



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20547

BJ005683

March 28, 1994

MEMORANDUM

TO: SHARON SNYDER
PRESS OFFICE

FROM: ROBERT J. COSTA *RJC*
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PUBLIC ISSUANCE OF THE FINAL AUDIT REPORT ON
AMERICANS FOR HARKIN, INC.

Attached please find a copy of the final audit report and related documents on Americans for Harkin, Inc. which was approved by the Commission on March 15, 1994.

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

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REPORT OF THE AUDIT DIVISION
ON

Americans for Harkin, Inc.

Approved March 15, 1994



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

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REPORT OF THE AUDIT DIVISION
ON

Americans for Harkin, Inc.

Approved March 15, 1994



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

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FEDERAL ELECTION COMMISSION

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FINAL AUDIT REPORT
ON
AMERICANS FOR HARKIN, INC.

EXECUTIVE SUMMARY

Americans for Harkin, Inc. (the Committee) registered with the Federal Election Commission on September 23, 1991. The Committee was the principal campaign committee of Senator Tom Harkin candidate for the 1992 Democratic presidential nomination.

The audit was conducted pursuant to 26 U.S.C. §9038(a).

The findings of the audit were presented to the Committee at an exit conference held at the conclusion of the audit fieldwork (November 17, 1992) and in the interim audit report approved by the Commission on June 17, 1993, and ratified by the Commission on November 9, 1993.^{1/} The Committee was given an opportunity to respond to the findings both after the exit conference and after receipt of the interim audit report. These responses have been included in the findings set forth in this report.

In the final audit report, the Commission made an initial determination that the Committee pay the U.S. Treasury a total of \$26,878 in connection with the Committee's receipt of matching funds in excess of the Candidate's entitlement; and the Committee's issue of checks which were not cashed (stale-dated). In addition, the Commission determined that a payment to the U.S. Treasury of \$33,033 is required in connection with the Committee's receipt of prohibited contributions from individuals and excessive contributions from individuals and political committees. These transactions and other matters are summarized below.

^{1/} Following the decision by the D.C. Court of Appeals, in FEC v. NRA Political Victory Fund, et al., (No. 91-5360, slip op. at 2), that the composition of the Federal Election Commission violated the Constitution's separation of powers, the Commission reconstituted itself on October 26, 1993, and ratified its earlier approval of the Interim Report on November 9, 1993.

Apparent Prohibited Corporate Contributions - 2 U.S.C. §441b(a). The interim report required the Committee to make a payment to the U.S. Treasury in the amount of \$7,373, representing the value of unresolved corporate contributions. Counsel for the Committee objected to the demand for payment, arguing that the Commission has no authority to require such payments and that the auditor's method of sampling^{2/} to project these payments is invalid. However, the Commission did not find the Committee's arguments persuasive.

Use of Corporate and Labor Organization Aircraft - 11 CFR §114.9(e). Candidates (or persons traveling on behalf of a candidate) who use aircraft owned by a corporation or labor union must pay the corporation or the labor organization for the travel in advance. For travel to a city served by regularly scheduled commercial service, the candidate committee must pay the first class air fare. The interim report recommended that, absent evidence to the contrary, the Committee make a payment to the U.S. Treasury in the amount of \$7,036, representing the underpayment for use of such aircraft. In response, the Committee provided information demonstrating that it had complied with the regulation in calculating the amounts paid to the corporation and labor union.

Apparent Excessive Contributions - 2 U.S.C. §§441a(a)(1) and (2). The interim report contained a recommendation that the Committee make payments to the U.S. Treasury in the amounts of \$22,060 and \$3,600, representing the value of unresolved excessive contributions from individuals and political committees, respectively. Counsel for the Committee objected to the demand for payment on the basis that the Commission has no authority to require such payments. The Commission did not find the Committee's arguments persuasive.

Misstatement of Financial Activity - 2 U.S.C. §§434(b)(1), (2), and (4). On its disclosure reports, as initially filed, for the period June 3, 1991, through August 31, 1992, the Committee misstated its financial activity. The Committee filed amended reports which corrected the misstatements.

Itemization of Receipts and Disbursements - 2 U.S.C. §434(b), 11 CFR §104.3. On its disclosure reports filed prior to the commencement of audit fieldwork a number of receipts and disbursements were not itemized as required. The Committee filed amended reports which corrected the itemization errors.

^{2/} On May 5, 1992, the Commission adopted a policy of using sampling techniques to project prohibited and excessive contributions and, based on the projection, to require repayments to the Treasury.

Omission of Disclosure Information - 2 U.S.C. §434 (b), 2 U.S.C. §431(13), 11 CFR §102.9, 11 CFR §104.3, 11 CFR § 104.7. On its initial reports, the Committee did not disclose adequately certain information related to disbursements and the identification of contributors. At the exit conference, Commission staff informed the Committee that (a) the Committee had failed to disclose the occupation and name of employer of a number of contributors who, in the aggregate, had contributed over \$600,00; and (b) the Committee had failed to use its best efforts to obtain, maintain and report this information, as required under 11 CFR 104.7(b). The Committee submitted amended reports which corrected the omissions, except with respect to disbursements made from the Committee's payroll account.

Matching Funds Received in Excess of Entitlement - 26 U.S.C. §9038(b)(1). In the final audit report the Commission made an initial determination that a repayment of \$24,595 to the U.S. Treasury was required. This determination was based on an analysis of the Committee's Statement of Net Outstanding Campaign Obligations and relevant receipts activity, which showed that the Candidate received matching funds in excess of the amount to which he was entitled.

Stale-dated Committee Checks - 11 CFR §9038.6. Finally, the final audit report required the Committee to pay to the U.S. Treasury \$2,283, representing the value of stale-dated checks.

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REPORT OF THE AUDIT DIVISION
ON
AMERICANS FOR HARKIN, INC.

I. Background

A. Audit Authority

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

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

B. Audit Coverage

The audit covered the period from the Committee's inception, June 3, 1991 through August 31, 1992. During this period, the Committee reports reflect an opening cash balance of \$-0-, total receipts of \$5,668,468, total disbursements of \$5,387,092, and a closing cash balance of \$144,134.1/ In addition, a limited review of the Committee's transactions was conducted through March 22, 1993, for purposes of determining the Committee's remaining matching fund entitlement based on its financial position.

1/ These totals do not foot due to various math errors. (See Finding II.C.). All figures are rounded to the nearest dollar.

C. Campaign Organization

The Committee registered with the Federal Election Commission on September 23, 1991. The Treasurer of the Committee during the period covered by the audit was Larry Hawkins. The current Treasurer is also Larry Hawkins.

During the period audited, the campaign established offices in 15 states in addition to its national headquarters located in Bethesda, Maryland. The campaign's current offices are in Washington, D.C.

To manage its financial activity, the campaign maintained nine bank accounts at various times. From the above accounts, the Committee issued approximately 4,108 checks in payment for goods and services. Also, the Committee received approximately 43,388 contributions from 34,275 individuals totaling \$2,655,641 and 193 contributions from political committees totaling \$325,025.

In addition to contributions, the campaign received \$2,103,362 in matching funds from the United States Treasury. This amount represents 15% of the \$13,810,000 maximum entitlement that any candidate could receive. The candidate was determined eligible to receive matching funds on November 27, 1991. Through February, 1993, the campaign made a total of 15 matching funds requests totaling \$2,253,220. The Commission certified 93% of the requested amount. For matching fund purposes, the Commission determined that Senator Harkin's candidacy ended March 9, 1992. This determination was based on a public statement by the Candidate. The Committee has continued to receive matching fund payments to defray expenses incurred through March 9, 1992 and to help defray the cost of winding down the campaign.

Attachment 1 to this report is a copy of the Commission's most recent Report on Financial Activity for this campaign. The amounts shown are as reported to the Commission by the Committee.

D. Audit Scope and Procedures

In addition to a review of the the Committee's expenditures to determine the qualified and non-qualified campaign expenses incurred by the campaign, the audit covered the following general categories:

1. The campaign's compliance with statutory limitations with respect to the receipt of contributions or loans (see Findings II.B.1. and 2.);

2. the campaign's compliance with the statutory requirements regarding the receipt of contributions from prohibited sources, such as those from corporations or labor organizations (see Findings II.A.1. and 2.);
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 (see Finding II.D.1. and E.1.);
4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed (see Findings II.D.2. and E.2.);
5. proper disclosure of campaign debts and obligations;
6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (see Finding II.C.);
7. adequate recordkeeping for campaign transactions;
8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by the campaign to disclose its financial condition and establish continuing matching fund entitlement (see Findings III.A. and III.B.);
9. the campaign's compliance with spending limitations; and
10. other audit procedures that were deemed necessary in the situation.

In addition, on April 20, 1992, the Audit staff conducted an inventory of the Committee's records to determine if they were materially complete and in an auditable condition. A letter, dated May 5, 1992, notified the Committee that records pertaining to several areas of the pending audit were not made available for review. Furthermore, the letter informed the Committee that if at the conclusion of a 30 day period ending June 8, 1992, the items listed on the letter had not been provided, the Commission would issue subpoenas for the production of those records. Records provided in response to our May 5, 1992 request were deemed sufficient to commence fieldwork.

