AGENDA DOCUMENT NO. 08-34

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

September 5, 2007

MEMORANDUM

AGENDA ITEM
For Meeting of: 11-13-08

To: The Commissioners

Through: Patrina M. Clark
Staff Director

John D. Gibson
Chief Compliance Officer

From: Joseph F. Stoltz
Assistant Staff Director
Audit Division

Martin L. Favin
Audit Manager

Subject: Report of the Audit Division on Edwards for President

Attached for your approval is the subject report. Included with the report is a legal analysis provided by the Office of General Counsel. There are no disagreements between the Offices with respect to this report.

Your attention is directed to Finding 4: Transfer of Apparent Ineligible Funds from Edwards for Senate. In that finding it is concluded that of $962,908 transferred from Edwards for Senate to Edwards for President, $508,414 was not eligible for transfer under Commission regulations. The analysis in the Audit Report divides the funds available in the Edwards for Senate accounts into three categories based on their election designation. The largest group of contributions is related to the retirement of 1998 debts. The final report, like the preliminary, concludes that these contributions were required to be redesignated, or refunded within 60 days of when the 1998 debt was satisfied. In this case, the only debt was owed to the Candidate. The Candidate forgave the debt before the amount was transferred to Edwards for President. Since no refunds or redesignations were done with respect to these contributions, none are considered to be transferable. Rather, funds are reserved for refund, return to Edwards for Senate, or disgorgement. The Office of General Counsel agrees.

The second group of contributions includes those that were raised for the 2004 general election. Pursuant to 11 CFR §102.9(e)(3), after the Candidate discontinued his campaign for Senator those contributions, like the 1998 debt retirement contributions, required either a redesignation or a refund. Edwards for Senate obtained written redesignations for $88,200 of these contributions and transferred that amount. However, $6,650 of that amount caused excessive contributions for Edwards for President. The Edwards for President Committee does not contest this amount. Like the 1998 debt retirement contributions, the funds that were needed to make transfers of the contributions that were properly redesignated by the contributors, or required a refund, are not considered available for transfer pursuant to 11 CFR §110.3(c)(5)(ii).

The final group is contributions received by Edwards for Senate for the 2004 primary election. The amount of these contributions was determined by calculating total cash on hand when the transfers were made and setting aside funds necessary to meet Edwards for Senate's obligations with respect to the first two groups of contributions. The amount that remained is $548,023. These contributions are transferable if they do not cause an excessive contribution to Edwards for President.

Section 110.3(c)(5)(ii) is the controlling regulation. It states:

> The limitation on contributions by persons shall not be exceeded by the transfer. The cash on hand from which the transfer is made shall be considered to consist of the funds most recently received by the transferor committee. The transferor committee must be able to demonstrate that such cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred. A contribution shall be excluded from the amount transferred to the extent that such contribution when aggregated with other contributions from the same contributor to the transferee principal campaign committee, exceeds the contribution limits set forth at 11 CFR 110.1 or 110.2, as appropriate.

Thus, the analysis starts with the contributions most recently received by Edwards for Senate and works back until $548,023 of contributions is identified. Those contributions are aggregated with contributions received by Edwards for President up to the time of the transfer. The contributions that were within the limitation available to Edwards for President totaled $372,944 or $87,665[1] less than the amount transferred.

In its response to the preliminary audit report, Edwards for President argues that the analysis of which funds could be transferred should include all funds received by Edwards for Senate, not just contributions. The regulation noted above discusses contributions in large part, but does use the phrase "funds most recently received."

[1] Edwards for Senate reported transferring $460,609 of 2004 Primary funds. The audit determined that $372,944 was the maximum amount that could be transferred. The difference is $87,665.

Edwards for President also argues that interest income and all refunds and offsets should be considered 100% transferable without respect to any contribution limitation or source.

In its legal analysis, the Office of General Counsel notes that the issue of whether Edwards for President should be able to transfer funds derived from sources other than contributions is an open question. Counsel further recommends that given that the regulation does not exclude other financing sources by the use of the term "funds," the Commission should consider other sources that can be used to finance a transfer.

In order to determine the impact of these other funding sources, Edwards for Senate's bank records and disclosure reports were reviewed to identify other funds that were received prior to the transfers. In working back from the most recent receipts until the cash balance of $548,023 noted above was accounted for, it was determined that in addition to contributions, Edwards for Senate received the following funds:

Source	Amount
Interest	$32,513
Amounts received from Edwards for President	$98,849
Other Refunds (telephone, rent, direct mail, and property insurance)	$53,337
Total	$184,699

The interest was earned on a pool of funds that undoubtedly contained both amounts that could be transferred and amounts that could not. The refunds from vendors are the recovery of earlier expenses rather than revenues. However, the most problematic amounts are those that were received from Edwards for President. Edwards for President purchased telephone equipment, computer hardware and software, a mailing list, a security deposit, and made overhead reimbursements. Absent payment for these assets and services, Edwards for Senate would have made an excessive in-kind contribution to Edwards for President. In the opinion of the Audit staff, by returning the funds to Edwards for President, the excessive contribution avoided is in fact made.

In order to determine the effect on the conclusion reached in the audit report of including in the cash flow some or all of these other receipts, the amounts in the above table were inserted in the analysis of contributions used to calculate the amounts that appeared in the preliminary audit report. All of the funds are considered transferable except the amounts paid to Edwards for Senate by Edwards for President for assets and expenses. Those are limited to the $2,000 contribution limitation to avoid the in-kind contribution that would otherwise have occurred. The result is a decrease in the permissible transferable amount from $372,944 to $345,728, or $27,216. The decrease occurs because the non-contribution receipts displace contributions that are largely transferable when determining the funds most recently received. Since the payments from Edwards for President are the bulk of the non-contribution receipts and are not transferable, the excess amount transferred increases from $87,665 to $114,881.

Should it be determined that Edwards for Senate may return the payments it received from Edwards for President for assets and services, the transferable amount would increase from $372,944 to $442,577, or by $69,633. The amount that would be required to be returned to Edwards for Senate related to primary contributions would decrease from $87,665 to $18,032.

In either analysis, the amounts that should be returned to Edwards for Senate related to 1998 debt retirement and 2004 general election contributions are unchanged; $414,099 and $6,650 respectively.

Recommendation

The Audit staff recommends that the report be approved as presented.

This report is being circulated on a tally vote basis. Should an objection be received, it is recommended that the report be considered at the next regularly scheduled open session. If you have any questions, please contact Marty Favin or Joe Stoltz at 694-1200.

Attachments:

- Report of the Audit Division on Edwards for President
- Legal Analysis on the proposed audit report on Edwards for President

Report of the Audit Division on Edwards for President

December 18, 2002 – April 30, 2004

Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a candidate who receives public funds for the primary campaign.[1] The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

About the Committee (p. 2)

Edwards for President is the principal campaign committee for Senator John Edwards, a candidate for the Democratic Party's nomination for the office of President of the United States. The committee is headquartered in Washington, DC. For more information, see chart on the Campaign Organization, p. 2.

Financial Activity (p. 3)

• **Receipts**	
o Contributions from Individuals	$ 21,900,808
o Matching Funds Received	6,108,375
o Loans Received	2,470,614
o Offsets to Operating Expenditures	1,386,903
o Transfers from Edwards for Senate	962,908
o Other Receipts	3,994
o **Total Receipts**	**$ 32,833,602**
• **Disbursements**	
o Operating Expenditures	$ 20,045,176
o Fundraising Expenditures	6,947,671
o Legal and Accounting Expenditures	2,847,441
o Loan Repayments	2,470,614
o Contribution Refunds	174,587
o **Total Disbursements**	**$ 32,485,489**

Findings and Recommendations (p. 4)

- Net Outstanding Campaign Obligations (Finding 1)
- Receipt of Contributions that Exceed the Limits (Finding 2)
- Receipt of In-Kind Contributions that Exceed the Limits (Finding 3)
- Transfer of Apparent Ineligible Funds from Edwards for Senate (Finding 4)
- Stale-Dated Checks (Finding 5)

[1] 26 U.S.C. §9038(a).

Report of the Audit Division on Edwards for President

December 18, 2002 – April 30, 2004

Table of Contents

Part I
Background

Authority for Audit

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

Scope of Audit

This audit examined:

1. The receipt of excessive contributions and loans.
2. The receipt of contributions from prohibited sources.
3. The receipt of transfers from other authorized committees.
4. The disclosure of contributions and transfers received.
5. The disclosure of disbursements, debts and obligations.
6. The recordkeeping process and completeness of records.
7. The consistency between reported figures and bank records.
8. The accuracy of the Statement of Net Outstanding Campaign Obligations.
9. The campaign's compliance with spending limitations.
10. Other campaign operations necessary to the review.

