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**MEMORANDUM**

**TO:** The Commissioners

**THROUGH:** Patrina M. Clark  
Staff Director

Margarita Maisonet  
Chief Compliance Officer

**FROM:** Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

Alex R. Boniewicz  
Audit Manager

Leroy Clay  
Lead Auditor

**SUBJECT:** Report of the Audit Division on Clark for President, Inc. (CFP)

Attached for your approval is the subject report. Also attached is a legal analysis provided by the Office of General Counsel. The report contains no recommendations for repayments of Federal Funds, but the report does recommend that a payment to the Treasury be made to resolve excessive contributions.

The Audit staff would like to direct your attention to Finding 3., Receipt of Contributions that Exceed Limits. This audit involves two distinct categories of excessive contributions. One category involves excessive contributions that the CFP could have presumptively reattributed to another contributor pursuant to 11 C.F.R. §110.1(k)(3)(ii)(B), because the contributions were made by written instruments imprinted with the names of more than one individual. The second category of excessive contributions are those that, pursuant to 11 C.F.R. §110.1(k)(1) and (3)(ii)(A), CFP could not presumptively reattribute because the contributions were made by other means, such as by credit card or by checks imprinted with a single name. The Commission's regulations treat these excessive contributions differently in terms of how a committee may cure the excessive contributions. A committee may cure the first category of excessive contributions by presuming that more than one individual intended to contribute to the committee, by notifying the contributors of its action and offering a refund within 60 days of receiving the contribution.

**AGENDA ITEM**

For Meeting of: 03-22-07

11 C.F.R. §110.1(k)(3)(ii)(B). To cure the second category of excessive contributions, the committee must obtain a written reattribution from the contributors within 60 days of receiving the contribution. 11 C.F.R. §110.1(k)(3)(ii)(A).

In this case, the Commission offered CFP the opportunity to cure those excessive contributions that could be presumptively reattributed although the 60-day period for the notification had lapsed. The Commission offered CFP this opportunity to be consistent with its decision in another audit. In its supplemental response, CFP notes that the extensive efforts to identify those contributions which could be resolved through a “presumptive reattribution” letter<sup>1</sup> were not cost effective and would not reduce the overall payment due. The Audit staff has not adjusted the payment amount for these items.

CFP, however, raises an issue with respect to the second category of excessive contributions; those for which presumptive reattribution would not have been available at any time. CFP suggests that the Commission should accept as a cure for some excessive contributions the written reattributions submitted in response to the preliminary audit report. Those reattributions had been obtained long after 60 days had elapsed. Application of Section 110.1(k)(3)(ii)(A)(2)’s requirement that signed reattributions be received from contributors within 60 days of receipt of the contribution would result in rejection of CFP’s argument. The question CFP raises is should the Commission provide the same leniency to the untimely *receipt* of actual reattributions as it offered for the untimely *sending* (or failure to send) of presumptive reattribution notices? Conversely, does the different regulatory treatment of these types of contributions counsel a stricter application of the 60-day period?

Even if processed timely, of the 29 letters submitted, the Audit staff believes only 11 would have been accepted. For the remaining 18, the documentation provided does not, in some cases, indicate that both contributors were notified. Further, 16 of these 18 excessive contributions were by credit card and the letters did not appear to provide an attestation from the contributor that he or she was also liable for the credit card.

Finally, with respect to three other excessive contributions, CFP states the documentation provided is sufficient. Again, the Audit staff made no adjustment to the payment amount. The documentation provided for each included:

- For one, a credit card contribution, information on the contributor card provided included two printed names. In addition, what appear to be forms used for data entry were provided. No signature or attestation to liability for the credit card was provided from either individual.
- For the next item, a copy of the contributor’s check was provided. There is only one signature, which appears to be that of the individual whose name was imprinted on the check. The memo line of the check notes “\$2,000 from Becky Gochman”; written in a cursive style. Again, data entry forms were provided.

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<sup>1</sup> Since the candidate was involved in only the primary election, the question of designating contributions to the general election or runoff election does not come up.

- For the third item, a copy of the contributor's check was provided. It contained one imprinted name, next to which a second name was annotated. There is only one signature, which appears to be that of the individual whose name was imprinted on the check. Information on the contributor card provided included two printed names. Like the previous two items, data entry forms were provided. Finally, a copy of a letter, apparently sent out by CFP, was provided seeking reattribution from the contributors and, although it contained the typed names of the two contributors, no signatures were on the letter.

The Audit staff does not consider the documentation sufficient to resolve these three items.

Recommendation

The Audit staff recommends that the report be approved.

It is recommended that this report be considered at the open session meeting of March 22, 2007. If you have any questions, please contact Leroy Clay or Alex R. Boniewicz at extension 1200.

Attachments:

Report of the Audit Division on Clark for President, Inc.  
Legal Analysis Prepared by the Office of General Counsel



## Report of the Audit Division on Clark for President, Inc.

September 16, 2003 – August 31, 2004

### Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a Presidential candidate who receives public funds for the primary campaign.<sup>1</sup> 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)

Clark for President, Inc. is the principal campaign committee of General Wesley K. Clark, a candidate for the Democratic Party's nomination for the office of President of the United States. The Committee is headquartered in Little Rock, AR. For more information, see chart on the Campaign Organization, p. 2.

### Financial Activity (p. 3)

• <b>Receipts</b>	
○ Contributions from Individuals	\$ 17,342,515
○ Contributions from Political Committees	58,450
○ Matching Funds Received	7,615,360
○ Loans Received	3,335,000
○ Offsets to Operating Expenditures	1,079,520
○ Other Receipts	91,059
○ <b>Total Receipts</b>	<b>\$ 29,521,904</b>
• <b>Disbursements</b>	
○ Operating Expenditures	\$ 25,684,242
○ Loan Repayments	3,335,000
○ Contribution Refunds	39,779
○ <b>Total Disbursements</b>	<b>\$ 29,059,021</b>

### Findings and Recommendations (p. 4)

- Net Outstanding Campaign Obligations (Finding 1)
- Excessive In-kind Contribution (Finding 2)
- Receipt of Contributions that Exceed Limits (Finding 3)
- Stale-dated Checks (Finding 4)
- Reporting of Press Travel Offsets (Finding 5)
- Reporting of Other Receipts (Finding 6)

<sup>1</sup> 26 U.S.C. §9038(a).

# **Report of the Audit Division on Clark for President, Inc.**

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September 16, 2003 – August 31, 2004



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# **Part I**

## **Background**

### **Authority for Audit**

This report is based on an audit of Clark for President, Inc. (CFP), 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 disclosure of contributions and transfers received.
4. The disclosure of disbursements, debts and obligations.
5. The recordkeeping process and completeness of records.
6. The consistency between reported figures and bank records.
7. The accuracy of the Statement of Net Outstanding Campaign Obligations.
8. The campaign's compliance with spending limitations.
9. 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. CFP records were materially complete and the fieldwork began immediately.