At the Entrance Conference on June 15, 1992, the Audit staff informed the Committee that a request would be made to the Office of General Counsel for subpoenas to be issued to its direct mail vendor for the production of all documents which detailed the amount and destination of direct mail distributed by the committee.

The subpoena to the Committee's direct mail vendor was approved by the Commission on July 13, 1992. On August 20, 1992, in response to the subpoena issued, the Audit staff received sufficient records from the Committee's direct mail vendor.

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

II. Findings and Recommendations - Non-Repayment Matters

Introduction to Findings

In light of an October 22, 1993 decision by the Court of Appeals for the D.C. Circuit in FEC v. NRA Political Victory Fund et al., the Commission reconsidered the interim audit report and voted its approval on November 9, 1993. As a result of this action, the Committee was afforded an additional 30 days to supplement its earlier response received on September 7, 1993. On November 22, 1993, Counsel to the Committee indicated that no supplemental response would be made.

A. Prohibited Contributions

1. Apparent Corporate Contributions

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

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of prohibited contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited. (See 11 C.F.R. 103.3(b)(1) and (2)). The Commission will no longer recognize any untimely refunds made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified a material dollar amount of prohibited contributions. The sample projected that the total dollar value of prohibited contributions

in the population was \$7,123. As of the conclusion of audit fieldwork, the Committee had made no refunds relative to the aforementioned items. In addition, one prohibited contribution of \$250 was identified in a 100% review of selected contributions.

The Committee did not establish a separate bank account for the deposit of potential prohibited contributions; however, the account balances maintained in the Committee's regular accounts were greater than the cumulative total of the prohibited contributions deposited. (See 11 C.F.R. §103.3(b)(4)).

All prohibited contributions identified during the reviews were verified by the appropriate Secretaries of State.

At the Exit Conference, the Committee was provided schedules and relevant check copies to support the prohibited contributions identified. Committee personnel had no comments with respect to the items noted above. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

In the interim audit report, the Audit Staff recommended that the Committee demonstrate that the contributions discussed above are not prohibited or make a payment to the United States Treasury in the amount of \$7,373.

In response to the interim report, Counsel for the Committee objected to the Commission's demand for payments of \$7,373 for alleged apparent corporate contributions. The objection is based on arguments that the Commission has no authority in the audit process to require payments of prohibited or excessive contributions and that the auditors' method of sampling to project these payments is invalid.

Counsel states correctly that the Federal Election Campaign Act requires publicly funded presidential candidates/committees to make repayments to the United States Treasury under very specific circumstances (26 U.S.C. §9038 (b)(1) and (2)) and that the payments requested for prohibited and excessive contributions fit neither of the categories. Further, Counsel notes that the only other authority granted the Commission to require any payment of money is found in the civil penalty provisions at 2 U.S.C. §437(g).

However, the payments at issue are not repayments or civil penalties. These payments are in accordance with the policy adopted by the Commission for use in 1992 Title 26 audits.^{2/}

This sampling technique is the same technique used by the Commission since 1980 to determine the value of matchable

^{2/} The Commission approved this policy on May 5, 1992. Committees were informed by letter dated June 2, 1992.

contributions contained in a submission made by a presidential primary candidate.^{3/}

Counsel for the Committee contends that "the combination of sampling with selected 100% review of certain transactions is an invalid methodology that may result in overstated projections." Counsel states,

"The auditors sampled a population (contributions received by the Committee) and on the basis of the number of prohibited or excessive contributions found in the sample, used a statistical estimate to project an amount based on the total population. In addition to the estimate based on the sample, the auditors conducted an additional selected 100% review of certain items either in the same population or in a discretely identified portion of the overall population, and included those items as additional prohibited and excessive amounts on top of the statistical estimate based on the population. This method clearly results in an overstated amount." [Emphasis not in original]

Counsel further states,

"The audit division's logic would allow for an estimate by sample, followed by a 100% review of a certain segment of the population known to contain errors (such as all refunds). This would, of course, lead to an overestimate of prohibited contributions just as the auditors have done."

Contrary to the contention apparently being made by Counsel to the Committee, it should be noted that the Audit staff performed two separate and distinct reviews. Certain contributions were tested on a sample basis while other contributions were tested on a 100% basis. Contributions reviewed on a 100% basis were not included in the population from which the sample was selected. Rather, as explained below, the 100% review items were a separate group of contributions.

On June 30, 1992, the Committee's Assistant Treasurer was informed that contributor information for 20 deposits into the Committee's bank account was not entered into the Committee's receipts database. The Committee requested the

^{3/} This technique was recommended by the firm of Ernst & Whinney (now Ernst & Young) in a 1979 report to the Commission entitled Report on Study of Selected Sampling Procedure.

information from the bank. It was received on August 26, 1992, subsequent to the Audit staff's sample review of contributions contained on the receipts database.

No overstatement occurs when the amount resulting from the separate and distinct 100% review is added to the projected amount based on the sample. Counsel's arguments on methodology used are flawed at best.

Counsel also states that the final audit report should be revised to require the Committee to refund to the contributors the \$750 [\$500 in corporation contributions identified in the sample and \$250 identified in the 100% review] in actual corporate contributions inadvertently accepted.

The Committee has not complied with the recommendation contained in the interim audit report. Arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive^{4/}; therefore a payment (\$7,373) to the United States Treasury is warranted. Further, the Audit staff has recognized this amount as a qualified campaign expense, and as such, included this amount on the NOCO statement (See Finding III. A.)

Recommendation #1

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$7,373, representing the value of unresolved corporate contributions.

2. Use of Corporate and Labor Organization Aircraft

Section 114.9(e)(1)(i) of Title 11 of the Code of Federal Regulations states that a candidate, candidate's agent, or person traveling on behalf of a candidate who uses an airplane which is owned or leased by a corporation or labor organization other than a corporation or labor organization licensed to offer commercial services for travel in connection with a Federal election must, in advance, reimburse the corporation or labor organization in the case of travel to a city served by regularly scheduled commercial service, the first class air fare.

During the review of the Committee's transactions relative to payments for air transportation services, the Audit staff identified Committee disbursements to one corporation and one labor organization. The name of the corporation was HealthSouth Rehabilitation Corporation and the labor organization

^{4/} Please refer to attached legal analysis (pages 2-5), dated 1/19/94, for a discussion of selected court cases which support both the Commission's authority to require payment and the methodology employed.

identified was the Machinists and Aerospace Workers International Association (Machinists Association). These organizations do not appear to be licensed to offer commercial services for travel as part of their normal business operations. The corporate status of the firm noted above was confirmed with the appropriate Secretary of State. The Audit staff compared the Committee's payments for flights which occurred between December 1991 and March 1992 to the lowest non-discounted first class fares charged by commercial airlines which regularly served the same cities.

Our analysis of the corporate aircraft usage revealed that the corporation billed the Committee \$5,473 and received a like payment prior to the flights. However, an apparent underbilling and underpayment of \$1,193 exists; this represents the difference between the amount billed/paid (\$5,473) and the value (\$6,666) calculated by the Audit staff using the lowest non-discounted first class fare available on the date of the flight.

Based on the analysis of the Machinists Association's aircraft usage by the Committee, it was noted that the Machinists Association billed the Committee \$35,705 and was paid \$35,961 prior to or on the date of the flight. However, an apparent underbilling and underpayment of \$5,843 exists; this represents the difference between the amount paid (\$35,961) and the value (\$41,804) calculated by the Audit staff using the lowest non-discounted first class fare available on the date of the flight.

Thus a total of \$41,434 ($\$35,961 + \$5,473$) was paid for the above flight activity which resulted in a total underpayment of \$7,036 ($\$1,193 + \$5,843$). The Committee was provided copies of audit workpapers detailing the aforementioned matter.

The Committee responded that it used appropriate first class airfares in calculating the amounts paid. The Committee noted that their rates were obtained in each case by the campaign scheduler who contacted Carroll Travel for the first class fares for each leg of the trip as of the date of travel.

To support its first class fares, the Committee provided the Audit staff with copies of a statement from its campaign scheduler, the scheduler's notes of conversations with Carroll Travel, and a statement from the owner of Carroll Travel.

The Audit staff's analysis of the information provided by the Committee indicated that the first class fares obtained by the Committee were, in many cases, discounted. In some instances, first class fares used by the Committee were identical to those identified by the Audit staff. Notwithstanding the Committee's efforts, the Audit staff maintains its position that the Committee's use of corporate and labor organization aircraft resulted in an underpayment of \$7,036.

The interim audit report recommended that the Committee provide information which demonstrates that the aforementioned activity is in accordance with 11 C.F.R. §114.9(e) or absent such a showing, make a payment of \$7,036 to the United States Treasury.

Counsel for the Committee raised the same objection to this recommendation as was raised in Section 1 above. For the reasons stated in Section 1 above, Counsel's arguments questioning the Commission's authority to require payments to the United States Treasury are not persuasive.

In addition, Counsel states that nothing in the regulations requires that the Committee reimburse in the amount of the highest first class airfare available on any particular date.