Inventory of Campaign Records

The Audit staff routinely conducts an inventory of campaign records before it begins the audit fieldwork. EFP's records were materially complete and the fieldwork began immediately.

Part II
Overview of Campaign

Campaign Organization

Important Dates	Edwards for President
• Date of Registration	January 2, 2003
• Eligibility Period [2]	December 4, 2003 – March 3, 2004
• Audit Coverage	December 18, 2002 – December 31, 2006
Headquarters	
• Until May 2004	Raleigh, NC
• From May 2004	Washington, DC
Bank Information	
• Bank Depositories	Two
• Bank Accounts	Five – Checking
Treasurer	
• Treasurer When Audit Was Conducted	Julius Chambers
• Treasurer During Period Covered by Audit	Julius Chambers
Management Information	
• Attended FEC Campaign Finance Seminar	No
• Used Commonly Available Campaign Management Software Package	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

[2] The period during which the Candidate was eligible for matching funds began on the date of certification of eligibility and ended on the date the Candidate announced his withdrawal from the campaign. See 11 CFR §9033.

Overview of Financial Activity
(Audited Amounts)

Cash on hand @ December 18, 2002	**$ 0**
o Contributions from Individuals	21,900,808[3]
o Matching Funds Received	6,108,375[4]
o Loans Received	2,470,614
o Offsets to Operating Expenditures	1,386,903
o Transfers from Edwards for Senate	962,908[5]
o Other Receipts	3,994
Total Receipts	**$ 32,833,602**
o Operating Expenditures	20,045,176
o Fundraising Expenditures	6,947,671
o Legal and Accounting Expenditures	2,847,441
o Loan Repayments	2,470,614
o Contribution Refunds	174,587
Total Disbursements	**$ 32,485,489**
Cash on hand @ April 30, 2004	**$ 348,113**

[3] Approximately 81,000 contributions from 55,500 individuals.

[4] As of April 1, 2005, EFP has made 11 matching fund submissions totaling $6,835,788 and received $6,706,548 which represents 36% of the maximum entitlement ($18,655,000).

[5] The Audit staff has determined that $508,414 of this amount was not eligible for transfer. See Finding 4.

Part III
Summaries

Findings and Recommendations

Finding 1. Net Outstanding Campaign Obligations

Based on its financial activity through December 31, 2006, and estimated winding down costs necessary to terminate the campaign, EFP did not receive matching fund payments in excess of the Candidate's entitlement. (For more detail, see p. 8)

Finding 2. Receipt of Contributions that Exceed the Limits

The Audit staff's sample review of contributions from individuals indicated that EFP failed to resolve a significant number of excessive contributions. The projected total dollar value of the unresolved excessive contributions is $239,538. The Audit staff recommended that EFP provide evidence that the sample errors were not excessive or make a payment of $239,538 to the U.S. Treasury. In response to the preliminary audit report, EFP argued that most of the contributions listed as errors in the sample were not excessive and therefore a payment to the U.S. Treasury was not warranted. EFP also demonstrated that notifications were sent to contributors eligible for presumptive reattributions totaling $64,925; and, that refunds were made to contributors for $20,535 of the excessive amount. As a result, the revised payment owed to the U.S. Treasury is $154,078 ($239,538 - $64,925 - $20,535). (For more detail, see p. 11)

Finding 3. Receipt of In-Kind Contributions that Exceed the Limits

The Audit staff's review of the use of non-commercial aircraft for campaign travel identified in-kind contributions from one contributor that exceeded the limits by $22,689. The excessive contributions resulted from EFP's reimbursement for the service provided at an amount less than required. The Audit staff recommended that EFP provide evidence that an excessive contribution was not received or make a payment of $22,689 to the U.S. Treasury. In response to the preliminary audit report, EFP provided documentation which demonstrated the correct amount was reimbursed for campaign travel. (For more detail, see p. 16)

Finding 4. Transfer of Apparent Ineligible Funds from Edwards for Senate

Edwards for Senate transferred a total of $962,908 to EFP. The Audit staff determined that $508,414 was not eligible for transfer. The ineligible amount included $414,099 in contributions that were attributed by the Senate committee to retire debt outstanding (candidate loans) from the 1998 Primary and General elections. These funds were transferred after the debt was forgiven but without written redesignations from the

contributors. The Audit staff recommended that EFP provide evidence that the $508,414 was eligible for transfer or make a payment of $508,414 to the U.S. Treasury. In response to the preliminary audit report, EFP disagreed with the Audit staff's analysis of the funds available for transfer. EFP considered the sales of assets from the Senatorial committee to EFP, as well as interest earned and other offsets[6] included in the funds available for transfer. They also believe disbursements should be applied against any receipts received to determine the available funds for transfer. As a result, EFP concluded permissible funds were available for the transfer.

Subsequent to the issuance of the preliminary audit report, EFP was notified that the Commission had determined that EFP could return the funds to Edwards for Senate rather than making a payment to the U.S. Treasury as stated in the report. In response to that notification, EFP reiterated its position that the transfers were permissible and hence it was not necessary for them to address any return of funds to Edwards for Senate.

Since the response does not demonstrate that the transfers were comprised of funds eligible for transfer, $508,414 should be returned to Edwards for Senate or paid to the U.S. Treasury. (For more detail, see p. 19)

Finding 5. Stale-Dated Checks

The Audit staff identified 53 stale-dated checks totaling $20,181 issued by EFP. It was recommended the EFP provide evidence that these checks were not outstanding or make a payment to the U.S. Treasury of $20,181. In response to the preliminary audit report, EFP demonstrated that as of December 31, 2006 three payees had cashed their checks and one check was voided. Therefore, $18,851 ($20,181 - $1,330) is payable to the U.S. Treasury. (For more detail, see p. 25)

[6] Some of the offsets included in EFP's analysis include reimbursements from EFP to the Senatorial committee.

Summary of Amounts Owed to the U.S. Treasury

• Finding 2	Receipt of Contributions that Exceed the Limits	$ 154,078
• Finding 3	Receipt of In-Kind Contributions that Exceed the Limits	$ 0
• Finding 4	Transfer of Apparent Ineligible Funds from Edwards for Senate	$ 508,414
• Finding 5	Stale-Dated Checks	$ 18,851
Total Due the U.S. Treasury		$ 681,343

Committee Response to the Preliminary Audit Report & Audit Staff's Assessment

In response to the preliminary audit report, EFP stated that the Commission does not have the authority under the statue nor the regulations to require payments to the U.S. Treasury for "receiving excessive contributions, including in-kind contributions, as well as improper transfers." They stated the Commission only has the authority to require repayments for funds used for non-qualified campaign expenses, failure to provide adequate documentation, receiving payments in excess of entitlement and for receiving net income from an investment or other use of public funds, none of which apply to the issues in this report.

EFP acknowledged that the Commission requires an amount equal to the amount of stale-dated checks to be paid to the U.S. Treasury and noted that there is a specific regulation to address this situation.

For publicly funded campaigns, the Commission formally approved the use of disgorgements for both unidentifiable (e.g. those resulting from a sample projection) and identifiable excessive/prohibited contributions in 1992. The Commission promulgated regulations to specifically address these issues in 1995. 11 CFR §9038.1(f)(3) (sampling) states,

> "...the Committee shall submit a check to the United States Treasury for the total amount of any excessive or prohibited contributions not refunded, reattributed or redesignated in a timely manner in accordance with 11 CFR§ 103.(b)(1)(2) or (3)..."

This regulation also applies to attempts to "cure" the error outside the specified time frame. "The Commission stated that disgorgement serves the following purposes: (a) it eliminates the need to monitor the refunds of excessive or prohibited contributions that have not been timely refunded; (b) it permits one payment to be made to the United

States Treasury, rather than refunding multiple contributions; and (c) it is a practical solution when a sample review has revealed excessive or prohibited contributions."

Although the Commission recently determined that a refund to the contributor is an alternative to disgorgement, this is the regulatory authority for requiring payments for unresolved or untimely excessive contributions.

EFP further argued that the Commission has been inconsistent in requiring payments for excessive/prohibited contributions. The examples EFP cites in their response either were not publicly funded campaigns or the excessive/prohibited contributions at issue were resolved prior to the commencement of the audit, albeit untimely. The Commission has determined that excessive/prohibited contributions resolved untimely prior to the commencement of the audit will not be subject to disgorgement.

Finally, EFP stated the Commission has never required a presidential committee to make a payment to the U.S. Treasury for an excessive transfer from one committee to another for a different election and if a payment is due it should be sent to the transferor committee. The Commission has never required a payment for this type of excessive contribution in a presidential audit because this issue has not been brought forth in this context.

