FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

July 22, 2009

MEMORANDUM

To: Judith Ingram
Press Officer

From: Joseph F. Stoltz
Assistant Staff Director
Audit Division

Subject: Public Issuance of the Audit Report on Edwards for President

Attached please find a copy of the audit report on Edwards for President, which was approved by the Commission on July 16, 2009.

All parties involved have received informational copies of the report and the report may be released to the public on July 23, 2009.

Attachment as stated

cc: Office of General Counsel
Office of Public Disclosure
Reports Analysis Division
FEC Library
ITD Web

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 Funds from Edwards for Senate (Finding 4)
- Stale-Dated Checks (Finding 5)

[1] 26 U.S.C. §9038(a).

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
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).

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 Funds from Edwards for Senate

Edwards for Senate transferred a total of $962,908 to EFP of which $508,414 was questioned by the Audit staff as not eligible for transfer. The $508,414 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. In response to the preliminary audit report, EFP disagreed with

the Audit staff's conclusion that the funds were not available for transfer and asserted that the funds in question could be legally transferred.

The Audit staff then recommended that the Commission determine that $508,414 was returnable to Edwards for Senate or payable to the U.S. Treasury. At the Open Session Commission Meeting held on November 13, 2008, some Commissioners were of the opinion that Edwards for Senate could transfer funds to EFP derived from sources other than contributions; as asserted by EFP in its response to the preliminary audit report. The Commission was equally divided (3-3) on a motion to approve such a conclusion. It was also the opinion of some Commissioners that the Act and Commission regulations did not clearly prohibit the transfers as structured by EFP. As a result, there were not 4 votes to approve the recommendations of the Audit staff, and the Commission voted 6-0 to have the audit report reflect the discussion held at the Open Meeting. (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. 23)

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 Funds from Edwards for Senate	$ 0
•	Finding 5	Stale-Dated Checks	$ 18,851
Total Due the U.S. Treasury			$ 172,929

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.

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			
Legal Fees (Incurred 1/1/05 – 12/31/06)	207,343	937,607	[c]	
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			
Transfer of Funds from Edwards for Senate (See Finding 4)	0			
Stale-Dated Checks (See Finding 5)	18,851	172,929		
Total Liabilities				$4,886,903

Net Outstanding Campaign Obligations (Deficit) as of March 4, 2004 ($3,677,166)

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.
[c] No additional winding down costs/legal fees were reported after 12/31/06 (Based on a review of EFP's disclosure reports).

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	($ 3,677,166)
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	($ 152,965)

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.[5] 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.[6] 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;

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[5] The Audit staff used a monetary unit sample with a 95% confidence level. The projected dollar value of the sample exceptions was $239,538 (midpoint of range) and the dollar value of the sampling error was $202,813. The range was $36,725 ($239,538 - $202,813) to $442,351 ($239,538 + 202,813).

[6] 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.

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."

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[7] 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.

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

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 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).[8]

[8] The dollar value of the unresolved excessive contributions was at least $96,110 based on the following: $10,650 (sample exception amounts) + $64,925 (amount of late notifications sent to contributors for "presumptive reattributions") + $20,535 (untimely contribution refunds for excessive contributions).

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.

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

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 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,

[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).

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 Funds from Edwards for Senate

Summary

Edwards for Senate transferred a total of $962,908 to EFP of which $508,414 was questioned by the Audit staff as not eligible for transfer. The $508,414 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. In response to the preliminary audit report, EFP disagreed with the Audit staff's conclusion that the funds were not available for transfer and asserted that the funds in question could be legally transferred.

The Audit staff then recommended that the Commission determine that $508,414 was returnable to Edwards for Senate or payable to the U.S. Treasury. At the Open Session Commission Meeting held on November 13, 2008, some Commissioners were of the opinion that Edwards for Senate could transfer funds to EFP derived from sources other than contributions; as asserted by EFP in its response to the preliminary audit report. The Commission was equally divided (3-3) on a motion to approve such a conclusion. It was also the opinion of some Commissioners that the Act and Commission regulations did not clearly prohibit the transfers as structured by EFP. As a result, there were not 4 votes to approve the recommendations of the Audit staff, and the Commission voted 6-0 to have the audit report reflect the discussion held at the Open Meeting.

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

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[11]	$ 860,398
Add: Funds Transferred to EFP – September 30, 2003	460,609
Cash on Hand prior to Transfer	$ 1,321,007

[11] 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. 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[12]	(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 calculated that contributions received on and after April 16, 2002 could be transferred. These contributions were evaluated for transfer eligibility[13] and contributions totaling $372,944 were identified as eligible for transfer. That amount was $87,665 ($460,609 - $372,944) less than was transferred 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 of contributions, when aggregated with prior contributions to EFP from the same donors, resulted in excessive contributions.

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 transferred.

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

[13] 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.

Summary of Transferred Amounts Questioned:	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. EFP representatives disagreed with the analysis.

Preliminary Audit Report Recommendation, Committee Response and Commission Action

In the preliminary audit report, the Audit staff recommended that EFP provide evidence that the contributions transferred by Edwards for Senate were eligible for transfer and absent such evidence, it was further recommended that $508,414 be paid to the U.S. Treasury.

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

EFP stated that 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 also argued 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."

The Audit staff considered EFP's arguments and concluded that EFP's response did not demonstrate that the transfers were comprised of funds eligible for transfer. It is noted that most non contribution receipts were payments from Edwards for Senate for goods and services purchased and were necessary to avoid an in-kind contribution. Also, using cash on hand already accounts for expenditures when calculating the available cash and funds raised for 1998 debt retirement were not available for 2004 expenses. As a result, the Audit staff recommended that $508,414 be returned to Edwards for Senate, or paid to the U.S. Treasury.

At the Open Session Commission Meeting held on November 13, 2008, some Commissioners were of the opinion that Edwards for Senate could transfer funds to EFP derived from sources other than contributions; as asserted by EFP in its response to the preliminary audit report. These other sources included interest, amounts received from EFP for assets and services, and, other refunds. If these funds were deemed eligible for transfer, then the acceptable amount transferred would have increased by $69,633 and the

amount at issue decreased from $508,414 to $438,781. The Commission was equally divided (3-3) on a motion to approve such a conclusion.

It was also the opinion of some Commissioners that the Act and Commission regulations did not clearly prohibit the transfers as structured by EFP. One Commissioner observed that each step in the overall transfer process seemed acceptable on its own, but that when these steps were viewed together by the Audit staff, it appeared to be problematic. Other Commissioners were of the view that the transfer process should be considered as a whole. As a result, there were not 4 votes to approve the recommendations of the Audit staff, and the Commission voted 6 to 0 to have the audit report reflect the discussion held at the Open Meeting.

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.