The Committee submitted an affidavit of Mr. Stuart Carroll, owner of Carroll Travel, the agency which regularly provided travel-related services to the Committee. The affidavit states, in part:

"The FEC's Interim Audit findings indicate that the Harkin Campaign Committee did not use fares that represented a non-discounted first class airfare. The term in dispute here is 'non-discounted'. I firmly state that I provided the Harkin Campaign Committee in every instance, to the best of my ability, a valid, industry standard, non-discounted first class air fare. The campaign committee has obtained a listing of the various first class airfares available for use on the dates in question. As you can see, there are a number of categories: 'F', 'F9', 'FN', and 'F28'. The 'F' and 'F9' categories represent non-discounted, unrestricted fares. In every instance, my agency quoted the campaign an 'F9' or other applicable non-discounted first class category fare."

According to airfare information provided by General Services Administration Transportation Audit Division, first class airfares are listed for unrestricted (code F), for night travel (code FN) and for other service (codes F9 and F28). The rates shown for code F first class accommodations are higher than the other first class rates. Generally this is because conditions accompany the lower fares, such as: the tickets must be purchased within a certain time, or travel is restricted to certain days or times.

The regulation at 11 C.F.R. §114.9(e) requires that first class airfare be used as a basis to determine the amount reimbursed, apparently in an attempt to equate a non-scheduled

corporate aircraft trip to that of a scheduled commercial flight with the same origin and destination points and of an equivalent level of service.^{5/} In the Audit staff's opinion, travel encumbered with conditions such as those stated above does not equate with the unrestricted use of a corporate or labor organization aircraft, therefore, reimbursement for less than a non-discounted first class rate with no conditions attached is contrary to the intent of the the regulation.

However, because of the specific facts presented in this report and the inherent difficulty presented to committees in determining first class rates in the context of 11 C.F.R. § 114.9(e)'s prepayment requirement, the Committee's approach is reasonable and further action does not seem warranted..

B. Apparent Excessive Contributions

1. Contributions from Individuals

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000.00.

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 a contribution 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.

^{5/} When the regulations were adopted in 1976, prior to the deregulation of the airline industry, there was generally, little price variation between carriers for a given trip.

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 C.F.R. §§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 110.1(l) of Title 11 of the Code of Federal Regulations states, 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.

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of excessive contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited, and 60 days in which to seek reattribution, redesignation or refund of excessive contributions (11 C.F.R. 103.3.(b)(1) (2) and (3)). The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified a material dollar amount of unresolved excessive contributions. The sample projected that the total dollar value of unresolved excessive contributions in the population was \$5,460. To date the Committee has not provided the Audit staff information relative to any refunds of the items noted. In addition, twenty-two unresolved excessive contributions, totaling \$16,600, were identified in a 100% review of selected contributions.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the aforementioned excessive contributions. (See 11 C.F.R. §103.3(b)(4)).

At the Exit Conference the Committee was provided with a schedule of the apparent excessive contributions. The Committee had no comments with regard to the excessive

contributions. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee either provide evidence that the contributions in question are not excessive or make a payment to the United States Treasury in the amount of \$22,060.

Counsel for the Committee raised the same objections to this recommendation as were raised in response to the recommendation in Finding II.A.1. above. Further, Counsel contends that \$2,250 had already been refunded by the Committee prior to the June notification and should not be included in the payment amount to the Treasury.

However, the Audit staff notes that only \$1,500 in refund checks written prior to the June notification letter are included in the excessive amount. Those checks had not cleared the Committee's bank as of November 1992 and are, therefore, considered unresolved.

The arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive; therefore a payment (\$22,060) is warranted. The Audit staff has recognized this amount as a qualified campaign expense, and as such, included the amount on the NOCO statement (see Finding III.A.)

Recommendation #2

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$22,060 representing the value of unresolved excessive contributions received from individuals.

2. Excessive Contributions From Political Committees

Section 441a(a)(2)(A) of Title 2 of the United States Code states that no multicandidate political committee shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000.

The Audit staff performed a review of contributions received from political committees and identified three contributors whose contributions exceeded the limit by \$3,600. As of the end of audit fieldwork, no refunds were made.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the excessive contributions. (See 11 C.F.R. §103.3(b)(4)).

At the Exit Conference the Committee was provided with a detailed schedule, as well as relevant check copies relative to these unresolved excessive contributions. The Committee did not provide any explanation for the above noted errors. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee either provide evidence that the contributions in question are not excessive or make a payment to the United States Treasury in the amount of \$3,600.

Counsel for the Committee raised the same objections to this recommendation as were raised in response to the recommendation in Finding II.A.1. above.

The arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive; therefore a payment (\$3,600) is warranted. The Audit staff has recognized this amount as a qualified campaign expense, and as such, included the amount on the NOCO statement. (See Finding III.A.)

Recommendation #3

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$3,600 representing the amount of unresolved excessive contributions received from political committees.

C. 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 the reporting period, and the total amount of receipts and disbursements received or made during the reporting period and calendar year.

The Audit staff performed a reconciliation of the Committee's bank account activity to the activity on its disclosure reports for the period June 3, 1991 through August 31, 1992. The reconciliation indicated that the reports initially filed contained material misstatements. Prior to the conclusion of audit fieldwork the Committee filed amended reports for the period June 3, 1991 through January 31, 1992. However, the amendments did not correct the misstatements.

For the period June 3, 1991 through December 31, 1991, reported disbursements were overstated by a net amount of \$19,511.28. The components of the misstatement are:

Reported Disbursements as Amended	\$2,011,203
Disbursements Reported Twice	(65,931)
Disbursements not Reported	12,560
Unexplained Difference	<u>33,859</u>
Adjusted 1991 Disbursements	<u>\$1,991,692</u>

The reported ending balance at December 31, 1991 was understated by \$23,992, resulting primarily from the misstatement detailed above.

For the period January 1, 1992 through August 31, 1992, reported disbursements were understated by \$194,085. Ending cash for the period was overstated by \$78,404, resulting primarily from the misstatement in disbursements.

According to the Committee's Assistant Treasurer, the disbursements were not reported due to the following reasons: 1) For the period 2/1/92 - 2/29/92, amounts coded to certain expense codes in the Committee's computer system were omitted from the disclosure report; 2) For the period 3/1/92 - 3/31/92, the Committee did not maintain the information required to be reported for disbursements from its field account, however the information was subsequently obtained from the Committee's bank.

In addition, the Committee did not report \$12,745 in disbursements from its payroll account or \$49,387 in disbursements made during the period 4/1/92 - 8/31/92.

At the Exit Conference the Committee was given schedules which outlined the misstatements.

The interim audit report recommended that the Committee file amended reports to correct the misstatements noted.

In response to the interim audit report, the Committee stated that amended reports had been filed which materially corrected mistakes that resulted from inadvertent errors in reporting disbursements. The Committee noted that the mistakes were due primarily to staff shortages and the inexperience of those staff in the accounting department.

The Committee filed amended reports on August 31, 1993, which materially corrected the misstatements.

D. Itemization of Receipts and Disbursements

1. Receipts

Section 434(b)(3)(A) of Title 2 of the United States Code states, in part, that each report shall disclose the identification of each person who makes a contribution to the

reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution.

The Audit staff conducted a sample review of contributions, the results of which indicated that a material amount of contributions were not itemized as required on disclosure reports initially filed. The identified exceptions, when used to estimate the total amount of contributions not itemized resulted in a projected amount of \$136,877. Further, we identified twenty-two additional contributions totaling \$5,950 which were not itemized as required.

Subsequent to the commencement of audit fieldwork, the Committee filed amended reports which materially corrected the errors noted above.

2. Disbursements

Sections 434(b)(4)(A) and (5)(A) of Title 2 of the United States Code state that each report shall disclose expenditures made to meet candidate or committee operating expenses; and the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.3(b)(4)(i) of Title 11 of the Code of Federal Regulations, states in part, that each report shall disclose the total amount of all disbursements for the reporting period and for the calendar year. Each authorized committee shall report the full name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet the committee's operating expenses, together with the date, amount and purpose of each expenditure.

a. Regular Accounts

The Audit staff performed a sample review of Committee disbursements made from its regular (excludes field and payroll accounts) bank accounts for the period of inception (6/3/91) through June 30, 1992. With respect to itemization, the Audit staff identified a material number of disbursement transactions that were not itemized as required on Committee disclosure reports filed prior to the beginning of audit fieldwork. The Committee's Assistant Treasurer attributed the itemization problems to the Committee's late start and a failure to have sufficient systems in place.

On August 26, 1992, the Committee filed amended disclosure reports for the period from inception through January 31, 1992 which materially corrected the problems noted for that period. However, at the close of fieldwork the Committee had not filed amended reports for the period subsequent to January 31, 1992. At the exit conference held on November 17, 1992, the Committee had no further comment on the itemization errors noted above. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

In the interim audit report, the Audit staff recommended that the Committee file amended Schedules B-P to correct the itemization errors made subsequent to January 31, 1992. On August 31, 1993, the Committee filed amended disclosure reports which materially corrected the itemization errors.

b. Field Account (Drafts)

The Audit staff performed a sample review of disbursements made from the Committee's field account. Although this account was opened in 1991, most of the activity occurred between January 1992 and March 1992. Our review indicated that very few disbursements made from the field account were itemized on the Committee's disclosure reports filed prior to the commencement of audit fieldwork. Further, for the report covering March 1992, \$27,289 in disbursement activity was not included in reported totals (See Finding II.C.).

