FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 29, 1998

MEMORANDUM

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TO: RON M. HARRIS
PRESS OFFICER
PRESS OFFICE

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE AUDIT REPORT ON LUGAR FOR PRESIDENT COMMITTEE, INC., LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND AND LUGAR FOR PRESIDENT - AUDIT FUND

Attached please find a copy of the audit report and related documents on Lugar for President Committee, Inc., Lugar for President Committee Legal and Accounting Compliance Fund and Lugar for President — Audit Fund. The report was approved by the Commission on May 19, 1998.

Informational copies of the report have been received by all parties involved and the report may be released to the public.

Attachment as stated

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

REPORT OF THE AUDIT DIVISION

ON

LUGAR FOR PRESIDENT COMMITTEE, INC.

LUGAR FOR PRESIDENT COMMITTEE

LEGAL AND ACCOUNTING COMPLIANCE FUND

AND

LUGAR FOR PRESIDENT — AUDIT FUND

Approved May 19, 1998

FEDERAL ELECTION COMMISSION
999 E STREET, N.W.
WASHINGTON, D.C.

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TABLE OF CONTENTS

LUGAR FOR PRESIDENT COMMITTEE, INC.
LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND
AND
LUGAR FOR PRESIDENT COMMITTEE - AUDIT FUND

FEDERAL ELECTION COMMISSION
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REPORT OF THE AUDIT DIVISION ON LUGAR FOR PRESIDENT COMMITTEE, INC., LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND, AND LUGAR FOR PRESIDENT COMMITTEE - AUDIT FUND

EXECUTIVE SUMMARY

Lugar for President Committee, Inc. (the Committee) registered with the Federal Election Commission on March 3, 1995. In addition, the Lugar for President Committee Legal and Accounting Compliance Fund (the Compliance Committee) and the Lugar For President Committee - Audit Fund registered with the Federal Election Commission on May 31, 1995 and March 15, 1996, respectively.

The audit was conducted pursuant to 26 U.S.C. §9038(a), requiring the Commission to audit committees authorized by candidates who receive Federal Funds. The Committee received $2,657,244 in matching funds from the United States Treasury.

The findings of the audit were presented to the committees at an exit conference held on February 10, 1997 and in the Exit Conference Memorandum. The Committees' response to those findings are contained in the audit report.

The following is an overview of the findings contained in the audit report.

MISSTATEMENT OF FINANCIAL ACTIVITY — 2 U.S.C. §§434(b)(1) and (4). The Committee misstated its total disbursements and cash balances on disclosure reports covering 1995 and 1996 activity. Amended disclosure reports were filed which materially corrected these misstatements.

ITEMIZATION OF DISBURSEMENTS — 2 U.S.C. §434(b)(5)(A). The Committee did not itemize 918 disbursements, totaling $94,777, that were less than or equal to $200 but were still required to be itemized on disclosure reports. The Committee filed amended reports which materially itemized these disbursements.

APPARENT NON-QUALIFIED CAMPAIGN EXPENSES — 11 CFR §9034.4(a)(5)(ii), 11 CFR §§9034.4(b)(3) and §9034.4(e)(6)(i). The Audit staff identified bonus payments made to two employees, totaling $3,000, which were not provided for pursuant to a written contract made prior to the candidate's date of ineligibility, as required by 11 CFR

§9034.4(a)(5)(ii). In addition, the Committee made payments, totaling $6,404, for Compliance Committee contribution solicitation and processing costs. As a result, the Commission determined that a pro-rata repayment to the United States Treasury in the amount of $3,336 was warranted pursuant to 26 U.S.C. §9038(b)(2) [$3000 + $6,404 x .35472 (the Committee's repayment ratio)].

APPARENT PROHIBITED IN-KIND CONTRIBUTIONS — 2 U.S.C. §441b(a) and 11 CFR §100.7(a)(1). During July of 1995, the Committee purchased a telephone call and contact management system from Ontario Systems Corporation (OSC) at a cost of $355,425. The system was repurchased by OSC in March 1996 in exchange for $232,500 and the Committee's agreement to serve as a beta test site for the political candidate telemarketing industry. The Audit staff requested additional documentation which demonstrated that OSC entered into similar repurchase agreements with other clients and that the agreement between the Committee and OSC conformed to the usual and normal practice in OSC's industry. The Audit staff concluded that the arrangement appeared to be commercially reasonable based on an analysis of the information ultimately provided and therefore, no in-kind contribution resulted.

The Committee made net payments, totaling $9,988, to three entities for use of an airplane for campaign travel. Although one of these entities, Eastway Aircraft Services, Inc. (Eastway), was licensed to operate a charter air service, the Audit staff noted that the Committee followed the corporate travel provisions of 11 CFR §114.9(e) instead of reimbursing Eastway for the usual and normal charter rates for travel on this plane. The Audit staff requested documentation relative to the Committee's arrangements with these entities. The Committee demonstrated that Eastway operated but did not own the plane and that the owner of the plane made the plane available to the candidate under the corporate travel provisions. Therefore, the Committee complied with the regulations at 11 CFR §114.9(e) and no in-kind contribution resulted.

STALE-DATED CHECKS — 11 CFR §9038.6. The Audit staff identified checks issued by the Committee, totaling $10,958, that had not been negotiated. The Commission determined that this amount was payable to the United States Treasury. The Committee paid $10,958 to the United States Treasury on April 24, 1997.

LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND AND THE LUGAR FOR PRESIDENT COMMITTEE - AUDIT FUND

The Audit staff did not detect any material non-compliance during the audits of these two committees.

FEDERAL ELECTION COMMISSION
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REPORT OF THE AUDIT DIVISION ON LUGAR FOR PRESIDENT COMMITTEE, INC., LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND, AND LUGAR FOR PRESIDENT COMMITTEE - AUDIT FUND

I. BACKGROUND

A. AUDIT AUTHORITY

This report is based on an audit of the Lugar for President Committee, Inc. (the Committee), the Lugar for President Committee Legal and Accounting Compliance Fund (the Compliance Committee), and the Lugar for President Committee - Audit Fund (the Audit Fund). The audit is mandated by Section 9038(a) of Title 26 of the United States Code. That section states that "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 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.

In addition to examining the receipt and use of Federal funds, the audit seeks to determine if the campaign has materially complied with the limitations, prohibitions, and disclosure requirements of the Federal Election Campaign Act of 1971 (FECA), as amended.

B. AUDIT COVERAGE

The audit of the Committee covered the period from its inception, March 3, 1995 through April 30, 1996. The Committee reported an opening cash balance of $-0-; total receipts of $9,328,581[1]; total disbursements of $9,085,912; and a closing cash balance of $194,669.[2] In addition, the Audit staff conducted a limited review through March 31, 1997, for purposes of determining the Committee's remaining matching fund entitlement.

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[1] The reported figures are rounded to the nearest dollar amount.

[2] These figures do not sum due to the Committee's reported figures containing material misstatements for 1995 and 1996. (See Finding II.A.).

The audit of the Compliance Committee covered the period from its inception, May 31, 1995 through April 30, 1996. The Compliance Committee reported an opening cash balance of $-0-; total receipts of $103,559; total disbursements of $91,084; and a closing cash balance of $12,475.

The audit of the Audit Fund covered the period from its inception, March 15, 1996 through May 31, 1996. The Audit Fund reported an opening cash balance of $-0-; total receipts of $98,248; total disbursements of $-0-; and a closing cash balance of $98,248.

C. CAMPAIGN ORGANIZATION

The Committee, the Compliance Committee and the Audit Fund maintain their headquarters in Indianapolis, Indiana. The Treasurer for all three committees is Mr. Patrick J. Kiely.[3]

The Committee registered with the Federal Election Commission on March 3, 1995. During the period audited, the Committee maintained depositories in Indianapolis, Indiana and in Washington, DC. To handle its financial activity, the Committee utilized eleven bank accounts. From these accounts the Committee made approximately 4,800 disbursements. In addition, the Committee received approximately 44,000 contributions from 26,000 contributors. These contributions totaled approximately $4,856,000.

In addition, the Committee received $2,657,244 in matching funds from the United States Treasury. This amount represents 17.19% of the $15,455,000 maximum entitlement that any candidate could receive. Senator Lugar ("the Candidate") was determined eligible to receive matching funds on August 30, 1995. The Committee made ten requests for matching funds totaling $2,659,799. The Commission certified 99.9% of the requested amount. For matching fund purposes, the Commission determined that Senator Lugar's candidacy ended on March 6, 1996, the date when the candidate publicly announced he was withdrawing from the campaign. The Commission's Regulations at 11 CFR 9033.5(a)(1) state that the candidate's ineligibility date shall be the day on which the candidate publicly announces that he or she is not actively conducting campaigns in more than one State. On August 1, 1996, the Committee received its final matching fund payment to defray qualified campaign expenses incurred through March 6, 1996, and to help defray the cost of winding down the campaign.

The Compliance Committee registered with the Federal Election Commission on May 31, 1995. To handle its financial activity, the Compliance Committee maintained one bank account located in Washington, DC. During the audit period, the Compliance Committee received 162 contributions from individuals, totaling $103,559. Of these, 125 were contributions received directly from individuals and 37 were originally contributions to the Committee (Primary) that were redesignated by the contributor for the Compliance Committee. The

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[3] The Committee's treasurer from inception (March 3, 1995) to March 22, 1995 was Mr. Joe Bill Wiley.

Compliance Committee's disbursements included transfers to the Audit Fund, refunds of contributions, and miscellaneous bank fees.

The Audit Fund registered with the Federal Election Commission on March 15, 1996. To handle its financial activity, the Audit Fund maintained one bank account located in Washington, DC. During the audit period, the Audit Fund received 149 contributions from individuals, totaling $98,248. Of these, 133 were contributions to the Compliance Committee that were redesignated by the contributors for Audit Fund, fifteen were originally contributions to the Committee (Primary) that were redesignated by the contributors for Audit Fund, and one was a contribution received directly from an individual. As of June 30, 1997, the Audit Fund had not made any disbursements.