## Part II

### Overview of Campaign

#### Campaign Organization

<b>Important Dates</b>	<b>Clark for President, Inc.</b>
• Date of Registration	October 2, 2003
• Eligibility Period <sup>2</sup>	December 1, 2003 – February 11, 2004
• Audit Coverage	September 16, 2003 – December 31, 2006 <sup>3</sup>
<b>Headquarters</b>	Little Rock, AR
<b>Bank Information</b>	
• Bank Depositories	Two
• Bank Accounts	Four Checking, One Investment, One Certificate of Deposit
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Dorian Vanessa Weaver
• Treasurer During Period Covered by Audit	William C. Oldaker (through November 13, 2003) Dorian Vanessa Weaver (from November 14, 2003 to present)
<b>Management Information</b>	
• Attended FEC Campaign Finance Seminar	No
• Used Commonly Available Campaign Management Software Package	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff and Campaign Consultants

<sup>2</sup> The period during which the candidate was eligible for matching funds began on the date of certification of his matching fund eligibility and ended on the date the candidate announced his withdrawal from the campaign. See 11 CFR §9033.

<sup>3</sup> Limited reviews of receipts and expenditures were performed after August 31, 2004, to determine whether the candidate was eligible to receive additional matching funds.



## Overview of Financial Activity (Audited Amounts)

<b>Cash on hand @ September 16, 2003</b>	<b>\$ 0</b>
○ Contributions from Individuals	\$ 17,342,515 <sup>4</sup>
○ Contributions from Political Committees	58,450
○ Matching Funds Received	7,615,360 <sup>5</sup>
○ Loans Received	3,335,000
○ Offsets to Operating Expenditures	1,079,520
○ Other Receipts	91,059
<b>Total Receipts</b>	<b>\$ 29,521,904</b>
○ Operating Expenditures	\$ 25,684,242
○ Loan Payments	3,335,000
○ Contribution Refunds	39,779
<b>Total Disbursements</b>	<b>\$ 29,059,021</b>
<b>Cash on hand @ August 31, 2004</b>	<b>\$ 462,883</b>

<sup>4</sup> Approximately 107,000 contributions from more than 68,000 individuals.

<sup>5</sup> CFP made 5 matching fund submissions totaling \$7,649,538 and received \$7,615,360 which represents 41% of the maximum entitlement (\$18,655,000).

## **Part III**

### **Summaries**

#### **Findings and Recommendations**

##### **Finding 1. Net Outstanding Campaign Obligations**

The Audit staff's review of CFP's financial activity through December 31, 2006, and estimated winding down costs indicated that the candidate did not receive matching fund payments in excess of his entitlement. (For more detail, see p. 6)

##### **Finding 2. Excessive In-kind Contribution**

The review of campaign travel identified six flights on private aircraft that were reimbursed at the first-class commercial airfare. The first three flights were flown in November 2003 and the subsequent three were flown in January 2004. It appeared that, in both instances, the plane travel should have been reimbursed on a charter basis. The difference between what CFP paid and the charter rate could have resulted in the receipt of an in-kind contribution of \$22,098. In response to the preliminary audit report recommendation, CFP provided documentation which reduced the amount of the excessive contribution to \$9,315. To date, CFP has made no payment to the U.S. Treasury. (For more detail, see p. 8)

##### **Finding 3. Receipt of Contributions that Exceed Limits**

The sample review of contributions from individuals indicated that CFP failed to resolve a material number of excessive contributions. The projected dollar value of the unresolved excessive contributions in the population was \$249,911. In response to the preliminary audit report recommendation, CFP demonstrated only one contribution was not excessive, and therefore, must make a payment of \$247,911 to the U.S. Treasury. (For more detail, see p. 12)

##### **Finding 4. Stale-dated Checks**

The Audit staff identified stale-dated checks totaling \$12,897 issued by CFP. In response to the preliminary audit report recommendation, CFP provided evidence that there is no longer a material amount of stale-date checks outstanding. (For more detail see p. 16)

##### **Finding 5. Reporting of Press Travel Offsets**

CFP reported the receipt of nine payments (\$400,266) of (net) press reimbursements collected by Air Charter Team (ACT) as offsets, but failed to disclose as memo entries the individual press organizations or members of the press which made up each transfer. In addition, ACT's collection service fees should also have been disclosed as memo entries. In response to the preliminary audit report recommendation, CFP filed amended reports disclosing as memo entries the press reimbursements and service fees noted above. (For more detail, see p. 17)

### **Finding 6. Reporting of Other Receipts**

CFP did not disclose the name, address, date and amount for 55 receipts totaling \$31,249 for the sale of equipment. In response to the preliminary audit report recommendation, CFP filed amended reports to disclose these receipts correctly. (For more detail, see p. 18)

### **Summary of Amounts Owed to the U.S. Treasury**

• Finding 2	Excessive In-kind Contribution	\$ 9,315
• Finding 3	Receipt of Contributions that Exceed Limits	247,911
	<b>Total Due U.S. Treasury</b>	<b>\$ 257,226</b>

## Part IV

# Findings and Recommendations

### Finding 1. Net Outstanding Campaign Obligations

#### Summary

The Audit staff's review of CFP's financial activity through December 31, 2006, and estimated winding down costs indicated that the candidate did not receive matching fund payments in excess of his 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 must 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.

**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, 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 February 11, 2004. The Audit staff reviewed CFP's financial activity through December 31, 2006, analyzed estimated winding down costs and prepared the Statement of Net Outstanding Campaign Obligations that appears below:

**Clark for President, Inc.**  
**Statement of Net Outstanding Campaign Obligations**  
 As of February 11, 2004  
 Prepared December 31, 2006

### Assets

Cash		\$ 660,650	
Matching Funds Receivable		759,023	
Accounts Receivable		641,485	
E-Mail List		30,000	[a]
Capital Assets		<u>2,604</u>	
<b>Total Assets</b>			<b>\$2,093,762</b>

### Liabilities

Accounts Payable for Qualified Campaign Expenses at 2/11/04			\$ 1,661,156	[b]
Winding Down Costs:				
Paid 2/12/04 – 12/31/06	\$ 928,659			
Estimated Winding Down Costs (1/1/07 - 6/30/07)	<u>34,500</u>	963,159		[c]
Loan Payable at 2/11/04			2,240,000	
Amounts Payable to U.S. Treasury for:				
Excessive In-Kind Contribution (See Finding 2)	\$ 9,315			
Unresolved Excessive Contributions (See Finding 3)	<u>247,911</u>	257,226		
<b>Total Liabilities</b>			<u>\$5,121,541</u>	

**Net Outstanding Campaign Obligations (Deficit) as of February 11, 2004** **(\$3,027,779)**

- [a] Based on past Commission experience with presidential audits (Buchanan, Quayle, Bauer), factors such as the list size and independent appraisals of other lists were used to assess the value and sale price. Considering the guidance provided by AO 2002-14, it appears the list was unique, having been developed for its own use; the list's fair market value was ascertainable; and the list was sold at the usual and normal charge in a bona fide arm's length transaction. In addition, the likely range of the fair market value would not result in a repayment or a contribution.
- [b] Does not include disputed invoices totaling \$103,868.
- [c] Estimated winding down costs include storage for a two year period.