Subsequent to the issuance of the preliminary audit report, EFP was notified that the Commission had determined that EFP could return the funds to Edwards for Senate rather than making a payment to the U.S. Treasury as stated in the report. In response to that notification, EFP reiterated its position that the transfers were permissible and hence it was not necessary for them to address any return of funds to Edwards for Senate.

Part IV
Findings and Recommendations

Finding 1. Net Outstanding Campaign Obligations

Summary
Based on its financial activity through December 31, 2006, and estimated winding down costs necessary to terminate the campaign, EFP did not receive matching fund payments in excess of the Candidate's entitlement.

Legal Standard
Net Outstanding Campaign Obligations (NOCO). Within 15 days after the candidate's date of ineligibility (see definition below), the candidate must submit a statement of "net outstanding campaign obligations". This statement shall contain, among other things:

- The total of all committee assets including cash on hand, amounts owed to the committee and capital assets listed at their fair market value;
- The total of all outstanding obligations for qualified campaign expenses; and
- An estimate of necessary winding-down costs. 11 CFR §9034.5(a).

Date of Ineligibility. The date of ineligibility is whichever of the following dates occurs first:

- The day on which the candidate ceases to be active in more than one state;
- The 30th day following the second consecutive primary in which the candidate receives less than 10 percent of the popular vote;
- The end of the matching payment period, which is generally the day when the party nominates its candidate for the general election; or
- In the case of a candidate whose party does not make its selection at a national convention, the last day of the last national convention held by a major party in the calendar year. 11 CFR §§9032.6 and 9033.5.

Qualified Campaign Expense. Each of the following expenses is a qualified campaign expense.

- An expense that is:
  - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
  - Made in connection with the candidate's campaign for nomination; and
  - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.

- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.
- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

Value of Capital Assets. The fair market value of capital assets is 60% of the total original cost of the assets when acquired, except that assets that are received after the date of ineligibility must be valued at their fair market value on the date received. A candidate may claim a lower fair market value for a capital asset by listing the asset on the NOCO statement separately and demonstrating, through documentation, the lower fair market value. 11 CFR §9034.5(c)(1).

Entitlement to Matching Payments after Date of Ineligibility. If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that he or she still has net outstanding campaign debts on the day when the matching payments are made. 11 CFR §9034.1(b).

Facts and Analysis

The Candidate's date of ineligibility (DOI) was March 3, 2004. The Audit staff reviewed EFP's financial activity through December 31, 2006, analyzed estimated winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations that appears on the next page:

Edwards for President
Statement of Net Outstanding Campaign Obligations
As of March 3, 2004
Prepared December 31, 2006

Assets

Cash in Bank		$ 671,137	[a]	
Accounts Receivable		532,876		
Capital Assets		5,724		
Total Assets				$1,209,737

Liabilities

Accounts Payable for Qualified Campaign Expenses at 3/3/04		$2,205,753	[b]	
Winding Down Costs:				
Paid 3/4/04 – 12/31/06	$ 730,264			
Estimated Winding Down Costs (1/1/07 – 12/31/07) – Legal Fees	102,000	832,264		
Loan Payable at 3/3/04		1,570,614		
Amounts Payable to the U.S. Treasury for:				
Unresolved Excessive Contributions (See Finding 2)	$ 154,078			
In-Kind Contributions that Exceed the Limits (See Finding 3)	0			
Ineligible Transfer from Edwards for Senate (See Finding 4)	508,414			
Stale-Dated Checks (See Finding 5)	18,851	681,343		
Total Liabilities				$5,289,974

Net Outstanding Campaign Obligations (Deficit) as of March 4, 2004 ($4,080,237)

Footnotes to NOCO Statement:

[a] Adjusted for stale-dated checks totaling $10,486 issued prior to DOI.
[b] Does not include disputed invoices totaling $54,159.

Shown below are adjustments for funds received after March 3, 2004 through March 31, 2005, based on the most current financial information available at the close of fieldwork.

Net Outstanding Campaign Obligations (Deficit) as of 3/3/2004	($ 4,080,237)
Private Contributions Received 3/4/04 through 3/31/05	373,201
Matching Funds Received 3/4/04 through 3/31/05	3,137,020
Other Receipts 3/4/04 through 3/31/05	13,980
Net Outstanding Campaign Obligations (Deficit) Remaining as of 3/31/05	($ 7,604,438)

As presented above, EFP has not received matching fund payments in excess of the amount to which the Candidate is entitled. Further, a payment of $52,297 on April 1, 2005 was appropriate given the deficit position at that time.

Finding 2. Receipt of Contributions that Exceed the Limits

Summary

The Audit staff's sample review of contributions from individuals indicated that EFP failed to resolve a significant number of excessive contributions. The projected total dollar value of the unresolved excessive contributions is $239,538. The Audit staff recommended that EFP provide evidence that the sample errors were not excessive or make a payment of $239,538 to the U.S. Treasury. In response to the preliminary audit report, EFP argued that most of the contributions listed as errors in the sample were not excessive and therefore a payment to the U.S. Treasury was not warranted. EFP also demonstrated that notifications were sent to contributors eligible for presumptive reattributions totaling $64,925; and, that refunds were made to contributors for $20,535 of the excessive amount. As a result, the revised payment owed to the U.S. Treasury is $154,078 ($239,538 - $64,925 - $20,535).

Legal Standard

Authorized Committee Limits. An authorized committee may not receive more than a total of $2,000 per election from any one person. 2 U.S.C. §441a(a)(1)(A) and (f); 11 CFR §§110.1(a) and (b) and 110.9.

Handling Contributions That Appear Excessive. If a committee receives a contribution that appears to be excessive, the committee must either:

- Return the questionable check to the donor; or
- Deposit the check into its federal account and:
  - Keep enough money in the account to cover all potential refunds;
  - Keep a written record explaining why the contribution may be illegal;
  - Include this explanation on Schedule A-P if the contribution has to be itemized before its legality is established;

- o Seek a reattribution of the excessive portion, following the instructions provided in Commission regulations (see below for an explanation of reattribution); and
- o If the committee does not receive a proper reattribution within 60 days after receiving the excessive contribution, refund the excessive portion to the donor. 11 CFR §§103.3(b)(3), (4) and (5) and 110.1(k)(3)(ii)(B).

Joint Contributions. Any contribution made by more than one person (except for a contribution made by a partnership) must include the signature of each contributor on the check or in a separate writing. A joint contribution is attributed equally to each donor unless a statement indicates that the funds should be divided differently. 11 CFR §110.1(k)(1) and (2).

Reattribution of Excessive Contributions. Commission regulations permit committees to ask donors of excessive contributions (or contributions that exceed the committee's net debts outstanding) whether they had intended their contribution to be a joint contribution from more than one person and whether they would like to reattribute the excess amount to the other contributor. The committee must inform the contributor that:

1. The reattribution must be signed by both contributors;
2. The reattribution must be received by the committee within 60 days after the committee received the original contribution; and
3. The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(A).

Within 60 days after receiving the excessive contribution, the committee must either receive the proper reattribution or refund the excessive portion to the donor. 11 CFR §§103.3(b)(3) and 110.1(k)(3)(ii)(B). Further, a political committee must retain written records concerning the reattribution in order for it to be effective. 11 CFR §110.1(l)(5).

Notwithstanding the above, any excessive contribution that was made on a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless instructed otherwise by the contributor(s). The committee must, within 60 days of receipt, inform each contributor:

1. How the contribution was attributed; and
2. The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(B).

Sampling. In conducting an audit of contributions, the Commission uses generally accepted statistical sampling techniques to quantify the dollar value of related audit findings. Apparent violations (sample errors) identified in a sample are used to project the total amount of violations. If a committee demonstrates that any apparent sample errors are not errors, the Commission will make a new projection based on the reduced number of errors in the sample. 11 CFR §9038.1(f)(1) and (2)

Within 30 days of service of the final audit report, the committee must submit a check to the United States Treasury for the total amount of any excessive contributions not refunded, reattributed, or redesignated in a timely manner. 11 CFR §9038.1(f)(3).

Facts and Analysis

The Audit staff's sample review of contributions from individuals indicated that EFP received a material number of excessive contributions. The projected dollar value of the unresolved excessive contributions in the sample population was $239,538. Included among the sample errors were contributions made by credit card in response to a telemarketing solicitation that were attributed to more than one individual. The documentation provided in support of these contributions was credit card authorizations from one individual in amounts exceeding the $2,000 limit. The excessive portion was reattributed to another individual without obtaining the signature of the second individual acknowledging the contribution and joint liability for the credit card used to make the contribution.

