 441a, 441b, 441c, 441e, 441f, or
11 441g; contributions made by persons without the necessary donative intent to make a gift or made
12 for any purpose other than to influence the result of a primary election; and contributions of
13 currency. 11 C.F.R. §§ 9034.3(a),(b),(e),(i) and (j).

14 The Commission's regulations provide that if a contribution, on its face or in the
15 aggregate, exceeds the contribution limitations, the committee treasurer may obtain a written
16 reattribution from the contributor within 60 days. 11 C.F.R. §§ 103.3(b)(3), 110.1(k)(3). A
17 contribution is reattributed if the treasurer asks the contributor whether the contribution is
18 intended to be a joint contribution by more than one person, informs the contributor that he or she
19 may request a refund of the excessive portion, and within 60 days, the contributors provide a
20 written reattribution, signed by each contributor, which indicates the amount to be attributed to

²⁹ Checks drawn on an escrow or trust account are also matchable provided that the "contributor has equitable ownership of the account" and the "check is accompanied by a statement, signed by each contributor to whom all or a portion of the contribution is being attributed, together with the check number, amount and date of the contribution" and the statement specifies "that the contributor has equitable ownership of the account and the account represents the personal funds of the contributor." 11 C.F.R. § 9034.2(c)(2).

1 each contributor if equal attribution is not intended. 11 C.F.R. § 110.1(k)(3)(ii). The treasurer
2 shall retain the written reattribution and the reattribution will not be effective unless the
3 committee retains the documentation. 11 C.F.R. § 110.1(l)(3) and (5).

4 A candidate who disputes the Commission's repayment determination shall submit in
5 writing, within 60 calendar days after service of the Commission's notice of repayment, legal and
6 factual materials demonstrating that no repayment, or a lesser repayment, is required. 11 C.F.R.
7 § 9038.2(c)(2)(i). The candidate's failure to timely raise an issue in these written materials will be
8 deemed a waiver of the candidate's right to raise the issue at any future stage of proceedings
9 including any petition for review filed under 26 U.S.C. § 9041(a). *Id.* Moreover, the candidate's
10 oral presentation before the Commission should be based upon the written materials. *See*
11 11 C.F.R. § 9038.2(c)(2)(ii).

12 2. ANALYSIS

13 The Commission concludes, after considering the Committee's arguments on review, that
14 the Committee received matching funds for non-matchable contributions. The Committee has
15 failed to demonstrate, in response to the Commission's repayment determination, that no
16 repayment, or a lesser repayment is required. 11 C.F.R. § 9038.2(c)(2).

17 The Commission's determination upon review that the reattributions were improper and
18 non-matchable is supported by the Commission's investigation.³⁰ *See* Attachment B at 10-13.
19 The investigation revealed evidence including the contribution checks which were drawn on the
20 accounts of the original contributors and do not list the names of the reattributees, and the survey

³⁰ The contributions appeared to be matchable when they were submitted for matching because the reattributees signed writings stating that the money was their personal funds and that they intended to make a contribution. The reattributions also generally appear to have been completed within 60 days. *See* 11 C.F.R. § 110.1(k)(3)(ii). However, as discussed *infra*, the Commission's investigation revealed that the reattributions were not matchable.

1 responses of the original contributors, who indicated that the reattributees did not have the right
2 to withdraw funds from their accounts. See 11 C.F.R. § 9034.2(c)(1); see also 11 C.F.R.
3 § 110.1(k). Since the contributions do not appear to be drawn on joint accounts, the
4 reattributions are not matchable under 11 C.F.R. § 9034.2(c)(1)(ii).³¹ In addition, there is no
5 evidence that the reattributed contributions were drawn on accounts that represented or contained
6 the personal funds of the reattributees. See 11 C.F.R. § 9034.2(b). Moreover, the Committee's
7 reliance on the "equitable ownership" language at 11 C.F.R. § 9034.2(c)(2) is unavailing because
8 that provision only applies to the matching fund requirements for contributions drawn on trust or
9 escrow accounts; however, there is no indication, other than the Committee's unsupported and
10 untimely assertions, that any of the checks at issue in this matter were drawn on trust or escrow
11 accounts.³² See 11 C.F.R. § 9034.2(c)(2). Therefore, the Committee has not demonstrated that

³¹ Moreover, the reattributions may not have complied with the requirements of 11 C.F.R. § 110.1(k), as required by 11 C.F.R. § 9034.2(c)(1)(iii). The form letter which was apparently sent to contributors did not inform them that they could request the return of the excessive portion of their contribution if it was not intended to be a joint contribution. See 11 C.F.R. § 110.1(k)(3)(ii); Attachment B at 19.

³² The regulations address the matchability of contributions drawn on, *inter alia*, joint accounts, escrow and trust accounts, and partnership accounts. See 11 C.F.R. § 9034.2(c). The language of the Commission's regulations does not provide for the matchability of reattributions except where the check is drawn on a joint account. See 11 C.F.R. § 9034.2(c)(1). Although the regulations provide that reattributions among joint tenants of an account must comply with the requirements of 11 C.F.R. §§ 110.1(k) and (1), complying with those requirements does not, conversely, automatically make a contribution reattributed among individuals who are not joint tenants of an account matchable. See 11 C.F.R. § 9034.2(c)(1). Moreover, the matchability of contributions is governed by the statute and regulations, not the *Guideline for Presentation in Good Order* ("Guideline") (August 1991). The *Guideline* provides guidance to committees for the format and procedures for submitting contributions for matching. The *Guideline* clearly cites 11 C.F.R. § 9034.2(c)(1), which concerns the matchability of checks drawn on joint accounts, where it addresses excessive portions of written instruments made payable for more than \$1,000 and signature discrepancies. See *Guideline*, at 48 and 58. However, the discussion of written instruments that cannot be associated with the listed contributor does not include this citation. *Id.* at 65. Further, the *Guideline* makes clear that the matchability problems it discusses "may not be the sole basis for determining that a contribution is non-matchable. Commission procedures provide that information obtained during an inquiry conducted under 11 C.F.R. § 9039.3 may also be used as the basis for determining the matchability of any contribution submitted for matching purposes." *Id.* at 42.

