FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AK006303

May 8, 1995

MEMORANDUM

TO: RON M. HARRIS, PRESS OFFICER
PRESS OFFICE

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON BENNETT FOR SENATE

Attached please find a copy of the final audit report and related documents on Bennett for Senate which was approved by the Commission on April 27, 1995.

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

Bennett for Senate

Approved April 27, 1995

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

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BENNETT FOR SENATE

FEDERAL ELECTION COMMISSION
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FINAL AUDIT REPORT
ON
BENNETT FOR SENATE

EXECUTIVE SUMMARY

Bennett For Senate (the Committee) registered with the Secretary of the Senate on October 3, 1991, as the principal campaign committee for Robert F. Bennett, Republican candidate for the U.S. Senate from the state of Utah.

The audit was conducted pursuant to 2 U.S.C. Section 438(b), which states that the Commission may conduct audits of any political committee whose reports fail to meet the threshold level of compliance set by the Commission.

The findings of the audit were presented to the Committee at an exit conference held after the fieldwork and later in an interim audit report. The Committee's responses to those findings are included in the final audit report.

Misstatement of Financial Activity 2 U.S.C. §434(b)(1), (2), and (4). The audit determined that the Committee's disclosure reports had overstated receipts by $281,397 and overstated disbursements by $254,403. In response to the interim audit report the Committee filed amended disclosure reports correcting the errors.

Apparent Prohibited Contributions 11 CFR 110.10(a) and (b); 2 U.S.C. 441b(a) and (b)(2); 2 U.S.C. 441a(a)(1)(A); and 11 CFR 100.7(a)(1). This section of the report addresses the Candidate's relationship with Franklin Quest, a corporation with which he was affiliated. The report questions a number of transactions that occurred during the campaign period. Each is noted below.

°Candidate's Consulting Fee from Franklin Quest Co. The Candidate, a former president and CEO of Franklin Quest, left the company and founded a consulting firm in July of 1991. The firm's only client was Franklin Quest, which paid a fee of $43,750 per month for one year. The interim audit report requested information to establish that the payments to the Candidate pursuant to the consulting agreement represented salary or other earned income from bona fide employment and were

independent of Senator Bennett's candidacy. Otherwise the payments would be considered prohibited contributions to his campaign. The Committee's response provides some additional information. However, the audit report concluded that the response fell short of demonstrating that the consulting payments were earned income.

°Consulting Fee Advance In January of 1992, the Candidate received an advance of $131,250 on the monthly consulting fee, an amount representing 3 months at $43,750 per month. Of that amount, $80,000 was transferred to the Committee. The interim audit report requested that the Committee demonstrate that the advance did not constitute, in part, a prohibited contribution form Franklin Quest. The Committee offered a number of arguments and explanations for the advance to support its claim that the advance was paid in the ordinary course of business and was driven by financial and business events completely independent of Senator Bennett's candidacy. The audit report concluded that the Committee's arguments were flawed, thus leaving unresolved the questions surrounding the advance payment.

°Corporate Stock Repurchase Agreement Used to Guarantee a Bank Loan A prohibited contribution also results when a corporation guarantees a bank loan used for a campaign. In February of 1992 the Candidate obtained a $385,000 line of credit from a bank. Of that amount, $185,000 was used to pay an obligation of the Candidate to Franklin Quest. The remaining $200,000 was used for the campaign. The loan was collateralized by the Candidate's Franklin Quest stock. In order for the loan to be made, Franklin Quest agreed to purchase the collateral in case of default. At the time, Franklin Quest was a closely held Subchapter S corporation, and there was no other market for the stock. The interim audit report concluded that the agreement with Franklin Quest constituted "any other form of security" within the meaning of 11 CFR 100.7(a)(1)(i). The Committee argued that the repurchase agreement did not represent any sort of loan guarantee because Franklin stood to make a profit on the stock if the default occurred. The Committee also submitted evidence that such agreements are common practice. The audit report, however, concluded that the Committee failed to demonstrate that the stock repurchase agreement was not a form of security provided for the loan.

°Guarantee of Bank Loan by Candidate's Spouse In addition to the Franklin Quest stock that was pledged to secure the line of credit, the Candidate's wife also signed the loan agreement as a guarantor. In response to the interim audit report, the Committee demonstrated that the sole collateral for the loan was the Candidate's Franklin Stock and that the bank requiring Mrs. Bennett to sign as a guarantor did not constitute a contribution by Mrs. Bennett.

°Franklin Quest Distribution Used to Repay Bank Loan On June 1, 1992, the Candidate received a $795,000 earnings distribution from Franklin Quest. Nearly half of that amount was used to benefit the campaign in the form of loan repayments and contributions made by the Candidate. The interim audit report asked the Committee to demonstrate that the distribution was in the ordinary course of Franklin Quest's business. In response, the Committee demonstrated that each Franklin Quest shareholder had received a proportionate share of the total distribution and that no special treatment had been afforded the Candidate.

Disclosure of Loan Receipts and Repayments 2 U.S.C. §434(b)(3)(E) and (5)(D); 2 U.S.C. §431(11); and 11 CFR §104.11(a). The Committee received bank loans totaling $210,441 and loans from the Candidate totaling $1,310,000. The audit discovered numerous reporting errors with respect to these loans, and the interim audit report requested that the Committee correct these errors in amended disclosure reports. The Committee filed the requested amended reports.

Apparent Excessive Contributions 2 U.S.C. §441a(a); 2 U.S.C. §441f; 11 CFR §100.7(a)(1); 11 CFR §110.1(k); and 11 CFR §103.3(b)(3)and (4). The audit discovered that the Committee had received 17 contributions that exceeded the contribution limitations by $19,450. In response to an interim audit report recommendation, the Committee submitted copies of refund checks for each of the questioned contributions.

Apparent Excessive Contributions from Staff Advances 2 U.S.C. §441a(a)(1)(A) and 11 CFR §116.5(b). A review of expense reimbursements showed that one individual had made excessive contributions by using his personal credit card to pay Committee expenses. The Committee attempted to justify the advances but misapplied the Commission's regulations by claiming that the expenses did not result in contributions because they were reimbursed within 60 days. However, the 60 day grace period applies only to an individual's payment of his own travel expenses. Non-travel expenses result in contributions on the date incurred regardless of when they are reimbursed.

Contributions Subject to 48 Hour Disclosure Notices 2 U.S.C. §434(a)(6). Authorized committees receiving contributions of $1,000 or more between 20 days and 48 hours before an election must disclose such contributions within 48 hours of their receipt. The audit concluded that the Committee failed to file the required 48 hour notices for 37 contributions totaling $649,001, including six from the Candidate totaling $600,000. The Committee suggested that some of the contributions may have been included in missing Facsimile transmissions to the Office of the Secretary of the Senate. The evidence suggests that only one of the 37 contributions could have been contained in those transmissions, assuming that they were filed on time.

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

A#93-13

REPORT OF THE AUDIT DIVISION ON BENNETT FOR SENATE

I Background

A. Overview

This report is based on an audit of Bennett for Senate (the Committee), undertaken by the Audit Division of the Federal Election Commission in accordance with the provisions of the Federal Election Campaign Act of 1971, as amended (the Act). The audit was conducted pursuant to Section 438(b) of Title 2 of the United States Code which states, in part, that the Commission may conduct audits and field investigations of any political committee required to file a report under section 434 of this title. Prior to conducting any audit under this section, the Commission shall perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act.

The audit covered the period from September 6, 1991, the date of the Committee's first recorded transaction, through June 30, 1993, the closing date for the latest report filed at the time of the audit. The Committee reported a beginning cash balance of $0; total receipts for the period of $4,343,331; total disbursements for the period of $4,314,891; and an ending cash balance of $28,440.

B. Campaign Organization

The Committee registered with the Secretary of the Senate on October 3, 1991 as the principal campaign committee for Robert F. Bennett, Republican candidate for the U.S. Senate from the State of Utah. The Committee maintained its headquarters in Salt Lake City, Utah.

The audit indicated that the Committee was financed primarily through contributions and loans from the candidate ($3,001,121). Together these contributions and loans represented 74% of total receipts. The remaining 26% was

derived from loans from the First National Bank of Layton ($210,441), contributions from political committees ($500,688), and contributions from individuals and from political party committees ($440,044).

This report is based on documents and workpapers which support each of its factual statements. They form part of the record upon which the Commission based its decisions on the matters in the report and were available to the Commissioners and appropriate staff for review.

C. Key Personnel

The Treasurer of the Committee during the period covered by the audit was Mr. John K. Baird.

D. Scope

The audit included testing of the following general categories:

1. The receipt of contributions or loans in excess of the statutory limitations; (see Finding II.D.)

2. the receipt of contributions from prohibited sources, such as those from corporations or labor organizations; (see Finding II.B.)

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;

5. proper disclosure of campaign debts and obligations; (see Finding II.C.)

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

7. adequate recordkeeping for campaign transactions;

8. other audit procedures that were deemed necessary in the situation.

Unless specifically discussed below, no material non-compliance was detected. It should be noted that the Commission may pursue any of the matters discussed in this report in an enforcement action.

II. Audit Findings and Recommendations

A. Misstatement of Financial Activity

Sections 434(b)(1), (2) 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, the total amount of all receipts, and the total amount of all disbursements for the period and calendar year.

The Audit staff's reconciliation of the Committee's reported activity to amounts reflected in its bank records from inception through December 31, 1992 revealed the following misstatements of financial activity. However, the Committee did not maintain any record that documented the derivation of reported amounts. Absent such a record, the Audit staff was not able to explain all differences between amounts reported and amounts reflected on the Committee's bank records.

1. Receipts

The sum of the Committee's reported receipts by period is $4,069,668. The Audit staff's bank reconciliation determined that the Committee should have reported $3,788,271 in receipts for the combined years 1991 and 1992. This represents a net overstatement of $281,397. The components of the misstatement and adjustments are as follows:

--an in-kind Candidate contribution overstated in the July 1992 Quarterly report (-$191,124);

--a Candidate contribution/loan not reported in the Pre-Primary report ($1,000);

--a Candidate contribution reported twice, on the check date and on the deposit date in the Post-General report (-$100,000);

--an in-kind contribution not reported ($402);

--Political Committee contribution and refund/rebate not reported ($2,600);

--net reconciling adjustment ($5,725).