Before this matter was brought to the Committee's attention, the Committee stated that all disbursement items were itemized on Schedules B-P regardless of amount. When asked, during the fieldwork, to explain why the March 1992 draft activity was omitted from the disclosure reports, the Assistant Treasurer noted that the Committee had only recently (9/92) obtained information from the bank relative to the drafts which cleared the March bank statement. The Assistant Treasurer further stated that the February 1992 disclosure reports needed to be amended because Schedules B-P contained only partial disbursement amounts for some vendors.

On August 26, 1992, the Committee filed amended disclosure reports for the period from inception through January 31, 1992 which materially corrected the problems noted for that period. However, at the close of fieldwork the Committee had not filed amended reports for the period subsequent to January 31, 1992. At the exit conference, the Committee had no additional comments with regard to field account activity. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee file amended Schedules B-P to reflect the required itemization of draft account disbursements made subsequent to

January 31, 1992. The amendments filed on August 31, 1993 by the Committee materially corrected the itemization errors.

c. Payroll Account

The Audit staff reviewed, on a sample basis, disbursements made from the Committee's payroll account for the period inception through August 31, 1992. This review indicated that the Committee failed to itemize a material number of payroll transactions which required itemization. It was also noted that the Committee did not itemize any payroll transactions on its March 1992 disclosure report. When asked during fieldwork, to explain this omission, Committee personnel stated that they had merely forgotten to report the March Payroll and would be filing amended disclosure reports.

Amended disclosure reports were filed by the Committee on June 18, 1992 and August 26, 1992, however the itemization errors discussed above were not materially corrected.

In the interim audit report, the Audit staff recommended that the Committee file Amended Schedules B-P within 30 calendar days to correct the above itemization errors.

In response to the recommendation in the interim audit report, the Committee filed amended disclosure reports on August 31, 1993 which materially corrected the itemization errors relative to its payroll activity.

d. Selected Review of Disbursements

The Audit staff conducted a review of selected Committee disbursements for the period inception through June 30, 1992, and noted 38 disbursements, totaling \$265,418, that were not itemized as required on Committee disclosure reports filed prior to the commencement of audit fieldwork. Our review of amendments filed on August 26, 1992 indicated that the Committee had materially corrected these itemization problems.

E. Omission of Disclosure Information

1. Receipts

Section 434 (b)(3)(A) of Title 2 of the United States Code states, in part, that each political committee shall disclose the identity of all persons who make a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year. Section 431(13) of this Title defines "identification" to mean, "in the case of any

individual, the name, mailing address, and the occupation of such individual, as well as the name of his or her employer, and in the case of any other person, the full name and address of such person." In addition, 11 CFR §104.3(a)(4) requires that in addition to the above, the aggregate year-to-date totals for such contributions be reported.

Section 102.9(d) of Title 11 of the Code of Federal Regulations states, in part, that in performing recordkeeping duties, the treasurer or his or her authorized agent shall use his or her best efforts to obtain, maintain, and submit the required information and shall keep a record of such efforts.

Section 104.7 of Title 11 of the Code of Federal Regulations states that if best efforts have been used to obtain, maintain, and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act. With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of \$200 in a calendar year (pursuant to 11 CFR 104.3(a)(4), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless he or she has made at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such information from the contributor. For purposes of 11 CFR 104.7(b), such effort shall consist of a clear request for the information (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

The Audit staff performed a review of contributions from individuals and identified a material number of errors relative to the itemization (or lack thereof) of contributors' occupation and name of employer. The errors, when used to estimate the dollar value of all report errors, result in a projection of \$605,314, which represents approximately 50% of the dollar value of all itemized contributions. In most cases, the Committee had no documentation in the receipts file to show that the information had been requested or that the contributor had submitted the information. In other cases, the information had been provided by the contributor but the Committee did not report the information.

Our review of response devices found in Committee receipt records and a review of the Committee database did not establish that the Committee exercised best efforts to obtain, maintain and disclose the required information. The Committee's receipts file made available did not contain any other information (such as copies of letters to the contributors or phone logs) which could be used to demonstrate "Best Efforts."

At the exit conference the Committee was informed of the aforementioned errors. A Committee representative stated that the Committee could establish an association between the receipts on the database and a fundraising code which could then be related to a solicitation device. The Committee noted that the relationship of the receipts to the solicitation devices sent out to the contributors for each fundraising drive would establish that "Best Efforts" had been made by the Committee.

Within the 10 day period following the exit conference, the Committee submitted information in an effort to demonstrate that it had exercised "Best Efforts." The information consisted of the program language used to extract from the database the contributor records which did not contain full occupation and name of employer information, and a listing of contributors to whom the Committee was in the process of sending letters requesting the required information. In addition, the Committee also submitted response devices which, according to the Committee, were examples of the response devices "always" included with solicitations for contributions. The devices contained requests for the required information.

Although the Committee stated that an association between the receipts database and a fundraising code could be established, the information submitted does not address this. Regarding the program language submitted, the Committee did not provide evidence of its use during the campaign period. In the Audit staff's opinion, the information provided does not demonstrate that the Committee exercised "Best Efforts."

The interim audit report recommended that the Committee demonstrate that "Best Efforts" were exercised in attempting to obtain the occupation and name of employer; or amend its Schedules A-P to include the occupation and name of employer in the instances where the information was omitted.

In response to the interim audit report, the Committee provided an affidavit from its Finance Director. The affidavit stated, in part, that:

"all solicitations for fundraising events which were sent out by the Committee always included one of two standard reply cards, as attached. If the card was not fully filled out, someone on the fundraising staff placed at least one call to the donor to try to obtain all the necessary contributor information."

Counsel for the Committee stated that,

"Both cards contain a clear request and convey that information is required, thus satisfying the requirements of II CFR §104.7(b)."

The Audit staff is unclear of the Committee's meaning, when it states, "all solicitations for fundraising events which were sent out by the Committee." The Audit staff questions whether "standard reply cards" were sent out with all solicitations for contributions, such as with direct mail solicitations or only in connection with specific events (e.g., "November 21st Reception" or "cocktail reception") such as those described on the copies of the "standard reply cards" submitted with the Committee's response.

The Committee also provided the Audit staff copies of response letters and a listing of contributors who received follow-up letters requesting the required information. The Committee's response stated that the request for contributor information was sent to 2,607 individuals and responses were received from 988 individuals; and the contributor information received was included on amended reports filed by the Committee. The Committee also noted that the auditors were advised at the Exit Conference that the contributors who had failed to produce the contributor information had been sent an additional letter requesting the information.

The Audit staff reviewed the Committee's amended reports and the material provided by the Committee. With respect to the "standard reply cards", the Audit staff acknowledges that language in compliance with the regulations is included. However, the "standard reply cards" submitted relate to specific fundraising events and do not demonstrate that the Committee exercised "best efforts" during the entire campaign period. The Committee did not submit a telephone log in support of its efforts to obtain information by telephone.

The Audit staff notes that the letters sent to contributors requesting additional information are dated November 17, 1992, - the date of the Exit Conference. In addition, our review of the listing provided, representing contributors who received follow-up letters identified 118 instances where no address is recorded for the contributor.

Notwithstanding the above, the Committee, based on its actions subsequent to November 17, 1992, has demonstrated "best efforts" to obtain, maintain and disclose the requested information.

2. Disbursements

a. Regular Accounts

Section 434(b)(4) and (5)(A) of Title 2 of the United States Code states, in part, that each report shall disclose for the reporting period and calendar year, the total amount of all disbursements, the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.3(b)(4)(i)(A) of Title 11 of the Code of Federal Regulations states, in relevant part, that each report filed shall disclose the total amount of all disbursements for the reporting period and for the calendar year. Each authorized committee shall report the full name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet the committee's operating expenses, together with the date, amount and purpose of each expenditure. As used in 11 CFR 104.3(b)(4), purpose means a brief statement or description of why the disbursement was made.

The Audit staff's review of Committee disbursements made from its regular (excludes payroll and field accounts) accounts and itemized on the reports for the period from inception through June 30, 1992 indicated that a material number of the itemized entries were incorrect as to the amount or the payee's address was missing. For example, the March 1992 disclosure report, although prepared manually, contained no addresses (street, number, city and state) for those transactions. On June 18, 1992 and August 26, 1992, the Committee filed amended disclosure reports which did not materially correct the disclosure problems noted above.

The recommendation in the interim audit report required the Committee to file amended Schedules B-P to correct the public record. In its response, Counsel to the Committee stated that, "The Committee exercised every effort to obtain and report full information on disbursements, notwithstanding the fact that the Committee had severely limited resources and inexperienced staff." On August 31, 1993, the Committee filed amended Schedules B-P which materially corrected the public record.

b. Payroll Account

Our review of disbursements made from the payroll account for the period from inception through August 31, 1992 and itemized on Committee reports revealed that for a

material number of itemized entries the payee's address was omitted. It was noted that a majority of those omissions involved entries dated July 1992.

On June 18, 1992 and August 26, 1992, the Committee filed amended disclosure reports, however no corrections were made with respect to the items mentioned above. The Committee was notified of the above noted errors.

The interim audit report recommended that the Committee file amended Schedules B-P to correct the errors. The Committee's response stated that amendments were filed which materially corrected the omitted itemization information. On August 31, 1993, the Committee filed amended disclosure reports, however the errors noted in the interim audit report were not corrected.