1 any of the reattributions at issue were proper and matchable, and that the repayment
2 determination should be adjusted accordingly. See 11 C.F.R. § 9038.2(c)(2).

3 The Committee failed to timely raise its contention that payments by nine reattributees to
4 the original contributors somehow created a trust relationship which made the reattributions
5 matchable; thus, it has waived this argument. See Attachment P at 16; Attachment F at 63-65;
6 11 C.F.R. § 9038.2(c)(2)(i); *Americans for Robertson v. FEC*, 45 F.3d 486,490-491 (D.C. Cir.
7 1995) (Commission could refuse to consider argument raised at oral hearing that was not in
8 written submission); *Fulani for President v. FEC*, 147 F.3d 924, 927 n.5 (D.C. Cir. 1998) (in
9 denying committee's petition for rehearing, court observed that the committee may have been
10 barred from raising its new theory at the oral hearing). The Committee's written response was
11 not sufficient to place the Commission on timely notice of the nature of the Committee's trust
12 argument. See 11 C.F.R. § 9038.2(c)(2)(i). Although the Committee makes several cryptic
13 references to "equitable ownership" in its written submission, it never explains this language.³³
14 Rather, it merely asserts that a number of the reattributees gave funds to the contributors, "thus
15 making them the owners – in law and equity – of the amounts attributed to them," and "the
16 equitable owners of the reattributed contribution." Attachment E at 3, n. 3 and 7-8. Further, the
17 Committee contends that the Commission "concluded that lack of equitable ownership of a bank
18 account precluded a proper attribution, failing to consider the possibility of equitable ownership of

³³ In both the Notice of Inquiry and the Notice of Repayment Determination, the Commission questioned the use of the phrase "equitable ownership" in many of the reattribution statements because it appeared that the Committee and contributors incorrectly applied 11 C.F.R. § 9034.2(c)(2) to contributions that were not drawn on escrow or trust accounts. See Attachment A at 4-5; Attachment B at 4 and 13. However, the Committee provided no explanation of this language in its written submission.

1 the funds within the bank account.³⁴ Attachment E at 8. The Committee never explained how
2 the alleged payments by retributees to the contributors could have had any effect on the
3 contributor's ownership of his or her bank account or upon the matchability of the
4 reattributions.³⁵ Nowhere in the Committee's written response does the Committee overtly refer
5 to these transactions as a "trust" or argue that the reattributions were matchable contributions
6 from a trust account pursuant to 11 C.F.R. § 9034.2(c)(2); the Committee only uses the same
7 "equitable ownership" language found in 11 C.F.R. § 9034.2(c)(2).³⁶ The Committee first
8 explicitly expounded its trust argument in response to a question at the oral hearing on March 1,
9 2000, more than four months after its written response, when counsel for the Committee stated
10 that a common law trust was created when a retributee gave the contributor money to make a
11 contribution, and that the retributee therefore had equitable ownership of the funds within the
12 contributor's bank account, which, he argued, made it a trust account.³⁷ Attachment F at 63-65.

13 - Nevertheless, even if it had not been waived, the Committee has failed to demonstrate that
14 a common law trust is automatically created where one individual gives another funds to make a
15 contribution; nor has it demonstrated how such a transaction could transform a contributor's

³⁴ Contrary to the Committee's contention, 11 C.F.R. § 9034.2(c)(2), which governs matchability of contributions from trust or escrow accounts, requires that the contributor have equitable ownership of the account and submit a statement with the contribution specifying that the contributor has equitable ownership of the account and the account represents the personal funds of the contributor.

³⁵ The Committee only states that the Commission's definition of errors "flatly contradicts regulations providing that contributions are matchable if reattributed to persons who owned the contributed funds who had the requisite donative intent." Attachment E at 7.

³⁶ Indeed, the only explicit reference to trust or escrow accounts in the Committee's written submission is its contention that the survey response of one contributor, Catherine Radecki, "indicates that her reattributed contributions were drawn on an escrow or trust account" and her reattributions would be proper "if Radecki's account is held in trust for any of the retributees." Attachment E at 9.

³⁷ The Committee discussed the trust argument further in its additional submission following the oral hearing. See Attachment P at 15-16.

1 checking account into a trust account subject to 11 C.F.R. § 9034.2(c)(2) or otherwise make the
2 reattribution matchable. One individual giving another funds to make a contribution could equally
3 constitute agency, debt, or some other kind of contract as it could a trust relationship.³⁸ A
4 determination of what legal relationship existed, if any, between a particular contributor and a
5 reattributee would depend on the specific facts of the situation, such as the intent of the
6 individuals and any written instrument or other evidence of any agreement. None of that
7 information is available here. Further, since the reattributions occurred after the dates of the
8 contributions, the Committee appears to be illogically arguing that reimbursements from the
9 reattributees to the original contributors could retroactively create a common law trust.³⁹ Indeed,
10 even if a common law trust was created, it is not clear how such a relationship could change the
11 contributor's personal checking account into a trust account or make these reattributions
12 matchable.⁴⁰

³⁸ A "trust" is a "fiduciary relationship with respect to property, arising as a result of a manifestation of an intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee." RESTATEMENT (THIRD) OF TRUSTS § 2, (Tentative Draft No. 1 1996).