For contributions made by written instrument, sample errors included EFP's attribution of the excessive portion of contributions made on single account holder checks without a signed reattribution or, for contributions made on joint account holder checks, written notification for the action taken, including the opportunity to request a refund (See legal standard for reattribution of excessive contributions). EFP's receipts database indicated that reattribution letters had been sent for some the sample errors, although none were found in the files available. EFP did not respond to a request for a copy of its procedures for processing receipts and sample copies of documentation used to notify contributors of attributions and/or to request a reattribution.

The Audit staff provided EFP representatives with a schedule of the sample errors for the unresolved excessive contributions at the exit conference. In response to the exit conference, EFP provided letters completed by the contributors in January and February 2005 for a number of the sample errors. As a result of Commission decisions in other audits, the Audit staff reevaluated these errors and applied a credit to the estimate of unresolved excessive contributions (see further discussion on page 15).

Regarding the excessive contributions for which no evidence was found that EFP sought a reattribution or refunded the excessive portion, EFP stated that in March 2004 the committee had compiled a list of excessive contributors requiring refunds.[7] However, due to clerical error, refunds were not issued to all the identified contributors. EFP maintained that these sample errors should be removed from the universe of sample errors because:

1. EFP had an adequate system in place to identify and issue refund checks for excessive contributions;
2. The system functioned properly by identifying the above sample errors as requiring refund; and
3. The refunds were not issued solely due to an "erroneous oversight."

[7] This listing was not provided to the Audit staff. EFP's April 2004 Disclosure Report (Schedule B-P, Line 28A) lists contribution refunds to 56 individuals totaling $58,521 but did not disclose a refund associated with any of the errors identified in the sample.

The Audit staff points out that, although the system may have identified the contributors requiring refunds, EFP did not issue the refunds.

Preliminary Audit Report Recommendation

The Audit staff recommended that EFP provide evidence that the contributions identified as sample errors were not excessive. Such evidence should have included timely notification of the action taken with the opportunity to request a refund; timely signed and dated reattribution letters; or copies of the front and back of timely negotiated refund checks. Absent such evidence, the Audit staff recommended that $239,538 be paid to the U.S. Treasury or the amount due be disclosed on Schedule D-P (Debts and Obligations) until paid.

Committee Response to the Preliminary Audit Report & Audit Staff's Assessment

In response to the preliminary audit report, EFP presented arguments attempting to demonstrate that the contributions in the sample, identified as excessive, were not errors. EFP argued that contributions received via credit card in excess of the limitations are acceptable unless the Audit staff has evidence that the cards were not jointly held by the contributors. The sample errors discussed in the response are addressed below:

EFP stated that it demonstrated that six of the twelve contributions were not errors because signed reattribution letters were provided and some of these contributions were made on joint accounts. EFP argued reattribution letters obtained late[8] prove that the contributors' intent was to attribute the contribution to both account holders, even though the required signatures were not obtained timely.

Furthermore, EFP stated these sample errors should be removed from the sample because it "unnecessarily penalizes the Committee for failing to adhere to the 60-day requirement." The EFP Compliance Director stated most contributions were only reattributed for "check or paper credit cards" if verbal approval was obtained or if EFP fundraising staff knew that a joint contribution was intended because a husband and wife both attended the event.

EFP provided reattribution letters from certain contributors; however, these letters were dated more than sixty days after receipt of the contribution and several months after the audit began. Five of the reattribution letters were dated after EFP was given a schedule of the sample errors. Section 110.1 of the CFR states a contribution is considered reattributed if the treasurer asks whether the contribution is intended to be a joint contribution and receives a written reattribution from the contributor within sixty days from receipt of the contribution. Absent receipt of the reattribution letter within 60 days, the contribution is required to be refunded.

EFP also stated that one contribution was never excessive because the contribution was made on a check imprinted with both contributors' names, even though only one contributor signed the check. A letter advising the contributor of the reattribution and

[8] These letters were dated after the start of the audit.

offering a refund would have been sufficient, if sent within 60 days of receipt. However, EFP did not send such a letter. Instead, they obtained an untimely signed reattribution letter. Because the letter was not received within 60 days, EFP was required to make a refund per 11 CFR §§103.3(b)(3) and 110.1(k)(3)(ii)(B). EFP believes failure to timely comply with the notification requirement does not prevent an excessive contribution from being cured.

EFP stated that three of the unresolved excessive credit card contributions should be removed from the sample because the Audit staff failed to prove that these were not made on joint accounts. EFP contended that these contributions may have been made on joint accounts. Moreover, EFP believes that all credit card contributions should be removed from the sample regardless of whether reattribution letters were obtained.

The signature of the second individual acknowledging joint liability for the credit card used to make the contribution was not provided for all credit card contributions to the Audit staff. It is the EFP's responsibility, not the Commission's, to provide documentation that the contributions were made on joint accounts.

EFP conceded that three contributions were excessive and should have been refunded. However, as stated above, these were not refunded due to a clerical error rather than a deficient system. Nonetheless, EFP believed these items alone "are not a valid sample." Clearly, three contributions are not enough items for a legitimate sample; however, this sample consisted of hundreds of items. A sample does not require a minimum number of errors to make a valid projection.

Finally, EFP asserted it would be "manifestly unfair" to require a payment based on a sample that is "fundamentally flawed." It appears that by "flawed," EFP means that it disagrees with the definition of an error. Although there is a disagreement regarding which contributions should be considered errors, the sample projection is valid.

Subsequently, as a result of Commission decisions in other audits, EFP was provided an opportunity to send notifications to contributors whose contributions would have been eligible for "presumptive reattribution" pursuant to 11 CFR §110.1(k)(3)(B) (See Legal Standard above), or to make refunds. These actions would obviate the need to make a payment to the U.S. Treasury for such contributions. In response, EFP demonstrated that notifications of presumptive reattribution were sent for excessive contributions totaling $64,925 and provided evidence of untimely contribution refunds for excessive contributions totaling $20,535. Therefore, the remaining amount due to the U.S. Treasury is $154,078 ($239,538 - $64,925 - $20,535).

Recommendation

The Audit staff recommends that the Commission determine that $154,078 is payable to the U.S. Treasury within 30 calendar days of service of this report.

Finding 3. Receipt of In-Kind Contributions that Exceed the Limits

Summary

The Audit staff's review of the use of non-commercial aircraft for campaign travel identified in-kind contributions from one contributor that exceeded the limits by $22,689. The excessive contributions resulted from EFP's reimbursement for the service provided at an amount less than required. The Audit staff recommended that EFP provide evidence that an excessive contribution was not received or make a payment of $22,689 to the U.S. Treasury. In response to the preliminary audit report, EFP stated that the aircraft was operated on a "dual usage" basis and therefore qualified for reimbursement at a first class rate, rather than a charter rate, which was the amount they paid. EFP provided documentation which demonstrated the correct amount was reimbursed for campaign travel.

Legal Standard

Contribution Defined. A gift, subscription, loan (except when made in accordance with 11 CFR §§100.72 and 100.73), advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office is a contribution. 11 CFR §100.52(a).

In-Kind Contribution. The term *anything of value* includes in-kind contributions. The provision of services at a charge less than the usual and normal charge results in an in-kind contribution. The usual and normal charge for a service is the commercially reasonable rate that one would expect to pay at the time the services were rendered. The value of such a contribution would be the difference between the usual and normal charge for the services and the amount the political committee was billed and paid. 11 CFR §100.52(d).

Contribution Limits. No individual or group (other than a multicandidate committee) may contribute more than a total of $2,000, per election, to a federal candidate's campaign (the campaign includes the candidate and his or her agents and authorized committees). 2 U.S.C. §441a (a)(1)(A).

Travel by Airplane – Prior to January 14, 2004. A candidate or person traveling on behalf of the candidate who uses an airplane owned or leased by a corporation not licensed to provide commercial service must reimburse the corporation the first class air fare for travel between cities with regular commercial service or the usual charter rate where no regular commercial service exists. 11 CFR §114.9(e).

Travel by Airplane – On or After January 14, 2004. Campaign travelers who use an airplane that is licensed by the Federal Aviation Administration to operate for hire under 11 CFR part 121, 129 or 135 are governed by the definition of a contribution at 11 CFR §100.52(a) and (d). 11 CFR §100.93(a)(2).

Due to the change of this regulation during the election cycle, the Commission has decided to allow EFP to comply with whichever regulation was most beneficial in the period prior to January 14, 2004.