III. Findings and Recommendations - Repayment Issues

A. Determination of Net Outstanding Campaign Obligations

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

In addition, Section 9034.1(b) of Title 11 of the Code of Federal Regulations states, in part, that if on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations.

Senator Harkin's date of ineligibility was March 9, 1992. The Audit staff reviewed the Committee's financial activity through August 31, 1992, analyzed winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations ("NOCO") as of August 3, 1992, which appears below:

Americans for Harkin, Inc.
 Audited Statement of Net Outstanding Campaign Obligations (NOCO)
 at August 3, 1992
 (Determined as of 11/5/92)

Assets

Current Assets:

Cash on Hand	\$ 86,685 a/	
Accounts Receivable	15,625	
Matching Funds	28,498	
(Certified 7/31/92)		

Total Current Assets	\$130,808	
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Capital Assets	<u>7,000</u>	
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Total Assets		\$137,808
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Liabilities

Accounts Payable for Qualified Campaign Expenses through 7/31/92	\$366,520 b/	
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Amount Payable to U.S. Treasury:	\$ 35,316 c/	
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Estimated Winding Down Costs paid through 3/22/93:	\$103,186 d/	
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Estimated Winding Down Costs 3/22/93 through 1996	<u>85,000 e/</u>	
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Total Winding Down	\$188,186	
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Total Liabilities		<u>\$590,022</u>
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Net Outstanding Campaign Obligations (Deficit)		<u>(\$452,214)</u>
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FOOTNOTES TO NOCO

- a/ This amount does not reflect a reduction for certain outstanding checks determined to be stale-dated.
- b/ The Audit staff initially verified accounts payable of \$332,793 as of August 3, 1992. However, subsequent to Audit fieldwork, the Committee provided a listing of accounts payable totaling \$368,803 which reflected an increase in that figure by \$36,010. At that time, no documentation was provided to support this increase. In response to the interim audit report, the Committee provided documentation to support \$33,728 of the \$36,010.
- c/ Consists of amounts discussed in Findings:
- | | |
|---|-----------------|
| II.A.1. - Prohibited Contributions | \$ 7,373 |
| II.B.1. - Excessive Contributions
Individuals | 22,060 |
| II.B.2. - Excessive Contributions
Political Committees | 3,600 |
| III.C. - Stale-dated Checks | <u>2,283</u> |
| | <u>\$35,316</u> |
- d/ This figure represents actual winding down costs paid for the period August 3, 1992 through March 22, 1993. Not included is approximately \$1,000 in tax penalties and/or insufficiently documented payments to taxing authorities.
- e/ This represents the Committee's calculation of its winding down estimates from March 23, 1993 through 1996. The Audit staff will review reports and records as necessary to compare actual expenses to these estimates.

In response to the interim audit report, Counsel for the Committee stated the following with respect to the NOCO:

"the Committee notes that it disputes the auditors' methodology for determining whether a candidate has received funds in excess of his or her entitlement. In order to make this determination, the auditors create a fictional NOCO statement modified with hindsight but purportedly creating a picture of a committee as of an arbitrary date-- in this case August 3, 1992. In fact, the auditors' NOCO does not provide an accurate financial picture of the committee either as of the date of ineligibility or at any later date. The Committee believes that its NOCO statements filed periodically as required by the regulation present the most accurate snap shot of the Committee's financial status as of each particular date.

The Committee thus objects to the use of the auditors' revised NOCO as of August 3, 1992 as the basis for determining when it was no longer eligible to receive additional matching funds."

The Committee's position is neither persuasive nor on point. While it is true that matching fund payments after the candidate's date of ineligibility are based on the representations made by the Committee in its NOCO statements, these statements are not audited at the time of payment. One of the purposes of the post-primary audit is to determine if the candidate received matching funds to which he was not entitled (see 26 U.S.C. §9038(a) and (b)). Such determination is based on an examination, after the fact, of the various components of the NOCO statement(s) on which such payments are based, as well as the impact on remaining entitlement of private contributions received by the Committee after the candidate's date of ineligibility.

B. Matching Funds Received in Excess of Entitlement

Section 9038(b)(1) of Title 26 of the United States Code states if the Commission determines that any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which such candidate was entitled under section 9034, it shall notify the candidate, and the candidate shall pay to the Secretary an amount equal to the amount of excess payments.

Section 9034.1(b) of Title 11 of the Code of Federal Regulations states if on the date of ineligibility a candidate has

net outstanding campaign obligations as defined under 11 CFR 9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31 of the Presidential election year provided that on the date of payment there are remaining net outstanding campaign obligations, i.e., the sum of the contributions received on or after the date of ineligibility plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations. This entitlement will be equal to the lesser of: (1) the amount of contributions submitted for matching; or (2) the remaining net outstanding campaign obligations.

As of August 3, 1992, the Candidate's remaining matching fund entitlement was \$452,214. Using the Committee's contribution records, bank records and disclosure reports, it was determined that as of February 1, 1993 the Committee received combined private and public funding of \$388,659. On February 2, 1993, the Committee received a matching fund payment in the amount of \$73,603. This payment exceeded the amount to which the Candidate was entitled by \$10,047. On March 2, 1993, the Committee received its final matching fund payment of \$14,547, bringing the total amount of matching funds received which exceeds the Candidate's entitlement to \$24,595.

Recommendation #4

The Audit Division recommends that the Commission make an initial determination that the Candidate was not entitled to \$24,595^{6/} in matching funds and therefore, the Committee repay \$24,595 to the United States Treasury pursuant to 26 U.S.C. §9038(b)(1).

C. Stale-dated Committee Checks

Section 9038.6 of Title 11 of the Code of Federal Regulations states, in part, that if the Committee has checks outstanding to creditors that have not been cashed, the Committee shall notify the Commission of its efforts to locate the payees, if such efforts have been necessary, and its efforts to encourage the payees to cash the outstanding checks. The Committee shall

^{6/} Since an estimate (\$85,000) for winding down costs through 1996 was a component of the NOCO statement presented on page 23, the Audit staff will review Committee records and reports after receipt of its response to this report. Any revision to the amount considered repayable will be contained in the Commission's final determination.

also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

During the review of Committee disbursement activity, the Audit staff identified nineteen checks made payable to vendors which had yet to be cashed as of August 31, 1992. Those checks totaled \$11,208 and were dated from January 9, 1992 through March 12, 1992.

At the Exit Conference on November 17, 1992, the Audit staff provided the Committee with a schedule of the stale-dated checks. When asked whether those vendors had been contacted to determine the status of the outstanding checks, Committee officials replied that they had not seen the outstanding check list before. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

On December 3, 1992, the Committee provided a memorandum to the Audit staff in which ten stale-dated checks (\$9,361) were addressed. The Committee stated that the checks were: (a) lost (one check for \$127), (b) not paid by its bank (four checks for \$360), (c) apparently voided and replaced or related to instances where no obligation now exists due to cancellation of the event or planned purchase (five checks for \$8,874). However, no documentation such as the actual voided check, replacement check, or correspondence from the named payee was presented. Notwithstanding the above, the Audit staff was able to reduce the amount of stale-dated checks by \$348.

In the interim audit report, it was recommended that the Committee present evidence that:

- The checks were not outstanding (i.e., copies of the front and back of the negotiated checks) or
- the outstanding checks were voided (copies of the voided checks with evidence that no Committee obligation exists, or copies of negotiated replacement checks); and
- the Committee attempted to locate the payees to encourage them to cash the outstanding checks.

In response to the interim audit report, the Committee provided evidence to demonstrate that checks totaling \$8,578 either have been replaced and cashed or involve instances where no Committee obligation existed. Accordingly, the Audit staff has reduced the amount of stale-dated checks to \$2,283.

Recommendation #5

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$2,283 representing the amount of stale-dated Committee checks.

IV. Recap of Amounts Due to the United States Treasury

Section 9038.1(c)(1)(v) of Title 11 of the Code of Federal Regulations states that preliminary calculations regarding future repayments to the U.S. Treasury may be contained within the interim audit report. Pursuant to §9038.2(a)(2) of this Title the Commission will notify the candidate of any repayment determinations not later than three years after the end of the matching payment period. The issuance of the interim audit report to the candidate (date of service June 18, 1992) constituted notice for purposes of the three year period.

Reflected below are amounts due the United States Treasury as noted in this report.