Shown below are adjustments for funds received after February 11, 2004, through May 31, 2004, the date CFP received its last matching fund payment:

Net Outstanding Campaign Obligations (Deficit) as of 2/11/2004	(\$ 3,027,779)
Private Contributions and Other Receipts Received 2/12/04 through 5/30/04	240,424
Matching Funds Received 2/12/04 through 5/31/04	2,467,368
Remaining Net Outstanding Campaign Obligations (Deficit) as of 5/31/04	(\$ 319,987) <sup>6</sup>

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

## **Finding 2. Excessive In-kind Contribution**

### **Summary**

The review of campaign travel identified six flights on private aircraft that were reimbursed at the first-class commercial airfare. The first three flights were flown in November 2003 and the subsequent three were flown in January 2004. It appeared that, in both instances, the plane travel should have been reimbursed on a charter basis. The difference between what CFP paid and charter rate could have resulted in the receipt of an in-kind contribution of \$22,098. In response to the preliminary audit report recommendation, CFP provided documentation which reduced the amount of the excessive contribution to \$9,315. To date, CFP has made no payment to the U.S. Treasury.

### **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. The term anything of value includes all in-kind contributions.

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 provision of services at a charge less than the usual and normal charge results in an in-kind contribution. 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 (a) and (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

<sup>6</sup> Subsequent to date of ineligibility, CFP incurred and repaid a \$440,000 loan. This has no effect on the analysis and is not included in the above figures.

campaign (the campaign includes the candidate and his or her agents and authorized committees). 2 U.S.C. §441a (a)(1)(A).

**Contributions by a Limited Liability Company:** An LLC not electing treatment as corporation under federal tax law or not having publicly-traded shares may make contributions to influence federal elections. Such a contribution will be considered as having been made from a partnership and governed by the rules pertaining to partnerships and subject to a single election limit per candidate of \$2,000. The contribution is considered a contribution from a single individual if the LLC is a single-member LLC that has not chosen to be treated as a corporation under IRS rules. 11 CFR §§110.1(b)(1) and (g)(2) and (4).

**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 in advance 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 presidential primary committees 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 dictate that the reimbursement amount is based on how the aircraft is licensed to operate, not on the ownership status:

- 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).

CFP reimbursed Cullman Ventures, LLC (Cullman) \$2,828 for first-class airfare for two people who made three trips on its aircraft. The flights occurred on separate days between January 23 and January 26, 2004; all involved travel between Teterboro, NJ and Manchester, NH. All of these trips were flown on planes which were certified for commercial service by the FAA under 14 CFR part 135, and thus, not eligible for this manner of reimbursement.

It appeared that payment for these flights should have been made at a charter rate which reflected the usual and normal charges for services. Based on the charter rate advertised by the company that managed the planes flown, a charter fee of \$5,600 for each flight was calculated.<sup>7</sup> Thus, for the service provided, CFP would have paid \$16,800. By failing to pay a charter rate, CFP would have received an in-kind contribution from Cullman of \$13,972 (the \$16,800 owed less the \$2,828 paid).

The preliminary audit report noted that if Cullman Ventures, LLC is taxed as a corporation the entire amount represents a corporate contribution. However, if Cullman elected to be treated for tax purposes as a partnership, both Lewis B. Cullman and/or the partnership would have made a contribution that exceeds the limitation by at least \$13,972.<sup>8</sup>

During fieldwork, the Audit staff explained to CFP representatives the regulatory change noted above and requested that tail numbers be provided for several flights flown after the change. The required information had not been obtained at the time of the exit conference and the request for this information was renewed. Subsequently, the prohibited contribution discussed above was identified and CFP representatives were notified and given an opportunity to respond.

### **Preliminary Audit Report Recommendation and Committee Response**

The Audit staff recommended that CFP provide documentation from Cullman which showed how Cullman elected to be treated under Internal Revenue Service rules. Also, if Cullman was treated as a partnership for tax purposes, information should be provided showing how the contribution should have been attributed to the various partners and that only those partners' profits are decreased or losses are increased as a result of the contribution. CFP was requested to produce documentation which:

- demonstrated a lower charter rate;
- established a different minimum flight time requirement;

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<sup>7</sup> This amount was calculated using the advertised charter rate of \$2,800 per hour for the type of plane flown from the "Spring 2004 Air Charter Guide" and applying the advertised minimum charge of two hours per day. The air service company did not advertise this aircraft in the "Fall 2003 Air Charter Guide." The Audit staff compared rates charged by other companies for the same aircraft in both publications and noted the rates were generally unchanged.

<sup>8</sup> Louis B. Cullman had already contributed the maximum amount allowable to CFP.



- proved that the planes were not certified for commercial service by the FAA at the time the flight occurred under 14 CFR parts 121, 129 or 135; and

Absent such a demonstration, the Audit staff recommended that CFP make a payment of \$13,972 to the United States Treasury.

In its response to the preliminary audit report, CFP contested neither "...that three flights flown between January 23 and January 26, 2004, by Committee personnel on a private aircraft provided by Cullman were not reimbursed correctly" nor that "...the difference between what the Committee paid for these flights and the charter rate is \$13,972." CFP's response also stated that it had been unable to obtain information indicating whether Cullman elected corporate or partnership tax treatment.

However, CFP's response notes the proximity of the dates of the travel and the effective date of the regulation and the change in focus of the regulation from ownership of the aircraft to the licensing of the aircraft. It also notes the proximity to the New Hampshire primary which occupied CFP's attention and contributed to the misapplication of the new regulation. CFP argues that in light of the above, some reduction is appropriate in the amount of the payment for the misapplication of the Commission's travel reimbursement requirements.

In a supplement to its original response, CFP demonstrated that Cullman "was a single-member Limited Liability Company that had not elected corporate tax status."

#### **Audit Staff Analysis of Committee Response**

CFP failed to note that the revisions to the travel regulation had been in process for some time before its final publication and that the proposal had been published several times beginning prior to CFP's formation. Perhaps most significantly, since Cullman has not elected corporate tax status, the first class reimbursement rate was not appropriate under the regulation in effect prior to or after January 14, 2004. CFP's response does not justify any reduction to the amount of the excessive contributions.

Additionally, since Cullman had not elected corporate tax status, the Audit staff re-evaluated three flights in November 2003, for which CFP paid \$8,674, the first class rate. It appeared that those flights<sup>9</sup> should also have been paid on a charter basis. Using the same rates detailed above, the Audit staff determined that CFP should have paid \$16,800. By failing to pay the charter rate, it appeared that CFP received an in-kind contribution from Cullman of \$8,126 (the \$16,800 owed less the \$8,674 paid).

Mr. Cullman had made the maximum contribution of \$2,000 to CFP. Therefore, based on the Audit staff's re-evaluation and Cullman's status as a single-member Limited Liability Company, CFP appeared to have received an excessive in-kind contribution of \$22,098 (\$13,972 + \$8,126).