³⁹ Moreover, these transactions would not result in matchable contributions if they involved, for example, a loan, advance, deposit of money or anything of value; in-kind contributions; a contribution in the name of another or other illegal contribution; currency or contributions by persons who lacked the donative intent to make a contribution because they were giving the contributor funds for some other reason, such as a gift. See 26 U.S.C. § 9034(a); 11 C.F.R. §§ 9034.3(a),(b),(e),(i), and (j). In addition, several reattributions appear to have been made to minor children and would not have been proper unless the decision to contribute was made knowingly and voluntarily by the minor child, the funds contributed were owned or controlled exclusively by the child, such as the child's income, the proceeds of a trust for which the child is the beneficiary or a savings account opened and maintained exclusively in the child's name; and the contribution was not the proceeds of a gift for the purpose of providing the funds to be contributed and was not in any way controlled by any other individual. See 11 C.F.R. § 110.1(i); see, e.g., Attachment Z at 2 ("Stuart [Humphreys, the reattributee] is 7 years old"). The Commission rejects the Committee's assertion that non-matchable contributions would necessarily be made matchable through the use of reattributions.

⁴⁰ The Committee argues that "a personal, escrow or trust account, contains a reattributee's personal funds" if the reattributee gives funds to the contributor and thus, appears to contend that such a reattribution is matchable under 11 C.F.R. § 9034.2(b) even if it is not from a trust account. Attachment P at 15-16 (emphasis in original). Nevertheless, the regulations provide for equitable ownership only of trust or escrow accounts, 11 C.F.R.

1 Moreover, the Committee has made no effort to obtain information to support its
2 assertions from the contributors or reattributees. The Committee has provided no evidence, such
3 as checks or other documentation, to demonstrate that any of the reattributees provided funds to
4 the contributors. Nor is there any evidence that the bank accounts of the nine contributors at
5 issue were trust accounts. To the contrary, seven of the nine contributors stated that the
6 contributions were not drawn on an escrow or trust account.⁴¹ See Attachment T. In addition,
7 the Committee has not provided any evidence to demonstrate that the contributors and
8 reattributees who signed the reattribution statements understood the phrase "equitable ownership"
9 to mean the account was a trust account, or that they had any intention to create a trust
10 relationship.

11 B. STATISTICAL SAMPLING

12 Sampling is an effective and appropriate means for the Commission to determine the
13 amount of a repayment of public funds. The Commission used a dollar unit sampling technique in
14 the 9039 inquiry to investigate representative reattributions (sample items) and to calculate the
15 error rate of 9.57% with a sampling error of $\pm 3.69\%$ and the repayment amount of \$62,116 for
16 non-matchable, improper reattributions.

17 I. SAMPLING WAS APPROPRIATE

18 The use of statistical sampling to project certain components of a large universe is a
19 legally acceptable, valid audit technique that is appropriate to determine repayments to the
20 government. See, e.g., *Georgia v. Califano*, 446 F. Supp. 404 at 409 (N.D. Ga. 1977) (use of

§ 9034.(c)(2), and the Committee has failed to demonstrate how an account could contain an individual's personal funds if it is not the individual's personal account or a trust or escrow account.

⁴¹ Two of the nine contributors did not respond to the question.

1 statistical sampling to audit Medicaid overbilling was not arbitrary and capricious where it was the
2 "only feasible method of audit," review of individual claims would be a "practical impossibility"
3 and Georgia had the opportunity to challenge the statistical sample). In approving the use of
4 sampling to calculate Medicare overpayments, for example, one court recently stated, "The use of
5 sampling and extrapolation as part of audits to determine overpayments to parties who receive
6 publicly-funded reimbursements has been approved by courts in a number of different settings."
7 *Webb v. Shalala*, 49 F. Supp.2d 1114, 1122 (W.D. Ark., 1999). Moreover, courts have generally
8 deferred to agency expertise in upholding the use of statistical sampling.⁴² See, e.g., *Chaves*
9 *County Home Health Service v. Sullivan*, 931 F.2d 914 (D.C. Cir. 1991), cert. denied, 502 U.S.
10 1091, 112 S.Ct. 407 (1992)(upheld use of sampling audit to recoup Medicaid overpayments to
11 health care providers). In *Ratanasen v. California*, the court approved

12 the use of sampling and extrapolation as part of audits in connection with
13 Medicare and other similar programs provided the aggrieved party has an
14 opportunity to rebut such evidence. To deny public agencies the use of statistical
15 and mathematical audit methods would be to deny them an effective means of
16 detecting abuses in the use of public funds. Public officials are responsible for
17 overseeing the expenditure of our increasingly scarce public resources and we
18 must give them appropriate tools to carry out the charge.

19
20 11 F.3d 1467 at 1471 (9th Cir. 1993)(use of random sample to calculate Medi-Cal overbilling by
21 doctor held valid). Indeed, counsel for the Committee admitted at the oral hearing that "we
22 haven't found any case that says statistical samples, if properly done, are not appropriate evidence

⁴² Courts have also deferred to agency expertise in considering challenges to an agency's accounting methods unless the agency's accounting methods are "so entirely at odds with fundamental principles of correct accounting as to be the expression of a whim rather than an exercise of judgment." *A.T. & T. Co. v. United States*, 299 U.S. 232, 236-37 (1936); *Warder v. Shalala*, 149 F.3d 73, 84 (1st Cir. 1998), cert. denied, 119 S.Ct. 1455 (1999); *Strickland v. Commissioner, Maine Dept. of Human Services*, 48 F.3d 12, 18 (1st Cir. 1995), cert. denied, 516 U.S. 850 (1995). The Commission's use of sampling is consistent with accepted auditing standards.

1 in a federal case” or any federal decisions that turned upon the size of the sample. Attachment F
2 at 48-49.

3 In particular, statistical sampling has generally been upheld when audits of the total
4 population would be “impossible.” *Michigan Dep’t of Educ. v. U.S. Dep’t of Educ.*, 875 F.2d
5 1196, at 1205-1206 (6th Cir. 1989)(upheld use of sample of payment authorizations to determine
6 amount of disallowed expenditures of federal funds by a vocational rehabilitation program).
7 Statistical sampling was necessary and appropriate in this inquiry because verification of each of
8 the 7,220 matched contributions related to reattributions in the population would be pragmatically
9 impossible. Sufficient records are not available to enable the Commission to verify that each of
10 the thousands of reattributions was proper.⁴³ Moreover, the practical impossibility of verifying
11 each of the thousands of reattributions is demonstrated by the difficulty of conducting an
12 investigation using surveys of contributors to obtain information concerning merely 47 apparent
13 errors in the sample of 324 items. In many cases, several contacts with contributors were
14 necessary to obtain the requested information, and some contributors never responded.