Facts and Analysis

As noted above, effective January 14, 2004, the Commission revised its air travel regulations. Prior to the rule change, air travel was governed by:

- 11 CFR §114.9 – for travel on airplanes ***owned or leased*** by a corporation or labor organization and ***not licensed*** to offer commercial services between locations served by regularly scheduled commercial service, the service providers would be paid first class airfare.
- 11 CFR §100.52 – for travel on airplanes ***not owned or leased*** by a corporation or labor organization, the service providers would be paid the usual and normal charge (the charter rate).

After the rule change, the revised regulations state :

- 11 CFR §100.93 – for travel on airplanes ***not licensed*** by the Federal Aviation Administration (FAA) to operate for compensation or hire under 14 CFR Part 121, 129 or 135, the service providers would be paid first class airfare.
- 11 CFR §100.52 – for travel on airplanes ***licensed*** by the FAA to offer commercial service, the service providers would be paid the usual and normal charge (the charter rate).

EFP's air travel occurred ***before and after*** the effective date of the revised regulations. For travel completed prior to the effective date (January 14, 2004) of the revised regulation, the Commission determined that EFP could take advantage of the regulation that was most beneficial to it.

Travel prior to January 14, 2004. EFP reimbursed G&L Aviation (a California partnership) $27,194 for seven campaign trips between March 1, 2003 and November 13, 2003. Reimbursement was based on the first class or coach air fare for travel between cities served by regularly scheduled commercial service. G&L Aviation is the registered owner[9] of the aircraft, a Gulfstream G-1189 (tail number N117GL), used for these trips. This aircraft does not qualify for treatment as corporate aircraft under 11 CFR §114.9(e) because it is owned by a partnership. In evaluating the flights under §100.93(a)(2) it is noted that the aircraft is certified for commercial service by the FAA under 14 CFR Part 135.

The Audit staff determined that EFP should have reimbursed G&L Aviation $41,764[10] for these trips. As result, EFP received an in-kind contribution of $14,570 ($41,764 owed

[9] FAA records list Thomas V. Girardi and Walter Lack as "other owners."

[10] This amount was calculated using the advertised charter rate of $3,600 per hour for the Gulfstream G-1189 listed by Elite Aviation in the Fall 2003 Air Charter Guide (the Guide), the latest version available at the time of these trips. Elite Aviation is certified by the FAA to operate this aircraft under 14 CFR Part 135 (Operating Requirements: Commuter and On Demand Operations and Rules Governing Persons On Board Such Aircraft).

less the $27,194 paid) from G&L Aviation. The contribution is excessive because each partner had individually contributed the maximum allowed to EFP.

Travel on or after January 14, 2004. EFP reimbursed G&L Aviation $3,374 for two campaign trips on the same aircraft after January 14, 2004. Based on the charter rate charged by Elite Aviation (the certified operator), EFP should have reimbursed G&L Aviation $11,493 for the trips. As result, EFP received an excessive in-kind contribution of $8,119 ($11,493 owed less the $3,374 paid) from G&L Aviation.

Summary.	Cost of Travel	Amount Paid	In-kind Contribution	Excessive Amount
G&L Aviation:				
Before January 14, 2004	$ 41,764	$ 27,194	$ 14,570	$ 14,570
On/After January 14, 2004	$ 11,493	$ 3,374	$ 8,119	$ 8,119
Total G&L Aviation	$ 53,257	$ 30,568	$ 22,689	$ 22,689

The Audit staff provided EFP representatives with a summary of its analysis of the in-kind contributions and resulting amount that exceeded the limits. The EFP representatives did not respond.

Preliminary Audit Report Recommendation

The Audit staff recommended that EFP provide evidence that the use of this aircraft did not result in excessive in-kind contributions. Such evidence should have included documentation that demonstrated the amount paid by EFP was the correct reimbursement rate for the aircraft used; that demonstrated a lower charter rate; or showed the aircraft provided by G&L Aviation was not certified for commercial service by the FAA under 14 CFR Parts 121, 129 or 135. Absent such evidence, the Audit staff recommended that $22,689 be paid to the U.S. Treasury and the amount due be disclosed on Schedule D-P (Debts and Obligations) until paid.

Committee Response to the Preliminary Audit Report & Audit Staff's Assessment

In response to the preliminary audit report, EFP states that the Commission allowed EFP to apply whichever regulation was most beneficial, so they chose to comply with 11 CFR §§100.93 and 100.52.

EFP states that G&L Aviation contracted in 1998 with Elite Aviation (Elite) for a "part time lease." Under the contract, Elite was responsible for the management of the aircraft, including maintenance and FAA safety inspections. Elite used the aircraft for charter operations with their own 14 CFR Part 135 (Part 135) certified crew.

According to EFP, the FAA stated that certification under Part 135 also allows an aircraft to be operated under 14 CFR Part 91. Thus, the aircraft used by both Elite and G&L Aviation was operated on a "dual usage" basis, sometimes under Part 135 of the FAA regulations and other times under Part 91. EFP contends that since the aircraft operated

under Part 91 when it was used for campaign travel, the first class airfare rates were correct and they did not receive an in-kind contribution.

As a result of Commission decisions in other audits, EFP was afforded an additional opportunity to obtain from the charter provider information concerning the certification under which the flights at issue were flown. Flights operated under a non commercial certificate (Part 91) were excluded from charter rate requirement. In response, EFP submitted a letter from a general partner of the aircraft provider stating that all nine flights were flown under Part 91.

Finding 4. Transfer of Apparent Ineligible Funds from Edwards for Senate

Summary

Edwards for Senate transferred a total of $962,908 to EFP. The Audit staff determined that $508,414 was not eligible for transfer. The ineligible amount included $414,099 in contributions that were attributed by the Senate committee to retire debt outstanding (candidate loans) from the 1998 Primary and General elections. These funds were transferred after the debt was forgiven but without written redesignations from the contributors. The Audit staff recommended that EFP provide evidence that the $508,414 was eligible for transfer or make a payment of $508,414 to the U.S. Treasury. In response to the preliminary audit report, EFP disagreed with the Audit staff's analysis of the funds available for transfer. EFP considered the sales of assets from the Senatorial committee to EFP, as well as interest earned and other offsets[11] included in the funds available for transfer. They also believe disbursements should be applied against any receipts received to determine the available funds for transfer. As a result, EFP concluded permissible funds were available for the transfer.

Subsequent to the issuance of the preliminary audit report, EFP was notified that the Commission had determined that EFP could return the funds to Edwards for Senate rather than making a payment to the U.S. Treasury as stated in the report. In response to that notification, EFP reiterated its position that the transfers were permissible and hence it was not necessary to address any return of funds to Edwards for Senate.

Since the response does not demonstrate that the transfers were comprised of funds eligible for transfer, $508,414 should be returned to Edwards for Senate or paid to the U.S. Treasury.

Legal Standard

Permissible Transfers. Transfers of funds between principal campaign committees of a candidate seeking more than one federal office in the same election cycle are allowed if

[11] Some of the offsets included in EFP's analysis include reimbursements from the EFP to the Senatorial committee.

the candidate is no longer actively seeking (see below) the nomination or election to one of those offices. Transfers must meet the following guidelines:

- The transferor committee's available funds shall be considered to consist of those contributions most recently received that add up to the cash on hand on the date of transfer;
- Contributions transferred must be aggregated with any contributions made by the same donor to the committee receiving the transfer; and
- Amounts that would cause a contributor to exceed his or her per election contribution limit must be excluded from the transfer. 11 CFR §110.3(c)(5)(ii).

No Longer Campaigning. A candidate will be considered to be no longer actively seeking the nomination or election to a federal office if the candidate:

- Publicly announces that he or she will no longer seek the nomination or election to that office and ceases to conduct campaign activities with respect to that election;
- Becomes ineligible for nomination or election to that office by operation of law;
- Files a termination report with the Commission; or
- Notifies the Commission in writing that he or she and his or her authorized committees will no longer conduct campaign activities with respect to that election. 11 CFR §110.3(c)(5)(i).

Contributions to General Election. Any contributions designated to a general election for which the candidate is no longer campaigning shall be refunded to the contributor or the committee can request a written redesignation to another election. 11 CFR §§102.9(e)(3) and 110.1(b)(5).

Contributions to Retire Outstanding Debt. Any contributions solicited after an election to retire the outstanding debt from that election shall be refunded to the contributor if the contributions received exceed the debt or the committee can request a written redesignation to another election. 11 CFR §§110.1(b)(3) and 110.1(b)(5).

Facts and Analysis

Contributions attributed to the 2004 Primary Election. On September 7, 2003, Senator Edwards announced that he would not seek re-election to the U.S. Senate in 2004. On September 30, 2003, Edwards for Senate transferred $460,609 to EFP. This transfer was reportedly comprised of contributions attributed to the 2004 Primary election.