<u>Finding</u>	<u>Subject</u>	<u>Amount</u>
II.A.1.	Apparent Prohibited Contributions- Individuals	\$ 7,373
II.B.1.	Apparent Excessive Contributions- Individuals	22,060
II.B.2.	Apparent Excessive Contributions- Political Committees	3,600
III.B	Matching Funds Received in Excess of Entitlement	24,595
III.C.	Stale-dated Committee Checks	<u>2,283</u>
	Total	<u>\$59,911</u>

Adjusted Receipts
(Through December 31, 1993)

	Federal Matching Funds	Individual Contributions Minus Refunds	PA's and Other Comit. Contrib. Minus Refunds	Contributions from the Candidate	Candidate Loans Minus Repayments	Other Loans Minus Repayments	Other Receipts	Adjusted Total Receipts
Democrats								
Larry Agren	\$269,691	\$311,631	\$0	\$500	\$5,000	\$1,029	\$2,993	\$610,844
Jerry Brown	\$4,239,345	\$5,176,336	\$0	\$0	\$0	\$0	\$4,693	\$9,420,374
Pat Clinton	\$12,516,130	\$24,983,668	\$2,429	\$0	\$0	\$1	\$14,385	\$37,518,633
Tom Harkin	\$2,103,352	\$3,080,206	\$415,570	\$0	\$0	\$0	\$14,293	\$5,613,421
Rob Kerrey	\$2,198,284	\$3,913,332	\$348,757	\$0	\$0	(\$1,225)	\$5,931	\$6,466,079
Lyndon LaRouche	\$0	\$1,603,015	\$0	\$0	\$0	\$0	\$21	\$1,603,036
Paul Tsongas	\$1,039,388	\$5,056,620	\$3,566	\$0	\$45,000	(\$9,575)	\$0	\$6,134,999
Doug Wilder	\$289,026	\$508,519	\$750	\$0	\$0	\$0	\$1,039	\$799,334
Total Democrats	\$24,657,216	\$44,653,347	\$772,072	\$500	\$50,000	(\$9,770)	\$43,355	\$70,166,720
Republicans								
Patrick Buchanan	\$4,999,981	\$7,157,608	\$24,750	\$0	\$0	\$0	\$21,115	\$12,203,656
George Bush	\$10,658,513	\$27,088,825	\$44,250	\$0	\$0	\$0	\$222,306	\$38,013,894
David Duke*	\$0	\$220,715	\$0	\$0	\$1,000	\$0	\$0	\$271,815
Total Republicans	\$15,658,496	\$34,467,348	\$69,000	\$0	\$1,000	\$0	\$243,421	\$50,489,365
Other Party								
Andre Marrou*	\$0	\$562,770	\$181	\$116	\$15,000	\$0	\$0	\$578,067
Lenna Fulant	\$1,935,524	\$2,201,577	\$0	\$325	(\$1,258)	\$1,200	\$0	\$4,137,368
Total Other Party	\$1,935,524	\$2,764,347	\$181	\$441	\$13,742	\$1,200	\$0	\$4,715,435
Grand Total	\$42,251,236	\$81,885,042	\$841,253	\$941	\$64,742	(\$8,570)	\$286,776	\$125,371,520

1 16 10 7 0 5 0

Adjusted Disbursements
(Through December 31, 1993)

	Operating Expenditures Minus (Offsets)	Exempt Fundraising Minus (Offsets)	Exempt Legal/Accounting Minus (Offsets)	Other Disburse	Adjusted Total Disbursements	Expenditures Subject to Limit	Latest Cash On Hand	Debts Owed By the Campaign
Democrats								
Larry Agran	\$608,718	\$0	\$0	\$95	\$608,813	\$613,830	\$2,432	\$5,170
Jerry Brown	\$8,708,451	\$2,278,938	\$272,823	\$108,584	\$8,968,596	\$8,688,482	\$188,119	\$0
Bill Clinton	\$25,468,178	\$5,524,000	\$2,858,177	\$0	\$33,850,353	\$25,508,978	\$1,252,783	\$84,713
Tom Harkin	\$4,003,103	\$1,144,008	\$198,833	\$0	\$5,345,742	\$3,128,315	\$215,918	\$153,714
Bob Kerrey	\$5,181,458	\$1,078,978	\$179,911	\$23,404	\$6,461,751	\$6,050,481	\$9,682	\$0
Lynfon LaFleur	\$1,523,524	\$0	\$85,140	\$0	\$1,608,664	\$1,493,218	\$3,223	\$27,183
Paul Tsongas	\$6,778,010	\$754,978	\$188,790	\$0	\$7,719,778	\$7,001,588	\$28,181	\$187,472
Doug Wilser	\$799,780	\$6,568	\$39	\$0	\$805,987	\$799,881	\$8,183	\$0
Total Democrats	\$50,666,822	\$10,785,468	\$3,783,313	\$132,083	\$65,367,686	\$51,280,727	\$1,708,479	\$438,252
Republicans								
Patrick Buchanan	\$11,627,811	\$0	\$0	\$0	\$11,627,811	\$11,627,813	\$885,287	\$0
George Bush	\$27,427,051	\$5,528,322	\$4,891,473	\$70,319	\$37,915,165	\$27,427,055	\$49,118	\$19,614
David Duke	\$353,838	\$0	\$0	\$1,000	\$354,838	\$0	\$0	\$29,250
Total Republicans	\$39,408,700	\$5,528,322	\$4,891,473	\$71,319	\$49,897,814	\$39,054,868	\$714,403	\$48,864
Other Party								
Andre Marrou	\$415,578	\$160,219	\$0	\$0	\$575,795	\$0	\$0	\$0
Lenora Fulani	\$4,203,622	\$0	\$0	\$3,235	\$4,206,857	\$4,204,555	\$2,970	\$0
Total Other Party	\$4,619,198	\$160,219	\$0	\$3,235	\$4,782,652	\$4,204,555	\$2,970	\$0
Grand Total	\$94,694,720	\$16,472,009	\$8,674,786	\$208,637	\$120,048,152	\$84,540,150	\$2,423,852	\$487,116



FEDERAL ELECTION COMMISSION

January 19, 1994

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Peter G. Blumberg
Attorney

Jane Whang
Law Clerk

SUBJECT: Proposed Final Audit Report on Americans for
Harkin, Inc. (LRA #402/AR #93-6)

The Office of General Counsel has reviewed the Final Audit Report on Americans for Harkin, Inc. ("the Committee") submitted to this Office on November 5, 1993.^{1/} The following memorandum provides our comments on the proposed report. If you have any questions concerning our comments, please contact Jane Whang, or Peter Blumberg, the staff members assigned to this audit.

^{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. Throughout our comments, "FECA" refers to the Federal Election Campaign Act of 1971, as amended, 2 U.S.C. §§ 431-455, and "Matching Payment Act" refers to the Presidential Primary Matching Payment Account Act, 26 U.S.C. §§ 9031-9042.

We concur with the findings in the proposed Final Audit Report which are not discussed separately below. The following are comments on Findings II.A.1.-2., and II.B.1.-2. of the proposed Report.

**I. APPARENT PROHIBITED AND EXCESSIVE CONTRIBUTIONS
(II.A.1, II.B.1., II.B.2.)**

The Interim Audit Report recommended that the Committee pay to the United States Treasury a sum of \$33,034 in prohibited and excessive contributions. The Committee objects to these recommendations on two bases. The Committee argues that the auditors' methods of using projected estimates through sampling, in addition to a 100% review, results in an overstatement of the amount of excessive or prohibited contributions. The Committee also argues that the Commission's June 1992 letter, which informed all of the presidential committees that sampling would be used and that excessive and prohibited contributions must be paid to the Treasury, is an invalidly promulgated rule.^{2/} The Committee further contends that the Commission does not have the authority under either the FECA or the regulations, to require disgorgement to the United States Treasury.^{3/}

This Office agrees with the use of sampling and concurs with the Audit staff's recommendation that these excessive and prohibited contributions be paid to the Treasury. The use of statistical sampling for projecting certain components of a large universe, such as excessive and prohibited contributions, is a legally acceptable technique. See, e.g., Chaves County Home Health Service v. Sullivan, 931 F.2d 914 (D.C. Cir. 1991), cert. denied, 112 S.Ct. 407 (1993) (sampling audit used to recoup Medicaid overpayments to

^{2/} The Commission approved the use of sampling for presidential audits on May 5, 1992, and informed presidential committees in a letter dated June 2, 1992, that sampling would be increasingly used in audits. The Commission also recommended that those contributions unresolved after 60 days be paid to the Treasury.

^{3/} The Committee also noted a general concern with the issue of notification of repayment determination, arguing that the Interim Audit Report does not constitute "notification," under 26 U.S.C. § 9038(c). The Final Audit Report and the initial repayment determination will likely be issued within three years after the end of the matching payment period making this argument moot. See 11 C.F.R. § 9038.2.

health care providers upheld).^{4/} In the instant case, the auditors performed a 100% review of those accounts that were either facially excessive, or were at discrepancy with the Committee's contribution tape.^{5/} A sample projection was done on the rest of the Committee's accounts. Therefore, the sample estimate and the 100% review were based on two separate populations, and not subject to overstatement. However, because of the Committee's apparent confusion regarding the auditing methods, we recommend that the report include a discussion clarifying the auditors' methods.

Nothing in the FECA or the regulations prevents the Commission from requesting such a payment to the Treasury. In fact, the Commission has requested payments to the Treasury in similar situations. The regulations for stale-dated checks explicitly provide that any refund checks from a committee that have not been presented for payment by the payee shall be paid to the Treasury. 11 C.F.R. § 9038.6. The Commission's requirement of payment of excessive and prohibited contributions to the Treasury is consistent with the treatment of stale-dated checks because both scenarios require a payment to the Treasury to account for all funds that have been retained by the committee that should have been promptly returned to the contributor. Compare 11 C.F.R. § 9038.6 with 11 C.F.R. § 103.3 (the Committee's treasurer is responsible for examining all contributions to identify unlawful contributions that must be refunded to the contributors within 30 or 60 days). The Commission anticipated such payments to the Treasury when it stated in an advisory opinion that refunds should be made to the federal government, or state or local governments, where a committee could not determine the identity of the original contributor. See Advisory Opinion ("AO") 1991-39.6/

The equitable doctrine of disgorgement also supports a payment to the Treasury. See generally United States v.