D. AUDIT SCOPE AND PROCEDURES

In addition to a review of expenditures made by the Lugar for President Committee, Inc. to determine if they were qualified or non-qualified campaign expenses (see Finding III.A.), the audit of the aforementioned committees covered the following general categories:

1. The receipt of contributions from prohibited sources, such as those from corporations or labor organizations (Finding III.B.);

2. the receipt of contributions or loans in excess of the statutory limitations;

3. proper disclosure of contributions from individuals, political committees and other entities, to include the itemization of contributions when required, as well as, the completeness and accuracy of the information disclosed;

4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed (Finding II.B.);

5. proper disclosure of campaign debts and obligations;

6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (Finding II.A.);

7. adequate recordkeeping for campaign transactions;

8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by the Committee to disclose its financial condition and to establish continuing matching fund entitlement (Finding III.C.);

9. the Committee's compliance with spending limitations; and,

10. other audit procedures that were deemed necessary in the situation (see Finding III.D.).

As part of the Commission's standard audit process, an inventory of campaign records is conducted prior to the audit fieldwork. This inventory is conducted to determine if the auditee's records are materially complete and in an auditable state. Based on our review of records presented, it was concluded that the records were materially complete and fieldwork began immediately.

During our testing of the Committee's disbursements, the Audit staff noted instances where the available documentation was a canceled check (without a notation as to purpose) and contemporaneous or other memoranda.[4] The Committee used contemporaneous or other memoranda created by the Committee's accountant or the Chief Financial Officer to support several payments to consultants and other vendors. The Audit staff notes that many of the documents did not contain a creation date and/or a signature of the person who prepared the document.

The Committee's accountant indicated that Committee personnel had reviewed the vendor files, and, for any undocumented payments, contacted the individual or vendor to obtain additional documentation. In some instances, Committee personnel sent a facsimile of the list of payments to the individual or company in an effort to obtain a signed acknowledgment.

The Audit staff's review of the available documentation indicated that for some vendors, especially consultants, the Committee listed the date and amount of payments to the person or entity and provided a purpose for each expenditure. In addition, the Audit staff notes that the Committee did not (except in a few instances) establish contracts or written employment agreements with its consultants or employees.

The Audit staff concluded that the available information satisfied the minimum recordkeeping requirements of 11 CFR §9033.11. However, the Audit staff was unable to verify the accuracy of certain information contained on many of the contemporaneous or other memoranda because the Committee generated the documents and no documentation from the payees was available for review.

Unless specifically discussed below, the Audit staff did not detect any material non-compliance. The Audit staff notes that the Commission may pursue further any of the matters discussed in this memorandum in an enforcement action.

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[4] Section 9033.11(b)(1)(ii)(B) of Title 11 of the Code of Federal Regulations provides for the use of a contemporaneous memorandum as an acceptable form of documentation.

II. AUDIT FINDINGS AND RECOMMENDATIONS: NON-REPAYMENT MATTERS

A. MISSTATEMENT OF FINANCIAL ACTIVITY

Sections 434(b)(1) and (4) of Title 2 of the United States Code state, in relevant part, that each report shall disclose the amount of cash on hand at the beginning of each reporting period and the total amount of all disbursements for the reporting period and the calendar year.

The Audit staff's reconciliation of the Committee's reported financial activity to its bank activity revealed material misstatements in the Committee's reported disbursements and ending cash balances for 1995 and 1996.[5]

1. 1995 Misstatements

The Committee reported total disbursements of $5,755,952 for the 1995 calendar year. The Audit staff determined that the Committee understated its disbursements by $100,751. This net understatement was due to the following: unreported disbursements totaling $123,749; reported disbursements that were later voided but not adjusted for on the reports totaling $24,746; and miscellaneous reporting errors resulting in a net understatement of $1,748. The Audit staff notes that a large amount ($107,327) of the unreported disbursements had a payment date of September 11, 1995; however, the specific reason for the error is unknown.

The Committee reported an ending cash balance at December 31, 1995 of $275,189. The Audit staff determined that the correct balance was $211,271. This overstatement was primarily due to unreported offsets to operating expenditures totaling $17,694; a mathematical error on the Committee's 1995 Year-End Report of $18,000; and the misstatements described above.

2. 1996 Misstatements[6]

The Committee reported total disbursements of $3,329,960. The Audit staff determined that the Committee understated its disbursements by $40,721. This net understatement was due to the following: unreported disbursements totaling $57,272; loan repayments that were reported twice totaling $20,000; reported disbursements that were later voided but not adjusted for on the reports totaling $4,188;

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[5] The dollar amounts are rounded to the nearest dollar.

[6] The Audit staff completed a reconciliation of the Committee's reported financial activity from January 1, through April 30, 1996.

contribution refunds made by the Compliance Committee but reported as contribution refunds on the Committee's reports totaling $6,263; unreported contribution refunds totaling $1,250; and miscellaneous reporting errors resulting in a net understatement of $12,650.

The Committee reported an ending cash balance at April 30, 1996 of $194,670. The Audit staff determined that the correct balance was $122,755. This overstatement was primarily due to the carryover of the errors made during 1995; an error in the total receipts balance carried forward from the Detailed Summary Pages (FEC Form 3P, Page 2) to the Summary Page (FEC Form 3P, Page 1) on its April Monthly report, totaling $30,000; unreported interest received in January, totaling $2,724; and the misstatements described above.

The Audit staff provided copies of our 1995 and 1996 bank reconciliation workpapers and discussed the noted misstatements with Committee officials at a conference subsequent to the end of fieldwork. The Committee officials acknowledged the receipt of the workpapers, but did not offer any specific comments concerning the misstatements.

In the Exit Conference Memorandum (the Memorandum), the Audit staff recommended that the Committee file amended Summary and Detailed Summary Pages (FEC Form 3P, Pages 1 and 2), along with accompanying itemized schedules, as appropriate, for the 1995 and 1996 calendar years to correct the misstatement of financial activity.

In its response to the Memorandum, the Committee did not contest this finding. On April 28, 1997, the Committee filed amended disclosure reports which materially corrected the 1995 and 1996 misstatements.

B. Itemization Of Disbursements

Section 434(b)(5)(A) of Title 2 of the United States Code states that each report shall disclose the name and address of each person to whom an expenditure in an aggregate amount or value in excess of $200 within a calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

During our sample review of disbursements, the Audit staff noted several instances where the Committee did not itemize disbursements that were less than or equal to $200, but due to previous payments to the same person required itemization. The Audit staff concluded that the Committee's system for identifying such disbursements was ineffective.

Utilizing the available records, the Audit staff identified 1,103 disbursements, totaling $123,083, that were less than or equal to $200, but required itemization. Of these, 918 totaling $94,777, were not itemized.

The Audit staff presented a schedule of these disbursements to Committee officials at a conference subsequent to the end of fieldwork. Committee officials acknowledged that the problem existed but did not offer any specific comments concerning the matter.

In the Memorandum, the Audit staff recommended that the Committee file amended Schedules B-P (Itemized Disbursements) to disclose the disbursements not itemized as required.

In its response to the Memorandum, the Committee did not contest this finding. On April 28, 1997, the Committee filed amended Schedules B-P which materially disclosed the disbursements.

III. AUDIT FINDINGS AND RECOMMENDATIONS: AMOUNTS DUE TO THE U.S. TREASURY

A. APPARENT NON-QUALIFIED CAMPAIGN EXPENSES

Section 9032(9) of Title 26 of the United States Code defines, in part, the term "qualified campaign expense" as a purchase or payment incurred by a candidate, or by his authorized committee, in connection with his campaign for nomination, and neither the incurring nor payment of which constitutes a violation of any law of the United States or of the State in which the expense is incurred or paid.

Section 9033.11(a) of Title 11 of the Code of Federal Regulations states, in part, that each candidate shall have the burden of proving that disbursements made by the candidate or his authorized committee(s) or persons authorized to make expenditures on behalf of the candidate or authorized committee(s) are qualified campaign expenses.

Section 9038.2(b)(2) of Title 11 of the Code of Federal Regulations states, in relevant part, that the Commission may determine that amounts of any payments made to a candidate from the matching payment account were used for purposes other than to defray qualified campaign expenses. The amount of any repayment under this section shall bear the same ratio to the total amount determined to have been used for non-qualified campaign expenses as the amount of matching funds certified to the candidate bears to total deposits, as of 90 days after the candidate's date of ineligibility.

During the Audit staff's review of the Committee's disbursements and related documentation, we identified payments to individuals and vendors that appeared to be non-qualified campaign expenses, categorized as follows:

1. Payment of Bonuses to Employees

Section 9034.4(a)(5)(ii) of Title 11 of the Code of Federal Regulations states, in relevant part, that monetary bonuses shall be considered qualified campaign expenses, provided that all monetary bonuses for committee employees and consultants in recognition for campaign-related activities or services are provided for pursuant to a written contract made prior to the date of ineligibility; and, are paid no later than thirty days after the date of ineligibility [emphasis added].

The Audit staff identified five payments to individuals and one payment to a consulting firm for monetary bonuses, totaling $18,000. The payments were described as "special bonus check", "signing bonus", "bonus check", or "signing fee" on the canceled check or accompanying documentation.

The Audit staff provided a list of these payments to Committee officials at a conference subsequent to the end of fieldwork. The Committee's response indicated that two of the payments ($6,000 to Richard Schwarm, a regional political director, and $9,000 to JS Day, a consulting firm), dated April 4, 1995, were prepayments of salary or consultant fees. However, information contained in the Committee's records describe the purpose of the disbursements as a "signing bonus" and "signing fee," respectively. The Committee's response did not offer any comments relative to the other apparent bonus payments.

The Audit staff notes that all of the apparent bonus payments were made prior to the Candidate's date of ineligibility (March 6, 1996); however, none of the payments were made pursuant to a written contract (see Section I.D.) and, thus, were not in accordance with 11 CFR §9034.4(a)(5)(ii).

In the Memorandum, the Audit staff recommended that the Committee provide documentation which demonstrated that the bonus payments were qualified campaign expenses.

In response to the Memorandum, the Committee provided copies of a proposal which outlined the responsibilities and fees for Richard Schwarm and JS Day. The proposal indicated that the questioned payments to the two entities were for fees relevant to the final month of service that would be prepaid over the first two months. The Audit staff notes that Richard Schwarm, and the principals of JS Day, drafted the proposal. Further, the apparent date of the proposal was March 24, 1995. The Committee provided a notarized statement from the Campaign Manager, Mr. R. Mark Lubbers. that stated,

> "The payments in question to James McKay and Rachel Schreperman were not bonuses in the sense that a bonus would be paid for specific performance against established objectives."