2. Disbursements

The sum of the Committee's reported disbursements by period is $3,896,244. The Audit staff's bank reconciliation determined that the Committee should have reported $3,641,841 in disbursements for the combined years 1991 and 1992. This represents a net overstatement of $254,403. The components of the misstatement and adjustments are as follows:

--loan repayments overstated in the July 1992 Quarterly report (-$191,124);

--repayment of the loan from the First National Bank of Layton with a draw on line of credit not reported in the April 1992 Quarterly report ($10,220);

--in-kind contribution not reported as a disbursement ($2,231);

--disbursements reported twice in the Pre-Convention and Post-General report periods (-$46,550);

--inter-account transfers reported in the Pre-General and Post-General report periods (-$36,643);

--1992 bank charges not reported ($1,661);

--net reconciling adjustment ($5,802).

3. Ending Cash on Hand

The reported ending cash on hand at December 31, 1992 was $173,424. The correct reportable ending cash on hand was $146,507. Primarily, this misstatement was caused by the receipt and disbursement misstatements detailed above.

At the exit conference, copies of the schedules explaining the adjustments were provided to the Committee. Committee representatives stated that they would file comprehensive amended reports to correct the misstatements described above. The Interim Audit Report also requested that the Committee file an amended report.

The Committee's Response to the Interim Audit Report (Response) included the requested amended report.

B. Apparent Prohibited Contributions

Sections 110.10(a) and (b) of Title 11 of the Code of Federal Regulations state, in part, that candidates for Federal office may make unlimited expenditures from personal funds.

For purposes of this section, personal funds means any assets which, under applicable state law, at the time he or she became a candidate, the candidate had legal right of access to or control over, and with respect to which the candidate had either legal and rightful title; an equitable interest; salary and other earned income from bona fide employment; dividends and proceeds from the sale of candidate's stocks or other investments; bequests to the candidate; income from trusts established before candidacy; income from trusts established by bequest after candidacy of which the candidate is the beneficiary; gifts of a personal nature which had been customarily received prior to candidacy; proceeds from lotteries and similar legal games of chance.

Sections 441b(a) and (b)(2) of Title 2 of the United States Code state, 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 in connection with any primary election or political convention or caucus held to select candidates for any political office.

For purposes of this section, the term "contribution or expenditure" shall include any direct or indirect payment, distribution, loan, advance, deposit or gift of money, or any services, or anything of value (except a loan of money by a national or State bank made in accordance with the applicable banking laws and regulations and in the ordinary course of business) to any candidate, campaign committee, or political party or organization, in connection with any election.

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 100.7(a)(1) of Title 11 of the Code of Federal Regulations, states in relevant part that the term loan includes a guarantee, endorsement, and any other form of security.

A loan which exceeds the contribution limitations of 2 U.S.C. 441(a) and 11 CFR part 110 shall be unlawful whether or not it is repaid. A loan is a contribution at the time it is made and is a contribution to the extent that it remains unpaid.

Further, a loan is a contribution by each endorser or guarantor. Each endorser or guarantor shall be deemed to have contributed that portion of the total amount of the loan for which he or she agreed to be liable in a written agreement. However, a candidate may obtain a loan on which his or her spouse's signature is required when jointly owned assets are used as collateral or security for the loan. The spouse shall

not be considered a contributor to the candidate's campaign if the value of the candidate's share of the property used as collateral equals or exceeds the amount of the loan which was used in the candidate's campaign.

Background

The Candidate contributed/loaned the campaign a total of $3,001,121. As a result, the auditors made an inquiry concerning the Candidate's financial status. This inquiry was also prompted by an October 1991 personal financial statement which shows the Candidate's net worth at $8,622,000 of which only $17,000 was liquid. The majority of the Candidate's assets were in "Non-Marketable Restricted Securities", $8,000,000. The explanatory note on the financial statement explains that this represents 20,044 shares of Franklin International Institute, Inc.1/ (Franklin) at $400 per share. The Candidate's contributions revolve around this stock and the Candidate's involvement in this corporation.

According to a June 2, 1992 stock prospectus, Franklin was incorporated in December of 1983. From September 1987 through June 2, 1992 Franklin operated as a Subchapter S Corporation. After that date Franklin discontinued its Subchapter S status and at the same time offered stock for public sale. The associated stock prospectus notes that "[h]istorically, the Company has never declared or paid any cash dividends on the Common Stock other than distributions made to shareholders to cover their individual liability for payment of income taxes occurring as a result of the Company's status as an S Corporation or in connection with the capitalization of affiliated companies."2/ According to the prospectus as of May 26, 1992 Franklin had 29 stockholders. The Candidate owned 11.37% of Franklin's stock on June 2, 1992.

Also according to the June 2, 1992 stock prospectus, "Robert F. Bennett has been a director of the Company since October 1984, and served as Chairman of the Board from December 1984 to December 1986." "From November 1990 to April 1991, Mr. Bennett was Vice Chairman of the Company. Mr. Bennett was President of the Company from October 1984 to January 1991 and served as Chief Executive Officer of the Company from December 1986 to April 1991." According to a June 23, 1993, stock prospectus Senator Bennett remained on the Board of Directors and was on the Compensation Committee. His then current term was due to expire at the 1993 annual meeting.

1/ In April of 1992 Franklin International Institute, Inc. changed its name to Franklin Quest,Inc.

2/ Similar statements are included in a second prospectus dated June 23, 1993.

Candidate's Consulting Fees from Franklin Quest Co.

Senator Bennett left Franklin and established a consulting firm. In response to an inquiry about the circumstances surrounding Senator Bennett's departure from Franklin, the Committee states that "The Senator left Franklin to pursue consulting opportunities, with new clients and former clients of Franklin Quest." Also the General Counsel of Franklin provided an affidavit that states:

> "In or about April 1991, Franklin and Mr. Bennett began developing a business plan for starting up a new division of Franklin to be known as the 'Franklin Consulting Group.' In April 1991, Mr. Bennett resigned his offices of Vice Chairman and Chief Executive Officer consistent with his decision to create and lead the consulting group.
>
> "The Franklin Consulting Group was to be an independent profit center for Franklin and was to be led by Mr. Bennett for the purpose of providing 'value-added' consulting to the corporate accounts and customers of Franklin, as well as providing consulting services to Franklin.
>
> "On further analysis by Franklin and Mr. Bennett, it became apparent that the activities of any internal consulting group would create an unacceptable level of liability for Franklin.
>
> "Accordingly, Mr. Bennett and Franklin agreed that an 'outside' consulting group would be formed by Mr. Bennett, which consulting group would provide consulting services to Franklin as well as other clients.
>
> "R. F. Bennett Associates, Inc., a Utah corporation with Mr. Bennett as its sole shareholder, was formed for the purposes originally conceived by Franklin and Mr. Bennett. Additionally, Franklin understood that Mr. Bennett would, in his discretion, be at liberty to conduct consulting activities with parties other than Franklin and/or its customers and clients.
>
> "Through R. F. Bennett Associates, Inc., Franklin continued to retain the business expertise and consulting services of Mr. Bennett."

Included in the materials submitted is a copy of an agreement between Franklin and Senator Bennett, dated July 1, 1991 but unsigned3/. The agreement states in part:

3/ According to Franklin's General Counsel neither this agreement nor any follow-up agreement was signed by either Franklin or Senator Bennett, but the unsigned agreement

"We have attempted to reflect in our decisions and conclusions the deep affection we have for you while reaching such conclusions as we have deemed necessary and appropriate to protect both parties to this transaction, eliminate any ambiguity or misunderstandings with respect to the future and facilitate a smooth transition into the next phase of our relationship."

"We initially announced to the world that Bob Bennett would be forming 'Franklin Consulting Group', which would be an affiliated company of Franklin International Institute, Inc. Subsequently, however, the structure, organization and ownership of that entity has evolved to the point that Franklin will have no ownership, control, direction or management of the new entity. Consequently, the new consulting firm should not use the Franklin name or logo. We are aware that you have already procured stationary and business cards reflecting the name 'Franklin Consulting Group.' All such business cards and stationary should be discarded. We strongly recommend that you name your new company 'Bennett Consulting Group' or 'Robert F. Bennett and Associates, Consultants' or such other title that incorporates your name."

The agreement does not specify the financial arrangement between the consulting firm and Franklin. The stock prospectus notes that a retainer of $43,750 per month was paid starting in July of 1991 and ending in June of 1992. The consulting agreement states that in consideration of the retainer, "Bennett Consulting agrees to be available, on an as-needed basis, at times mutually acceptable to both parties, to consult with senior management of Franklin. You have agreed to provide certain specific consulting services as outlined in your June 25, 1991, memorandum."

The agreement goes on to provide for Senator Bennett to use Franklin staff to service third party clients on a reimbursable basis and contrary to provisions of a stock "Buy/Sell Agreement"4/, not to require that Senator Bennett sell his stock

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(Footnote 3 continued from previous page)
accurately reflects the terms of the agreement which both parties duly performed.

4/ Corporations may place restrictions on the transferability of stock under Utah law in order to maintain the the corporation's status when it is dependent on the number or

in Franklin "given the fact that you have technically ceased being an employee of Franklin." Finally, Franklin was "desirous of being quite liberal" in allowing Senator Bennett to take copies of any Franklin files he felt would assist him in his business.

The Committee provided a copy of the June 25, 1991 memorandum referenced in the unsigned agreement. That memorandum states that a portion of the budget of the Franklin Consulting Group would be translated into a retainer to be paid monthly. The memorandum lays out a number of projects to be undertaken for Franklin as follows:

° Opening new consulting opportunities with Franklin's knowledge and approval.

° A complete market survey and feasibility study of the retail market for Franklin products to include possibilities, costs, difficulties and timetables, with no actions taken without Franklin's direction.

° Consulting with Franklin officers and employees as asked.

° A rewriting of the 'control book', to make it more usable in the Stress Seminar Kit.

° An examination of various new product possibilities.

° Such other assignments as are given from time to time.