Using the receipts database provided by Edwards for Senate and disclosure reports filed by both committees, the Audit staff determined the Senatorial committee's available cash on hand on September 30, 2003 (prior to the transfer) as follows:

Reported Ending Cash on Hand – September 30, 2003[12]	$ 860,398
Add: Funds Transferred to EFP – September 30, 2003	460,609
Cash on Hand prior to Transfer	$ 1,321,007

[12] Per EFS October 2003 Quarterly Disclosure Report.

As part of the Audit staff's analysis, a portion of the cash on hand equal to the contributions attributed to the 2004 General election was reserved for refunds of those contributions. These contributions required refund or written redesignation before they could be transferred because the candidate was no longer running in the 2004 General election. Similarly, a portion of the cash on hand attributed to the retirement of the 1998 election debt was reserved for the payment of that debt. The adjusted cash on hand on September 30, 2003, attributable to 2004 Primary contributions was:

Cash on Hand (from above)		$1,321,007
Less amounts reserved for contributions to:		
2004 General Election	($ 360,085)	
Retire 1998 Primary/General Debt[13]	(412,899)	($ 772,984)
Available Cash for Transfer of 2004 Primary Contributions		$ 548,023

Contributions received by the Senatorial committee for the 2004 Primary election were reviewed by the Audit staff on a last-in, first-out basis. Using the amount of cash available ($548,023) for the transfer, the Audit staff determined that only contributions received on and after April 16, 2002 could be transferred. These contributions were evaluated for transfer eligibility[14] and contributions totaling $372,944 were identified as eligible for transfer.

Based on the analysis above, the Audit staff determined that EFP received a transfer of ineligible funds totaling $87,665 ($460,609 - $372,944) on September 30, 2003.

Contributions attributed to the 2004 General Election. Edwards for Senate transferred contributions totaling $88,200 attributed to the 2004 General election to EFP. The Audit staff reviewed the documentation (written redesignations) provided by the Senatorial committee in support of these transfers, evaluated the contributions' eligibility for transfer, and determined that $81,550 was eligible for transfer. The remaining $6,650 was not eligible because the associated contributions, when aggregated with prior contributions to EFP from the same donor, would result in an excessive contribution.

Contributions attributed to retire 1998 Primary/General outstanding debt. After the 1998 election, Edwards for Senate reported a debt of $6,150,000, all owed to Senator Edwards. The debt was forgiven on December 31, 2003. On January 11, 2004, the Senatorial committee transferred $414,099 to EFP. The receipt was disclosed as a transfer of excess funds by EFP. The transfer was made up of contributions that were solicited and received after the 1998 elections for the purpose of retiring the outstanding debt remaining after those elections. Once the debt had been forgiven, the Senatorial committee had 60 days to refund the contributions or obtain written redesignations for another election. Written redesignations were not obtained for any of the contributions

[13] Gross contributions totaling $414,099 less contribution refunds of $1,200.

[14] If the contribution (when aggregated with other contributions from the same donor to EFP) causes the donor to exceed the limits, the contribution or the excessive portion was excluded from the transfer.

transferred. Therefore, the Audit staff determined that the $414,099 was not eligible for transfer to EFP.

Summary.	**Amount Transferred**	**Amount Eligible per Audit Staff**	**Amount Ineligible**
2004 Primary	$ 460,609	$ 372,944	$ 87,665
2004 General	88,200	81,550	6,650
1998 Primary/General Debt	414,099	-0-	414,099
Totals	$ 962,908	$ 454,494	$ 508,414

The Audit staff provided EFP representatives with a summary of its analysis of the transfer of contributions from Edwards for Senate at the exit conference. An EFP representative asked if the Senatorial committee's expenditures were taken into account as part of the review. The Audit staff responded that the disbursements did not apply to the analysis at hand. The representative stated that EFP disagrees for the record. Also, the representative stated that EFP disagrees with the Audit staff's application of the regulations involving the transfer of $414,099 representing funds solicited after the 1998 election for debt retirement and would present a legal argument in response to the preliminary audit report.

In response to the exit conference, EFP submitted an analysis of the transfer of 2004 Primary contributions received by Edwards for Senate taking the position that a minimum of $460,609 was available to transfer. EFP's analysis stated:

> "In accordance with standard accounting practices and the chronological time available for processing, the correct starting point is the EFS [Senatorial committee] Q2-2003 ending cash balance. The Committee used the month of September to properly aggregate these contributions. The September 30th figure used by the Commission was not available until October 15, well after the transfer and the aggregation processes took place. The June 30th figure is also more reflective of actual cash."

The Audit staff believes that EFP's reliance on disclosure report filing dates in their response is irrelevant. It is the accounting records that document the available cash balances and these records were available to the Senate committee on a daily basis. The regulations are specific in this matter – "The transferor committee must be able to demonstrate that such cash on hand contains sufficient funds ***at the time of the transfer*** that comply with the limitations and prohibitions of the Act to cover the amount transferred."[15] Given the limited amount of activity by the Senate committee during the reporting period, the cash available on the date of transfer could have been determined with minimal effort. The Audit staff agrees that processing constraints require planning in advance of the transfer but that same planning should provide the Senatorial committee with transfer scenarios that could easily be adjusted on the date of the transfer.

[15] 11 CFR §110.3(c)(5)(ii).

Preliminary Audit Report Recommendation

The Audit staff recommended that EFP provide evidence that the contributions transferred by Edwards for Senate were eligible for transfer. Absent such evidence, the Audit staff recommended that $508,414 be paid to the U.S. Treasury and the amount due be disclosed on Schedule D-P (Debts and Obligations) until paid.

Committee Response to the Preliminary Audit Report & Audit Staff's Assessment

In response to the preliminary audit report, EFP asserts that the Audit staff misapplied the regulations allowing such transfers and miscalculated the pool of contributions from which the transfers were made.

EFP believes that $228,545 in interest, other offsets, and asset sales should be included in the available funds to transfer since 11 CFR §110.3 (c)(5)(ii) states that the cash on hand from which the transfer is made shall be considered to consist of the funds most recently received by the transferor committee. EFP believes the Audit staff was incorrect in their analysis because it only included contributions in funds available on the date of the transfer. Additionally, EFP states that because these types of funds are not considered contributions, they do not need to be aggregated and are transferred without limits.

The sale of assets and other offsets included in EFP's analysis of the Senatorial committee's cash on hand are comprised of assets sold to EFP while the Candidate was running for both offices, as well as offsets from EFP reimbursing the Senatorial committee for shared expenses. At the time these transactions occurred it would have been impermissible for the Senatorial committee to provide goods and services to EFP without charge, except in amounts within the contribution limitation.

According to 11 CFR §110.3 (c)(5)(ii), the transferor committee must be able to demonstrate that cash on hand contains sufficient funds at the time of the transfer that comply with the limitations and prohibitions of the Act to cover the amount transferred. Furthermore, a contribution shall be excluded from the amount transferred to the extent that such contribution, when aggregated with other contributions from the same contributor to the transferee (principal campaign committee), exceeds the contribution limits. It is because this regulation specifies that the funds must comply with the limitations and the prohibitions of the Act that only contributions are included in the analysis. Neither the regulation, nor the E&J, specify that "funds received" includes anything other than contributions, but do discuss the aggregation of contributions when determining a transferable amount. This regulation is unlike 11 CFR §110.3(d) which governs federal to nonfederal transfers and specifies "transfers of funds or assets," clearly establishing that assets, other than contributions are included.

EFP also reiterated their argument that expenditures should be applied against contributions to determine the available funds for transfer. They stated that "'98 debt retirement contributions were expended or used up prior to the time of transfers...and thus were gone by the time of the transfers at issue." In effect, had these contributions been in a separate bank account, they would not have been considered in the analysis

because the "cash on hand available for the 2003 transfer would have been reduced by the amount of disbursements made."

The regulation states that the cash on hand will consist of the funds most recently received by the transferor committee; it does not state that expenditures will be evaluated in determining which funds are available. However, cash on hand on the date of the transfer does account for disbursements. If the funds had been disbursed they would not be on hand and available for consideration. EFP argued that disbursements should be applied to contributions that were raised and designated for a particular purpose unrelated to those disbursements. Other than possible fundraising costs, the only disbursements that could be made with the funds designated for 1998 debt retirement would have been payments on the one debt outstanding from that election. Payments were not made on that debt.