Mr. Lubbers also stated that,

> "The intention of these payments was to recognize their good work to-date, and to keep them positive and productive in the difficult summer months of 1995. I wanted to make sure they knew they were appreciated and to stimulate their continued good work."

Additionally, the Committee's response contends,

> "...that these were not bonuses in the context anticipated by the cited FEC regulations. They were not payments made to deplete the treasury prior to the conclusion of a Primary Campaign. Nor were they made to high level campaign officials who could influence their own bonus payments by controlling receipts or disbursements. This was a supplement to the regular compensation of two low-paid employees intended to let them know they were appreciated."

In reference to the proposal for the payments made to Richard Schwarm and JS Day, the Audit staff notes that the document is not a written contract as required by the Regulations. The document contains no signatures, thus, the Audit staff is unable to verify whether either of the parties accepted the terms of the proposal. Nonetheless, given the Committee made the payments to the entities as specified in the March 1995 proposal, the Audit staff now views the payments to Richard Schwarm and JS Day as prepayments of fees and not impermissible monetary bonuses.

In regards to the payments made to Mr. McKay and Ms. Schreperman, the Audit staff agrees that the payments were not made to "...deplete the [Committee's] treasury prior to the conclusion of a Primary Campaign." However, the Committee's argument that the payments are not within the "context anticipated by the cited FEC regulations" (for such payments) is not persuasive. The regulations clearly state that all monetary bonuses for committee employees and consultants in recognition for campaign-related activities or services are provided for pursuant to a written contract made prior to the date of ineligibility. There is no basis in the Regulations or the Commission's Explanation and Justification that would allow a committee to provide a monetary bonus to any person absent a written contract made prior to the date of ineligibility.

Further, the Committee's response appears contradictory. The Committee indicates that the payments were supplements to the individuals regular compensation for "the employees' extraordinary efforts" and, "in recognition of their good work." Notwithstanding, the Committee states that the payments "were erroneously termed 'bonuses' in the sense that they were not paid for performance against specific objectives."

It is the Audit staff's opinion that the payments are bonuses and to be considered a qualified campaign expense, must be provided for pursuant to a written contract made prior to the date of ineligibility. The Committee acknowledges in its response that they made the payments without a written contract. Consequently, the Audit staff maintains that the two bonus payments to Mr. McKay and Ms. Schreperman totaling $3,000, were not made in accordance with 11 CFR §9034.4(a)(5)(ii) and require a pro-rata repayment to the United States Treasury.

2. Payment of the Compliance Committee's Contribution Solicitation and Processing Costs

Section 9034.4(b)(3) of Title 11 of the Code of Federal Regulations states, in relevant part, that any expenses incurred before the candidate's date of ineligibility for property, services, or facilities used to benefit the candidate's general election campaign are not qualified campaign expenses.

Section 9034.4(e)(6)(i) of Title 11 of the Code of Federal Regulations states, in part, that the costs of a solicitation shall be attributed to the primary election or the GELAC (General Election Legal and Accounting Compliance Fund), depending on the purpose of the solicitation.[7]

During our review of contributions to the Compliance Committee, the Audit staff noted that solicitation devices contained direct appeals for contributions to the Compliance Committee. The costs associated with the creation and mailing of these solicitations ($1,944) were paid for by the Committee.

Similarly, the Audit staff noted an invoice from a vendor, dated July 15, 1996, which contained a $4,460 charge for processing contributions made to the Compliance Committee. This charge was also paid by the Committee.

In the Memorandum, the Audit staff recommended that the Committee provide documentation which demonstrated that the payments were qualified campaign expenses.

In response to the Memorandum, the Committee did not submit any evidence which demonstrated that the expenditures were qualified campaign expenses. Instead, the Committee disputed the finding for two reasons. First, the Committee's contends that,

> "...the processing that is the subject of this recommendation in the Exit Conference Memorandum was based on a contract signed before August 16, 1995, the date the Regulation at issue went into effect.... This regulation should not be applied to a contract for processing these

[7] The effective date of this regulation was August 16, 1995.

receipts which was signed on March 6, 1995. As the Memorandum tacitly acknowledges, there was no relevant Regulation in effect before that date.

The Committee's argument concludes,

"The Memorandum's repayment determination of $4,460 for processing costs should be rejected because it is based on a Regulation not in effect at the time the contract was signed."

Secondly, the Committee's response contends that,

"The current Regulations are internally inconsistent, contradictory, and place a committee which simply exercises its rights granted by the Regulations automatically in violation for following the Regulations. Specifically, 11 CFR §9003.3(a)(1) states that a GELAC 'may be established by such candidate prior to being nominated or selected as the candidate of a political party for the office of President or Vice President of the United States.' However, another Regulation requires a candidate who raises GELAC funds pursuant to this Regulation, but not nominated or selected to be the Presidential or Vice Presidential candidate, to return (or have redesignated) all of the funds collected by the GELAC. 11 CFR §102.9(e)(2). None of the funds raised may be attributed to any fundraising or overhead costs according to 11 CFR §102.9(e)(2).

"Yet, 11 CFR §9034.4(e)(6)(i) requires that a joint solicitation be paid for by both the primary committee and the GELAC.

"It cannot be both ways.

"This fundamental contradiction in the Regulation makes it impossible for a committee exercising its rights granted by the Regulations to comply. Whatever the correct answer is, it cannot be forcing the Primary Committee to repay $6,404.

"Therefore, the Committee respectfully asserts that the audit finding should be rejected as to these charges, that these disbursements should be allowed as qualified campaign expenses..."

The Committee also indicates in its discussion that the "overwhelming purpose" of the solicitation, whose costs ($1,944) the Audit staff questioned as being paid for by the Committee, was "raising funds for the Primary Committee." The Audit staff notes that certain solicitations for both the Committee and the Compliance Committee contained the same newsletter which discussed the Candidate

and the campaign's progress. However, the contributor response form on the Committee's solicitations instructed contributors to "[p]lease make checks payable to Lugar for President," whereas, for the Compliance Committee it stated, "[p]lease make checks payable to the Lugar for President Compliance Committee" and made no reference to the Committee. The solicitation in question is a direct solicitation on behalf of the Compliance Committee, not a joint solicitation. Therefore, the associated costs are expenses of the Compliance Committee, and by definition, cannot be qualified campaign expenses of the Committee.

Further, the Audit staff notes that the effective date of 11 CFR §9034.4(e)(6)(i) is irrelevant in determining whether any of the processing costs in question are qualified campaign expenses of the Committee. Section 9034.4(e)(6)(i) of Title 11 of the Code of Federal Regulations addresses only solicitation costs. Thus, the Committee's argument that the costs of processing the contributions are qualified campaign expenses because the Committee signed a contract before the effective date of the Regulation is not persuasive. The applicable regulatory language is at 11 CFR §9032.9. This Regulation (in effect since 1977) describes a "qualified campaign expense" as an expense incurred in connection with the candidate's campaign for nomination. Expenses clearly related to the candidate's Compliance Committee do not satisfy this standard.

In regards to the Committee's argument that "11 CFR §9034.4(e)(6)(i) Contradicts Other Regulations," the Audit staff notes that this argument is also fallible. The fact that the Committee believes that this regulation appears to contradict other regulations does not mean that the expenditures in question are qualified campaign expenses. Indeed, the sum of the regulations surrounding a GELAC presents committees with several choices, some of which may hold potential hazards. However, the regulations also work to put the candidate on notice of the risks involved with establishing a GELAC prior to receiving his or her party's nomination. Thus, the regulations leave it up to the candidate to decide whether a proactive fundraising program for the Compliance Committee early in the campaign is wise. Accordingly, one section of the regulations in question unequivocally states, in part, "...any expenses incurred before the candidate's date of ineligibility...for property, services, or facilities used to benefit the candidate's general election campaign, are not qualified campaign expenses." (11 CFR §9034.4(b)(3)).

After considering the Committee's arguments, the Audit staff maintains that the Compliance Committee's solicitation costs ($1,944) and contribution processing costs ($4,460) paid by the Committee are not qualified campaign expenses and thus, require a pro-rata repayment to the United States Treasury.

3. Other Non-Qualified Campaign Expenses

During the Audit staff's review of disbursements, we identified a payment of $8,893, made to KLF, Inc. (KLF) on June 4, 1996, which appeared to

duplicate payment of the May monthly rental fee and applicable taxes ($2,198), for a telephone system and pagers.

The Audit staff presented this matter to Committee officials at a conference held subsequent to the end of fieldwork. The Committee contacted KLF who subsequently issued a credit to the Committee's account. A copy of the credit authorization noted that there was a misprint on the invoice from KLF indicating that the rental charges were for May when the correct month should have been June. Nonetheless, KLF issued a credit because they removed the system on June 3, 1996, thus, the Committee paid for the June's rental charges in error.

The Committee provided a copy of the credit authorization from KLF that detailed the credit, however, at the end of fieldwork the Committee did not provide evidence that it had received a reimbursement.

In the Memorandum, the Audit staff recommended that the Committee provide documentation which demonstrated that the payment to KLF was a qualified campaign expense.

In response to the Memorandum, the Committee provided documentation which demonstrated that the $2,198 credit to the Committee's account had been offset against a remaining amount owed to KLF ($1,330). Further, the Committee provided evidence that they had received and deposited the refund check for the balance of the overpayment ($868). Thus, the Audit staff now views the payment to KLF as a qualified campaign expense.

To summarize, the Audit staff has revised our analysis to reflect the additional documentation and commentary provided by the Committee. The remaining amount of non-qualified campaign expenses includes impermissible bonuses, totaling $3,000; and, Compliance Committee solicitation and contribution processing costs, totaling $6,404 ($4,460 + $1,944). Accordingly, there remains non-qualified campaign expenses, totaling $9,404, which are subject to a pro-rata repayment to the United States Treasury.

Recommendation #1

The Audit staff recommends that the Commission determine that $3,336 is repayable to the United States Treasury pursuant to 26 U.S.C. §9038(b)(2).[8]

[8] The payment amount is calculated as $9,404 x .35472 (the Committee's repayment ratio as calculated pursuant to 11 CFR §9038.2(b)(2)(iii).