(Footnote 4 continued from previous page)
identity of its share holders; to preserve entitlements, benefits, or exemptions under federal, state, or local law; or, for any other reasonable purpose. Such restrictions may require a shareholder to offer stock first to the corporation or other persons; may require the corporation or other persons to acquire the stock; may require the corporation or other persons to approve the stock transfer; may prohibit the transfer of stock to designated persons or groups of persons; or, may include other restrictions (Utah Code Ann. §16-10a-627(1993)). Franklin was at the time of the loan a Subchapter S corporation and was therefore limited to 35 shareholders all of who were required to be individuals, estates, or certain trusts (26 U.S.C. §1361(b)). Generally, a Buy-and-Sell Agreement compels a shareholder to sell his shares to the corporation or to the other shareholders at the price stated in the agreement. It also obligates the corporation or the other shareholders to buy the selling shareholder's shares at that price. Business Law and the Regulatory Environment; Irwin; Homewood, Illinois; Sixth Edition 1986.

Also, the memorandum notes that Senator Bennett would remain on the Franklin Board and would continue his duties with Franklin's Japanese subsidiary until a designee was selected. Finally, Senator Bennett notes that he had located office space and would be prepared to vacate his space as of July 1, 1991.

No information is available to establish which, if any, of the projects discussed in the June 25, 1991 memorandum were accomplished and what if any other projects were undertaken.

A review of the R. F. Bennett Associates records revealed that the consulting firm apparently had no other paying clients. The consulting firm's bank account was opened on July 17, 1991, little more than seven weeks before the Committee account5/, with the first consulting payment. Thereafter there were only five deposits that were not Franklin consulting payments. All of these deposits were transfers from Senator Bennett's personal account.

The consulting firm's disbursement records indicated that, other than the Candidate, the firm had only one regular employee. In addition, one other individual received three monthly payments of $1,500 each. It is also noted that in April of 1992, the Senator's personal tax liabilities were apparently paid from the consulting firm's account.

A review of the records available for the Candidate indicated that for the latter part of 1991 and until the sale of some of his Franklin stock in June of 1992 the majority of the Candidate's income came either from Franklin in the form of earnings distributions to cover his tax liability for his share of the corporation's income, or the consulting firm which in turn received its revenue from Franklin in the form of consulting payments.

During the fall of 1991 and January of 1992 there is a direct correlation between consulting payments to the consulting firm and some of the Candidate's contributions/loans to the campaign. Of the $38,000 contributed by the Candidate in 1991 $35,000 came directly from the consulting firm account which was at the time funded by the consulting payments. The consulting firm was incorporated on January 8, 1992 and after that date funds were transferred to the Candidate and his spouse's joint checking account and then to the campaign. As discussed below,

5/ The Committee filed FEC Forms 1 and 2 dated September 30, 1991, and opened its bank account with a deposit on September 6, 1991.

on January 30, 1992 funds from the consulting payment advance were deposited into the consulting firm's account, transferred to the Candidate and his spouse's personal account, and again transferred to the campaign.6/

In the Interim Audit Report it was stated that, in the opinion of the Audit staff, the following factors demonstrated that the consulting payments from Franklin may not constitute "salary and other earnings from bonafide employment" as required by 11 CFR 110.10 (b)(2) to be considered personal funds of the Candidate and are therefore prohibited corporate contributions to the Candidate's campaign from Franklin:

(1) The timing of the Candidate's departure from Franklin, the creation of the consulting firm and the beginning of the campaign;

(2) the apparently less than arms length nature of the agreement between the consulting firm and Franklin, including the original intent that the consulting firm be a division of Franklin; the lack of employees and clients of the consulting firm; the Candidate's lack of other income during the early part of the campaign; a statement by the Treasurer that he believed that the consulting contract was part of a "golden parachute" that the Candidate got upon his departure from Franklin;

(3) the Candidate's continued presence on the Franklin Board of Directors;

(4) the lack of information concerning the Candidate's departure from Franklin after such a long, and according to the stock prospectus, successful relationship with the company.

6/ Contributions and loans totaling nearly $1.1 million were drawn on this joint account. Utah law provides that a joint account belongs to "the parties in proportion to the net contributions by each to the sums on deposit" Utah Code Ann. § 75-6-103(1) (1993). This is the presumed basis of ownership unless there is clear and convincing evidence of a different intent. Id. At this time, there is no evidence that the Candidate and his spouse intended to divide the assets of this joint account by any manner other than the net contributions method. An analysis of deposits into this account shows that with minor exception, the funds deposited were those of the Candidate. Therefore, pursuant to the net contributions method of dividing the ownership of the account, none of the contributions are attributed to Joyce M. Bennett.

The Interim Audit Report recommendation with respect to the consulting payments asked the Committee to provide documentation and explanations that establish that the consulting retainer paid to R. F. Bennett Associates, Inc. represent salary or other earned income from bona fide employment and was independent of Senator Bennett's candidacy. This documentation was to include:

- An explanation of the circumstances surrounding Senator Bennett's departure from Franklin;
- Lists of other clients of R. F. Bennett Associates, Inc. during the period July 1991 to December 1992;
- Information concerning attempts to obtain other clients;
- Descriptions of similar contracts that Franklin entered into with other consultants to include an explanation of the work to be performed;
- Descriptions of work performed by R. F. Bennett Associates, Inc. for Franklin including which of the projects listed in the June 25, 1991 memorandum were undertaken, as well as any other projects undertaken, the approximate number of hours devoted to each and copies of any reports or memoranda produced; and
- Any other information that the Committee believes is relevant to establishing that the contract and retainer represented compensation in consideration of services, the amount of the compensation did not exceed the amount that would be paid to a similarly qualified person, and the employment was genuinely independent of the candidacy (See Advisory Opinion 1979-74).

The Response provides some additional background on Franklin and Senator Bennett's departure. The Committee explains that Senator Bennett and four other individuals co-founded Franklin in 1984 and that under Senator Bennett's leadership Franklin grew from a start up company to a company with $104 million in sales in 1991. The Committee also notes that by 1991 Franklin was considering various expansion options and going public.

The Committee goes on to explain that:

"This dramatic growth in seven short years created management tensions -- a common business occurrence -- that were noticeable in the company as early as 1989 and which came to a head in late 1990. In July 1989, Arlen Crouch was hired as Franklin's Chief Operating Officer and Executive Vice President. Mr. Crouch was experienced in taking private companies public and Franklin needed Mr. Crouch's expertise because Franklin was considering that option. Several of the company's founders began to leave

the company (Richard Winwood, for example, left in 1990) or to take on less management responsibilities within the company as the value of their stock increased to the millions of dollars."

The Committee explains that Senator Bennett and Mr. Crouch did not always agree on various aspects of the Franklin's management and future, and that by late 1990 it was mutually agreed that Mr. Crouch should direct Franklin's affairs. According to the Committee's response, management control was amicably passed to Mr. Crouch in January of 1991.

The Response also explains the chain of events surrounding the creation of R.F. Bennett Associates, Inc. The explanation mirrors the earlier explanation described above but adds that it was anticipated that for the first year Franklin would consume the majority of the consulting firm's time. Redacted copies of the minutes of Franklin board meetings and a press release were provided in support of the explanation. No additional information is provided concerning the decision to have the consulting firm operate as an independent company rather than a division of Franklin.

With respect to Senator Bennett's departure from Franklin to establish the R.F. Bennett and Associates, Inc., the Committee states:

> "Mr. Bennett's departure was a major event at Franklin, for Mr. Bennett was an original founder of the company and former President and Chief Executive Officer for seven years. Although he would remain, and to this day remains, on the Board of Directors, Franklin wanted to ensure his availability to consult on important corporate matters, especially since he had such a through knowledge of the company. At the same time, Franklin wanted to ensure that Mr. Bennett would not compete directly with the company in his new consulting endeavors. Franklin also wanted to compensate Mr. Bennett for seven years of successful leadership and management. Accordingly, Franklin retained Mr. Bennett to consult with the company on an as-needed basis from July 1991 to June 1992."

With respect to the amount of the consulting fee ($43,750 per month), the Committee states that sum was determined by adding Senator Bennett and his secretary's annual salaries, the associated taxes and benefits, Senator Bennett's car allowance, and figures for yearly rent, office supplies and telephone. To this total was added Senator Bennett's estimated bonus due for 1991. This total was then divided by 12 to reach the monthly consulting fee. The estimated 1991 bonus amount accounted for more than 50% of the total.

The Committee goes on to state that "Franklin's agreement with Mr. Bennett was consistent with Franklin's standing corporate policy in dealing with every company founder and other key employees who have departed active employment at the company -- both before and after Mr. Bennett. This kind of arrangement is common, if not standard, throughout corporate America, and thus Franklin did not hesitate to disclose its consulting arrangements with Mr. Winwood and Mr. Bennett in its June 2, 1992 Prospectus..." The Committee provides the names and copies of agreements for three other individuals as examples.

With respect to services provided to Franklin under the consulting agreement the Committee states that:

> "In the months following Mr. Bennett's departure, Franklin's officers indeed called upon Mr. Bennett's expertise and counsel many times for important management decisions. For example, in the Fall of 1991, Mr. Bennett was very involved in assessing the company's options regarding going public or remaining a private company. He met with representatives of an investment company and evaluated their proposals for investing in Franklin. He presented their proposals to Franklin management and made important recommendations to management regarding its decision to go public and its options to adopt an Employee Stock Ownership Plan or be acquired. Once Franklin decided to go public, Mr. Bennett often consulted with Franklin officers regarding management decisions ranging from the important, such as investment options targeted by Franklin, to the mundane, such as management tensions and intra-company relationships. Mr. Bennett spent considerable time assisting with operations in Japan and helping Franklin with a troublesome licensee in that country. He assisted in winding down the Franklin Learning division. He also worked on new curriculum with Franklin's research and development team in a consulting capacity. Franklin deemed all of these services as essential consulting services in fulfillment of Mr. Bennett's consulting agreement and more"

The Committee represents that Franklin required less from other departing officers than was required from Senator Bennett.