4/ See also Michigan Dep't of Educ. v. U.S. Dep't of Educ., 875 F.2d 1196 (6th Cir. 1989) (statistical sampling generally upheld when audits of the universe of cases would be "impossible"); State of Georgia v. Califano, 446 F. Supp. 404, 409 (N.D. Ga. 1977) (statistical sampling upheld, and "recognized as a valid audit technique").

5 Because the Committee's bank statements reflected more deposits than its batches of contributions showed, the auditors requested copies of those deposits of checks that were not on the contribution list. These deposits were then reviewed on a 100% basis.

6 The auditors do not know the identity of the original contributor when sampling is used to project the excessive and prohibited contributions.

Bonanno Organized Crime Family of La Cosa Nostra, 683 F. Supp. 1411 (E.D.N.Y. 1988), aff'd, 879 F.2d 20 (2d Cir. 1989) (disgorgement held to be appropriate, non-punitive remedy).²⁷ A payment to the Treasury is an equitable remedy for contributions that have been accepted in excess of the limits of 2 U.S.C. § 441a or from sources prohibited by 2 U.S.C. § 441b. Disgorgement in this instance is consistent with past Commission practice. See Matter Under Review ("MUR") 1704 (Mondale) (based upon preliminary estimates, the Commission directed respondents to pay \$350,000 to the United States Treasury for contributions that would have exceeded the limitations of 2 U.S.C. § 441a); see also Plaintiff's Motion to Effectuate Judgment, FEC v. Populist Party, No. 92-0674 (HHG) (D.D.C. filed May 4, 1993).

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With respect to the issue of notice, agencies are required to comply with the Administrative Procedure Act's ("the APA") notice and comment provisions for "legislative rules" it issues, by giving notice in the Federal Register (or actual notice) at least 30 days in advance of the rule's effective date, and by giving interested parties "an opportunity to participate in the rulemaking through submission of written data, views, or arguments, with or without opportunity for oral presentation." 5 U.S.C. § 553 (b) and (c). However, an exemption from these requirements is created for "interpretative rules, general statements of policy, or rules of agency organization, procedure or practice." 5 U.S.C. § 553(b)(3)(A). An agency makes a general policy statement if the announcement either acts prospectively or leaves the agency and its decision-makers free to exercise discretion. American Bus Ass'n v. U.S., 627 F.2d 525, 529 (D.C. Cir. 1980).

The distinctions between general statements of policy or interpretative rules, and "legislative rules," (which require notice-and-comment) are nebulous, but courts have looked variously at whether the agency pronouncement "substantially alter[s] the rights or interests of regulated parties," American Hospital Ass'n v. Bowen, 834 F.2d 1037, 1041 (D.C. Cir. 1987), and whether it acts prospectively. American Bus Ass'n, 627 F.2d at 529. An interpretative rule merely states what an agency thinks the statute means, and "reminds affected parties of existing duties" while a "legislative rule" creates new law, rights or duties.

²⁷ Disgorgement eliminates the Commission's need to monitor a committee's refunds of illegal contributions. It is also easier for a committee to make one payment to the Treasury, as opposed to refunding multiple contributions.

General Motors Co. v Ruckelshaus, 742 F.2d 1561, 1565 (D.C. Cir. 1984), cert. denied, 471 U.S. 1074 (1985).⁸

The 1992 letter to presidential committees falls within the interpretive rule exemption of 5 U.S.C. § 553 b(3)(A). It does not substantially alter the Committee's rights or interests. Rather, it is interpreting a current regulation. Section 9038.1(a)(2) allows the Commission to conduct examinations and audits "as it deems necessary to carry out the provisions of this subchapter." The letter informed the Committee that sampling would be used as a technique for reviewing excessive and prohibited contributions, which is a necessary part of the audit and examination process.⁹ Further, the letter was defining the audit method that would be employed to conduct an examination of the Committee's contributions. Since the letter notified the committees of the future intent to "make more extensive use of statistical sampling," it was prospective. See Letter from Commission to Presidential Committees, June 2, 1992.

The requirement that the Committee disgorge unlawfully retained contributions to the Treasury is not a new policy which significantly affects committees' rights or interests. A policy statement does not "alter the rights or interests of parties, although it may alter the manner in which parties present themselves or their viewpoints to the agency." American Hosp. Ass'n, 834 F.2d at 1047 [emphasis added](citing Batterton v. Marshall, 648 F.2d 694, 707 (D.C. Cir. 1980)). The committees' rights and interests have not been affected here. Their duty with respect to illegal contributions is to redesignate, reattribute, or refund these contributions within either 30 or 60 days, pursuant to 11 C.F.R. § 103.3. Therefore, the Committee has a general duty to relinquish unlawfully retained contributions. The 1992 letter does not alter this duty; it only notifies committees that all such untimely unresolved contributions must be paid to the United States Treasury.

⁸ Interpretative rules can be found in the Commission's Financial Control and Compliance Manual for Presidential Primary Candidates Receiving Public Financing, and in the Guideline for Presentation in Good Order, (the "Guideline"). The Guideline, for example, is a comprehensive set of rules for committees requesting matching funds. While the procedures for matching fund submissions are found at 11 C.F.R. § 9036, the Guideline supplements the regulations by setting forth a "uniform format for the presentation of requests for matching payments" by which committees must comply. Guideline, at II.

⁹ Sampling is not a new technique within the Commission, which has been using the sampling method since 1980 to administer the matching funds submissions. See 11 C.F.R. § 9036.4(b).

II. USE OF CORPORATE AND LABOR ORGANIZATION AIRCRAFT
(II.A.2.)

The proposed Final Audit Report recommends that the Commission determine that the Committee pay the U.S. Treasury \$7,036, representing underpayments for the use of corporate and labor organization aircraft. By using unrestricted, non-discounted first class fare schedules provided by the General Services Administration ("GSA"), the auditors calculated that the Committee had underpaid a labor organization and a corporation for various flights provided to the Committee. The Committee, however, responded with an affidavit from its travel agent asserting that the Committee based its fare calculation on non-discounted first class fares. The Committee also contended that because the GSA fare schedules are unavailable to them, it is impossible to conform to that type of calculation system.

We disagree with the report's finding that the Committee underpaid the corporation and labor organization, and recommend that the report be revised to note that the Committee's fare calculations are acceptable. Section 114.9 only specifies that first class fares be used in the payment calculation, and the regulation does not address the issue of whether discounted or restricted fares can be used in determining the proper reimbursement. However, because the service provided by labor organizations and corporations pursuant to the regulation is outside of their ordinary course of business and because committees usually receive unrestricted service, we believe that committees should use unrestricted, non-discounted fares in their calculations. See Memorandum to Robert J. Costa, Re: proposed Final Audit Report for Wilder for President (December 10, 1993).

Nevertheless, in this case, we believe the Committee acted reasonably and in conformance with the regulation, even if the GSA fare schedule indicates that higher fares should have been paid. The GSA fare schedule was only designed pursuant to an Audit Division request, and these fares are not generally available to committees or the public. Committees can only conform to the regulation by having a travel agent calculate the appropriate fare for them.^{10/} In this case, the Committee appears to have made every feasible attempt to conform with the regulation. They have submitted an affidavit from their travel agent stating that, to the

^{10/} Committees could call in to GSA or the Audit Division to get the correct fares, or the Commission could issue a fare schedule at the start of the election cycle, but these options appear to be burdensome to committees, as well as GSA, the Audit Division and the Commission. Because these options were not available to committees in the 1992 election cycle, the only manner of compliance was reliance on travel agents' quotes.

best of his ability, he quoted the "valid, industry standard non-discounted first class air fare" to the Committee for these flights.

Further, the Committee's fare calculations are not substantially different from the GSA fares. In some instances the Committee-quoted fare was the precise GSA fare, and most other times the fare differential was between \$4-\$140.^{11/} In many instances the Committee personnel were flying at hours when only restricted or discounted fares were offered to the public, and that explains why the Committee travel agent quoted them what the auditors believe is a discounted or restricted fare.^{12/} The most practical (and effective) way to conform to and enforce section 114.9 is to have committee travel agents calculate the fares based on the non-discounted first class fares available at that time. Because the Committee substantially conformed to the regulation, we recommend that no repayment be sought for the apparent underpayments.

Finally, we disagree with the Final Audit Report's recommendation that any payment for underpaid reimbursements for aircraft travel be made to the Treasury. The use of sampling and the inability to identify contributors justified disgorgement to the Treasury in the instances involving apparent excessive and prohibited contributions in §§ II.A.1. and II.B.1.-2. of the report. Because the apparent prohibited contributions made through aircraft service underpayments were not discovered through sampling and because the contributors are identifiable, refunds should be made to the corporation and labor organization at issue. Further, requiring a refund to the identifiable contributors in this instance would be consistent with the treatment for repayments on loans and staff advances which result in prohibited or excessive contributions. See Memorandum to

^{11/} The auditors calculated that Committee personnel made 10 trips with 29 legs on corporate and labor organizations aircraft. 84 tickets were issued and paid for on these flights, of which, 37 Committee fares matched the GSA fare, and 27 Committee fares were within \$4-\$140 of the GSA fare. 20 fares were off by \$166-\$384 per ticket.