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<sup>9</sup> The planes flown in November were also certified for commercial service by the FAA under 14 CFR part 135

As a result of Commission decisions in other audits, CFP was afforded an additional opportunity to obtain from the charter provider information concerning the certification under which the flights at issue were flown, in addition to how the planes were licensed. Flights operated under a non commercial certificate (Part 91) would be excluded from charter rate requirement. A senior Vice President of the aircraft provider submitted a letter stating that the first four of the six flights in question were flown under Part 91 and the remaining two were flown under a commercial certification. The Audit staff calculated the amount of the excessive contribution, based on the two flights operated under commercial certification, to be \$9,315. That amount is due to the U.S. Treasury.

### **Finding 3. Receipt of Contributions that Exceed Limits**

#### **Summary**

The sample review of contributions from individuals indicated that CFP failed to resolve a material number of excessive contributions. The projected dollar value of the unresolved excessive contributions in the population was \$249,911. In response to the preliminary audit report recommendation, CFP demonstrated only one contribution was not excessive, and therefore, must make a payment of \$247,911 to the U.S. Treasury.

#### **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(a).

**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 and:
  - o Keep enough money in the account to cover all potential refunds;
  - o Keep a written record explaining why the contribution may be illegal;
  - o 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 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).

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 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)(ii)(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 error is not an error, the Commission will make a new projection based on the reduced number of errors in the sample. 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).

### **Facts and Analysis**

The Audit staff's review of contributions from individuals indicated that CFP received a significant number of excessive contributions. The projected dollar value of the unresolved excessive contributions in the sample population was \$178,407. Sample errors included contributions made by credit card that were attributed to more than one individual. The documentation provided in support of these contributions were 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 both the contribution and joint liability for the credit card used to make the contribution.

Further, a 100% review of selected contributions from individuals not included in the sample population identified additional excessive contributions, totaling \$71,504,

resulting from contributions made by written instrument with a single accountholder imprinted on the check or by credit card. There was no evidence that CFP had received a timely signed reattribution letter or that the excessive portion had been refunded.

The Audit staff provided CFP representatives with a schedule of all the errors supporting the \$249,911 (\$178,407 + \$71,504) in unresolved excessive contributions. A discussion ensued relative to the errors on the schedule and the sampling technique utilized by the Audit staff. CFP representatives indicated they would look into these items.

### **Preliminary Audit Report Recommendation**

The Audit Staff recommended that CFP provide documentation to demonstrate that the contributions identified are not excessive. Such documentation should have included copies of timely negotiated refund checks or timely signed and dated reattribution letters. Absent such documentation, the Audit staff recommended that CFP make a payment of \$249,911 to the U. S. Treasury. It was noted that any amount remaining unresolved will require payment in a like amount to the U. S. Treasury within 30 calendar days of service of the final audit report.

### **Committee Response to Preliminary Audit Report**

In its response to the preliminary audit report, CFP presented documentation and arguments attempting to demonstrate that many of the excessive contributions identified were joint contributions, untimely reattributed by the contributors. To support this position, the response included letters and memos from contributors acknowledging that they intended the contributions to be joint. As such, CFP believes that a reduction in the payment is warranted.

The response noted that, as a result of CFP's late entry into the campaign, a consultant, The Synetech Group (Synetech), was retained to collect, process and record all contributions to CFP. Synetech also was responsible for reviewing and administering CFP's compliance with the federal contribution limitations; which included sending timely reattribution letters and notices to contributors whose contributions appeared to exceed federal limitations. CFP insists that it was not until after the campaign concluded that it discovered Synetech had failed in many instances to send reattribution requests. The response noted that in many instances, Synetech sent erroneous requests to contributors seeking other information rather than a reattribution. In any event, CFP states that it recognizes its responsibility for Synetech's actions, but it asks that its overall compliance record be taken into consideration when determining an appropriate "penalty" amount. It added that CFP's serious commitment to compliance with the law was demonstrated by the inability of the Audit staff to determine any misuse of public funds or acceptance of prohibited contributions.

In the narrative portion of its response, CFP addressed each of the 54 specifically identified excessive contribution errors arising from both the sample and 100% reviews. First, the response stated that 21 of the excessive contributions identified by the Audit staff are not contested by CFP. Second, the response includes 29 reattribution letters and memos in which the contributor agrees to the attribution of a portion of the contribution to another person. All of the letters submitted in the response are dated a year or more

after the receipt of the contribution and after CFP was notified of the audit. The regulations clearly state that reattributions must be accomplished within 60 days of receipt of the contributions.

In addition, CFP asserted that checks with a second person written on the check, either at the top near the imprinted name or on the memo line, should be considered contributions from multiple contributors (a joint contribution) with no need to contact the contributor.

Third, CFP contends that for the four remaining excessive contributions, the documentation in hand, displays the contributor's intent for these to be joint contributions; therefore, providing additional documentation was deemed unnecessary.

CFP concludes that "11 CFR §110.1(k) is important to preventing circumvention of the individual contribution limitations, but it should not operate as an absolute bar that overrides and frustrates contributors' demonstrated intent where that intent is clear." In this case, CFP maintains that the documentation and arguments presented in its response demonstrated that a large number of the excessive contributions identified by the Audit staff were intended to be joint contributions by the contributors. As such, it contends that a reduction of the recommended payment is appropriate.

#### **Audit Staff's Assessment of Committee Response**

Consistent with the time periods contained in the Commission's Regulations, the notice provided in the audit notification letter, and past practice, the Audit staff has not recognized the 29 reattribution letters generated after the regulatory time frames and CFP's notification of the audit.

Of the remaining four excessive contributions in dispute, the Audit staff agrees that one excessive contribution (\$2,000) was properly attributed; however, CFP's response does not resolve the other three excessive contributions. In two instances, the contributor checks were annotated by hand with a second name, but only contained the signature of the contributor whose name was imprinted on the check. The final excessive contribution, made by credit card, was supported only by a contributor card that contained both spouses name, but the signature of neither. The regulations are clear that in order for any excessive portion of a contribution to be presumptively reattributed to another account holder, the check must have each account holder's name imprinted on it and a notification must be sent to that contributor within 60 days. No presumptive reattribution can occur if only one account holder's name is imprinted on the check and no notification is sent.

As a result, CFP's response to the preliminary audit report resolved only one excessive contribution from the 100% review group, reducing the amount CFP must pay to the U.S. Treasury within 30 days of receipt of this report to \$247,911.

As a result of Commission decisions in other audits, CFP was afforded an additional opportunity to respond to this matter as it relates to contributions that were eligible for "presumptive" redesignation pursuant to 11 CFR §110.1(k)(3)(ii)(B). In its response, CFP acknowledges that only one of the errors identified could be resolved by sending a

presumptive reattribution notice. Noting it would take an exhaustive internal review to identify other such excessive contributions which could be resolved in this manner, CFP does not believe it would yield significant results and given the time and cost associated with such an effort, would not be cost effective.