The Committee explains that Senator Bennett pursued other clients independent of the consulting agreement with Franklin. Two are mentioned in particular, one being Senator Bennett's accountant and the other being a bank. However, the bank is also mentioned as a potential client in the June 25, 1991 memorandum discussed above and would appear to predate the establishment of R.F. Bennett and Associates, Inc. The Committee states that after he became a Senate candidate, Senator Bennett decided not to pursue these relationships.

With respect to work performed under the consulting contract, the Committee lists a number of items that appear to fall under the heading " Consulting with Franklin officers and employees as asked" in the June 25, 1991 memorandum. The Committee also notes work with Franklin's operation in Japan that is also mentioned in the June 25, 1991 memorandum. It appears that the other specific projects enumerated in the memorandum were not undertaken. The documentation of the hours devoted and copies of work products requested in the Interim Audit Report are not provided.

The copies of contracts with other departing Franklin executives are varied in their provisions. The first provides for a $32,000 per month payment for 60 months. No mention is made of any annual bonus in the contract. Rather, a sum is paid for writing services to be performed over the life of the contract to include curricula and book manuscripts, a sum is paid for general consulting, a sum is paid for the settlement of propriety interests in Franklin tangible and intangible products, and the largest single sum is paid for a 10 year non competition agreement. This contract was signed by all parties in September of 1990 and, according to the 1993 stock prospectus, terminated with a $300,000 lump sum payment in April of 1992.

The second example submitted calls for the payment of $100,000 over 12 months and 75% of the discretionary bonus to be paid at the time when all such bonuses were paid. The 1993 stock prospectus refers to this agreement as a severance payment. No mention is made of any services to be provided in return for the payments. The documentation provided is in the form of a signed letter from Franklin's President. No agreement signed by the recipient is included.

The third example, dated May 17, 1994, provides for $100,000 to be paid over one year and 50% of the annual discretionary bonus. The agreement states that the individual "agreed to remain employed as a consultant and merger/acquisition specialist, with responsibility to assist the Executive Committee in reviewing and processing potential acquisitions." Further, the agreement includes a three year non-disclosure and non-competition clause. The agreement is signed by both the employee and Franklin's General Counsel.

The Committee concludes by stating that "[t]he bottom line is that the consulting payments served legitimate corporate purposes and were consistent with Franklin's standing policy of retaining the counsel of company founders and key officers after their departure." It is also noted that the consulting arrangement was part of Senator Bennett's evolving separation from Franklin and that "[t]hese business events and arrangements

were totally unconnected to the 1992 campaign for Utah Senator, a seat which was not open until May 28, 1991, when former Senator Jake Garn unexpectedly announced his intention not to seek reelection."

The Committee's Response provides additional background on Senator Bennett s departure from Franklin, but does not provide any supporting documentation. Documentation is provided that establishes that the consulting business was originally intended to be a division of Franklin and that it was subsequently determined that a separate entity was preferred. The Response confirms that R.F. Bennett and Associates had no clients other than Franklin. Two potential clients are mentioned, a bank that according to the documentation had been contacted while the consulting operation was still part of Franklin and Senator Bennett's accountant. The Committee suggests that others were contacted but provides no specifics or documentation. When the Senator Bennett became a candidate shortly after establishing the consulting firm none of these prospects were pursued.

The examples of other agreements provided are significantly different than the contract with R.F. Bennett and Associates. None provide for the payment of the full discretionary bonus, and the two that mention the bonus pay it at the time other recipients are paid. Two of the three contain non-competition clauses while Senator Bennett's does not. The third is described as a severance payment. One of the contracts includes a significant sum for the purchase of the individuals proprietary interests in Franklin's products unlike the agreement with Senator Bennett. All of the agreements submitted with the Committee's response are signed by a Franklin representative and, except for the agreement described as "severance" in the 1993 stock prospectus, each is signed by the recipient as well. None of the documents surrounding the agreement with Senator Bennett are signed by either party. Finally, although the Committee states that Senator Bennett's departure from Franklin was not related to his candidacy, but rather the opposite, it is noted that the Committee states that former Senator Garn announced his intention not to seek reelection on May 28, 1991[7/]. Senator Bennett's memorandum outlining the services to be provided came nearly a month later. The unsigned agreement is dated July 1, 1991 and notes that Senator Bennett was prepared to leave Franklin on that day.

The Committee's Response has not established that the consulting retainer paid to R.F. Bennett Associates represents salary or other earned income from bona fide employment and was independent of Senator Bennett's candidacy.

7/ Franklin's June, 1993 stock prospectus notes that former Senator Garn joined Franklin's Board of Director's in January of 1993.

Consulting Fee Advance

Also related to the consulting agreement with Franklin is a deposit into the consulting firm bank account on January 30, 1992. The regular deposit of $43,750 was made on January 21st. The deposit on the 30th was in the amount of $131,250 or 3 x $43,750. This apparently represents a three-month advance on the consulting retainer from Franklin given that the next $43,750 deposit does not occur until three and a half months later. On the same day of the deposit, January 30, 1992, a $90,000 check was written from the consulting firm account to the Candidate's personal account. Also on this date, the Candidate wrote an $80,000 check to the campaign from his personal account. Thus, it appears that the advance was used, in part, to fund the campaign and constitutes a prohibited advance from Franklin within the meaning of 2 U.S.C. 441b(b)(2). In a response to an inquiry about this transaction the Committee states that "[t]he advance of $131,250 which represented one quarter of consulting fees was advanced to Robert Bennett because the stock offering was delayed from January until June. Since it was delayed, both parties agreed to pay the consulting agreement in quarterly installments rather than monthly installments."

The Interim Audit Report recommended that the Committee demonstrate that the consulting fee advance did not constitute, in part, a prohibited contribution. The Committee was asked to provide any written agreements with respect to the advance, and explanations of the circumstances surrounding the advance from both the Candidate and Franklin.

In its Response, the Committee argues that the payment of $131,250 represented funds that the Candidate had earned up to that point. The Committee contends that the entire 1991 annual bonus of approximately $275,000 had been earned by year end 1991 along with seven months of consulting fees. The total of these was approximately the amount that was paid up to and including the $131,250 payment on January 30, 1992. The Committee goes on to state that the consulting agreement permitted the lump sum payment and that Franklin could have paid the entire amount as severance in July of 1991. Finally the Committee points to another agreement that was settled for a lump sum payment and concludes that the $131,250 payment "was paid in the ordinary course of Franklin's business, was driven by financial and business events completely independent of Mr. Bennett's candidacy, was consistent with Franklin's prior business dealings with consultants, and simply made him whole on bonus payments and consulting fees he had already earned."

The Committee's Response is flawed in a number of respects. First, although the unsigned consulting agreement does not prohibit the advance payment, neither does it envision it. The agreement simply states that "Franklin agrees to pay Bennett

Consulting a retainer in the amount of $_____ per month for a period of one year commencing July 1, 1991, and ending June 30, 1992." Nothing in the agreement contemplates an advance payment. Second, the contention that the entire amount could have been paid as a severance payment may be accurate, however, the agreement reached did not call for a lump sum payment. Though the agreement is unsigned, the flow of payments up until January 30, 1992, indicates that at least with respect to the payments, it was being followed. Third, assuming that the agreement as submitted is accurate, the Candidate had not "earned" the full amount of the bonus at January 30, 1992. The amount of the bonus and other fees were to be paid monthly regardless of the derivation of the amount. Fourth, the other consulting agreement cited by the Committee that was settled for a lump sum payment was not equivalent to the situation with Senator Bennett. That contract is discussed in the Franklin stock prospectus. According to the prospectus if the contract had run to the end of its 5 year term, Franklin would have expended approximately $1.3 million. The $300,000 lump sum payment appears to have saved Franklin $1 million over the remaining life of the contract. In the Candidate's case, at the end of the 3 months covered by the advance, Franklin resumed the monthly payments. Finally the Committee has not demonstrated any "financial and business events" that make the advance advantageous to Franklin.

Corporate Stock Repurchase Agreement Used to Guarantee a Bank Loan

The Candidate obtained a $385,000 line of credit at the First National Bank of Layton in his name. This line of credit was used by the Candidate (apparently to repay a personal obligation to Franklin) and by the campaign. It appears that Franklin was a guarantor on this loan. The Committee made 9 draws totaling $200,221.

The stock prospectus discloses that "[i]n connection with bank loans obtained by Messrs. Robert F. Bennett ($385,000), Robert G. Pederson ($150,000) and Gregory L. Fullerton ($60,000) in February 1992, the Company agreed, in the event of default, to redeem part or all of the shares of the Company's Common Stock pledged by each borrower as collateral for the loans at the then fair market value of the shares. No such default has occurred. Messrs. Bennett, Pederson and Fullerton pledged 554,400, 45,000 and 86,400 shares respectively."8/

8/ In comparing the number of shares owned versus the number pledged, it must be considered that in April of 1992 the Board of Directors of Franklin approved a 90 to 1 stock split. The number of shares discussed in the stock prospectus gives retroactive effect to the split.

A letter from Franklin's Chief Operating Officer, Arlen B. Crouch, to Layton Bank describes the repurchase agreement. The agreement states that:

> "Franklin agrees that in the event of any borrower's default in any loan obligation to the Bank that is secured by Franklin stock, Franklin will honor the Bank's request to redeem part or all of the pledged stock at the stock's then current fair market value as determined by generally accepted closely held corporation valuation principles, applying such reasonable discounts, including the minority shareholder discount and the lack of marketability discount, as appropriate or at the public market price (if applicable), but not less than $500 per share.
>
> The foregoing commitment is conditioned on the Bank's securing from each borrower an agreement to allow the Bank to convey and transfer to Franklin all right, title and interest in and to the stock purchased by Franklin pursuant to the terms of this letter. This latter provision must be made part of the loan agreement with each borrower such that each borrower consents to the termination and transfer of his interest in the stock upon the Bank's exercise of its right to have the stock redeemed under the terms of this letter."