15 In addition, there is “no case law that states how large a percentage of the entire universe
16 must be sampled,” see *Michigan*, 875 F.2d 1196, at 1205, nor any “statistical ‘floor’” which the
17 population or sample size must exceed. See *Ratanasen* at 1471-1472. Contrary to the
18 Committee’s contentions, federal courts have approved the use of sampling in cases with sample

⁴³ The Commission’s sampling method is distinguishable from the audit method disapproved in the New York state cases cited by the Committee. See, e.g. *Chartair*, 411 N.Y.S.2d 41; *Mohawk*, 429 N.Y.S.2d 759. Those cases involved state agencies that had all of the necessary records to review the transactions, while in this case, sufficient records, including, for example, bank documentation indicating whether contributors and reattributees had joint accounts, are not available for the Commission to verify each of the reattributions, and obtaining all of the necessary records from the contributors would be difficult, if not impossible. In addition, unlike most of the cases cited by the Committee, the Commission used a random sample drawn from the entire population rather than the limited test period of time used to assess state taxes.

1 and population sizes similar to the sample size of 324 out of a population of 7,220 used here. See
2 *Ratanasen*, 11 F.3d at 1469 (300 of a total of 8,761 Medi-Cal beneficiaries, or 3.4%); *Michigan*,
3 875 F.2d 1196 (259 out of a population of 66,368, or 0.4%); *Webb*, 49 F. Supp.2d 1114 (250 out
4 of 9,131 claims).

5 In addition, the Committee's argument that a 100% review would have been feasible in
6 this case is flawed. To complete a 100% review of the population, Commission staff would have
7 had to review each of the 7,220 contributions in the population to exclude those that were
8 apparently reattributions between spouses or that were not reattributions.⁴⁴ This process would
9 have been time and resource intensive, and it is not clear how many reattribution items requiring
10 additional verification would have remained. While the number would probably be less than the
11 total population of 7,220 contributions, there is no factual basis for the Committee's assumption
12 that the number would be around 1,000 rather than some other number. However, even if the
13 number were approximately 1,000, as the Committee asserts, completing the survey process and
14 obtaining sufficient information to verify the reattributions would not have been practicable. See
15 *supra* note 44. Since it was difficult and time consuming for Commission staff to obtain

⁴⁴ The steps required for a 100% review of the population would include the following: pulling the original written instrument for each of the 7,220 items from the paper files submitted in the Committee's first seven submissions, or from electronic records for the remaining submissions; checking documentation for each matched contribution to see if it was reattributed prior to matching and eliminating any items that were not related to reattributions from the review; for the items that were reattributed, finding the additional documentation supporting the reattribution; generating a matching funds history for each contributor; examining the work paper files for each submission to determine in which submission the contribution was included and the percentage matched for that submission; reviewing each submission to determine if the item was an error in the submission or would have been an error and eliminating those items from the review; and reviewing the remaining transactions to determine if the reattributions appear to be valid. See Attachment R at 2. Upon identification of transactions that appeared to be improper reattributions, Commission staff would prepare letters and questionnaires; update addresses and mail the letters; send follow-up letters and make telephone contacts; respond to questions; review the completed questionnaires and, if necessary, contact individuals to clarify responses or obtain omitted information.

1 information for 47 sample items by surveys and follow-up contacts, sending out more than twenty
2 times as many surveys would simply be unworkable.

3 Moreover, as a question of policy, the Commission notes the possible chilling effect of a
4 100% review. A 100% review would necessitate written and telephone contacts by Commission
5 staff to thousands of contributors, and could require several contacts or the use of subpoenas and
6 other discovery methods to obtain sufficient documentation from some individuals. Some
7 contributors, particularly those who are averse to cooperating, could have an unfavorable reaction
8 to such an investigation, resulting in a widespread chilling effect on future contributions by
9 contacted contributors.

10 2. THE SAMPLING METHOD WAS VALID AND RELIABLE

11 The Commission's sampling method was valid and reliable. Dollar unit sampling is an
12 accepted audit technique and information is publicly available explaining it. *See, e.g.,* JOHN H.
13 MCCRAY, DOLLAR UNIT SAMPLING FOR AUDITORS (1978); DONALD M. ROBERTS, STATISTICAL
14 AUDITING (1978). The Commission has used the dollar unit sampling method in its review of
15 matching fund submissions since 1980.⁴⁵ *See* 11 C.F.R. § 9036.4(b). The Commission's sampling
16 method selects specific pennies as sample items from the total amount of all transactions in the
17 population, rather than selecting whole transactions, and projects the total amount of matching
18 funds for the population based on review of the matchability of the selected sample items.⁴⁶ *See*

⁴⁵ The Commission staff review the contributions and documents in each matching fund submission for errors and, using the dollar unit sampling method, calculate the error rate and the amount of the matching payment for the submission. *See* 11 C.F.R. Part 9036; *Guideline*. Matching fund payments are based on an error rate similar to the error rate used for this repayment determination.