B. Apparent Prohibited In-Kind Contributions

Section 441b(a) of Title 2 of the United States Code states, in part, that it is unlawful for any national bank or any corporation organized by authority of any law of Congress, to make a contribution or expenditure in connection with any election to any political office, or for any corporation or labor organization, to make a contribution or expenditure in connection with any election to federal office and that it is unlawful for any candidate, political committee or any other person knowingly to accept or receive any contribution prohibited by this section.

Section 100.7(a)(1) of Title 11 of the Code of Federal Regulations states, in part, that the term *contribution* includes the following payments, services or other things of value: A gift, subscription, loan (except for a loan made in accordance with 11 CFR §100.7(b)(11)), advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office.

Section 100.7(a)(1)(iii)(A) of Title 11 of the Code of Federal Regulations states, in part, for purposes of 11 CFR §100.7(a)(1), the term *anything of value* includes all in-kind contributions. Unless specifically exempted under 11 CFR §100.7(b), the provision of any goods or services without charge or at a charge which is less than the usual and normal charge for such goods or services is a contribution. If goods or services are provided at less than the usual and normal charge, the amount of the in-kind contribution is the difference between the usual and normal charge for the goods or services at the time of the contribution and the amount charged the political committee.

Section 100.7(a)(1)(iii)(B) of Title 11 of the Code of Federal Regulations states for purposes of 11 CFR §100.7(a)(1)(iii)(A), *usual and normal charge* for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and *usual and normal charge* for any services, other than those provided by an unpaid volunteer, means the hourly or piecework charge for the services at a commercially reasonable rate prevailing at the time the services were rendered.

1. Ontario Systems Corporation - Repurchase of Phone Bank Equipment

During July of 1995, the Committee entered into a written agreement with Ontario Systems Corporation (OSC)[9] to provide an "Onyx" telephone

[9] According to Ontario Corporation's website (http://www.ontario.com) and a report from Dun & Bradstreet, Inc., the Chairman of Ontario Corporation (the parent corporation of OSC), Mr. Van Smith, is a partner (along with Mr. David Sursa) in the ownership of Delaware Aviation. Both Mr. Smith and Mr. Sursa contributed $1,000 to the Committee. The Audit staff notes that Delaware Aviation provided one charter trip for the Committee. The Committee reimbursed Delaware Aviation for an amount equal to a first class air fare ($1,132).

call and contact management system to include equipment, software and related services. The quoted purchase price of the system was $355,425 ($338,500 + $16,925 in taxes). The agreement included a provision for OSC to repurchase the system from the Committee as follows:

> "In exchange for serving as a beta site for the political candidate telemarketing industry, OSC will grant to Lugar for President a repurchase option which may be exercised at any time during the first nine (9) months of operation from the date of system acceptance as defined in the attached Terms and Conditions. As a beta site, Lugar for President will grant OSC the right to review and publish statistical results observed on the Onyx system in use at Lugar for President and will provide OSC direct access to Lugar for President employees for interviews and debriefing not to exceed 80 hours of time. In exchange for these considerations, the repurchase option may be exercised for the amount of $232,500.00, payable within thirty (30) days from the date notice is received by OSC of Lugar for President's desire to exercise this option."

The Audit staff noted that the Committee exercised the repurchase option contained in the agreement and, on March 14, 1996, received a payment from OSC, in the amount of $232,500.

On August 30, 1996, the Audit staff requested that the Committee obtain additional documentation from OSC which demonstrated that OSC entered into similar repurchase agreements with other clients and that OSC's agreement with the Committee conforms to the usual and normal practice in OSC's trade or industry. Further, the Audit staff requested documentation regarding the use of the Committee as a beta site.[10] The request noted that such documentation should include instances where OSC used other clients as beta sites and include information which documents the use of the Committee as a beta site.

In response, the Committee provided a letter from Wilbur R. Davis, the President of OSC, which details two agreements with other clients he described as "substantially similar" to the agreement made with the Committee. In one example, a client purchased an Onyx system and OSC offered them the option to purchase an expansion of the system within 90 days after the initial installation date of the original system. In this example, OSC also offered the client a six month trial period on the expansion. The second example detailed an agreement whereby the client was offered the option to purchase a system for a quoted price. The payment terms required a non-refundable rental fee covering approximately four months, that was due prior to installation and which OSC would fully apply to the purchase price of the system. This

[10] A beta site is defined by OSC as a "test site." In such agreements, OSC stated that the customer agrees to test a development concept for some form of economic consideration.

client had the option to purchase the system and software at the end of the rental period or return it to OSC. According to the letter, both of the clients were testing different concepts for OSC.

The Audit staff reviewed the documentation provided and concluded that OSC had used other clients as test or beta sites; however, neither of the examples demonstrated that OSC had offered a similar repurchase agreement to another client.

At a conference held subsequent to the end of fieldwork, the Audit staff discussed our preliminary findings with the Committee and requested a more definitive response in regards to repurchase agreements that OSC had offered to other clients. Committee officials did not offer any specific comments concerning the matter. The Committee did submit comments in response to the meeting which stated:

> "...based on the two cases already submitted, Lugar for President believes that the transaction with Lugar for President was economically the same as transactions for other customer[s] of Ontario."

After considering the Committee's response, the Audit staff maintained that the documentation made available did not demonstrate that OSC had similar agreements with other clients. Although, it appeared that OSC had entered into test site agreements with other clients, none of the examples provided included a repurchase agreement provision with terms similar to those offered to the Committee. Therefore, the Audit staff concluded that, absent a demonstration to the contrary, an apparent prohibited in-kind contribution existed from OSC in the amount of $232,500.

In the Memorandum, the Audit staff recommended that the Committee:

(a) provide documentation from Ontario Systems Corporation which demonstrates that OSC made written agreements that included an offer to repurchase equipment under terms similar to those offered to the Committee, to include, but not limited to, copies of the written agreement;

(b) provide documentation which demonstrates that a standard exists within Ontario Systems Corporation's industry to repurchase similar equipment at terms similar to those offered to the Committee; or

(c) make a payment to the United States Treasury for $232,500.

In its response to the Memorandum, the Committee did not provide any additional documentation, as requested in (a) and (b) above, from Ontario Systems Corporation. Instead, the Committee elected to submit commentary and analysis from Mr. R. Mark Lubbers, the Campaign Manager; a memorandum from Ms. Jan Abbs, General Counsel for Ontario Systems Corporation; and three memoranda from campaign employees.

Mr. Lubbers contended that the Committee "cannot provide examples of other repurchase agreements;" however, they can "make an equally significant 'demonstration to the contrary'."

The Committee's response stated,

> "The Committee respectfully submits that if we can show that the financing arrangements for other beta site examples accepted by the staff [Audit staff] are economically the same as the terms of the repurchase agreement, then this is a demonstration to the contrary necessary for the Audit staff to reverse its finding."

The Committee contended that other beta sites (clients of OSC) were financed through lease or rental arrangements and that the net present value[11] (NPV) of the purchase/sell-back transaction can be made identical to the NPV of a lease or rental arrangement. The Committee's response continued,

> "the payment method is irrelevant; and
>
> "that what is relevant is the comparison between the NPV of the actual purchase/sell-back transaction and the NPV of a likely [emphasis not in original] lease transaction, (the financial arrangement that had been used in other beta test agreements with an Ontario customer).
>
> "that in order for there to have been an in-kind contribution, the NPV of the purchase/sell-back transaction would have had to have been less than the NPV of a reasonable lease arrangement -- in other words, that

[11] Net Present Value (NPV) is a technique used in capital budgeting which calculates the present value of all of the project's expected cash inflows and outflows found today at the company's weighted average cost of capital. Simply put, NPV summarizes the expected net revenue produced by an investment into a single figure that is adjusted for risk, inflation and the time value of money. The NPV measures the economic consequences of an investment decision; thus, generally an investment with the highest NPV would add the most value to a company. (See Sources: http://www.cba.uiuc.edu, Introduction to Corporate Finance, Chapter 10; http://arts.uwaterloo.ca, Summary of Present Value; http://www.vanderbilt.edu/Owen, Lecture 2: Net Present Value and the Alternatives; http://www.salestoolz.com/capital.html, How Customer Managers Budget Capital Expenditures; and http://www.agric.gov.ab.ca, How Much to Bid for Beef Cows.

> if the NPV of the purchase/sell-back transaction is greater than a reasonable or likely lease transaction, then there was no in-kind contribution."

Next, the Committee's response provided a calculation of the NPV of the purchase/sell-back transaction ($-134,243) and then posed this question,

> "What would the monthly lease rate have to have been in order to make the NPV of a lease or rental payment method identical to the purchase/sell-back payment method?"

The Committee then calculated that a monthly lease rate of $23,035, for a six month lease period (mid-August 1995 to February 15, 1996) would have created a cash-flow with a NPV equal to the NPV of the purchase/sell-back transaction.

The Committee's response stated,

> "...if the Committee had had a choice between the purchase/sell-back payment method and a theoritical[sic] lease payment method, it would have been indifferent about the choice at a lease rate of $23,035/month."

Finally, the Committee's response concluded that:

> "The existence of this NPV breakeven point is the basis of the Committee's previous response that the transaction between LFP and OSC was 'economically the same' as other transactions between OSC and its beta site customers.
>
> "The analysis, however, gives further insight into the economics of this transaction that will permit the Commission to determine that no in-kind contribution took place. Again, in fact, there is no lease program or lease offer to compare [emphasis not in original]. But having pegged the lease rate that would have been required to make the actual Purchase/Sell-Back identical to a lease arrangement, we can ask the following question: Is it reasonable or likely that if Ontario had a lease program, that they would have leased the Onyx system, with a market price of $338,500, for 23,000/month?
>
> "The Committee respectfully submits that the answer to this question is, 'No.' It is neither reasonable nor likely that Ontario, if it had a lease program, would charge a lease rate that would recover 40% of its market value in 6 months." [The Audit staff notes that in one of the previous examples provided by OSC, although the terms and values

are not analogous to the Committee's arrangement, OSC recovered approximately 21% of the market price of an Onyx system, in the form of a non-refundable rental fee over a term of four and a half months.]

The Committee's response continued,

"At that rate, on a product with a multi-year useful life and the capacity to have its software upgraded, Ontario would undoubtedly be breaking even against their direct costs in less than a year, and probably breaking even in less than a year against their fully loaded costs -- direct costs plus allocated indirect costs. In sum, it is inarguable that, if Ontario had a lease program, it would be charging a lease rate **less than** $23,035 per month. And if that conclusion is reasonable, then it is not possible to conclude that an in-kind contribution occurred as a result of the transaction between Ontario Systems and the Committee."