The Interim Audit Report noted that the repurchase agreement was apparently necessary due to the lack of the marketability of the pledged stock, Franklin's Subchapter S status, and the Buy-and_Sell Agreement associated with Senator Bennett's stock (Footnote 4 above). As a Subchapter S Corporation, Franklin was limited to 35 stockholders all of which are required to be either individuals, estates or certain trusts (26 U.S.C. §1361(b)). Therefore, it appears that the use of the stock as collateral for the loan, absent the repurchase agreement, may have violated the terms of the Subchapter S election and the Buy-and-Sell Agreement. Also, the prospectus states several times that, prior to the public offering in June of 1992, there had been no public market for the stock. This conforms to the notes to the October 1991 personal financial statement regarding the method of valuation of the stock.

Therefore, the Interim Audit Report concluded that the repurchase agreement constitutes a loan guarantee by Franklin and, as such, a prohibited contribution from a corporation in the amount of the campaign draws on the line of credit, $200,221.

The Interim Audit Report recommendation asked the Committee to demonstrate that the stock repurchase agreement provided by Franklin in connection to the line of credit did not constitute a contribution by Franklin in the amount of the Committee's draws on the line of credit totaling $200,221. The Committee was also asked to provide information and documentation showing the terms of the Buy-and-Sell Agreement associated with the Candidate's stock at the time of the loan and any other restrictions on the transfer of the stock; documentation generated or relied on by the First National Bank of Layton, Franklin, or the Candidate in evaluating the stock used as collateral for the line of credit and how that documentation was used; and, correspondence and other documentation between Franklin and the Candidate generated in preparation of the agreement, particularly documentation indicating whether the Candidate compensated Franklin for its action on behalf of the Candidate.

The Committee's Response explains that when Franklin was preparing to offer stock for public sale, it was recommended that several loans to officers be extinguished for the public offering. In the process of extinguishing these loans the transactions described above occurred. The Committee goes on to explain that "[T]he Layton Bank was concerned that the stock was not readily marketable. However, Franklin would not guarantee the loans because that would establish liabilities for the company and defeat the objective of having the officer loans paid off (i.e., a guarantee would have traded an insider loan for an insider guarantee). Franklin wanted the loans to be made, however, and it was proposed that Franklin agree to repurchase the stock -- which was extremely valuable -- in the event of default." The Committee further argues that because of the increasing value of the stock, Franklin stood to make a profit on the repurchase should it have become necessary. The Committee concludes that given the situation the repurchase agreement was not "a 'guarantee' of any sort."

Included with the Committee's Response are letters from the First National Bank of Layton and another bank that the Committee used, attesting to the fact that such repurchase agreements are common practice when non-publicly traded stock is used to collateralize a loan. The letter from the First National Bank of Layton explains that the purpose of the loan was the repayment of a Franklin debt of $184,317 with the balance "placed in undisbursed" to be issued upon request for campaign use. With respect to the collateral the letter states that "it should be noted that many banks do not lend funds based on security of non-publicly traded stock. This exception to bank policy was made due to the repurchase agreement from Franklin International."

The letter from the second bank was a response to a hypothetical lending situation. In discussing non-publicly traded stock as collateral the bank states that "[I]f closely held or non-exchange traded stock is proposed as collateral it would be altogether common for a bank to require a repurchase (by the issuing firm) agreement of the stock collateral. The repurchase agreement then mitigates the risk (of potentially illiquid stock collateral) that the bank bears when non-publicly traded stock collateralizes a loan."

The Committee did not provide any of the other specific information requested in the Interim Audit Report.

The Committee's Response confirms that the repurchase agreement was necessary for the loan to be made. The lending institution states that accepting the stock as collateral was an exception to bank policy made due to the repurchase agreement. Franklin guaranteed a market for collateral that otherwise would not have been acceptable to the bank. This action falls within the definition of loan at section 100.7(a)(1)(i) of the Commission's regulations which states that a loan includes any guarantee, endorsement, and any other form of security. The fact that the arrangement was an ordinary course of business transaction for the bank; that at least part of the loan was beneficial to Franklin; that the repurchase agreement may have protected Franklin's Subchapter S status; or that Franklin could have made a profit on any stock that was repurchased under the agreement, does not change the fact that a campaign loan was made that, absent the repurchase agreement provided by Franklin, would not have been made.

Guaranty of Bank Loan by Candidate's Spouse

In addition to the guarantee of the line of credit by the corporation, the loan was also guaranteed, per the loan agreement, by the candidate's wife Joyce M. Bennett in the amount of $385,000. No signed guarantee was available; however in a December, 1992 letter to the Candidate, the Chief Executive Officer of the First National Bank of Layton states that the "bank had no anticipation of looking to Joyce for repayment, inasmuch as the loan was extremely well secured by salable stock backed by a repurchase agreement from a substantial company."

In another part of the letter the bank notes that the reason that Joyce Bennett was requested to sign as a guarantor was that some of the assets on the Candidate's personal financial statement were jointly owned and that it is the bank's policy to obtain the signatures of all parties with an interest in assets shown on financial statements presented for loan requests. It is not specified which assets were jointly held, however the only assets listed on the pledge agreement or elsewhere in the loan agreement is the Franklin stock. No information has been found in the loan documents or the Franklin stock prospectuses to indicate that the stock was jointly owned.

The Interim Audit Report concluded that the guarantee of the loan by Mrs. Bennett appeared to constitute an excessive contribution in the amount of $200,221, the amount of the campaign draws on the line of credit. It was recommended that the Committee provide documentation to demonstrate that Joyce M. Bennett did not make a $219,221 ($220,221 in campaign draws on the line of credit less $1,000 contribution limitation) excessive contribution by guaranteeing the line of credit at the First National Bank of Layton. The documentation provided was to include a copy of the loan application and any associated documents, a copy of an executed guarantee, and information indicating whether Joyce M. Bennett had assets equal to or exceeding $219,221, and any documentation from the First National Bank of Layton showing a release of liability.

The Committee's Response provides all of the specific documentation requested in the Interim Audit Report. In addition, another letter from the First National Bank of Layton is included that explains Mrs. Bennett's role in the loan. The letter states that "the only reason that Mrs. Bennett signed the loan documents was that the financial statement provided by Senator Bennett included jointly held assets. It is our bank's policy that a borrower must reflect only their individual assets on their financial statement or that the joint holder of those assets also sign on the loan. As I recall, it was an element of timing which precluded Senator Bennett from going back and restructuring his financial statement. Therefore, the easiest remedy was to have Mrs. Bennett sign, thereby expediting the loan process."

The documentation submitted also establishes that the only collateral specified in the loan agreement was the Franklin stock. Further, a copy of the stock certificate for the pledged stock shows that the Candidate was sole owner of the stock.

Given the information and documentation provided, it is concluded that Joyce M. Bennett did not make an excessive contribution to the Committee.

Franklin Quest Distribution Used to Repay Bank Loan

The Candidate received a $795,415 earnings distribution from Franklin on June 1, 1992. From these funds, the Candidate contributed/loaned $190,000 to the campaign, and repaid the First National Bank of Layton $200,000 on the line of credit.9/ See Finding II.C. for a discussion of the reporting of loan receipts and repayments.

9/ The Committee drew $200,221 on the line of credit and the Candidate drew $184,317. The $200,000 payment was made on June 1, 1992 and reported as a contribution from the

According to the stock prospectuses, Franklin historically did not make profit distributions other than to allow stockholders to pay income tax liabilities resulting from the company's Subchapter S status. It is also stated in the prospectus that as of June 2, 1992, Franklin had ceased operating as a Subchapter S corporation. If the statements in the stock prospectus are taken at face value and non-tax liability distributions were not made by Franklin, the transaction does not appear to be a customary distribution. In response to an inquiry about this transaction the Committee states that:

> "This check represents Robert F. Bennett's portion of the Franklin 2nd quarter dividend distribution which Franklin, Inc. made to all shareholders.
>
> "Franklin, Inc. distributed 7 million dollars to its shareholders on May 28, 1992. At that time, Robert F. Bennett owned about 11% of the Franklin stock, therefore he received approximately 11% of the total dividend."

In the Interim Audit Report it was requested that the Committee provide documentation to demonstrate that the $795,415 earnings distribution noted in the Candidate's records represents a normal course of business transaction. The documentation submitted was to include information concerning how the total amount to be distributed to shareholders on May 28, 1992 was determined by Franklin, whether all shareholders received a proportionate distribution, whether this amount represented a distribution in excess of the estimated tax liabilities of the shareholders, and if so, by how much, whether Franklin had previously made such distributions, on what dates and in what amounts.

The Response does not provide much of the information that was requested. The Committee states that "one of Franklin's last financial acts prior to the public offering -- on May 28, 1992 -- was to distribute to <u>each</u> shareholder retained earnings sufficient to pay each shareholder's estimated tax liability arising from the company's Subchapter S-status and the termination of its S-status in June 1992." No information on

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(Footnote 9 continued from previous page)
candidate and loan repayment of $203,793. This amount represents the campaign draws on the line of credit with accrued interest. On June 15, 1992 the Committee reported a similar entry in the amount of $191,124. This amount represents the Candidate's personal draw on the line of credit with accrued interest plus a portion of the principal and interest reported as paid on June 1, 1992. The actual amount of this payment was $191,681, the remaining balance on the line of credit.

how the amounts were determined is included. It is noted that the distributions for Franklin's 1992 fiscal year were more than four times the previous year, while income for the year rose by approximately 65%. Also Franklin operated as a Subchapter S corporation for only three-quaters of its 1992 fiscal year.

However, the Committee has submitted sufficient information to show that all stockholders received a pro rata portion of the distributions made in Franklin's 1992 fiscal year. The total amount and percentage of ownership of each shareholder for the May 28, 1992 distribution can be verified to the stock prospectus and the audited financial statements contained therein. Therefore, although the Committee has not established that the May 28, 1992 distribution was an ordinary course of business transaction, it has demonstrated that the distribution did not constitute a contribution to the Committee.

Finally, Franklin made its first public stock offering in early June 1992 and the Candidate was listed as selling at least 235,000 shares at a net of $14.42 per share. The source of Candidate contributions/loans to the Committee after that point are not questioned.

C. Disclosure of Loan Receipts and Repayments

Sections 434(b)(3)(E) and 434(b)(5)(D) of Title 2 of the United States Code state that each report shall disclose the identification of each person who makes a loan to the reporting committee during the reporting period, together with the identification of any endorser or guarantor of such loan, and date and amount or value of such loan; as well as, the name and address of each person who receives a loan repayment from the reporting committee during the reporting period, together with the date and amount of such loan repayment.