⁴⁶ The Commission's dollar unit sampling method accomplishes probability weighting of sample items because the larger the share of the population a transaction represents, the more likely it is to be selected in the sample. Since matching funds are limited to \$250 for each transaction, 26 U.S.C. § 9034(a), it is not likely that a few very large transactions in a population would lead to an erroneous sample result. It appears that the Committee has largely abandoned its argument that bias in the sample is demonstrated by the fact that the average

1 Attachment R at 2-3. Commission staff have reviewed hundreds of matching fund submissions
2 over the course of two decades using essentially the same dollar unit sampling method that was
3 used to draw the sample and project the repayment amount here.⁴⁷ The population in this matter
4 was treated like a matching fund submission and the same computer program was used to
5 calculate this repayment as was used to calculate the matching fund payments for the Committee
6 and all other matching fund recipients in 1996.⁴⁸

7 Indeed, it is appropriate to calculate a repayment for non-matchable contributions using
8 the same statistical sampling technique that was used to review the Committee's matching fund
9 submissions. The purpose of the repayment is to recapture funds to which the Committee was
10 never entitled. See 26 U.S.C. § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). Since the contributions
11 at issue were never matchable, matching funds should not have been paid to the Committee for
12 them.⁴⁹ Thus, it is consistent to use the same sampling method to recover public funds for non-
13 matchable contributions as the Commission uses for making matching fund payments.

amount of contributions in the sample was higher than the average in the population. See *supra* p. 10 note 20; Attachment F at 9-12; Attachment P at 2-4 and 20. In fact, this result is not indicative of a biased sample but is a manifestation of the dollar unit sampling method. See Attachment R at 2. The source of the Committee's apparent confusion is not clear, since the Commission's Notice of Repayment Determination indicates that the Commission used the "same statistical sampling technique that is used to review matching fund submissions" and that a "dollar unit sampling" technique has been used to review matching fund submissions since 1980. Attachment B at 9. In addition, an internal Commission memorandum dated October 22, 1997 provided to the Committee on October 8, 1999 states that dollar unit sampling was used. See Attachment Q.

⁴⁷ The Committee admits that its statistical consultants conclude that dollar unit sampling, "if properly implemented, could produce an unbiased sample." Attachment P at 5 and 20 (emphasis in original). Attachment P at 5 and 20 (emphasis in original). The Committee has failed to demonstrate that the Commission staff did not properly implement the Commission's long-standing dollar unit sampling procedures in this case.

⁴⁸ While the computer program has been modified over the years due to technological changes, it is essentially the same method recommended by Ernst & Whinney in 1979 and used by the Commission since 1980.

⁴⁹ Further, the Commission's policy is to allow prompt payments of matching funds to eligible candidates, even if it must forgo a thorough investigation of the matching fund submissions and later seek a repayment of matching funds paid in excess of a candidate's entitlement. Courts have observed that Congress intended to "provide prompt payments to eligible candidates" to "ensure that an eligible candidate will have the money he needs at a time when its availability is most important to his campaign." *Committee to Elect Lyndon LaRouche v.*

1 Moreover, it was proper for the Commission to calculate the repayment amount using the
2 mid-point of the sample error range (9.57% \pm 3.69%) rather than the lower end of the range. The
3 precision of the estimate in the instant case is consistent with Commission policy.⁵⁰ See
4 Attachment R at 3-6. The sampling error of \pm 3.69% is consistent with the tolerable sampling
5 error of 4% used in the review of matching fund submissions to pay matching funds to
6 presidential primary candidates, and the Commission generally uses a 95% confidence level in
7 these sample projections. In addition, the Commission uses the mid-point of sample projections,
8 not only for matching funds but also for other uses of sampling in audits, such as calculations of
9 the amounts of excessive or prohibited contributions. See 11 C.F.R. \S 9038.2(f)(1).

10 **C. THE COMMISSION'S INVESTIGATION PROTECTED THE**
11 **COMMITTEE'S DUE PROCESS RIGHTS AND WAS FAIR**
12

13 The Commission's repayment procedures protected the Committee's due process rights.

14 See *Explanation and Justification, Presidential Election Campaign Fund and Presidential*
15 *Primary Matching Fund*, 44 Fed. Reg. 20338 and 20341 (April 4, 1979). The Commission's
16 repayment procedures meet due process requirements because they include "Notice of the legal
17 and factual matters upon which the Commission is relying;" the "opportunity [for the Committee]
18 to present in writing evidence and reasons" why the repayment should not occur, a "determination
19 by the Commission on the basis of all evidence presented; and a statement of reasons underlying

FEC, 613 F.2d 834, 841 (D.C. Cir. 1979). This policy "is served by limiting the role of the Commission during the certification process to reviewing the face of a . . . submission except where that submission (or that submission together with other reports on file with the Commission) contains patent irregularities suggesting the possibility of fraud." *Id.* at 843.

⁵⁰ The Committee acknowledges that precision is a matter of agency policy. See Attachment P at 8 and 21-23.

1 the Commission's determination."⁵¹ 44 Fed. Reg. 20338. The Committee received ample notice
2 of the Commission's actions. The Committee received notice that the Commission had initiated
3 the 9039 inquiry. Attachment A. Following the investigation, the Committee received the
4 Commission's Notice of Repayment Determination which set forth the legal and factual reasons
5 for the Commission's repayment determination. Attachment B. The Committee then had the
6 opportunity to seek administrative review of the repayment determination by submitting written
7 materials and making an oral presentation before the Commission, and took advantage of that
8 opportunity. 11 C.F.R. § 9038.2(c)(2). The Commission's repayment determination upon review
9 is delineated in this Statement of Reasons and is based upon the Commission's consideration of
10 the evidence and arguments presented by the Committee.

11 Due process rights are not violated by the use of sampling if the Committee has "access to
12 hearings and appeals and . . . the opportunity to be heard," and the Committee had such an
13 opportunity. *Ratanasen*, 11 F.3d at 1472. The Committee was "given every opportunity to
14 challenge each disallowance as well as the audit technique itself," and thus, it "has been treated as
15 fairly as possible under the circumstances." *Michigan*, 875 F.2d at 1206. The Commission staff
16 provided numerous documents requested by the Committee and the Committee had sufficient
17 information to challenge both the Commission's sampling technique and the treatment of specific
18 sample items as errors.⁵²

⁵¹ The 1979 Explanation and Justification for the Commission's procedures for determining disputes concerning repayments and suspension of payments to candidates state that the Commission's procedures "meet due process requirements" and explain that "procedural due process requirements mandate" that a candidate "be afforded some type of opportunity to demonstrate to the Commission" that the proposed Commission action is "not warranted." 44 Fed. Reg. 20338 and 20341. While some changes have been made to the Commission's repayment procedures over the years, they still include all of the elements to satisfy due process.