The Audit staff had previously obtained documentation from the Committee concerning two clients of Ontario Systems Corporation. This documentation indicated that OSC had some form of beta site agreement with those clients; no detailed terms were disclosed concerning compensation for selection as a beta site. The Committee argued that if it could show that the financing arrangements with the other beta sites are economically the same as the Committee's purchase/sell-back transaction then there was no in-kind contribution. The Audit staff agreed; however, the net present value analysis put forth by the Committee did not accomplish this task.

The analysis did not compare the financing arrangements of OSC's other beta site customers with the transaction in question. The Committee did not provide any documentation which indicated that OSC ever made an actual offer to lease the equipment to the Committee, thus, there is no basis in fact for the Committee's lease amount of $23,035 per month. The Committee acknowledged that "there is no lease program or lease offer to compare" and that the lease payment method is "theoritical [sic]."

Further, the results of the NPV analysis showed that the purchase/sell-back transaction is economically the same as a hypothetical monthly lease amount. The existence of the same NPV for the purchase/sell-back transaction and the theoretical lease value, does NOT provide any basis for the Committee's conclusion that "the transaction between LFP and OSC was **'economically the same'** as other transactions between OSC and its beta site customers." The analysis compared two separate transactions available to the Committee and the results, even assuming that the monthly lease value was factually correct, simply indicated that either financing option would have the same economic impact to the Committee.

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its conservative and cautious approach to comply with all applicable rules and regulations, was willing to pay OSC to be a Beta Site."

In regards to the decision about the terms of the agreement, Ms. Abbs stated,

"...OSC had used a lease arrangement for a Beta Site previously...The lease arrangement was rejected by OSC and the LFP for two reasons. One reason was that there was no standard contract form for a lease arrangement. Secondly, and most importantly, the lease arrangement appeared to place OSC in the position of a bank for the LFP. Simply stated, neither party wanted it to appear that OSC was providing financing for the LFP."

Ms. Abbs further claimed that,

"[n]o special financing of the business arrangement was offered by OSC. The LFP was required to pay for products in the same manner as other customers. This was done because of the conservative and cautious approach taken by the LFP and OSC to assure compliance with all applicable rules and regulations. This was done even though the LFP was a Beta Site for which OSC would typically consider terms and conditions not regularly made part of a contract and alternative financing possibilities. If anything unusual occurred in this situation, it was that the 'special' treatment OSC is accustomed to providing its customers could not be a part of the arrangement."

Ms. Abbs also indicated that,

"[r]egular business factors were taken into consideration to determine the appropriate amount of reimbursement to the LFP upon termination of the contract and return of products."

A footnote to this statement indicated that OSC intended to maintain the confidentiality of this information and "does not waive any rights or release any such information." Ms. Abbs also stated,

"OSC also took into account the value of what was being returned to OSC. Significantly, OSC would be receiving equipment which had been little used. Indeed, the equipment returned was in excellent condition. The LFP had kept not only the boxes, but the original packing materials. It would have been very difficult to distinguish the returned equipment from new equipment. The entire system could have been resold, but was not because OSC had other needs for the

equipment. OSC could re-configure the telephone switch and sell it to another customer. (This was done.)"

Ms. Abbs continued to explain that OSC used the rest of the equipment, including the main computer and the terminals to complete a computer upgrade of their own facility.

Finally, Ms. Abbs concluded that,

"[t]he value of the returned products to OSC exceeded the amount reimbursed to the LFP...There simply is no basis concluding that the amount reimbursed to the LFP was anything other than a return to the LFP of its own money upon the cancellation of the contract and return of OSC products."

Counsel for OSC provided two generic examples of past situations in which OSC repurchased equipment from its clients. In one example, OSC repurchased equipment from a client who determined that OSC's products did not suit their needs. OSC did not explain the reason for the other repurchase. The Audit staff maintained that neither of these examples were relevant to the repurchase of the Committee's equipment. The Committee's contract included a specific clause to repurchase the equipment within nine months of operation from the date of system acceptance. The Committee was, to our knowledge, completely satisfied with the equipment. Further, Ms. Abbs did not disclose any specific information about the other clients contracts. As such, the Audit staff has no knowledge of the terms and conditions of those client's agreements and was unable to make a comparison to the Committee's arrangement.

Further, Ms. Abbs indicated that extensive effort was put into researching the terms of the agreement and finding the most conservative and cautious approach to executing the transaction. Ms. Abbs stated that no standard contract existed for political clients and/or "Beta Site" clients. The Audit staff contended that the fact that the client is a political client is irrelevant. The Regulations at 100.7(a)(1)(iii) simply require that a political committee pay the "usual and normal" charge for any goods and services provided to them. Applied to this transaction, the Committee should have paid the usual and normal price when purchasing the equipment. Likewise, when the equipment was repurchased by OSC, the transaction should have been in the ordinary course of OSC's business and the repurchase value ($232,500) should have been OSC's usual and normal value for repurchasing such equipment.

Ms. Abbs reiterated that the Committee received no "special" treatment from OSC. At one point, Ms. Abbs specifically stated that no special financing arrangements were made to the Committee. Further, Ms. Abbs remarked that,

"[t]his was done even though the LFP was a Beta Site for which OSC would typically consider terms and conditions not regularly made part

> of a contract and alternative financing possibilities. If anything unusual occurred in this situation, it was that the 'special' treatment OSC is accustomed to providing its customers could not be a part of the arrangement."

This statement is inconsistent with the Committee's original contract which stated,

> "[i]n exchange for serving as a beta site for the political candidate telemarketing industry, OSC will grant to Lugar for President a repurchase option which may be exercised at any time during the first nine (9) months of operation from the date of system acceptance as defined in the attached Terms and Conditions. As a beta site, Lugar for President will grant OSC the right to review and publish statistical results observed on the Onyx system in use at Lugar for President and will provide OSC direct access to Lugar for President employees for interviews and debriefing not to exceed 80 hours of time. **In exchange for these considerations, the repurchase option may be exercised for the amount of $232,500.00, payable within thirty (30) days from the date notice is received by OSC of Lugar for President's desire to exercise this option"** [emphasis not in original].

Accordingly, the language in the original contract afforded the Committee a "special" financing arrangement -the repurchase option in question- in return for the Committee serving as a beta site.

Finally, Ms. Abbs mentioned that "regular business factors were taken into consideration" when OSC calculated the appropriate amount of the repurchase option. Ms. Abbs also indicated that OSC reconfigured and then resold the telephone switch. In concluding, Ms. Abbs stated that "[t]he value of the returned products to OSC exceeded the amount reimbursed to the LFP." These statements addressed critical factors in attempting to determine whether or not OSC made an apparent prohibited in-kind contribution to the Committee. However, as previously noted by Ms. Abbs, OSC considers the information confidential and proprietary and will not release it.

In doing so, OSC has declined to provide any additional competent evidential matter, such as a detailed breakdown of the equipment and its fair market value, including documents which support the fair market valuation. Such information was necessary to assist the Committee in demonstrating that an apparent prohibited in-kind contribution did not exist or existed in an amount less than $232,500.

After considering the available documentation and the Committee's response to the Memorandum, the Audit staff maintained that OSC apparently had other beta site agreements with other customers. However, neither of the other beta site examples made available to the Audit staff indicated that those clients

received equivalent incentives in exchange for being a beta site. According to the representations of OSC's Counsel, the only disclosed instances where OSC repurchased equipment from its customers, notwithstanding the Committee's arrangement, were in situations where the client was dissatisfied with their products.

As stated above, the Audit staff recommended in the Memorandum that the Committee provide documentation from Ontario Systems Corporation which demonstrated that OSC had made written agreements with other clients that included an offer to repurchase equipment under terms similar to those offered to the Committee; and, to provide documentation which demonstrated that a standard exits within OSC's industry to repurchase similar equipment at terms similar to those offered to the Committee.

The Audit staff concluded that the net present value analysis and other commentary submitted by the Committee did not demonstrate that the agreement to repurchase the equipment was commercially reasonable. Likewise, the Committee's efforts did not prove that it was in the ordinary course of OSC's business to offer to repurchase their equipment at the terms and conditions offered to the Committee.

As previously noted, neither the Committee nor OSC had provided adequate documentation with which to determine whether or not the agreement was commercially reasonable.[13] Thus, the Audit staff concluded that the amount of the apparent prohibited contribution, if any, on a worst case basis, was equal to $232,500.

On September 18, 1997, the Commission directed the Audit Division and the Office of General Counsel to attempt to secure the information (about the valuation of the equipment upon the repurchase date and the valuation of the beta site option) from the Committee and the vendor (OSC). In addition, the Commission authorized the issuance of subpoenas, if necessary.

The Commission approved subpoenas to produce documents and answer interrogatories on October 7, 1997. On November 7, 1997, the Commission received responses from both the Committee and OSC.

The Committee's response included documents already submitted in response to the Memorandum, additional memoranda which take issue with certain statements made and procedures followed by the Audit staff, and other miscellaneous documents. Counsel for the Committee states,

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[13] There were several unknown variables to consider when attempting to evaluate whether the agreement was commercially reasonable and whether or not an apparent prohibited contribution existed. For example, the economic variables used by OSC to calculate the value of the repurchase option, such as the economic value of the Committee serving as a beta site and the estimated fair market value of the equipment.

"At the September 18, 1997 Open Session Meeting, the Audit Division misrepresented to the Commission certain facts regarding the alleged lack of cooperation by LFP in supplying information as to the valuation of the 'beta' site and the valuation of the returned ONYX system. Further, subsequent to the September 18, 1997 meeting, Commission staff caused the issuance of Subpoenas in this matter in apparent contravention to the stated intention and explicit language of an order of the Commission adopted unanimously on September 18, 1997.

"Under the Commission's procedural rules, the Audit Division draws 'conclusions' and recommends 'findings' to the Commission based on its audit of LFP. In this process, the Audit Division is under no obligation to share with the Commission the actual text of any of the materials provided by LFP or OSC, including their responses to these Subpoenas. In fact, the Audit Division is free to characterize and summarize the arguments made and the documents provided by LFP and OSC, without actually forwarding either the documents or the factual analysis submitted by LFP and OSC to the individual members of the Commission."