11 CFR §110.1(b)(3) requires that a contribution that is designated for a particular election but received after the election must not exceed net debts outstanding from that election. If contributions are received in excess of net debts outstanding they must be either deposited or returned within ten days. If deposited, they must be refunded or redesignated within sixty days. Net debts are to be recalculated as contributions are received and expenditures are made. Additionally, a candidate who does not participate in the general election shall return, refund or redesignate all contributions received for the general election.[16]

In this case, the only debt the Senatorial committee owed was the loan repayment to the Candidate. Once the Candidate forgave the loan, the debt was eliminated. Therefore, any unused funds collected specifically to retire this debt were required to be refunded or redesignated by the contributor.[17] The Senatorial committee did not refund or redesignate these contributions. As a result, these contributions were not available for transfer.

EFP did not dispute that contributions received for the 2004 Senatorial general election, that created an excessive contribution to EFP, needed to be refunded to the contributors.

In conclusion, the response does not demonstrate that the transfers were comprised of funds eligible for transfer.

Subsequent to the issuance of the preliminary audit report, EFP was notified that the Commission had determined that EFP could return the funds to Edwards for Senate rather than making a payment to the U.S. Treasury as stated in the report. In response to that

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[16] "Net debts outstanding" means, in part, the total amount of unpaid debts incurred with respect to an election, including the estimated cost of raising funds to liquidate debts incurred with respect to the election and if the candidate's authorized committee terminates or if the candidate will not be a candidate for the next election, estimated necessary costs associated with termination of political activity, such as the costs of complying with the post-election requirements of the Act and other necessary administrative costs associated with winding down the campaign.

[17] Had Edwards for Senate paid the available cash to the Candidate in partial settlement of the debt, the Candidate would have been limited to a contribution to EFP of $50,000 (2 U.S.C. §9035(a)).

notification, EFP reiterated its position that the transfers were permissible and hence it was not necessary for them to address any return of funds to Edwards for Senate.

Since the response does not demonstrate that the transfers were comprised of funds eligible for transfer, $508,414 should be returned to Edwards for Senate or paid to the U.S. Treasury.

Recommendation

The Audit staff recommends that the Commission determine that $508,414 is returnable to Edwards for Senate or payable to the U.S. Treasury within 30 calendar days of service of this report.

Finding 5. Stale-Dated Checks

Summary

The Audit staff identified 53 stale-dated checks totaling $20,181 issued by EFP. It was recommended the EFP provide evidence that these checks were not outstanding or make a payment to the U.S. Treasury of $20,181. In response to the preliminary audit report, EFP demonstrated that as of December 31, 2006 three payees had cashed their checks and one check was voided. Therefore, $18,851 ($20,181 - $1,330) is payable to the U.S. Treasury.

Legal Standard

Handling Stale-Dated (Uncashed) Checks. If a committee has issued checks that the payees (creditors or contributors) have not cashed, the committee must notify the Commission of its efforts to locate the payees and encourage them to cash the outstanding checks. The committee must also submit a check payable to the U. S. Treasury for the total amount of the outstanding checks. 11 CFR §9038.6.

Facts and Analysis

The Audit staff's reconciliation of EFP's bank accounts through April 30, 2004, and review of financial activity through March 31, 2005, identified 53 stale-dated checks totaling $20,181 issued by EFP. The checks were dated between May 30, 2003 and August 17, 2004 and had not cleared the bank as of March 31, 2005.

The Audit staff provided EFP representatives with a schedule of stale-dated checks at the exit conference and no response was offered.

Committee Response to the Preliminary Audit Report & Audit Staff's Assessment

The Audit staff recommended that EFP provide evidence that the checks were no longer outstanding by demonstrating the checks or replacement checks had cleared the bank or that the obligations did not exist and the checks were voided. Absent such evidence, it

was recommended that $20,181 be paid to the U.S. Treasury or the amount should be disclosed on Schedule D-P (Debts and Obligations) until paid.

In response to the preliminary audit report, EFP stated that the correct amount of stale-dated checks was $16,872. They stated checks totaling $3,309 were either voided and paid in subsequent invoices, had cleared the bank or were duplicates. EFP provided documentation for only one voided check ($380).

EFP stated that three reissued checks had cleared the bank. Two of the reissued checks they referenced cleared the bank and one had not as of December 31, 2006. EFP did not provide documentation for the discrepancy. The Audit staff made requests after receiving EFP's response for this documentation. To date no such documentation has been submitted.

EFP was able to provide bank statements showing that three stale-dated checks totaling $916 had cleared the bank and one check was voided ($380). Thus, $18,851 ($20,181-$1,330) is payable to the U.S. Treasury.

Recommendation

The Audit staff recommends that the Commission determine that $18,851 is payable to the U.S. Treasury within 30 calendar days of service of this report.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 27, 2007

MEMORANDUM

TO: Joseph F. Stoltz
Assistant Staff Director
Audit Division

THROUGH: Patrina M. Clark
Staff Director

FROM: Thomasenia P. Duncan
General Counsel

Lawrence L. Calvert Jr.
Acting Associate General Counsel

Lorenzo Holloway
Assistant General Counsel
For Public Finance and Audit Advice

SUBJECT: Proposed Audit Report on Edwards for President (LRA # 638)

I. INTRODUCTION

This memorandum reflects our comments on the Edwards for President ("Presidential Committee") Proposed Audit Report ("Proposed Audit Report"). We concur with any findings not specifically discussed in this memorandum. In this memorandum, we address the legal issues that arise out of Finding 2 that involves the Presidential Committee receiving excessive contributions from individuals and Finding 4 that concludes that the Edwards for Senate Committee ("EFS") transferred funds to the Presidential Committee that were not eligible for transfer.

We start, however, with a procedural point that is related to the remedy for both findings. To remedy these findings, the Preliminary Audit Report ("PAR") recommended that the Presidential Committee disgorge the excessive contributions and ineligible funds to the United States Treasury. The Presidential Committee argued in its response to the Preliminary Audit Report, however, that the Commission did not have the

authority to require it to disgorge excessive contributions and ineligible funds to the United States Treasury.

The Office of General Counsel believes that the Presidential Committee's argument is moot because the Commission is no longer requiring the Presidential Committee to disgorge these amounts to the United States Treasury. In another audit, the Commission allowed a presidential committee to refund excessive contributions to the contributors instead of disgorging the excessive contributions to the United States Treasury. Kerry-Edwards Audit Report. Similarly, the Commission notified the Presidential Committee that it would have an opportunity to refund excessive contributions to the individuals and refund the ineligible funds to EFS.

In the following discussion, we address the legal issues that remain ripe in Finding 2 and Finding 4. In Finding 2, we focus on the issue of whether the Presidential Committee attributed its contributions to more than one individual to reduce the amount of the excessive contributions. Our comments on Finding 4 address the issue of what funds EFS can use to finance a transfer to the Presidential Committee.

II. RECEIPT OF CONTRIBUTIONS THAT EXCEED THE LIMITS (Finding 2)

The Audit staff conducted a sample review of 650 contributions and found 12 excessive contributions. From the sample, the Audit Division projected that the Presidential Committee received $239,538 in excessive contributions. The Committee raises three issues related to the Audit Division's conclusion that it received $239,538 in excessive contributions.

First, the Presidential Committee questions the sample projection. The Presidential Committee acknowledges that three of the contributions are excessive contributions. The Presidential Committee contends, however, that a sample projected over the entire population of contributions cannot be drawn from three excessive contributions that are reflected as errors in the sample population. The question of whether the Audit Division can project the excessive contributions from its sample is an accounting question. We, therefore, defer to the Audit Division's expertise on this point. The Proposed Report, however, merely notes that the sample projection is valid. To further assist the Commission in resolving this issue, we recommend that the Audit Division revise the Proposed Audit Report to explain why the sample projection is valid.

Second, the Presidential Committee contends that it has demonstrated that the remaining nine excessive contributions are not excessive because they are actually attributable to individuals other than the original contributors. To support its contention that the contributions are attributable to other individuals, the Presidential Committee offers six written statements reattributing the excessive contributions to other individuals. The Presidential Committee acknowledges the rule that it must receive such written reattributions within 60 days of receiving the excessive contributions, 11 C.F.R.

§ 110.1(k)(3)(ii)(A)(2), and it concedes that it did not receive its written reattributions within the 60 days. The Committee contends that the excessive contributions have been cured, regardless of the time that the Presidential Committee took to cure the contributions.