⁵² Further, the Commission rejects the Committee's contention that the Committee still lacks sufficient information concerning whether the sample was properly designed and implemented to determine if the method was valid. Attachment P at 5-7 and 20-21. Indeed, the Committee appears to be uncertain of which documents it

1 Moreover, the Commission's analysis of the sample and the contributor responses to the
2 questionnaire was not only fair to the Committee, but was structured to err, if at all, in the
3 Committee's favor. Indeed, the Commission made an assumption in favor of the Committee by
4 not requiring repayment where it was impossible to verify whether a reattribution was proper.
5 For example, eight sample items for which there was no response or an incomplete response to
6 the survey were not treated as errors in calculating the repayment amount. In addition, sample
7 items that appeared to be reattributions between spouses were assumed to be proper and were not
8 verified. Had the Commission assumed that additional information would reveal these
9 contributions were improperly reattributed, it is possible that it would have concluded that the
10 Committee received more than \$62,116 in matching funds based upon non-matchable
11 contributions related to improper reattributions. The Commission also treated an additional eight
12 sample items as properly reattributed based simply on the contributors' responses that the
13 reattributee had the right to withdraw funds from the contributor's bank account without
14 requiring additional documentation from those individuals.

15 Furthermore, the Commission concludes that the Committee failed to timely raise its
16 contentions that the Commission's investigation was improperly conducted and "introduced bias"
17 into the sample results and that two sample items, reattributees Carlita Brown and Roderick Fox,

wants because it made numerous separate requests for different kinds of documents. See *supra*, p. 5-8. For example, in its October 12, 1999 written submission the Committee claimed that it had no "handbook or manual" that explained the "dollar unit sampling" method, but it had not specifically requested such a manual in its previous request for documents. Attachment E at 6. The information the Committee claims it still does not have, input data files, program execution files and program output files, has already been provided to the Committee in a different format because the Committee does not have the Commission's computer database system. See Attachments H and L and Attachment R at 3. Contrary to the Committee's argument that the Commission only provided documents concerning the use of sampling in "other contexts," Attachment P at 5, the information the Commission provided about the use of sampling in the matching funds context concerns the same sampling program that was used for the repayment calculation. The Commission made efforts to promptly provide the documents requested by the Committee but it cannot be expected to anticipate the Committee's requests when the Committee itself appears to be confused about which documents it wants.

1 that were "established solely by means of these telephone interviews" should not be the basis of
2 any repayment because the Commission did not provide the Committee documents memorializing
3 the interviews. Attachment P at 10-12; Attachment F at 12-14 and 20-21. The Committee's
4 written response does not include any of these arguments; thus, the Committee has waived
5 them.⁵³ See 11 C.F.R. § 9038.2(c)(2)(i); *Robertson*, 45 F.3d 486, 490-491; *Fulani*, 147 F.3d
6 924, 927 n.5.

7 Nonetheless, even if these arguments had not been waived, the Committee has failed to
8 demonstrate that the Commission's investigation was improper or biased. The Committee has
9 provided no basis to support its assertion that an investigation of individual sample items is not
10 compatible and consistent with the use of sampling.⁵⁴ Moreover, sampling is an audit technique,
11 and the questionnaire and telephone contacts were discovery tools that were properly used by the
12 Commission in this 9039 inquiry to obtain factual information from the individuals who
13 participated in the reattribution transactions.⁵⁵ See 11 C.F.R. § 9039.3(b)(2). Further, the

⁵³ In its written response, the Committee contends that the "'survey' process used by the [Commission] to 'verify' errors raises numerous questions as to validity, reliability, due process and fairness" but does not elucidate what these problems are. Attachment E at 8. The written response also states that the Committee is "effectively precluded from challenging the determination of error" because the Commission provided survey response forms but no "information concerning interviews conducted with these contributors." *Id.* at 8-9. Nowhere in its written response does the Committee discuss whether follow-up telephone calls bias survey results, the proper techniques for surveys and telephone contacts, the training of interviewers, or the reattributions to Carlita Brown and Roderick Fox.

⁵⁴ Indeed, it is particularly important to investigate sample items because problems with sample items indicate larger problems in the overall population. The Commission's Audit staff regularly uses sampling to choose items for review and may seek additional information from audited committees concerning sample items.

⁵⁵ Although the Internal Revenue Service Manual cited by the Committee is not binding on the Commission and does not reflect the Commission's internal procedures, the Commission's written questionnaire and follow-up telephone contacts were similar to the approach it describes. See, e.g., Internal Revenue Service Manual § 1282.54(1) ("a large proportion of persons generally fail to reply to a mail inquiry, and this can lead to time consuming follow-up work in the form of additional letters, telephone calls, or personal contacts"). Commission staff drafted the questionnaire to be comprehensible, unambiguous, neutral and easy to complete, and contacted several contributors by telephone to obtain complete information using the questionnaire as the basis for questions and memorializing answers in writing. In contrast, the Committee's reference to *Zippo Mfg. Co. v. Rogers*, 216 F.

1 Committee has failed to demonstrate that because the responses were by telephone and the
2 Commission did not provide documents memorializing these contacts to the Committee, the
3 Commission should exclude the reattributions to Carlita Brown and Roderick Fox.⁵⁶ The
4 Commission has not provided to the Committee copies of reports prepared by an investigator and
5 electronic messages memorializing telephone contacts, because these materials are protected by
6 the attorney work product privilege. See FED. R. CIV. P. 26(b)(3); *Upjohn Co. v. U.S.*, 449 U.S.
7 383 (1981); *Hickman v. Taylor*, 329 U.S. 495 (1947). However, the Commission has provided
8 the written survey form that was the basis of the oral contacts with contributors, and the results of
9 all of the surveys are summarized in a chart attached to the Notice of Repayment Determination.
10 See Attachment B at 27-29. Therefore, the Committee had sufficient information to challenge
11 each of the errors.