Further, the Campaign Manager (Mr. Mark Lubbers) also takes issue. Mr. Lubbers, in a memorandum to Committee Counsel, argues that,

"Yesterday, I listened to the entire audio tape of the September 18 FEC discussion of the LFP audit. I am extremely frustrated.

"As you know, I was surprised this week when we received the subpoena. Based on your account of the September 18 meeting, I expected the audit staff to contact us prior to issuing the subpoenas. Having now listened to the tape, I am more than surprised! From the motion they passed and the preceding discussion, there is no doubt that the Commission directed the staff to use subpoenas only if they could not get the information voluntarily. What gives? Is the staff allowed to ignore a specific directive of the Commission?"

Mr. Lubbers also contends that,

"In listening to the tape, I find the staff (mostly Mr. Robert Costa) consistently leading the Commission to believe that we have been unresponsive to their requests for information.

"On numerous occasions during the September 18 meeting, Mr. Costa and others made indirect and direct statements asserting that we had

failed to provide specific information that the Audit Division had requested. **This is simply untrue.**"

Mr. Lubbers claims, in part, that

"No official or representative of either LFP or OSC has **ever** been asked by any representative of the FEC, in writing or any other means of communication, to provide information about the value of either the repurchased Onyx Systems [sic] or the value of the beta test site."

Mr. Lubbers continues,

"We received multiple requests for information about the similarity of our transaction to other Ontario transactions, and about the usual and customary practices in Ontario's industry. **BUT at no time did we ever receive a request from the staff about the economic values in question.**"

First, the Audit staff made several requests, both written and verbal, for additional documentation concerning the OSC transaction. On August 30, 1996, the Audit staff requested that the Committee obtain additional documentation from OSC which demonstrated that OSC entered into similar repurchase agreements with other clients and that OSC's agreement with the Committee conformed to the usual and normal practice in OSC's trade or industry. Further, the Audit staff requested documentation regarding the use of the Committee as a beta site. The request noted that such documentation should include instances where OSC used other clients as beta sites and include information which documents the use of the Committee as a beta site. In addition, the Audit staff discussed this matter with Committee officials on October 29, 1996, at a conference held at the conclusion of fieldwork. At this conference, the Audit staff made a verbal request for additional documentation concerning the transactions with OSC. Finally, the Audit staff recommended in the Memorandum, that the Committee provide documentation from Ontario Systems Corporation which demonstrates that OSC made written agreements that included an offer to repurchase equipment under **terms** [emphasis not in original] similar to those offered to the Committee, to include, but not limited to, copies of the written agreement; and, provide documentation which demonstrates that a standard exists within Ontario Systems Corporation's industry to repurchase similar equipment at terms similar to those offered to the Committee.

The Audit staff acknowledges that the August 30th and October 29th requests were general requests for additional documentation primarily concerned with the form of the transaction. However, the recommendation in the Memorandum specifically addresses the terms of the transaction. "Terms" as defined by ***Black's Law Dictionary, Sixth Edition*** is conditions, obligations, rights, price etc., as specified in a contract or instrument. The recommendation, in our opinion, encompasses all documents including those documents which assign values to the Committee's, as well as, any of

OSC's other client's equipment. The Committee's argument that the Audit staff never asked for these documents is without merit. Although the Audit staff did not specifically explain each interrogatory and list each document, as done in the subpoena, we clearly requested all documents including the terms relative to the transactions in question.

Next, the Committee questions whether or not the Commission's staff can "ignore a specific directive" of the Commission. The Commission approved a motion directing the Office of General Counsel and the Audit Division to obtain additional documentation from the Committee and OSC. In addition, the Commission approved the use of subpoenas, if necessary. The Audit staff and the Office of General Counsel evaluated the circumstances of this case and decided that the use of subpoenas was necessary. OSC had already refused to provide documentation on the basis that the documents were confidential and proprietary in nature. It was the opinion of the Audit staff and the Office of General Counsel that further delays could be avoided by utilizing subpoenas. As previously noted, the Commission approved the subpoenas on October 7, 1997.

Finally, the Committee's Counsel argues that the Audit Division "draws 'conclusions' and recommends 'findings' to the Commission...," and, "..is under no obligation to share with the Commission the actual text of any of the materials provided by LFP or OSC." Briefly, the Audit staff uses a Commission approved audit program in conducting our audits. In addition, the Audit staff conducts each audit in accordance with Generally Accepted Government Auditing Standards (GAGAS). Accordingly, the Audit staff performs an objective analysis of any documentation provided by a committee. Furthermore, each Title 26 audit report undergoes several levels of review, including an analysis by the Office of General Counsel. The Audit staff includes in our workpapers the entire text of each document(s) submitted by a committee. The workpapers are available at every level of review. Further, prior to the Commission's consideration of any report, the Audit staff circulates a copy of the report to each Commissioner. The Commissioner's have complete access to the Audit staff responsible for the report, as well as, the workpapers which contain the entire text of documents submitted by the committee. Consequently, the allegations of the Committee and its representatives that the Audit staff is not obligated to provide the actual text of documents submitted are without merit.

Notwithstanding the above, the Audit staff analyzed the arguments provided by the Committee and documentation provided by OSC[14]. Documentation provided by OSC included: vendor invoices and purchase orders (from OSC's purchase

[14] OSC states in its response to the Subpoena and Order, dated October 10, 1997, that all the information provided is "highly sensitive commercial and financial information[,] disclosure of which to competitors would have a demonstrable adverse economic consequence to Ontario Systems Corporation. Accordingly, OSC formally requests an exemption to the application of the Freedom of Information Act for this information, in its entirety, pursuant to 11 CFR §4.5(a)(4).

of the equipment); general ledger reports; a product cost analysis; and examples of contracts with three other clients.

Based on our review, it now appears that OSC did not make a prohibited contribution to the Committee.

The Audit staff based its conclusion entirely on the financial impact of the transactions on OSC. Neither the Committee nor OSC has demonstrated, including the documentation submitted in response to subpoena, that it is in the ordinary course of OSC's business to offer to repurchase its equipment from a customer, at the terms and conditions offered to the Committee. Specifically, OSC has not provided any evidence that it has repurchased equipment from other clients in exchange for being a beta site. A specific clause in the Committee's original contract contained that provision.

OSC has demonstrated that they have repurchased equipment from other clients. However, in the examples provided, the repurchase of the equipment was a business decision OSC made subsequent to the original contract. The Audit staff notes that the existence of any undisclosed circumstances associated with these examples could have a negative or positive impact on OSC's business, thus effecting the terms of a repurchase.[15] In none of the examples did OSC offer to repurchase the equipment as part of the original contract.

In addition, the Committee argues that, "the system itself at the time of repurchase had a fair market value of at least $232,500." Neither the Committee nor OSC has provided any documentation, such as an independent appraisal,[16] to justify such a conclusion. Thus, the Audit staff cannot render an opinion as to whether or not the $232,500 represents a fair market value for the equipment and software returned to OSC. The Committee's argument utilizes OSC's accounting "book values" and several assumptions about the fair market value of OSC's proprietary equipment and software.

Although, the "book values" recorded by OSC seem accurate, they are not necessarily representative of a fair market value. Further, the Committee's conclusion that no prohibited in-kind contribution exists is only valid if the Audit staff assumes that the Committee can return OSC's proprietary software to OSC at its original

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[15] OSC repurchased equipment from one of its customers according to a "Settlement Agreement." The Audit staff is not aware of any mitigating circumstances relative to the agreement which could have additional financial implications for OSC (e.g. pending litigation, etc.).

[16] Counsel for the Committee indicated that the Committee contacted a "Big 6" accounting firm about undertaking an independent appraisal of the computer equipment returned to OSC. The firm indicated that they could conduct an appraisal for approximately $25,000. The firm stated that the appraisal would take three weeks to one month to complete. The firm also stated that, "such an appraisal is generally only undertaken by a client in contemplation of litigation.." The Committee stated that it would obtain such an appraisal, if necessary, as part of its litigation posture.

cost. The Committee's contract dictates that the software cannot be sold to a third party without prior approval from OSC. Likewise, there are additional stipulations involved in the sale of OSC's software to an additional third party (e.g., maintaining OSC's service agreement). It is the opinion of the Audit staff that the fair market value of the equipment returned to OSC approximates the values placed on the equipment by the Committee. However, the software has no market value to the Committee since it is a proprietary asset owned by OSC. Consequently, the Audit staff disagrees with the Committee's argument.

Nonetheless, the Regulations at Section 100.7(a)(1)(iii) dictate that an in-kind contribution exists "[i]f goods or services are provided at less than the usual and normal charge." The "*usual and normal charge* for goods means the price of those goods in the market from which they ordinarily would have been purchased at the time of the contribution; and *usual and normal charge* for any services...means the hourly or piecework charge for services at a commercially reasonable rate prevailing at the time the services were rendered." Additional analysis indicates that the Committee apparently paid the "usual and normal charge" for the goods and services provided by OSC. In this particular case, the financial impact to OSC from the transactions with the Committee, was similar to the estimated financial impact from a repurchase settlement involving another client of OSC's,[17] both of which appear commercially reasonable.

Based on our analysis of the information provided, the financial impact of the transactions between the Committee and OSC appears commercially reasonable. Therefore, no payment to the U.S. Treasury seems warranted in this instance.

2. Air Charter Services

The Committee used various means of air travel during the campaign including several air charter services. The Audit staff's review of this activity identified an entity that appears to have made an apparent prohibited in-kind contributions to the Committee.

Eastway Aircraft Services, Inc.[18] (subsequently referred to as "Eastway") is an air charter service located in Ronkonkoma, New York. Eastway was incorporated in the state of New York on April 5, 1985. Documents obtained from the Federal Aviation Administration (FAA) indicate that Eastway maintains a valid Air Carrier Certificate which authorizes it to "operate as an air carrier and conduct common

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[17] The repurchase settlement predated the Committee's agreement by approximately nine months.

[18] Documents provided to the Audit staff indicate that Eastway has become "Excelaire Services, Inc." Apparently, a name change was made in January of 1996. The Audit staff also notes that both entities advertise their services in the Summer 1996 edition of, *The Air Charter Guide*.

carriage operations." Eastway operates its charter service out of Long Island MacArthur Airport.