Section 431(11) of Title 2 of the United States Code states that the term "person" includes any individual, partnership, committee, association, corporation, labor organization, or any other organization or group of persons.

Section 104.11(a) of Title 11 of the Code of Federal Regulations states, in relevant part, that debts and obligations owed by a political committee which remain outstanding shall be continuously reported until extinguished.

The Committee obtained two loans from the First National Bank of Layton totaling $210,441, a $10,220 loan obtained in 1991 and nine draws totaling $200,221 from a $385,000 line of credit established in the Candidate's name in 1992; a draw on the line of credit repaid the first loan. In addition, the Committee obtained fourteen loans from the

Candidate totaling $1,310,000. By the close of the audit period, the $200,221 in draws on the line of credit had been repaid directly to the bank by the Candidate. However, the $1,310,000 from the Candidate remains outstanding.

The Audit staff's review of available records for loan receipts from the First National Bank of Layton and from the candidate indicated that none of the loan receipts were itemized as required on Schedules A. Also, when the $10,220 loan from the bank was repaid by a draw on the line of credit, the Committee reported the $10,220 draw on Schedule C but failed to itemize the repayment of the original loan on Schedule B.

It was also noted that the Committee improperly disclosed a $190,000 contribution from the Candidate as $189,000 in draws on the line of credit from the First National Bank of Layton on Schedule C in the Pre-Convention report (4/1/92-6/7/92). A $191,124 payment made by the Candidate on the line of credit to repay a draw unrelated to the campaign was itemized on Schedule B of the July 1992 Quarterly report (6/8/92-6/30/92). In addition, a $100,000 loan from the Candidate was itemized as two separate loans on Schedule C, in the Post-General Election report (10/15/92-11/23/92), once on the check date and once on the deposit date.

Finally, the correct amount of the outstanding balances of the loans from the Candidate were not reported on Schedules C or on line 10 of the Summary Page for all reporting periods beginning with the Pre-General Election report. It appeared that the Committee reported on Schedules C and line 10 only the amount(s) of loans received in each period; no Schedules C were filed to continuously report these loans in subsequent periods.

At the exit conference, Committee representatives were provided schedules of the loans requiring itemization and a narrative detailing the discrepancies noted above. Committee representatives stated that they would amend their reports to properly disclose the above noted obligations.

In the Interim Audit Report it was recommended that the Committee file a comprehensive amended report to correctly disclose 1991 and 1992 loan activity and an amended Mid-Year 1993 report to correctly disclose loan activity for that period.

In response to the Interim Audit Report recommendation the Committee noted that any accounting or reporting errors were inadvertent and the result of a predominantly volunteer campaign staff. The Committee also filed amended disclosure reports that materially correct the public record.

D. Apparent Excessive Contributions

Section 441a(a) of Title 2 of the United States Code states, in relevant part, that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal Office which, in the aggregate, exceed $1,000.

Section 441f of Title 2 of the United States Code states that no person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person.

Section 100.7(a)(1) of Title 11 of the Code of Federal Regulations states that the term "contribution" includes a gift, subscription, loan, advance, or deposit of money or anything of value.

Section 110.1(k) of Title 11 of the Code of Federal Regulations states, in part, that any contribution made by more than one person, except for contributions made by a partnership, shall include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A contribution made by more than one person that does not indicate the amount to be attributed to each contributor shall be attributed equally to each contributor.

If a contribution to a candidate on its face or when aggregated with other contributions from the same contributor exceeds the limitations on contributions, the treasurer may ask the contributor whether the contribution was intended to be a joint contribution by more than one person. A contribution shall be considered to be reattributed to another contributor if the treasurer of the recipient political committee asks the contributor whether the contribution is intended to be a joint contribution by more than one person, and informs the contributor that he or she may request the return of the excessive portion of the contribution if it is not intended to be a joint contribution; and within sixty days from the date of the treasurer's receipt of the contribution, the contributors provide the treasurer with a written reattribution of the contribution, which is signed by each contributor, and which indicates the amount to be attributed to each contributor if equal attribution is not intended.

Section 103.3(b)(3) of Title 11 of the Code of Federal Regulations states, in part, that contributions which exceed the contribution limitation may be deposited into a campaign depository. If any such contribution is deposited, the treasurer may request redesignation or reattribution of the contribution by the contributor in accordance with 11 CFR

§§110.1(b) and 110.1(k), as appropriate. If a redesignation or reattribution is not obtained, the treasurer shall, within 60 days of the treasurer's receipt of the contribution, refund the contribution to the contributor.

Section 103.3(b)(4) of Title 11 of the Code of Federal Regulations states, in part, that any contribution which appears to be illegal and which is deposited into a campaign depository shall not be used for any disbursements by the political committee until the contribution has been determined to be legal. The political committee must either establish a separate account in a campaign depository for such contributions or maintain sufficient funds to make all such refunds.

Sections 110.1(k)(3) and (5) of Title 11 of the Code of Federal Regulations state, in part, that if a political committee receives a written reattribution of a contribution to a different contributor, the treasurer shall retain the written reattribution signed by each contributor. If a political committee does not retain the written records concerning reattribution as required, the reattribution shall not be effective, and the original attribution shall control.

A review of contributions from individuals was conducted to determine if contributions in excess of the limitations were received. Twenty four such contributions from 17 contributors were identified. The excessive portions of these contributions total $19,450.

Among the excessive contributions are a number of instances where checks drawn on joint accounts were attributed to account holders who had not signed the contribution check and for which no signed reattribution had been obtained. Similarly, five of the excessive contributions were reported in more than one named account holder, for example John and Susanne Lindquist, but only one of the individuals signed the check. Also, some excessive contributions were assigned to more than one election without the requisite redesignations.

Six of the excessive contributions are associated with the same individual. That individual made two $1,000 contributions on October 6, 1992, designated for the primary and general elections. In addition, six other $1,000 contributions were received on the same date drawn on three other accounts. Each account listed this individual as account holder with the addition of the words "Custodian For" another individual. The other individuals appear to be the contributor's children in that two of the three have "student" listed as their occupation on Committee disclosure reports. None of the checks bear the signatures of these individuals. Three of the checks are designated for the primary election and three are designated for the general election.

A search of the Committee's files did not produce any evidence of written reattributions or redesignations for any of the excessive contributions noted. Further, neither a separate account for potential excessive contributions nor any attempt to monitor amounts required to be held in the Committee's regular accounts was found. None of the excessive contributions had been refunded.

A listing of the excessive contributions was provided to the Committee at the exit conference with a recommendation that all of the excessive contributions be refunded or that it be demonstrated that the contributions are not in excess of the limitations. In response to the exit conference the Committee stated that refunds had been or would be delivered to 11 of the contributors and submitted copies of unnegotiated refund checks. These checks total $5,600. The Committee also stated that information on the remaining contributions would be forwarded as soon as possible.

In the Interim Audit Report it was recommended that the Committee demonstrate that the remaining contributions are not in excess of the contribution limitations. With respect to the contributions drawn on the "Custodian" accounts the evidence was to include statements signed by the recorded contributor to establish that they voluntarily made the decision to contribute and that the funds were previously owned and controlled exclusively by the recorded contributors and were not the proceeds of a gift intended to be a contribution to the Candidate. Absent evidence that these contributions are not excessive, it was recommended that the Committee refund the contributions and submit copies of both sides of the negotiated refund checks.

With respect to excessive contributions the Response states that the Committee had a system in place for checking on the source of contributions drawn on joint accounts and seeking reattributions and redesignations. The Committee goes on to describe a three step procedure including telephone calls, written requests, and follow-up calls. However, during the audit fieldwork few redesignation or reattribution letters were found. In addition the Committee submitted copies of refund checks for each of the contributions questioned in the Interim Audit Report. Of the $19,450, copies of refund checks totaling $7,700 are negotiated Committee checks, while the remainder are cashier's checks. For the cashier's checks there is no evidence of delivery or negotiation.

E. Apparent Excessive Contributions from Staff Advances

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed $1,000.

Section 116.5(b) of Title 11 of the Code of Federal Regulations states, in part, the payment by an individual from his or her personal funds, including a personal credit card, for the costs incurred in providing goods or services to, or obtaining goods or services that are used by or on behalf of, a candidate or political committee is a contribution unless the payment is exempted from the definition of contribution under 11 CFR 100.7(b)(8).

If the payment is not exempted, it shall be considered a contribution unless, it is for the individual's transportation and normal subsistence expenses incurred by other than a volunteer, while traveling on behalf of a candidate or political committee of a political party; and the individual is reimbursed within sixty days after the closing date of the billing statement on which the charges first appear if the payment was made using a personal credit card, or within thirty days after the date on which expenses were incurred if a personal credit card was not used. "Subsistence expenses" include only expenditures for personal living expenses related to a particular individual traveling on committee business such as food or lodging.

The Committee's payments of expense reimbursements were reviewed to determine if contributions from staff advances had been made. As part of the Audit staff's analysis, contributions resulting from untimely reimbursement of expenses were added to direct contributions made by the individual. The review disclosed that Michael Tullis, the Committee's Custodian of Records, was the only individual making excessive contributions from advances he made to the Committee for his own travel and subsistence, others' travel and subsistence, as well as, campaign office expenses, media expenses, and other miscellaneous items. These contributions resulted from extensive campaign use of Mr. Tullis' personal credit card. The Audit staff determined that the highest outstanding balance owed to Mr. Tullis was $22,206 on June 1, 1992. At the time of the audit, no expense reimbursement requests were outstanding.

At the exit conference, the Committee was presented with a schedule of Mr. Tullis' excessive contributions. Mr. Tullis acknowledged that he had made an error in judgment in using his personal credit card to pay Committee expenses and that he would most likely not be able to demonstrate that no excessive contributions occurred.

The Interim Audit Report recommendation with respect to this matter stated that the Committee should either demonstrate that no contribution occurred with respect to these expense reimbursements, or offer any other information that is believed to be relevant to the issue.