12 D. SPECIFIC ERRORS

13 The Committee specifically challenged five of the non-matchable sample items upon which
14 the repayment determination is based, contending that these items should be treated as acceptable

Supp. 670 (S.D.N.Y. 1963), is not apt. The market research survey of consumer opinions about similarities between products in *Zippo* was completely different from the Commission's use of a questionnaire as a discovery tool in an investigation to obtain facts, not opinions, concerning specific contributions and reattributions from the contributors involved in the transactions. Since the Commission was trying to obtain facts rather than opinions, it is unclear how telephone contacts would bias the survey results.

⁵⁶ The Committee has provided no support for its contention that Commission staff may have biased the responses of contributors by asking leading questions or coercing particular answers. See Attachment P at 10. Indeed, telephone contacts with some contributors resulted in the treatment of the sample items as proper reattributions. See, e.g., Attachment B at 28 (Tomberg). The survey filled in by Commission staff based on a telephone call from the son of contributor Christine Tomberg was provided to the Committee, with staff's initials and a notation "Based on conversation with Lucian Orasel." Mr. Orasel informed staff that he handles Ms. Tomberg's finances and they share a joint account. Accordingly, the reattribution to Mr. Orasel was considered proper and no repayment of matching funds was required. The other sample item, reattributed to Constance Doehner, was considered improperly reattributed because Mr. Orasel stated that Ms. Doehner does not have access to Ms. Tomberg's account. Similarly, survey responses by James Pettit and Sheila Thomsen were also clarified by telephone contacts. In addition, two contributors sent in completed questionnaires after staff obtained responses from them by telephone; those questionnaires were provided to the Committee. Finally, Commission staff also spoke to several individuals who called with questions concerning the contribution verification.

1 and should not be the basis of any repayment. However, the Committee has failed to demonstrate
2 that any of the five sample items were properly reattributed or matchable and thus has failed to
3 demonstrate that the repayment amount should be reduced. See 11 C.F.R. § 9038.2(c)(2).

4 First, Anna Newton contacted the Commission by telephone and the meaning of
5 "retribution" was explained to her. Because she stated that the retributee, Andrew Newton,
6 did not have the right to withdraw funds from her bank account, the retribution was improper
7 and the matching funds related to this sample item are subject to repayment. See Attachment U at
8 2. Confusion about the meaning of "retribution" by several contributors supports the
9 Commission's repayment determination because these contributors may not have realized the
10 significance of signing the retribution statements. The fact that Ms. Newton, or any other
11 contributor who received a survey, contacted Commission staff to ask a question does not make
12 her survey response biased or unreliable. See *supra*, Section IV. C.

13 Second, on the written survey, Catherine Radecki responded that her contribution check
14 was drawn on an escrow or trust account. See Attachment V at 1. However, it is not clear that
15 Ms. Radecki understood the question because she added the handwritten notation "my bank,"
16 which is irrelevant to the question of whether the account was an escrow or trust account. *Id.* In
17 addition, there was no indication on the face of her checks that the account was a trust or escrow
18 account, and the Committee has provided no evidence to demonstrate that the contribution was
19 made on a trust or escrow account. Ms. Radecki also responded that the retributee had no right
20 to withdraw funds from her account.⁵⁷ *Id.* The retribution was not matchable because the

⁵⁷ The Commission notes that Ms. Radecki's retributee, Jean McMahon, was not one of the nine retributees whom the Committee contends gave funds to contributors and were involved in a trust relationship. See Attachment P at 17. In addition, while the Committee challenged the errors related to Ms. Radecki, Mr. Pettit, and Mr. Kremer in its written submission of October 12, 1999, the chart the Committee presented at the oral hearing and additional materials submitted on March 17, 2000 do not refer to these individuals specifically. See

1 reattributee did not have the right to withdraw from Ms. Radecki's account. *See* 11 C.F.R.
2 § 9034.2(c)(1).

3 Third, James Pettit did not respond in writing to the question of whether the reattributee,
4 Emily Jane Pettit, had the right to withdraw from his account, but in a telephone contact with the
5 Commission's investigator, Mr. Pettit clarified that it was not a joint account; thus, it was an
6 improper reattribution. *See* Attachment W at 2. Fourth, John W. Kremer's response that he did
7 not make the reattribution is not evidence that the reattribution was proper, but rather, supports
8 the Commission's conclusion that he did not make a proper reattribution. *See* Attachment X at 2.
9 Mr. Kremer also stated that the reattributee did not have the right to withdraw funds from his
10 account, thus, the reattribution was not proper. *See id.*

11 Finally, Sheila Thomsen reattributed funds from her contributions to her son, David Arthur
12 Thomsen, who has the same first name as her husband, David J. Thomsen. This fact was clarified
13 in a telephone contact with Ms. Thomsen. Ms. Thomsen's survey indicated "n/a" to both
14 questions concerning her son, David Arthur Thomsen, the sample item, and included a note that
15 there was a "typo."⁵⁸ *See* Attachment Y at 2-3. However, the reattribution statements make
16 clear that there are two different people with different occupations (her husband is an
17 "economist," and the son lists "student") and apparently different handwriting. *See* Attachment S
18 at 2-3. A follow-up telephone call by the Commission's investigator to Sheila Thomsen clarified
19 that the reattribution in question was to David Arthur Thomsen, her son, a college student at the

Attachment F at Exhibit 3, Attachment P at 12-14. Thus, it is unclear whether the Committee continues to contest these errors.

⁵⁸ The Commission investigator contacted David J. Thomsen, who indicated that he, rather than Sheila Thomsen, filled out the survey form and wrote "typo." David J. Thomsen signed the corner of Sheila Thomsen's survey form. *See* Attachment Y at 1.