The Audit staff identified payments to three different entities: "Eastway Aircraft Svcs", "Tudor Investment Corp.", and "TIC Aviation" for eight different charters on an aircraft with the registration number N117TF. The total amount paid for the trips was $9,988.[19] In some instances, checks made payable to Eastway were endorsed and cashed by "Excelaire Services." (See Footnote #18).

The Committee provided two letters from the Operational Coordinator of Tudor Investment Corporation. The letters stated,

> "...T.I.C. Aviation or Tudor Aviation, is the Corporate Flight Department of Tudor Investment Corporation. Tudor Investment Corporation is the aircraft owner of Falcon 900 - N117TF. Eastway Aircraft Charter or Excelaire Services, as they are now known as (name change 1/96) is the operator of before mentioned aircraft, N117TF"; and,
>
> "we operated ALLflights[sic] with Senator Lugar onboard under **FAR Part 135** and paid applicable transportation tax" [emphasis not in original].

In most cases, the Committee contacted a travel agent to obtain a first class air fare for each trip and then made a payment, in advance, for an amount equal to the number of campaign related passengers multiplied by the quoted rate. In so doing, the Committee treated the travel with the charter company as "corporate travel" and followed the regulations at 11 CFR §114.9(e), which describes a candidate's use of corporate or labor organization airplanes and other transportation. This regulation requires a candidate, candidate's agent or person traveling on behalf of the candidate to reimburse, in advance, a corporation for the use of a plane which is owned or leased by a corporation **other than a corporation licensed to offer commercial services** for travel in connection with a Federal election [emphasis added]. In the case of travel to a city served by regularly scheduled commercial air service, the regulation requires reimbursement at a rate equal to the first class air fare; whereas, for travel to a city not served by a regularly scheduled commercial service, the usual charter rate.

The representative from Tudor Investment Corporation indicated that all of the flights were operated under "FAR Part 135." Part 135.1 of Title 14 of the Code of Federal Regulations states, in part, that "This part prescribes rules governing the commuter or on-demand operations of each person who holds or is required to hold an

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[19] The Committee made payments totaling $11,747 and received two related refunds totaling $1,759 for a net cost of $9,988 ($11,747 - $1,759).

Air Carrier Certificate..." Therefore, it appears that Tudor Investment Corporation considered the trips in question to be commercial charter flights.

It is the opinion of the Audit staff that the Committee's reliance on 11 CFR §114.9(e) is misplaced. The requirement of payment in advance at a first class commercial rate is not applicable for the flights in question. The Regulations at 114.9(e) addresses the use of an airplane which is owned or leased by a corporation, **other than a corporation licensed to offer commercial service** [emphasis added]. Apparently, Tudor Investment Corporation owns the plane (N117TF) that the Committee chartered from Eastway.[20] However, the plane is included on a FAA approved list of available aircraft for use by Eastway,[21] a corporation that maintains a license to provide air charter service to the general public and commercial entities.

Therefore, it is also the opinion of the Audit staff that the Committee should have reimbursed Eastway for the usual and normal charter rate for all travel onboard the aircraft. Eastway advertises its services in *The Air Charter Guide*, published semi-annually by Charter Guides of Cambridge, Massachusetts. The Audit staff notes that Excelaire Services, Inc. (see Footnote #17) advertises the availability of a plane similar to the one used by the Committee (N117TF, a Dassault-Breguet Mystere Falcon 900 or DA900B), at a per hour rate of $4,475. The difference between the amount paid and the usual and normal charge for the air charter represents an apparent prohibited in-kind contribution from Eastway.

In the Memorandum, the Audit staff recommended that the Committee:

(a) provide documentation from Eastway Aircraft Services, Inc. and/or Excelaire Services, Inc. that details the normal charter rate for each flight taken by the Committee;

(b) provide documentation from Eastway Aircraft Services, Inc. and/or Tudor Investment Corporation that details whether or not a corporate affiliation existed between Eastway and Tudor Investment Corporation, as well as, documentation which details what type of agreement existed between the two entities with regards to the aircraft in question (N117TF), to include, but not limited to, copies of the written agreement;

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[20] The Committee did not provide any evidence of a corporate affiliation or subleasing agreement between Tudor Investment Corporation and Eastway.

[21] The aircraft listing as of January 11, 1988, inspected and approved by the FAA, effective October 15, 1996.

(c) make a payment to the United States Treasury equal to the difference between the usual and normal cost of the charters and the amount paid by the Committee.

In its response to the Memorandum, the Committee did not provide the documentation requested in section (a) above, nor did it provide any competent evidential documentation relating to what type of agreement exists between Eastway and TIC. Instead, the Committee elected to submit commentary from Mr. R. Mark Lubbers; a memorandum from Mr. Andrew S. Paul, General Counsel for Tudor Investment Corporation; and several memoranda from other campaign employees and/or consultants describing their knowledge of the Committee's use of TIC's aircraft.

The Committee contends "that the factual analysis employed by the Audit staff is incorrect," and that the Committee, "believes that all payments made by the Committee for use of aircraft N117TF were correctly made using the authority found at 11 CFR §114.9(e).." The Committee lists three reasons to support their contention.

First, the Committee argues that TIC owns the plane while Eastway merely maintains and operates the aircraft. Statements from Mr. Paul indicate that "[t]here is no corporate ownership, control or subsidiary relationship between TIC and Eastway." In an attempt to explain the business arrangement, Mr. Paul states that "[w]hen not used by TIC, the Aircraft is available through Eastway for charter to third parties...Eastway does possess an Air Carrier Certificate and the Aircraft is listed on Eastway's FAR Part 135 certificate."

Next, the Committee contends that the candidate used the aircraft as an invitee of TIC and Paul Tudor Jones; not as a charter customer of Eastway. The Committee further states,

> "...the candidate and his campaign staff were informed by Paul Tudor Jones that his company, TIC owned a Falcon 900 and that on those occasions when the aircraft was not being used by Jones or TIC executives, Senator Lugar would be invited to use the aircraft for campaign travel ."

Mr. Paul indicates in his discussion that,

> "[t]he proper amounts were collected prior to each LFP flight and such amounts, whether paid to Eastway or to TIC offset the costs which TIC incurred for such flights. Because Eastway managed the Aircraft for TIC, it made no difference whether LFP's payment checks were made out to TIC or to Eastway. In fact, it appears that at different times LFP was told by TIC personnel to pay to either TIC or Eastway. Payments by LFP for use of the Aircraft, whether the checks were made out to Eastway or directly to TIC, were credited to TIC's account."

Finally, the Committee's response notes,

> "[i]n large measure the Audit staff bases its conclusion on its application of the provision of 11 CFR §114.9(e) which would prohibit corporate travel if the sponsoring corporation were a corporation licensed to offer commercial service. Successful application of this provision of the Regulations to this fact situation would require either (1) that Eastway was the sponsor corporation which had provided the aircraft, or (2) that TIC was licensed to offer commercial air service. In fact, neither of these is true."

Considering the representations in the commentary provided by the Committee (including the comments of Mr. Paul), the Audit staff agrees that the plane is owned by TIC. In addition, the Audit staff concurs that TIC is not licensed to offer commercial services and TIC does not maintain a valid Air Carrier Certificate. Further, based on the arguments presented, TIC apparently made the aircraft available to the candidate.

Thus, it is the opinion of the Audit staff that the Committee's transactions with TIC were in accordance with the provisions of 11 CFR §114.9(e).

C. DETERMINATION OF NET OUTSTANDING CAMPAIGN OBLIGATIONS

Section 9034.5(a) of Title 11 of the Code of Federal Regulations requires that within 15 calendar days after the candidate's date of ineligibility, the candidate shall submit a statement of net outstanding campaign obligations which reflects the total of all outstanding obligations for qualified campaign expenses, plus estimated necessary winding down costs.

In addition, Section 9034.1(b) of Title 11 of the Code of Federal Regulations states, in part, that 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 on the date of payment there are remaining net outstanding campaign obligations.

Senator Lugar's date of ineligibility was March 6, 1996. The Audit staff reviewed the Committee's financial activity through March 31, 1997, analyzed winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations which appears below.

LUGAR FOR PRESIDENT COMMITTEE, INC.

STATEMENT OF NET OUTSTANDING CAMPAIGN OBLIGATIONS

As of March 6, 1996
As Determined March 31, 1997

ASSETS

Cash in Bank		$ 105,693 (a)	
Accounts Receivable		148,448	
Capital Assets (60% of cost)		305,410	
Other Assets		19,245	
Total Assets			$ 578,795

OBLIGATIONS

Accounts Payable for Qualified Campaign Expenses		352,605	
Loans Payable		1,328,500 (b)	
Amount Payable to U. S. Treasury		10,958 (c)	
Stale-dated Checks (see Section III.D.)	10,958		
Actual Winding Down Costs (March 7, 1996 - March 31, 1997)		225,436	
Estimated Winding Down Costs (April 1, 1997 - July 31, 1997)		46,932	
Total Obligations			1,964,432
Net Outstanding Campaign Obligations			($1,385,636)

FOOTNOTES TO NOCO

(a) Outstanding checks issued prior to the date of ineligibility and determined to be stale-dated have been added back to the Cash in Bank figure.

(b) This amount includes $60,000 in outstanding loans from the Friends of Dick Lugar. The Audit staff notes that any change in the amount of the liability could affect the calculation of the Candidate's remaining entitlement.

Shown below are adjustments for funds received after March 6, 1996, based on the most current financial information available at the close of fieldwork:

Net Outstanding Campaign Obligations (Deficit) as of 3/7/96	($1,385,636)
Matching Funds Received 3/7/96 to 8/1/96	1,254,364
Net Private Contributions Received 3/7/96 to 8/1/96	38,704
Interest Received 3/7/96 to 8/1/96	1,045
Remaining Net Outstanding Campaign Obligations (Deficit)	($ 91,523)

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

D. STALE-DATED COMMITTEE CHECKS

Section 9038.6 of Title 11 of the Code of Federal Regulations states, in part, that if the committee has checks outstanding to creditors or contributors that have not been cashed, the committee shall notify the Commission. The committee shall inform the Commission of its efforts to locate the payees, if such efforts have been necessary, and its efforts to encourage the payees to cash the outstanding checks. The committee shall also submit a check for the total amount of such outstanding checks payable to the United States Treasury.

During our review of the Committee's disbursement activity, the Audit staff identified 27 stale-dated checks totaling $10,958.