The Response states that since the regulation allows 60 days to reimburse expenses paid by credit card, that most of the charges were reimbursed before becoming contributions. The Committee also notes that in many cases, the Audit staff analysis uses the date the expense was incurred rather than the closing date of the credit card statement on which the charge first appears as provided in the regulation.

The Committee has not read the regulation correctly. While it is true that expenses paid by an individual by personal credit card for his own travel and subsistence do not become a contribution if reimbursed within 60 days of the closing date of the credit card statement on which the charge first appears, the same is not true of expenses other than personal travel and subsistence. Expenses for other than the individuals personal travel and subsistence are contributions on the date incurred. In Mr. Tullis' case the majority of the $22,206 cited in the Interim Audit Report consisted of four charges for newspaper advertising totaling $21,109 and an amount for the purchase of a computer.

With respect to using the closing date of Mr. Tullis' credit card statement, when that information was available and the expense was for Mr. Tullis' travel and subsistence, the closing date was used. The Committee states in the Response that it is attempting to locate additional copies of Mr. Tullis' credit card statements.

The conclusion reached in the Interim Audit Report is unchanged.

F. Contributions Subject to 48 Hour Disclosure Notices

Section 434(a)(6) of Title 2 of the United States Code requires that each treasurer of the principal Campaign committee of a candidate shall notify the Clerk, the Secretary, or the Commission, and the Secretary of State, as appropriate, in writing, of any contribution of $1,000 or more received by any authorized committee of such candidate after the 20th day, but more than 48 hours before, any election. This notification shall be made within 48 hours after the receipt of such contribution and shall include the name of the candidate and the office sought by the candidate, the identification of the contributor, and the date of receipt and the amount of the contribution. The notification required under this paragraph shall be in addition to all other reporting requirements under this Act.

The Audit staff reviewed individual contributions to determine which contributions required notification within 48 hours of receipt. Contributions requiring the 48 hour notice were received within two and twenty days of the nominating Convention (6/26-27/92), and the Primary (9/8/92) and General (11/3/92) elections. The Interim Audit Report stated that the review identified a total of 181 contributions which required 48 hour notices. The Interim Audit Report also concluded that, of these, the Committee failed to file the required notices for 41 contributions totaling $797,001, including 8 from the Candidate totaling $750,000.

At the exit conference, Committee representatives were provided with a schedule of items for which the required notices were not filed. The Committee did not provide an explanation of why the notices were not filed.

In the Interim Audit Report it was recommended that the Committee provide an explanation, including an account of any mitigating circumstances, as to why these notices were not filed.

In the Response the Committee states that it exercised tremendous effort to file every necessary 48-hour notice and was surprised to learn that the audit indicated 41 omissions. The Committee goes on to explain that its telephone records indicate that on both October 30, and November 3, 1992 two items were faxed to the Office of the Secretary of the Senate. The Committee believes that in both cases the documents faxed were 48-hour contribution reports. However, in both cases the public record reflects only one report filed on that day. Although the Committee has not been able to locate copies of the material faxed, it believes that a portion of the 41 omissions were included on those reports.

In reviewing this matter during the preparation of this report, a number of errors were noted in the original analysis. After re-examining the workpapers it was determined that the Committee was required to file 131 contribution notices, and that 37 had not been filed. These 37 contributions total $649,001 (See Attachment 1).

With respect to the Committee's discussion of the documents faxed to the Secretary of the Senate, the explanation would at best explain only one of the missing notices, assuming that, the faxed documents were 48-hour notices; were not re-transmitals of others on the same day; and, were filed timely. That contribution was a $100,000 receipt from the Candidate.

The 37 contributions for which no notice was filed include six from the Candidate totaling $600,000; six totaling $10,000 relating to the pre-primary period when no 48-hour notices were filed: and, twenty-two non-candidate contributions during the period October 15-20, 1992.

Except for the change in the number and amounts resulting from the correction of the original analysis, the conclusion contained in the Interim Audit Report is unchanged.

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

April 4, 1995

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

By: Kim Bright-Coleman KBC
Associate General Counsel

Lorenzo Holloway LH by KBC
Assistant General Counsel

Peter G. Blumberg PGB
Attorney

SUBJECT: Proposed Final Audit Report on Bennett for Senate (LRA #459)

970 / C 2501 15

I. INTRODUCTION

The Office of General Counsel has reviewed the proposed Final Audit Report on Bennett for Senate ("the Committee") submitted to this Office on February 28, 1995.1/ The following memorandum provides our comments on the proposed report. We concur with the findings in the proposed Final Audit Report which are not discussed separately in the

1/ Since the proposed Final Audit Report does not include any matters exempt from public disclosure under 11 C.F.R. § 2.4, we recommend that the Commission's discussion of this document be conducted in open session.

following memorandum.2/ If you have any questions concerning our comments, please contact Peter Blumberg, the attorney assigned to this audit.

II. APPARENT PROHIBITED CONTRIBUTIONS (II.B.)

The proposed Final Audit Report identifies various transactions between the Committee, Robert F. Bennett ("the candidate"), Robert F. Bennett & Associates, the candidate's consulting firm, ("R.F. Bennett") and Franklin Quest, Inc., the candidate's former full-time employer, ("Franklin"). The following transactions were identified by the report as apparent prohibited contributions: (1) monthly payments from Franklin to R.F. Bennett for the candidate's consulting services; (2) advances by Franklin to R.F. Bennett for future consulting services; and (3) Franklin's guarantee on the candidate's bank line of credit.

With respect to the consulting agreement and advances, the proposed report states that the Committee has not established that the payments arising out of the agreement for consulting services constitute salary and other earned income or that the payments were independent of Mr. Bennett's candidacy.3/ Therefore, the proposed report suggests that the payments were contributions from Franklin to the Committee.

The Committee states that Mr. Bennett provided many services to Franklin pursuant to the consulting agreement, and implies that the payments also serve as severance payments to the candidate for past service. The Committee states that the candidate's agreement was comparable to the other agreements executed with other departing Franklin executives. Finally, the Committee argues that the candidate and Franklin made the agreement prior to, and independent of, the candidate's candidacy.

The Commission has previously determined that an employer will not make a contribution to a former employee running for a federal elective office when: (1) the compensation was in consideration of services; (2) the amount of the compensation did not exceed the amount that would be

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2/ We concur with your conclusion that the candidate's spouse did not make a contribution to the Committee through a loan guarantee. However, we recommend that your report cite to 11 C.F.R. § 100.7(a)(1)(i)(D) for the proposition that the candidate's spouse did not make a contribution to the Committee since the stock pledged as collateral for the loan was in the candidate's name.

3/ Pursuant to the agreement, Franklin was to pay $43,750 to R.F. Bennett once a month for 12 months starting in July 1991 and

paid to a similarly qualified person; and (3) the employment is genuinely independent of the candidacy. Advisory Opinion ("AO") 1979-74. (applying the standard to a candidate whose consulting business provided services to his former employer, among other clients). Similarly, in AO 1992-3, the Commission approved a corporation's plan to provide benefits to an employee who took unpaid leave to run for federal office since the employer had a pre-existing policy providing benefits to employees on unpaid leave that was generally applicable to all employees and not created for the benefit of one specific employee. The Commission also stated that the time period for the provision of benefits involved (31 days) was short, and that the benefits could be viewed as "other earned leave time" under 11 C.F.R. § 100.7(a)(3)(iii).4/ Id.

We concur with the Audit Division's conclusion that all the payments to the candidate arising under the consulting agreement are contributions to the Committee. The payments may not have been independent of the candidate's candidacy and the agreement may have contained terms that were not available to other employees. The consulting agreement, which was never signed, apparently went into effect in July 1991. At that time, the candidate had recently resigned from his day-to-day position with Franklin, even leaving behind a newly created Franklin subsidiary called Franklin Consulting Group that he was to run.5/ In mid-August 1991, after consulting for a little over a month, the candidate announced

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(Footnote 3 continued from previous page)
ending in June 1992.

4/ The Commission has also dealt with similar situations in the context of federal candidates who receive payments from their law partnerships during campaigns. In the law partnership context, the Commission will consider the basis of the partner's compensation to determine whether the payments comply with the FECA. See AO 1978-6 (where partner income is based on client-billable hours); AO 1979-58 (where partner income is based on an ownership interest in the partnership); MUR 3435 (Commission found no reason to believe that a law partnership made excessive contributions in violation of 2 U.S.C. § 441a when it made payments to a partner who was a federal candidate since the compensation reflected his proprietary interest in the firm). Unlike a partnership, Franklin was a corporation. Therefore, the candidate benefited from his proprietary interest in the corporation through earnings distributions for his ownership share, and on the sale of his stock.

5/ The narrative portion of the Committee's response implies that the candidate founded R.F. Bennett, his consulting company, after Franklin's Board of Directors decided not to go forward with Franklin Consulting Group. However, the minutes of the July 8,

his plan to run for Senate to the media. Ex-Utah Sen. Bennett's Son Wants Post Dad Held 24 Years, Rocky Mtn. News, Aug. 15, 1991, at 34. The Committee registered with the Secretary of the Senate on October 3, 1991. The short time frame between the execution of the consulting agreement and the commencement of the campaign suggests that the candidate's right to payments under the agreement may have had some relation to the campaign. Further, Franklin and R.F. Bennett appear to have contravened the express terms of the agreement's monthly payment requirement when Franklin made a three-month advance payment on the agreement on January 30, 1992. A Committee memorandum to the Audit Division of March 7, 1994, indicates that the advance was initiated because the candidate needed the money. A large portion of this advance was transferred to the Committee through the R.F. Bennett account on the same day Franklin made the advance. Therefore, it appears that the payments from the consulting agreement (or at least the three payments owed for the period January 1992 through March 1992) may have been linked to the candidacy.

With respect to the Committee's claim that the candidate's consulting agreement was similar to other previous agreements, we note that the candidate's contract terms appeared more beneficial in some respects than those offered to other departing executives since the candidate's agreement did not contain a no-competition clause and paid the candidate 100% of the 1991 bonus. Finally, little documentation was provided to indicate that the candidate engaged in any of the work that was called for in the agreement.