In addition, CFP states that identifying and refunding all excessive contributions to either the contributors or to the U.S. Treasury would not be prudent, since it would not reduce CFP's overall liability. CFP expressed concerns that there is no legal certainty the Commission would reduce its repayment obligation in accordance with any refunds it makes at this time. The response asserts that repaying \$247,911 for refunds or repayments would leave CFP without sufficient funds to pay outstanding debts. The response notes additional fundraising would be difficult at this time and result in additional expenses and obligations for CFP.

The response concludes by asking the Commission to reconsider its submission in response to the preliminary audit report and note its success in after-the-fact reattribution letters, demonstrating that most of the excessive contributions would have been properly reattributed.

#### **Finding 4. Stale-dated Checks**

##### **Summary**

The Audit staff identified stale-dated checks totaling \$12,897 issued by CFP. In response to the preliminary audit report recommendation, CFP provided evidence that there is no longer a material amount of stale-date checks outstanding.

##### **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**

During our review of CFP's disbursement activity, the Audit staff identified 35 stale-dated checks totaling \$12,897 dated between January 1, 2004 and June 30, 2004. The Audit staff provided a schedule of the stale-dated checks to CFP representatives at the exit conference. There was a discussion on how this schedule was developed. CFP had no other comments concerning this matter.

##### **Preliminary Audit Report Recommendation and Committee Response**

The Audit staff recommended that CFP provide evidence that:

- The checks were not outstanding by providing copies of the front and back of the negotiated checks along with bank statements; or
- The outstanding checks had been voided by providing copies of the voided check with evidence that no obligation exists.

Absent such evidence, it was recommended that CFP make a payment of \$12,897 to the U.S. Treasury.

In response to the preliminary audit report, CFP provided evidence that materially all of the checks were either reissued and cleared, or represent instances where no outstanding obligation exists. Therefore, no payment is required.

## **Finding 5. Reporting of Press Travel Offsets**

### **Summary**

CFP reported the receipt of nine payments (\$400,266) representing (net) press reimbursements collected by Air Charter Team (ACT) as offsets, but failed to disclose as memo entries the individual press organizations or members of the press which made up each transfer. In addition, ACT's collection service fees should also have been disclosed as memo entries. In response to the preliminary audit report recommendation, CFP filed amended reports disclosing as memo entries the press reimbursements and service fees noted above.

### **Legal Standard**

#### **Disclosure Requirements for Committees**

A committee will disclose the identification of each person:

- who provides an offset to operating expenditures in an aggregate amount in greater than \$200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal Office), together with the date and amount of such receipt. 2 U.S.C. §434(b)(3)(F)
- to whom an expenditure in an aggregate amount greater than \$200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal Office) is made together with the date, amount and purpose of such expenditure. 2 U.S.C. §434(b)(5)(A).

Identification in the case of any individual means, the name, the mailing address, and the occupation of such individual, as well as the name of employer; and, in the case of any other person, the full name and address of such person. 2 U.S.C. §431(13) and 11 CFR §100.12

#### **Transportation Costs to be Reported**

The total amount paid by an authorized committee for the cost of transportation, plus the administrative costs incurred by the committee in providing this service and seeking reimbursement for them, shall be reported as expenditures in accordance with 11 CFR 104.3(b)(2)(i). Any reimbursement received by such committee shall be reported in accordance with 11 CFR 104.3(a)(3)(ix). 11 CFR §9034.6(e).

### **Facts and Analysis**

CFP utilized Air Charter Team for the majority of the air charter flights during the campaign. ACT also handled the billing and collection of air transportation costs incurred by the traveling press. CFP received reimbursements for press travel

expenditures totaling \$484,475. A portion of this total, \$84,209, was paid directly to CFP by members of the press or their associated news organizations and disclosed properly. The remainder of the press travel reimbursements, \$400,266, were received by ACT and transferred to CFP net of its fees (\$28,129).

Although, CFP disclosed the payments received from ACT, it should have also disclosed the individual press organizations or members of the press which made up each payment as memo entries on Schedules A-P (Itemized Receipts). Further, CFP failed to disclose on Schedules B-P (Itemized Disbursements), memo entries totaling \$28,129 representing ACT's fees.

For each amount received from ACT, the Audit staff identified the amount received from each member of the press and/or press organization. This information along with the amount of the fee retained by ACT was provided to CFP at the exit conference. CFP representatives agreed to file the necessary amended reports.

### **Preliminary Audit Report Recommendation and Committee Response**

In response to the preliminary audit report recommendation, CFP filed amended reports that disclose substantially all of the transactions noted above.

## **Finding 6. Reporting of Other Receipts**

### **Summary**

CFP did not disclose correctly the name, address, date and amount for 55 receipts totaling \$31,249 for the sale of equipment. In response to the preliminary audit report recommendation, CFP filed amended reports to disclose these receipts correctly.

### **Legal Standard**

#### **Disclosure Requirements for Committees**

A committee will disclose the identification of each person who provides any dividend, interest or other receipt in an aggregate amount in excess of \$200 within the calendar year (or election cycle, in the case of an authorized committee of a candidate for Federal Office) together with the date and amount of such receipt. 2 U.S.C. §434(b)(3)(G).

Identification in the case of any individual means, the name, the mailing address, and the occupation of such individual, as well as the name of employer; and, in the case of any other person, the full name and address of such person. 2 U.S.C. §431(13) and 11 CFR §100.12.

### **Facts and Analysis**

The Audit staff reviewed all receipts from the sale of equipment and noted that for the sale of 55 items, totaling \$31,249, the name, address, date and amount were not disclosed on Schedule A-P (Itemized Receipts). CFP disclosed these receipts in a number of lump-sum amounts which were described as from "various persons."



At the exit conference, CFP representatives were provided a workpaper detailing these items. The representatives were requested to file amended Schedules A-P to correct the disclosure of these receipts. The representative stated that CFP would comply with the recommendation.

**Preliminary Audit Report Recommendation and Committee Response**

In response to the preliminary audit report recommendation, CFP filed amended reports that materially corrected the disclosure of the receipts noted above.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

August 16, 2006

**MEMORANDUM**

**TO:** Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

**THROUGH:** Patrina M. Clark  
Staff Director

**FROM:** James A. Kahl *JAK*  
Deputy General Counsel

Thomasenia P. Duncan *TD*  
Associate General Counsel

Lorenzo Holloway *LH*  
Assistant General Counsel  
for Public Finance and Audit Advice

Margaret J. Forman *MJF*  
Attorney

**SUBJECT:** Report of the Audit Division on Clark for President, Inc. (LRA #636)

**I. Introduction**

The Office of General Counsel has reviewed the proposed Audit Report ("proposed Report") of the Audit Division on Clark for President, Inc. ("Clark" or "the Committee") that you submitted to this Office on March 30, 2006. This memorandum discusses our comments on the proposed Report.<sup>1</sup> If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit. We generally concur with the findings not discussed in this memorandum. We summarize our comments below and provide further detail under each heading.