We believe that the issue arising out of the Presidential Committee's argument was decided in the Clark for President ("Clark Committee") Audit Report. In that audit report, the Audit Division included a finding that the Clark Committee accepted excessive contributions. In the cover memorandum that forwarded the Clark Committee audit report to the Commission, the Audit Division raised the issue of whether written reattributions that a committee receives after the 60-day period could cure excessive contributions. The Commission considered the Clark Committee Audit Report at an open session meeting, but there was no discussion of this issue. Rather, the Commission approved the Clark Committee audit report with the finding the Clark Committee accepted excessive contributions. There are no unique facts in this audit that would warrant an outcome that is different from the Clark audit. We, therefore, conclude that if a committee receives written reattributions after 60 days, these reattributions cannot be used to cure excessive contributions.

Finally, the Presidential Committee argues that the remaining excessive contributions are from credit cards that should be considered from two individuals with a joint account because the Audit Division does not have any proof that the contributions originated from a single account.[1] In contrast, the Audit Division presumes that any contribution made by a credit card was a contribution from one individual as a single credit card accountholder, unless the committee provides proof to the contrary.

We agree with the Audit Division. While the Commission's regulations on contributions from multiple individuals do not specifically address credit card contributions, the actions that a committee must undertake to demonstrate that a contribution is from more than one individual suggest that the Audit Division's approach is correct. Unless a contribution is in the form of a check with multiple signatures, 11 C.F.R. § 110.1(k)(1), in the form of a check imprinted with the names of multiple individuals making it eligible for presumptive reattribution pursuant to 11 C.F.R. §110.1(k)(3)(ii)(B), or it is received accompanied by a written reattribution signed by each contributor, 11 C.F.R. § 110.1(k)(1), then it is presumed to come from a single contributor no matter the form in which it is made. That presumption may only be overcome by a timely and signed written reattribution, 11 C.F.R. § 110.1(k)(ii)(A), which the committee must retain. 11 C.F.R. § 110.3(l)(6). The credit card contributions are obviously not checks; they were not accompanied by written attributions; and the committee has produced no timely reattributions. We conclude, therefore, that one

[1] The Committee obtained reattributions for three of the four excessive contributions that it received by a credit card transaction. These reattributions are a part of the untimely reattributions that the Presidential Committee references in its second argument.

person contributed to the Presidential Committee using a credit card for each of the excessive contributions at issue.

III. TRANSFER OF APPARENT INELIGIBLE FUNDS FROM EDWARDS FOR SENATE (Finding 4)

In addition to the excessive contributions from individuals, the Audit Division found that the Presidential Committee received funds via transfers from EFS. Finding 4 involves transfers totaling $962,908 from EFS to the Presidential Committee. The transferred funds came from three sources within EFS: 1) $88,200 from contributions made to the 2004 general election, 2) $414,099 from contributions made to retire debt outstanding from the 1998 election, and 3) $460,609 from contributions made to the 2004 primary election.

The auditors examined the funds that were used to make the $962,908 in transfers to the Presidential Committee. The Audit staff found that a portion of the funds, $508,414, were not eligible for transfer to the Presidential Committee. First, EFS did not have the option of transferring the contributions raised for the 2004 general election and the 1998 debt retirement to the Presidential Committee because EFS should have refunded these contributions to the contributors. For the contributions that were raised for the 2004 general election, the problem originates with the fact that the Candidate did not participate in the 2004 general election for the Senate. Since the Candidate did not participate in the general election, the Audit Division contends that those funds had to be refunded to the contributors. 11 C.F.R. § 102.9(e)(3). The Audit Division concludes, therefore, that EFS could not use those funds to make a transfer to the Presidential Committee. Similarly, the Audit Division concludes that EFS had to return the contributions that it raised to retire the 1998 debt because it did not have net debts outstanding at the time of the transfer. 11 C.F.R. §§ 110.1(b)(3). Finally, a portion of the contributions raised for the 2004 primary election and transferred to the Presidential Committee, $87,665, did not comply with the Commission's transfer rule at 11 C.F.R. § 110.3(c)(5). The transfer caused some donors to exceed their contribution limits with respect to the Presidential Committee. *Id.*

The Presidential Committee challenges the Audit staff's conclusion with respect to the $414,099 transfer and the $460,609 transfer. First, it argues that the Audit Division erred by deeming the funds transferred from EFS to the Presidential Committee to consist solely of contributions, rather than the funds most recently received from all sources. It asserts that if the funds from all sources were included in the calculations, neither transfer would include contributions that EFS raised to retire debt from the 1998 election. The Proposed Report notes that at the time of the transfer of funds, EFS had recently derived a substantial amount of income from the sale of assets to the Presidential Committee. Second, even if only the contributions are considered, the Presidential Committee argues that EFS could not have transferred money derived from the 1998 debt retirement contributions because EFS had already spent that money. We address these points in turn.

The issue of whether EFS should be able to transfer funds derived from sources other than contributions is an open question. The Commission's regulations do not define the term "funds" as it is used in 11 C.F.R. § 110.3(c)(5)(ii) or otherwise limit this term to mean only contributions. We acknowledge that this regulatory provision and the relevant statutory provision both require an accounting of contributions to ensure that the individual contribution limitation is not exceeded when there is a transfer. 2 U.S.C. § 441a(a)(5)(C)(ii). The fact that there must be an accounting of contributions when there is a transfer, however, does not mean that the term "funds" includes only contributions. The accounting of contributions is merely a tool that is necessary to ensure that a committee making a transfer does not cause an individual to exceed their contribution limitation with respect to the committee that receives the transfer. 2 U.S.C. § 441a(a)(5)(C)(ii).

Given that the regulation does not exclude other financing sources by the use of the term "funds," we think that the Commission should consider other sources that can be used to finance a transfer. In considering other sources that are available, the Commission should be aware that the funds transferred in this case included a substantial amount of proceeds that EFS derived from the sale of its assets to the Presidential Committee. If these proceeds were available as a source to finance the transfer, this would mean, in effect, that the Presidential Committee paid for the assets and recovered its money. But we note that under the Audit Division's reading of the regulation, had any funds derived from bona fide asset sales to third parties in arm's length transactions, those would be equally excluded from the calculation under 11 C.F.R. § 110.3(c)(5)(ii).

As for the committee's argument that EFS could not have transferred 1998 debt retirement contributions to the Presidential Committee because it had already spent those funds, there are a number of things to be said.

First, to the extent the Presidential Committee's argument is a criticism of the audit for not taking EFS's disbursements into account in determining which funds were available for transfer, we agree with the Audit Division that "cash on hand on the date of transfer does account for disbursements" because if "the funds had been disbursed they would not be on hand and available for consideration."

It is also difficult to understand the Presidential Committee's contention that EFS's 1998 debt retirement contributions had already been spent. EFS certainly had not spent those funds on debt retirement, for its only creditor was Senator Edwards himself, and he eventually forgave the debt without taking any repayment. And even if one accepted the committee's argument that not enough disbursements were backed out of the calculation, the result of the backing out presumably would be that the auditors would have to reach back even further in time to earlier contributions to EFS. These earlier contributions presumably would have an even higher proportion of 1998 debt retirement contributions.

However, the draft report implies that the Audit Division did not back out as spent any 1998 debt retirement contributions precisely because EFS never used any of these funds to retire any portion of its debt to Senator Edwards. The apparent corollary to this point is that these funds could *only* be spent for 1998 debt retirement, and that if EFS had spent any of its 1998 debt retirement contributions for some other purpose, that spending would have been illegal. But whether this is correct is a question that, at least in part, is still open.

In considering the PAR, the Commission determined that *after* Senator Edwards forgave EFS's debt, funds EFS raised after the 1998 election for purposes of debt retirement did not become available for other purposes, such as a transfer to Edwards for President. The Commission reasoned that because 11 C.F.R. § 110.1(b)(3)(ii)(C) bars committees from raising funds for a previous election unless there are net debts outstanding for that election, once EFS no longer had net debts for 1998 it had to return to contributors all of the funds it raised for 1998 debt retirement. Doing otherwise would effectively have allowed some contributors to contribute twice the limit for the 2004 senatorial election or, ultimately, the 2004 presidential election.

But, here we understand the committee to be positing a slightly different set of facts: that is, that even *before* Senator Edwards had forgiven the debt, much less before EFS transferred funds to the committee, EFS had spent at least some of the funds it had raised for 1998 debt retirement on other activities, presumably relating to the 2004 senatorial election. Regarding such spending as illegal would be consistent with the rationale behind the Commission's determination in the PAR. It would also be consistent with the way the Commission has applied 11 C.F.R. § 116.2(c)(2) (prohibiting transfers from one of a candidate's authorized committees to another if the first one has net debts outstanding) to committees that establish successive committees for successive elections to the same office. AO 1997-10 (Hoke); MUR 4803 (Tierney). However, we have found no prior matter involving a committee that simply continued its operations from one election to the next in which the Commission explicitly restricted the specific use of funds raised as debt retirement contributions.