The proposed report also concludes that Franklin's agreement to repurchase the candidate's Franklin stock that was used as collateral for a $385,000 loan from Layton Bank resulted in a guarantee, endorsement or other form of security. 11 C.F.R. § 100.7(a)(1)(i).6/ The Committee states that Franklin's agreement with Layton Bank to purchase Franklin stock in case of the candidate's default on the loan was not a guarantee because Franklin assumed no risk in this transaction. Any payment that Franklin would have to make to the bank would result in Franklin assuming ownership of the candidate's pledged stock which Franklin valued at more than $385,000.

Loans, other than those made in accordance with 11 C.F.R. § 100.7(b)(11), are contributions. 11 C.F.R. § 100.7(a)(1). For purposes of 11 C.F.R. § 100.7(a)(1), a loan includes a guarantee, endorsement, and any other form of security. 11 C.F.R. § 100.7(a)(1)(i). Each guarantor of a loan shall be deemed to have contributed that portion of the total amount of the loan for which it agreed to be "liable in a written agreement." 11 C.F.R. § 100.7(a)(1)(i)(C).

This Office concurs with the report's conclusion on the corporate repurchase agreement. Franklin's repurchase agreement with Layton Bank resulted in a guarantee or another "form of security" to the candidate. A letter to the Bank from Franklin's President and Chief Operating Officer, Arlen B. Crouch, dated February 24, 1992, stated that Franklin "will honor the Bank's request to redeem part or all of the pledged stock ... ." A "secretary's certificate" was attached to the letter stating that the Franklin Executive Committee directed Mr. Crouch to prepare and execute the letter and that Franklin is bound by the terms of the letter. Further, Layton Bank stated that absent the repurchase agreement, Layton Bank would not have made the loan. The practical effect of these transactions was that if Mr. Bennett defaulted on his loan, Franklin would have had to pay $385,000 in cash to Layton Bank. Therefore, Franklin agreed "to be liable in a written agreement." 11 C.F.R. § 100.7(a)(1)(i)(C). Additionally, the fact that the loan was processed only because of Franklin's intervention demonstrates that Franklin has provided something of value to the Committee. 11 C.F.R. § 100.7(a)(1). The likelihood that Franklin would be fully reimbursed by assuming ownership of the pledged stock does not repudiate the fact that the repurchase obligation served as security to the loan, and that Franklin accepted liability on the loan.

(Footnote 5 continued from previous page)
1991 Franklin board meeting indicate that the Franklin Consulting Group plan was dropped because the candidate left Franklin to start R.F. Bennett.

6/ Approximately $185,000 of the line of credit was used to repay an "insider loan" owed to Franklin by Mr. Bennett. The Committee explained that Merrill Lynch, a brokerage house assisting Franklin's efforts to hold a public offering of stock, requested that Franklin extinguish certain "insider loans" by having the loan recipients repay the loans. In order to repay the loans, the candidate and two other Franklin executives took out loans at Layton Bank with the Franklin repurchase promise. The candidate, in addition to receiving enough credit to repay the "insider loan," received an extra $200,000. The loan application indicates that the extra money was to "set up campaign line." This money was eventually used in the campaign. All the draws on the line of credit were eventually paid, and no default ever occurred, therefore, Franklin never had to follow through on the agreement to purchase the stock.

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April 26, 1995

The Hon. Danny Lee McDonald
Chairman
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Proposed Final Audit Report on Bennett for Senate
(FEC Agenda Document #95-37)

Dear Chairman McDonald:

This office represents the Bennett for Senate Committee ("Committee") in connection with an audit of the Committee undertaken by the Audit Division of the Federal Election Commission ("Audit Division"). Because of the peculiar and fundamentally unfair recommendations of the Audit Division, the Committee wishes to bring several key issues to the Commission's attention prior to its April 27, 1995 meeting.

The audit covered the period from September 6, 1991 through June 30, 1993. On June 15, 1994, the Audit Division issued an Interim Audit Report and requested that the Committee respond to detailed sets of questions and provide relevant supporting documentation. On September 6, 1994, the Committee submitted a comprehensive 24-page response, accompanied by extensive supporting documentation, addressing each of the Audit Division's questions.

Despite the Committee's detailed response, the Audit Division issued a Final Audit Report dated April 5 alleging that Senator Bennett, the Committee and others had violated numerous provisions of the Federal Election Campaign Act of 1971, as amended. On April 24, 1995, the Committee received a copy of the Final Audit Report and learned that this matter had been placed on the agenda for the Commission's April 27, 1995 meeting.

The Committee's extremely short notice of the Commission's April 27 hearing precludes the preparation of a detailed response

to the Final Audit Report. Nevertheless, the Committee believes that the Commission should keep several important issues in mind as it reviews this matter.

First, by the Audit Division's own admission in the Final Audit Report, many of the allegations in the Initial Audit Report were baseless. Specifically, the Audit Division acknowledged that the allegation that Joyce M. Bennett made an illegal contribution to the Committee by guaranteeing a loan from the First National Bank of Layton lacked foundation. Moreover, the Audit Division recognized that there was no basis for the allegation that the Senator's use for campaign purposes of a portion of $795,415 in earnings distributed to him in May, 1992 by Franklin Quest, Inc. ("Franklin") was improper.

The fact that the Audit Division was forced to withdraw the foregoing findings casts considerable doubt on the remaining allegations in the Final Audit Report, reveals the incomplete nature of the Audit Division's conclusions, and suggests that the Audit Division charged the Committee with wrongdoing on the basis of a selective factual record and misapplied legal standards.

Second, in its Final Audit Report, the Audit Division dismissed many of the relevant facts that the Committee highlighted and documented in its September 6, 1994 Response. The Committee's September 6 Response demonstrated inter alia that Senator Bennett's departure from Franklin and related transactions were completely unrelated to his later candidacy for the United States Senate as demonstrated by the following facts:

(1) Senator Bennett's decision to step down from active management of Franklin was an evolutionary process that grew out of changes in the company during the mid- and late-1980s and accelerated when Arlen Crouch joined the company in 1989;

(2) Senator Bennett's consulting arrangement with Franklin was an arms-length transaction which was consistent with Franklin's long-standing policy of retaining the counsel of company founders and key officers after their departure;

(3) All of the consulting payments that Senator Bennett received from Franklin were for services duly rendered pursuant to the parties' consulting agreement;

(4) The amount of consulting services rendered by Senator Bennett exceeded the services rendered by other former Franklin officers under similar consulting arrangements;

(5) Senator Bennett did not become a candidate for the United States Senate until September, 1991;

(6) Senator Bennett's decision to leave the active management of Franklin and to found and operate a consulting firm predated his decision to run for the United States Senate; and

(7) The events precipitating Senator Bennett's withdrawal from Franklin's management began long before former Senator Garn's May 28, 1991 announcement of his decision to retire from the United States Senate.

Despite these uncontested facts, the Audit Division refuses to recognize that all of the monies that Franklin paid Senator Bennett for consulting services were Senator Bennett's personal funds that he was legally entitled to use in his campaign without limitation or qualification and were not corporate contributions.

Likewise, Franklin's agreement with the First National Bank of Layton to purchase its own stock in connection with a loan obtained by Senator Bennett does not constitute a corporate contribution to the Committee. As the Committee's September 6 Response demonstrated, the agreement (1) is customary in the banking industry when closely-held stock is used for collateral, (2) created no net liability for Franklin, and (3) created the possibility of financial gain for Franklin. Under these circumstances, the agreement cannot be properly viewed as a corporate contribution to the Committee.[1/]

Finally, the manner in which the agency has handled this matter has been fundamentally unfair and is inconsistent with the

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[1/] The remaining allegations in the Final Audit Report are complex compliance issues that are highly technical in nature. In its September 6, 1994 Response, the Committee stated that any technical oversights resulted from inadvertent errors made by inexperienced campaign staffers, and the Committee outlined the steps it has taken to ensure that such oversights do not recur.

Federal Election Campaign Act. After pursuing groundless allegations against the Committee and ignoring key exculpatory facts, the Audit Division now sees fit to bypass the statutorily-mandated enforcement process, 2 U.S.C. § 437g, and have the Final Audit Report, which purports to make conclusions of alleged violations, debated in public without affording the Committee an opportunity to defend itself. The Committee's September 6 Response is not even among the agenda materials made public to date by the FEC. In addition to violating due process and denying the Committee its right of confidentiality under § 437g(a)(12), the highly irregular nature of these proceedings reflects a disregard for the rights of Senator Bennett and the Committee.

In light of the foregoing and the Committee's comprehensive September 6, 1994 Response, I respectfully request that the Commission not adopt the Final Audit Report in its current form, but rather amend the report in such a fashion that it accurately reflects the facts and exonerates the Committee from wrongdoing with respect to Senator Bennett's personal contributions to his campaign.

Sincerely,

Jan Witold Baran
Counsel to Bennett for Senate Committee

cc: The Hon. Lee Ann Elliott
The Hon. Joan D. Aikens
The Hon. John Warren McGarry
The Hon. Trevor Potter
The Hon. Scott E. Thomas
Lawrence M. Noble, Esq.
Mr. Robert J. Costa

FEDERAL ELECTION COMMISSION
WASHINGTON D.C. 20463

AK006293

May 3, 1995

Mr. John K. Baird, Treasurer
Bennett for Senate
Corbridge, Baird & Christensen
39 Exchange Place, Suite 100
Salt Lake City, UT 84111

Dear Mr. Baird:

Attached please find the Final Audit Report on Bennett for Senate. The Commission approved the report on April 27, 1995.

The Commission approved Final Audit Report will be placed on the public record on May 8, 1995. Should you have any questions regarding the public release of the report, please contact the Commission's Press Office at (202) 219-4155. Any questions you have related to matters covered during the audit or in the report should be directed to Joe Stoltz of the Audit Division at (202) 219-3720 or toll free at (800) 424-9530.

Sincerely,

Robert J. Costa
Assistant Staff Director
Audit Division

Attachment as stated

CHRONOLOGY

BENNETT FOR SENATE

Audit Fieldwork	11/15/93 - 12/8/93
Interim Audit Report to the Committee	6/14/94
Response Received to the Interim Audit Report	9/6/94
Final Audit Report Approved	4/27/95