The first finding in the proposed Report addresses the Committee's Statement of Net Outstanding Campaign Obligations ("NOCO"). Based on the net outstanding campaign obligations, the auditors conclude that the Committee does not owe a repayment for receiving

<sup>1</sup> The Commission is required to consider the audit report in an open session agenda document, and is required to provide the candidate and the committee with copies of the agenda document twenty-four hours prior to releasing the agenda document to the public. 11 C.F.R. §§ 9038.1(e)(1).

funds in excess of entitlement. We concur with the finding and the auditors' conclusion on the repayment. We recommend, however, that the auditors revise the finding to include a discussion of how the Committee determined the fair market value of its mailing list, which is one of the assets in the NOCO.

In the second finding, the auditors address the Committee's receipt of in-kind contributions from the Committee's payment for air travel services. We concur with this finding and recommend that the auditors revise the proposed Report to clarify how the air travel regulations apply to the Committee's travel. Because the proposed Report concludes that the Committee's payment for air travel services results in a contribution to the Committee from a limited liability company, we discuss the issue of whether the limited liability company affirmed its tax status so that it could make a contribution to the Committee. We conclude that the limited liability company's tax status has been affirmed.

We concur with the auditors' conclusion in the third finding that the Committee received excessive contributions. We disagree with the auditors' conclusion with respect to one excessive contribution, but the main focus of our comments on this finding is to ensure that the auditors address all of the arguments that the Committee raised about this finding in its response to the Preliminary Audit Report. To address the Committee's arguments, the Audit Division developed a chart that responds to the Committee's contentions for each excessive contribution.

## II. Committee Has Net Outstanding Campaign Obligations (Finding 1.)

We recommend that the Audit staff include a discussion of how the Committee determined the fair market value of its mailing list. The Committee sold its mailing list, which contained email and postal addresses, to WesPAC, a leadership political action committee associated with the candidate, for \$30,000. In the proposed Report, the auditors address the mailing list by (1) listing the sales price of the mailing list (\$30,000) in the NOCO as an asset; and (2) stating in a footnote that the Committee "generated mailing list sold at fair market value."<sup>2</sup> Proposed Report at 7, note [a].

The proposed Report does not include an explanation of the Committee's valuation of the mailing list. The valuation of the mailing list is important, however, because it is used to determine if there is a repayment or a contribution. If, for example, the fair market value is greater than the actual sales price of the mailing list, the Committee may, depending on its remaining net outstanding campaign obligations, owe a repayment. The repayment would be based on receiving public funds in excess of entitlement. 11 C.F.R. § 9038.2(b)(1)(i). The details of such a repayment would be as follows: the Committee was entitled to and received public funds after the candidate's date of ineligibility based on the net outstanding campaign obligations as reflected on the NOCO. 11 C.F.R. § 9034.1(b). The fair market value of the Committee's assets is used to calculate the net outstanding campaign obligations. 11 C.F.R. § 9034.5(a)(2)(ii). Therefore, a conclusion that a Committee asset has a higher fair market value than the value listed on the NOCO could result in a determination that the

<sup>2</sup> The Preliminary Audit Report contained the same footnote, however, the issues surrounding the valuation of the mailing list were not apparent at that time. The audit report may address issues other than those contained in the Preliminary Audit Report. 11 C.F.R. § 9038.1(d)(1).

Committee did not have net outstanding campaign obligations.<sup>3</sup> 11 C.F.R. § 9034.5(a). If the Committee did not have net outstanding campaign obligations, then a repayment is due for receiving funds in excess of entitlement. 11 C.F.R. § 9038.2(b)(1)(i). The contribution theory is different. If the Committee sells the mailing list for an amount greater than the fair market value, the difference between the actual sales price and the fair market value is a contribution to the committee. 2 U.S.C. § 431(8)(A); 26 U.S.C. § 9032(4); *see also* 11 C.F.R. § 100.52.

Given the impact of the Committee receiving more or less than the fair market value for the mailing list, the Commission must determine whether the Committee properly valued the list in its transaction with WesPAC.<sup>4</sup> In Advisory Opinion ("AO") 2002-14 (Libertarian Party), the Commission stated that whether a mailing list could be leased to others depended on the nature of the development of the list and its use, and on the characteristics of the lease transaction. AO 2002-14. Under the factual circumstances presented in AO 2002-14, a mailing list could be leased without receiving a contribution if: (1) the list was developed by the committee in the course of its political activities over a period of time and for its own purposes, rather than for the sale or lease to others; (2) the list (or the leased portion) had an ascertainable fair market value; and (3) the list was leased at the usual and normal charge in a *bona fide*, arm's length transaction and was used in a commercially reasonable manner consistent with an arm's length agreement. AO 2002-14.

In this transaction, the facts show that the Committee's mailing list is unique and was developed in the Committee's normal course of operations and for its own use. The terms for renting the Committee's mailing list, along with other campaign mailing lists, are available in SRDS Direct Marketing List Source. The market value of the list, therefore, is ascertainable. *See SRDS Direct Marketing List Source*, vol. 38, no. 3, at 3173 (Oct. 2004). The questions of whether the transaction was at arm's length and whether the Committee sold the mailing list at the usual and normal charge are more complicated.

First, we acknowledge the differences among Commissioners as to whether a sale must be both at the usual and normal charge and in a *bona fide* arm's length transaction. The Committee and WesPAC, however, endeavored to negotiate the transaction as if it were an arm's length transaction, even though the same candidate is associated with the Committee and

<sup>3</sup> Because the Committee was not in a surplus as of the candidate's date of ineligibility, we do not need to analyze whether there are any implications regarding income from the investment or use of surplus public funds. *See* 11 C.F.R. § 9038.2(b)(4).

<sup>4</sup> In the context of a proposed rulemaking on the sale, rental or exchange of a political committee's mailing list, the Commission found the valuation of mailing lists to be dependent on many different factors. The Commission, however, terminated the proposed rulemaking due to the difficulty of developing "a factual record adequate to conclude that a particular test is sufficiently flexible and comprehensive to address all circumstances to which the proposed rules would apply . . .". *Notice of Disposition; Termination of Rulemaking for Mailing Lists of Political Committees*, 68 Fed. Reg. 64571, 64572 (Nov. 14, 2003); *see also Proposed Rules for Mailing Lists of Political Committees*, 68 Fed. Reg. 525-31 (Sept. 4, 2003). Among the reasons to terminate the proposed rulemaking, however, the Commission observed that those commenting on the proposed rulemaking "believe that Commission advisory opinions, particularly Advisory Opinion 2002-14 . . . have provided clear enough guidance on the conditions under which the proceeds from the sale or rental of mailing lists are not considered contributions to the political committee." *Id.*

**WesPAC.** According to the Committee, the Committee and WesPAC engaged in "extensive negotiations" and WesPAC had separate staff and counsel for the negotiations. The parties, therefore, appear to have conducted the negotiations in a manner indicating separate control and distance between the parties.