The Audit staff provided a schedule of the stale-dated checks to Committee officials at a conference held subsequent to the end of fieldwork. The Committee's response indicated that one of the questioned checks was lost and another, never received by the payee. Further, the Committee stated that they would void both checks from their accounting system and issue replacement checks.

The Audit staff notes that any checks outstanding to creditors or contributors that have not been cashed are stale-dated and the total amount of such checks are payable to the United States Treasury. Further, the Committee did not provide any

evidence which demonstrated that they had voided and replaced the two checks in a timely manner, nor did they demonstrate that the original checks have been cashed by the payees. Therefore, it is the Audit staff's opinion that the two checks are still stale-dated checks.

In the Memorandum, the Audit staff recommended that the Committee present evidence that the checks were not outstanding (i.e., copies of the front and back of the negotiated checks), or that the outstanding checks are voided and/or that no Committee obligation exists.

In response to the Memorandum, the Committee issued a check to the United States Treasury, dated April 24, 1997, for the amount of the stale-dated checks ($10,958). The Audit staff delivered the check to the United States Treasury on April 29, 1997.

Recommendation #2

The Audit staff recommends that the Commission make a determination that the total amount of stale-dated checks ($10,958) is payable to the United States Treasury. As noted above, the Committee made the payment on April 24, 1997.

IV. LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND (COMPLIANCE COMMITTEE)

The Audit staff did not detect any material non-compliance matters resulting from the audit of the Compliance Committee.

V. LUGAR FOR PRESIDENT COMMITTEE - AUDIT FUND (FINES COMMITTEE)

The Audit staff did not detect any material non-compliance matters resulting from the audit of the Fines Committee.

If residual monies exist in the Fines Committee account(s) after payment of all fines and civil penalties, the Fines Committee must take the following action with respect to such monies:

a. Return any residual monies to contributors on either a pro-rata basis or a first-in, first-out basis;

b. Disgorge any residual monies to the United States Treasury;

c. Contribute any residual monies to any organization described in section 170(c) of Title 26 of the United States Code; or

d. Transfer any residual monies to any national, state, or local committee of any political party so long as such monies are not used in connection with any Federal election.

VI. SUMMARY OF AMOUNTS DUE TO THE U.S. TREASURY

Finding III.A.	Apparent Non-Qualified Campaign Expenses	$ 3,336
Finding III.D.	Stale-dated Committee Checks	10,958[22]
	Total	$14,294

[22] As noted in Finding III.D., this amount has been paid.

99 *07 *0225 *2091

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

April 3, 1998

MEMORANDUM

TO: Robert J. Costa
Assistant Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Rhonda J. Vosdingh
Assistant General Counsel

Joel J. Roessner
Attorney

SUBJECT: Proposed Revised Report of the Audit Division on Lugar for President Committee, Inc.; Lugar for President Committee Legal and Accounting Compliance Fund; and Lugar for President Committee - Audit Fund (LRA #479)

I. INTRODUCTION

The Office of General Counsel has reviewed the proposed revised Report of the Audit Division on Lugar for President Committee, Inc. (the "Committee"), Lugar for President Committee Legal and Accounting Compliance Fund, and Lugar for President Committee - Audit Fund, submitted to this Office on December 19, 1997.

The Audit Division drafted one previous proposed Audit Report, which was submitted to this Office on June 19, 1997. On August 5, 1997, this Office submitted a Memorandum setting forth its comments on the previous proposed report. In that

Memorandum, this Office agreed with the Audit Division's conclusion that the Committee had not provided sufficient information to properly value the benefits exchanged between the Committee and Ontario Systems Corporation ("OSC") in connection with an agreement to purchase certain telecommunications equipment, and that it therefore appeared that the Committee received an in-kind contribution in the amount of $232,500. However, this Office did not agree with the Audit Division on the issue of how the benefits exchanged between the Committee and OSC should be measured.

The proposed revised Audit Report concludes that, based on additional information, it appears that the Committee did not receive a contribution from OSC.[1] *See* proposed Audit Report at 28. Based upon meetings between the Audit Division and this Office, we understand that the analysis employed by the Audit Division compares the two transactions in terms of OSC's costs (measured as the cost to OSC of providing the equipment, plus the repurchase price paid by OSC) and the consideration received by OSC (measured as the purchase price paid to OSC, plus the book value of the equipment returned to OSC).

The information upon which the Audit Division relied, and the valuation method used, differ from this Office's views, as set forth in this Office's August 5, 1997 Memorandum. However, in light of the limited information available to the Audit Division, its valuation appears to be the best estimate possible, and this Office defers to the Audit Division's conclusion. The Office of General Counsel therefore concurs with the findings in the proposed revised Audit Report.[2] If you have any questions concerning our comments, please contact Joel J. Roessner, the attorney assigned to this audit.

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[1] As noted a page 24 of the proposed Audit Report, the Commission on September 18, 1997 directed the Audit Division and this Office to secure additional information relevant to this issue.

[2] The comments in the August 5, 1997 Memorandum also addressed the issue whether certain air transportation which had been provided to the candidate was an in-kind contribution. The Audit Division's revised conclusions regarding the air transportation issue, set forth at pages 29-33 of the proposed revised Audit Report, are consistent with this Office's previous comments, and this Office agrees with this part of the proposed revised Audit Report.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 7, 1998

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Rhonda J. Vosdingh
Assistant General Counsel

Joel J. Roessner
Attorney

SUBJECT: Consideration of Part of the Proposed Revised Report of the Audit Division on Lugar for President Committee, Inc.; Lugar for President Committee Legal and Accounting Compliance Fund; and Lugar for President Committee - Audit Fund (LRA #479) in closed session

The Audit Division drafted a revised Audit Report on the Lugar for President Committee, Inc. ("Committee"), which was submitted to this Office on December 19, 1997. The revised Audit Report concludes that, based on additional information, it appears that the Committee did not receive a contribution from Ontario Systems Corporation ("OSC"). *See* revised Audit Report at 28. This Office submitted a Memorandum in which it concurred with the findings in the revised Audit Report. The document concerns the audit of a publicly financed presidential candidate, and unless an exception applies, would be considered in open session. 11 C.F.R. §§ 2.3; 2.4; 9038.1(c).

The Office of General Counsel recommends that the issue whether the Committee received a contribution from OSC be considered in closed session. The issue of an apparent contribution arising from the Committee's option to resell telecommunications equipment to OSC is discussed with reference to materials provided by OSC subject to a claim to protection from disclosure on the ground that the material provided includes confidential and proprietary business information. The Office of General Counsel agrees that the material provided to the Commission includes confidential and proprietary business information, and recommends that this issue be considered in closed session. 11 C.F.R. § 2.4(b)(2). This Office further recommends that the remaining issues in the revised Audit Report be considered, and that the revised Audit Report be approved, in open session.

FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

May 27, 1998

Mr. Patrick J. Kiely, Treasurer
Lugar for President Committee, Inc.
Post Office Box 20484
Indianapolis, IN 46220

Dear Mr. Kiely:

Attached please find the Report of the Audit Division on Lugar for President Committee, Inc., Lugar for President Committee Legal and Accounting Compliance Fund, and Lugar for President Committee - Audit Fund. The Commission approved the report on May 19, 1998. As noted on page 4 of the attached report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9038.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $3,336 is required within 90 calendar days after service of this report (August 28, 1998). A payment relative to stale-dated checks, in the amount of $10,958, was made on April 24, 1997.

Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9038.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 60 calendar days after service of the Commission's notice (July 29, 1998), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 CFR §9038.2(c)(2)(ii) permits a Candidate who has submitted written materials to request an opportunity to address the Commission in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted within the 60 day period when deciding whether to revise the repayment determination. Such materials may be submitted by counsel if the Candidate so elects. If the Candidate decides to file a response to the repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 694-1650 or toll free at (800) 424-9530. If the Candidate does not dispute this determination within the 60 day period provided, it will be considered final.

The Commission approved Audit Report will be placed on the public record on May 29, 1998. Should you have any questions regarding the public release of this report, please contact Ron Harris of the Commission's Press Office at (202) 694-1220.

Any questions you may have related to matters covered during the audit or in the audit report should be directed to Marty Favin or Rick Halter of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachment as stated

FEDERAL ELECTION COMMISSION
WASHINGTON D C 20463

May 27, 1998

Senator Richard Lugar
Lugar for President Committee, Inc.
c/o Mr. Keith Davis
Huckaby-Davis and Associates
228 South Washington Street, Suite 200
Alexandria, VA 22314

Dear Senator Lugar:

Attached please find the Report of the Audit Division on Lugar for President Committee, Inc., Lugar for President Committee Legal and Accounting Compliance Fund, and Lugar for President Committee - Audit Fund. The Commission approved the report on May 19, 1998. As noted on page 4 of the attached report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 CFR §§9038.2(c)(1) and (d)(1), the Commission has made a determination that a repayment to the Secretary of the Treasury in the amount of $3,336 is required within 90 calendar days after service of this report (August 28, 1998). A payment relative to stale-dated checks, in the amount of $10,958, was made on April 24, 1997.

Should you dispute the Commission's determination that a repayment is required, Commission regulations at 11 CFR §9038.2(c)(2) provide you with an opportunity to submit in writing, within 60 calendar days after service of the Commission's notice (July 29, 1998), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 CFR §9038.2(c)(2)(ii) permits a Candidate who has submitted written materials to request an opportunity to address the Commission in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted within the 60 day period when deciding whether to revise the repayment determination. Such materials may be submitted by counsel if you so elect. If you decide to file a response to the repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 694-1650 or toll free at (800) 424-9530. If you do not dispute this determination within the 60 day period provided, it will be considered final.

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Any questions you may have related to matters covered during the audit or in the audit report should be directed to Marty Favin or Rick Halter of the Audit Division at (202) 694-1200 or toll free at (800) 424-9530.

Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachment as stated

CHRONOLOGY

LUGAR FOR PRESIDENT COMMITTEE, INC.
LUGAR FOR PRESIDENT COMMITTEE LEGAL AND ACCOUNTING COMPLIANCE FUND
AND
LUGAR FOR PRESIDENT COMMITTEE - AUDIT FUND

Audit Fieldwork	7/8/96 — 10/21/96
Exit Conference Memorandum to the Committee	2/10/97
Response Received to the Exit Conference Memorandum	4/25/97
Audit Report Approved	5/19/98

99.07.025.2101