1 time of the reattribution, but Ms. Thomsen was unsure of the amount of the reattribution. This
2 reattribution is non-matchable because Ms. Thomsen stated that she and her son do not have a
3 joint account. *See* 11 C.F.R. § 9034.2(c)(1).

4 E. REFUNDED CONTRIBUTIONS

5 The Commission's repayment determination in the amount of \$1,634 for matching funds
6 based on contributions that were subsequently refunded, must be repaid because refunded
7 contributions are not matchable.⁵⁹ *See* 26 U.S.C. § 9038(b)(1); 11 C.F.R.
8 § 9038.2(b)(1)(iii)(non-matchable contributions are subject to repayment). Since the
9 contributions have been refunded, they are no longer a matchable gift of money given by the
10 contributors for the purpose of influencing the primary election. *See* 11 C.F.R. § 9034.2(a)(1).
11 Moreover, the fact that the contributors requested and received refunds negates the donative
12 intent necessary for matchability. *See* 11 C.F.R. § 9034.3(i). Although the Committee argued at
13 the oral hearing that a mere request for a refund does not negate donative intent, the Commission
14 need not address that issue here because refunds were made, and the Committee admits that
15 "[o]nce we give them their money back, I don't disagree that the matching funds have to follow."
16 Attachment F at 40-41.

17 The Commission's repayment calculation used the amount of matching funds actually paid
18 for the refunded contributions, as determined by the error rates applicable to the submission of
19 those contributions for matching, consistent with the Commission's calculation of similar
20 repayments in other matters. *See* Memorandum from Lawrence M. Noble to the Commission
21 dated July 8, 1999, "Alexander for President, Inc., Buchanan for President, Inc., Clinton/Gore '96

⁵⁹ The Commission's regulations provide that committees must submit a list of all refunds with their threshold submission and with subsequent matching fund submissions. *See* 11 C.F.R. §§ 9036.1(b)(6), 9036.2(b)(1)(iv); *see also* *Guideline* at 14, 31.

1 Primary Committee, Inc.: Matching Fund Error Rates (LRA # 559)" at 1-3 and 8-9. The
2 Committee submitted the contributions and associated reattributions for a total of \$1,750 in
3 matching funds, \$250 for each of the two original contributors and \$250 for each of five
4 reattributees. These contributions were included in two matching fund submissions with different
5 error rates, two matched at a rate of 94.8% and five at a rate of 92.8%. The total amount of
6 matching funds approved for the refunded contributions was \$1,634 ($5 \times \$250 \times .928$) + ($2 \times$
7 $\$250 \times .948$). Thus, the Committee must repay the \$1,634 in matching funds paid for the
8 refunded contributions.

9 **V. CONCLUSION**

10 Based on the foregoing, the Commission has determined upon administrative review that
11 Patrick J. Buchanan and Buchanan for President, Inc. must repay a total of \$63,750 to the United
12 States Treasury for matching fund payments received in excess of the candidate's entitlement
13 based on matched contributions later determined to have been non-matchable. 26 U.S.C.
14 § 9038(b)(1); 11 C.F.R. § 9038.2(b)(1)(iii). The repayment amount results from Commission
15 determinations that the Committee must repay \$62,116 for matching funds related to improper
16 reattributions and \$1,634 for matched contributions that were later refunded. Patrick J. Buchanan
17 and Buchanan for President, Inc. are ordered to repay \$63,750 to the United States Treasury
18 within 30 days. 11 C.F.R. §§ 9038.2(c)(3) and (d)(2).

19 **Attachments**

- 20
21 A. Letter from Chairman Aikens to Patrick J. Buchanan Notice of Inquiry dated
22 June 23, 1998
23 B. Letter from Kim Bright-Coleman to Patrick J. Buchanan dated July 23, 1999 with
24 attached Notice of Repayment Determination
25 C. Letter from John J. Duffy to Delanie DeWitt Painter dated August 24, 1999
26 D. Letter from Joel J. Roessner to John J. Duffy dated October 8, 1999 (without
27 enclosures)

- 1 E. Buchanan for President, Inc. response dated October 12, 1999
- 2 F. Oral hearing Transcript – March 1, 2000
- 3 G. Letter from Rhonda M. Rivens to Kim Leslie Bright dated February 7, 2000
- 4 H. Letter from Delanie DeWitt Painter to Rhonda M. Rivens dated February 16, 2000
- 5 (without enclosures)
- 6 I. Facsimile transmission from Rhonda M. Rivens to Delanie DeWitt Painter dated
- 7 February 18, 2000
- 8 J. Facsimile transmission from Delanie DeWitt Painter to Rhonda M. Rivens dated
- 9 February 25, 2000
- 10 K. Facsimile transmission from Rhonda M. Rivens to Delanie DeWitt Painter dated
- 11 March 2, 2000
- 12 L. Letter from Delanie DeWitt Painter to Rhonda M. Rivens dated March 3, 2000
- 13 (without enclosures)
- 14 M. Letter from Delanie DeWitt Painter to Rhonda M. Rivens dated March 10, 2000
- 15 (without enclosures)
- 16 N. Facsimile transmission from Rhonda M. Rivens to Delanie DeWitt Painter dated
- 17 March 6, 2000
- 18 O. Facsimile transmission from Rhonda M. Rivens to Delanie DeWitt Painter dated
- 19 March 7, 2000
- 20 P. Additional materials submitted to Chairman Wold from John J. Duffy dated
- 21 March 17, 2000
- 22 Q. Memorandum from Robert J. Costa to Lawrence M. Noble dated October 22,
- 23 1997
- 24 R. Memorandum from Robert J. Costa to Lawrence M. Noble dated May 15, 2000
- 25 S. Sheila Thomsen check and reattribution statements
- 26 T. Survey forms for Nine Contributors
- 27 U. Anna Newton survey
- 28 V. Catherine Radecki survey
- 29 W. James Pettit survey
- 30 X. John Kremer survey
- 31 Y. Sheila Thomsen survey
- 32 Z. Alyssa D. Humphreys survey