Second, we believe that there is not enough information to determine whether the mailing list was sold at a "usual and normal charge." See 11 C.F.R. § 100.52(d). The audit report states that the mailing list sold at fair market value, but does not say how the fair market value was determined. According to the Committee, it sold a list for \$30,000 consisting of 250,000 email addresses, and a number of postal addresses. Also according to the Committee, the email list was the most valuable part of the database. We cannot, however, determine the fair market value of the list, because we do not know the total number of names that were on the mailing list.

To address this situation, the Commission could find that the evidentiary record is inadequate to conclude that the fair market value of the list was \$30,000 and instruct the auditors to request additional information. Alternatively, given the probable fair market value range of the mailing list on the NOCO, the Commission could determine that no repayment obligation exists and no contribution was received from WesPAC.<sup>5</sup> See Statement of Reasons for Buchanan Foster, Inc. (Nov. 15, 2004). The Committee has remaining net outstanding campaign obligations of \$308,302. See proposed Report at 8. Based on this deficit, we believe it is unlikely that the Committee could reasonably have undervalued the mailing list enough to result in a determination that the Committee had no net outstanding campaign obligations, and therefore received matching fund payments in excess of the Committee's entitlement. The fair market value of the list would have to be greater than \$338,302 to reach such a result (current net deficit of \$308,302 + \$30,000 mailing list, valued in NOCO as Committee asset = \$338,302 total amount for fair market value of mailing list to eliminate deficit).<sup>6</sup> Given the information discussed below, we do not believe that a \$338,302 fair market value is reasonable. A list-broker's valuation of a donor list maintained by the Committee suggests that the fair market value of the known number of donors (i.e., 250,000 email donors, who make up the most valuable part of the list) is in the \$30,000-range.

We can determine a range of value for the email donors based on the valuation of a list the Committee rents to Carol Enters List Company (CELCO). CELCO, a list-broker, pays the

<sup>5</sup> The Commission has two other alternatives. The Commission could direct the auditors to halt the audit report process and send out an official request to the Committee for additional information about the mailing list, to ascertain whether the mailing list sold at a "usual and normal charge." See 11 C.F.R. § 9038.1(c)(2). Alternatively, the Commission could approve the Audit Report, but issue an addendum to the Audit Report based on follow-up fieldwork to determine the fair market value of the mailing list. 11 C.F.R. § 9038.1(d)(3); see also 11 C.F.R. § 9038.1(b)(3). Under either alternative, the Committee would have an opportunity to respond with factual information and legal analysis, in accordance with the Committee's due process rights to notice and opportunity to respond. U.S. Const. amend. XIV; See *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Because the impact of the reasonable range of the fair market value of the mailing list on the NOCO would not likely result in a repayment obligation or contribution, we do not recommend these alternatives.

<sup>6</sup> Our assessment assumes that other assets and obligations based on qualified campaign expenses will not change. If the Commission makes significant changes to the NOCO when it considers the Audit Report (e.g., due to significant changes to the findings), the auditors will need to assess the potential impact of the mailing list valuation.

Committee a fee on each rental. We do not know whether, or to what extent, this list overlaps with the list sold to WesPAC,<sup>7</sup> see CELCO's Clark for President List Rental, <http://www.carolenterslists.com/p1562.html> (last visited Apr. 25, 2006); see also *SRDS Direct Marketing List Source*, vol. 38, no. 3, at 3173 (Oct. 2004), but a comparison of the CELCO list to the list sold to WesPAC may be "reasonable given that the candidate is the same, and it is common for candidates to recycle mailing lists . . .". Statement of Reasons for Buchanan Foster, Inc. at 8 (Nov. 15, 2004). According to the CELCO website, the lists rents at \$85 to \$150 per thousand names, depending on the contribution level of the individuals on the list. *Id.* Also, according to the website, the list includes 32,638 "active donors."<sup>8</sup> *Id.*

Applying CELCO's price range of \$85 to \$150 per thousand names, the 250,000 email names would be valued at a range of \$21,250 to \$37,500 ( $\$85/1000 \times 250,000 = \$21,250$ ;  $\$150/1000 \times 250,000 = \$37,500$ ). The average for the range is \$29,375. Thus, considering only the email donors on the CELCO list, which, according to the Committee makes up the majority of the value of the mailing list, we can value the list at an amount close to the sales price. Given the fair market value range of the Committee's email donors on the mailing list, the Commission may reasonably conclude that the impact on the NOCO would not result in a repayment. Likewise, because the fair market range of the email portion of the mailing list reaches the sales price, it is also reasonable to conclude that the Committee did not receive a contribution from WesPAC.

Although the Commission may conclude the transfer of the mailing list does not result in a repayment or a contribution, we recommend that the Audit staff revise the proposed Report to include a discussion of how the Committee determined the fair market value of its mailing list. We recommend the discussion include the following: (1) that the Committee's mailing list is unique and was developed in the Committee's normal course of operations and for its own use; (2) the mailing list had an ascertainable market value, based on the valuation of a list broker; and (3) the parties appear to have conducted the negotiations as if it were an arm's length transaction, and (4) the likely range of the fair market value would not result in a repayment or contribution. The expanded discussion will assist the Commission in deciding whether the Committee owes a repayment or if it received a contribution.

### III. Committee Received Excessive In-Kind Contributions (Finding 2.)

In the second Finding, the auditors discuss the Committee's receipt of in-kind contributions arising from the Committee's payment for air travel services. The auditors discovered that the Committee paid the first class rate instead of the charter rate for six flights, resulting in an in-kind contribution of \$22,098 from Cullman Ventures, LLC ("Cullman"), the

<sup>7</sup> According to the CELCO website, the names on the Committee's contributor list were acquired by the Committee between September 2003 and February 2004. See CELCO's Clark for President List Rental, <http://www.carolenterslists.com/p1562.html> (last visited Apr. 25, 2006).

<sup>8</sup> According to SDRS, the CELCO list contains 127,547 total donors, and the donors rent for \$85 per thousand for postal addresses (64,595 postal donors), \$125 per thousand for email addresses (52,952 email donors) and \$100 per thousand for high dollar donors (10,500 high dollar donors). See *SRDS Direct Marketing List Source*, vol. 38, no. 3, at 3173 (Oct. 2004). The SDRS data, which was verified July 8, 2004, appears to be older than the information on the CELCO website. *Id.*

entity that provided the air travel to the Committee. proposed Report at 8-12. Three of these flights occurred in November 2003 and three in January 2004. While we generally agree with the finding as it pertains to excessive in-kind contributions, for the reasons discussed below, we recommend a change to the finding for clarification. In our discussion, we also explain the basis for the statement in the proposed Report that the Committee has demonstrated the tax status of Cullman.

We recommend that the Audit Division clarify how the candidate travel regulations apply. The report discusses both the old and new regulations. In discussing the regulations, the auditors note that the first class rate is not appropriate under either regulation because Cullman has not elected corporate tax status. The corporate status of the entity that provides the aircraft is only relevant for the old regulation. See 11 C.F.R. §§ 110.1(g)(3), 114.9(e).

The Commission has decided to allow the application of whichever regulation would result in a lower rate (i.e., first class rather than charter) for each of the flights flown prior to January 14, 2004. The effective date of the Commission's new candidate travel regulations was January 14, 2004. Prior to January 14, 2004, section 114.9(e) provided that travel on airplanes owned or leased by a corporation or labor organization not licensed to offer commercial services and involving travel to a city served by regularly scheduled commercial service, would be paid at the first class rate. 11 C.F.R. § 114.9(e). If an entity other than a corporation or labor organization provided such service, the charter rate applied. See 11 C.F.R. § 100.52. Therefore, the determination as to whether to use the first class rate under section 114.9(e) or the charter rate under section 100.52 is based on: (1) the corporate or labor status of the entity that owned or leased the aircraft; and (2) if the entity is a corporation or labor organization, the licensing status of the corporation or labor organization that owned or leased the aircraft.

The new regulations, however, focus solely on how the airplane is licensed to operate. Under the new regulation at section 100.93, the Committee must apply the first class rate if the travel was on an airplane not licensed by the Federal Aviation Administration to operate for compensation or hire under 14 C.F.R. Part 121, 129 or 135. Otherwise, under the new rule, the charter rate applied. 11 C.F.R. § 100.52. We understand that the Audit Division will change the analysis on page 11 of the proposed Report to clarify that the corporate status of the entity is relevant only when considering the regulations in effect prior to January 14, 2004 (i.e., section 114.9(e)).

Because the use of Cullman Ventures LLC's ("Cullman's") aircraft results in a contribution from Cullman to the Committee, we must determine whether Cullman is a corporation, and therefore prohibited from making such contributions. 2 U.S.C. § 441b(a). The proposed Report states that the Committee "demonstrated that Cullman "was a single-member Limited Liability Company that had not elected corporate tax status." Proposed Report at 11. There is, however, an issue as to whether Cullman Ventures, LLC affirmed its tax status to the Committee. The pertinent regulation provides that "[a]n LLC that makes a contribution ... shall ... affirm to the recipient committee that it is eligible to make the contribution." 11 C.F.R. § 110.1(g)(5). The information provided by the Committee to demonstrate the tax status of Cullman Ventures, LLC was provided by the CPA, and "Authorized Person for Lewis

B. Cullman LLC," which is a different entity than Cullman Ventures, LLC. See Memorandum dated Feb. 9, 2006 from Andy Kessel, Chief Financial Officer, Clark for President, Inc.

Although the person that provides the affirmation technically represents a different entity, we believe that Cullman's tax status has been affirmed. The mailing addresses of both LLC's on file with the New York State Division of Corporations are identical. Because both LLC's have the same mailing address, and the single-member of Cullman Ventures, LLC, Lewis B. Cullman, appears to be associated with both LLC's, the CPA for Lewis B. Cullman LLC would likely be in a position to know the status of Cullman Ventures, LLC. Thus, we believe that Cullman Ventures, LLC has likely met its obligation to "affirm to the recipient committee that it is eligible to make the contribution." *Id.*

#### IV. Committee Received Direct Excessive Contributions (Finding 3.)

The auditors found that the Committee received \$249,911 in excessive contributions, and they conclude that the Committee must pay this to the United States Treasury. We believe that the auditors should provide a chart that addresses all of the Committee's excessive contributions. The proposed Report concludes that the Committee had 54 excessive contributions, and the Committee addressed each of the 54 excessive contributions separately in its response to the Preliminary Audit Report.<sup>9</sup> See Committee Response to Preliminary Audit Report. For 33 of the excessive contributions, the Committee attached copies of supporting documentation, including copies of the checks, contributor cards, or letters from the contributors acknowledging that the contributions were intended to be joint contributions. Because the Committee's response addressed each contribution that it challenged separately, with separate arguments, this Office believes the excessive contributions should be addressed in a manner that provides additional support for the finding that the Committee received excessive contributions. A chart detailing the nature of and reasons for finding each of the contributions to be excessive will provide an explanation that puts the Committee on notice of the reasons why the Commission seeks a payment of the excessive contributions, and why the Commission has determined that these excessive contributions were not refunded, reattributed or redesignated in a timely manner. 11 C.F.R. § 9038.1(f). In response to this Office's concerns, the auditors have already prepared a chart that provides more details concerning each of the excessive contributions, including the name, transaction amount, check number (when applicable), unresolved excessive amount, whether a reattribution letter was submitted and the date of such letter, and a brief statement that responds to the Committee's arguments. Given that the chart responds to the Committee's arguments, we generally concur with the chart.

The chart should show, however, that the Committee has demonstrated that one of the contributions is not an excessive contribution. The Committee, in its response, challenges a \$4,000 contribution by pointing out that the contributor check contains two signatures (*i.e.*, one signature from each contributor), and therefore it should be attributed as a joint contribution,

<sup>9</sup> The Committee did not contest 21 of the 54 excessive contributions; however, for one of the contributions the Committee admits was excessive, they dispute the amount of the excessive contribution. See proposed Report at 15; Committee Response to Preliminary Audit Report at 8 ("Count 43"). It is our understanding that this contributor made other contributions, resulting in the excessive contribution as determined by the auditors.



with an equal attribution of \$2,000 each. See Committee Response to Preliminary Audit Report at 8 ("Count 45"). The proposed Report analyzes this joint contribution as a presumptive reattribution, and not an attribution. Proposed Report at 15. We disagree with this analysis. Because the contribution check contains signatures from both of the contributors, it is already a properly attributed joint contribution; thus we do not need to examine the contribution for reattribution between the two contributors. 11 C.F.R. § 100.1(k)(1). Since we have no indication of how the joint contribution is to be attributed, we attribute the contribution equally between each contributor. 11 C.F.R. § 100.1(k)(2). Thus, we attribute \$2,000 to each of the two contributors for the \$4,000 check. By attributing the joint contribution in this manner, neither contributor has exceeded the contribution limitation. Accordingly, this Office recommends that the Audit Division revise the proposed Report to subtract the amount of the contribution identified as excessive from the total excessive contributions, resulting in a payment to the United States Treasury of \$247,911 (\$249,911 - \$2,000).

**CASE INDEX FORM**

**CASE NO. & NAME:** Clark for President, Inc.

**STAFF ASSIGNED:** Alex Boniewicz, Audit Manager  
Leroy Clay, Lead Auditor

**TELEPHONE:** Audit - 202-694-1200

<b><u>DATE</u></b>	<b><u>DOCUMENT</u></b>
June 28, 2005	Legal Analysis on Preliminary Audit Report
July 29, 2005	Preliminary Audit Report
October 17, 2005	Response to Preliminary Audit Report (Narrative Only)
August 16, 2006	Legal Analysis on Audit Report
March 15, 2007	Audit Report

**For more information or to request any of the documents listed above, contact Alex Boniewicz at 694-1200.**