^{12/} Many of the discrepancies between the GSA fare and Committee fare appear on flights taken by Committee personnel over weekends, when usually restricted rates are available to the public. Furthermore, the report appears to criticize the Committee for using "code F9" fares because those fares are only used to calculate non-discounted one-way service. However, all the flights in question are one-way flights, thus, it appears that the Committee used the correct fare code. The auditors should, at a minimum, explain in the report why the "code F-9" one-way fares are less appropriate than the "code F" fares which they suggest.

Robert J. Costa, Re: proposed Interim Audit Report for Wilder for President (April 22, 1993).^{13/} However, if the report is revised to require no repayment for the apparent underpayments, the issue of who is to receive the payment will be moot.^{14/}

13/ Loans and staff advances which result in excessive or prohibited contributions are not disgorged to the Treasury because it is assumed that the lender or staff member did not intend on making a contribution and expected to be repaid by the committee, and thus, it would be unfair to have the committee pay the Treasury, rather than refund the contributions. See Operational Guidelines for the Applications of 11 C.F.R. § 116.5, Staff Advances (March 2, 1993).

14/ We also note that the Audit Division's repayment calculation includes underbilled tickets for the press traveling on these flights. Section 114.9(e) only requires a payment for underbillings for air travel by "a candidate, candidate's agent, or person traveling on behalf of a candidate," and makes no mention of the press. Therefore, because there is no justification to compel the Committee to pay for the underbillings of the press, we would suggest that the payment, if any, be adjusted to \$5,406.60, by subtracting the \$1,629 in press underbillings. Further, the auditors have indicated that the Committee accepted reimbursements from press organizations for travel expenses paid by the Committee pursuant to 11 C.F.R. § 9034.6(b), although it cannot be confirmed whether reimbursements were made for the flights at issue here.



FEDERAL ELECTION COMMISSION

March 7, 1994

MEMORANDUM

TO: Robert J. Costa
Assistant Staff Director
Audit Division

THROUGH: John C. Surina
Staff Director

FROM: Lawrence M. Noble
General Counsel

Kim Bright-Coleman
Associate General Counsel

Lorenzo Holloway
Assistant General Counsel

Peter G. Blumberg
Attorney

SUBJECT: Proposed Final Audit Report on Americans for
Harkin, Inc. (LRA #402/AR #93-6)

The Office of General Counsel has reviewed the additional finding in the Final Audit Report on Americans for Harkin, Inc. ("the Committee") submitted to this Office on February 28, 1994. The following memorandum provides our comments on the proposed report. If you have any questions, please contact Peter Blumberg, the attorney assigned to this audit.

We concur with the additional finding and recommendation that the Committee repay \$24,595 to the U.S. Treasury for matching funds received in excess of entitlement (III.C.). On the candidate's date of ineligibility, he had net outstanding campaign obligations as defined under 11 C.F.R. § 9034.5. Thus, the candidate could continue to receive matching fund payments after the date of ineligibility as long as the combination of future private contributions and matching funds did not exceed his net outstanding campaign obligations. See 11 C.F.R. § 9034.1(b). The February 1993 matching fund payment eliminated the candidate's net outstanding campaign obligations. Therefore,

the portion of the February 1993 payment exceeding the
candidate's outstanding obligation and all of the March 1993
must be repaid. See 11 C.F.R. § 9038.2(b)(1)(i).

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FEDERAL ELECTION COMMISSION

BJ005655

March 22, 1994

Mr. Larry Hawkins, Treasurer
c/o Lynn Utrecht, General Counsel
Americans for Harkin, Inc.
Oldaker, Ryan & Leonard
818 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20006

Dear Mr. Hawkins:

Attached, please find the Final Audit Report on Americans for Harkin, Inc. The Commission approved this report on March 15, 1994. As noted on page 4 of the report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 C.F.R. §9038.2(c)(1) and (d)(1), the Commission has made an initial determination that the Candidate is to repay to the Secretary of the Treasury \$26,878 within 90 days after service of this report (June 21, 1994). Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 C.F.R. §9038.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 30 calendar days after service of the Commission's notice (April 21, 1994), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 C.F.R. §9038.2(c)(3) permits a Candidate who has submitted written materials, to request an opportunity to make an oral presentation in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted by the Candidate within the 30 day period in making a final repayment determination. Such materials may be submitted by counsel if the Candidate so elects. If the Candidate decides to file a response to the initial repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 219-3690 or toll free at (800) 424-9530. If the Candidate does not dispute this initial determination within the 30 day period provided, it will be considered final.

In addition, the Commission determined that a payment to the U.S. Treasury in the amount of \$33,033 representing the value of unresolved excessive and prohibited contributions. The Commission adapted this policy for the 1992 presidential cycle, and so informed Americans for Harkin, Inc. by a letter dated June 2, 1992.

Letter to The Honorable Tom Harkin
Page 2

Any questions you may have related to matters covered during the audit or in the report should be directed to Lorenzo David or Wanda Thomas of the Audit Division at (202) 219-3720 or toll free at (800) 424-9530.

Sincerely,



Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Final Audit Report
Legal Analysis dated 1/19/94 and 3/7/94



FEDERAL ELECTION COMMISSION

BJ005653

March 22, 1994

The Honorable Tom Harkin
c/o Lynn Utrecht, General Counsel
Americans for Harkin, Inc.
Oldaker, Ryan & Leonard
818 Connecticut Ave., N.W., Suite 1100
Washington, D.C. 20006

Dear Senator Harkin:

Attached, please find the Final Audit Report on Americans for Harkin, Inc. The Commission approved this report on March 15, 1994. As noted on page 4 of the report, the Commission may pursue any of the matters discussed in an enforcement action.

In accordance with 11 C.F.R. §9038.2(c)(1) and (d)(1), the Commission has made an initial determination that the Candidate is to repay to the Secretary of the Treasury \$26,878 within 90 days after service of this report (June 21, 1994). Should the Candidate dispute the Commission's determination that a repayment is required, Commission regulations at 11 C.F.R. §9038.2(c)(2) provide the Candidate with an opportunity to submit in writing, within 30 calendar days after service of the Commission's notice (April 21, 1994), legal and factual materials to demonstrate that no repayment, or a lesser repayment, is required. Further, 11 C.F.R. §9038.2(c)(3) permits a Candidate who has submitted written materials, to request an opportunity to make an oral presentation in open session based on the legal and factual materials submitted.

The Commission will consider any written legal and factual materials submitted by the Candidate within the 30 day period in making a final repayment determination. Such materials may be submitted by counsel if the Candidate so elects. If the Candidate decides to file a response to the initial repayment determination, please contact Kim L. Bright-Coleman of the Office of General Counsel at (202) 219-3690 or toll free at (800) 424-9530. If the Candidate does not dispute this initial determination within the 30 day period provided, it will be considered final.

In addition, the Commission determined that a payment to the U.S. Treasury in the amount of \$33,033 representing the value of unresolved excessive and prohibited contributions is required. The Commission adapted this policy for the 1992 presidential cycle, and so informed Americans for Harkin, Inc. by a letter dated June 2, 1992.

Letter to Larry Hawkins, Treasurer
Page 2

Any questions you may have related to matters covered during the audit or in the report should be directed to Lorenzo David or Wanda Thomas of the Audit Division at (202) 219-3720 or toll free at (800) 424-9530.

Sincerely,



Robert J. Costa
Assistant Staff Director
Audit Division

Attachments:

Final Audit Report
Legal Analysis dated 1/19/94 and 3/7/94

Chronology - Americans for Harkin, Inc.

Pre-Audit Inventory Commenced	April 20, 1992
Audit Fieldwork	June 15, 1992
Response Received to Interim Audit Report	September 7, 1993
Final Audit Report Approved	March 15, 1994

05070121

Public Disclosure

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT
(Cooper)



FEDERAL ELECTION COMMISSION

JUN 2 3 50 AM '94

June 2, 1994

MEMORANDUM

TO: THE COMMISSIONERS)
THROUGH: JOHN C. SUBINA
STAFF DIRECTOR)
FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION)
SUBJECT: PAYMENT OF \$35,316 RECEIVED FROM AMERICANS FOR HARKIN

This informational memorandum is to advise you of a \$35,316 payment received from Americans For Harkin (the Committee). The payment is a partial payment received in response to the \$59,911 initial repayment determination contained in the final audit report and represents stale dated checks (\$2,283), receipt of prohibited contributions (\$7,373) and receipt of contributions in excess of contributor's limitations (\$25,660). The Committee has not repaid \$24,595 which represents matching funds received in excess of entitlement. The Audit staff is currently reviewing the Committee's response to the matching fund entitlement finding.

Attached is a copy of the check, the letter which accompanied the payment, and the receipt showing delivery to the Department of Treasury.

Should you have any questions regarding the payment please contact Ray Lisi at 219-3720.

Attachments as stated

05 2 2 1 2 1 2 1

AMERICANS FOR HARKIN 7-91

P. O. BOX 2308
WASHINGTON, DC 20013

CRESTAR BANK, N.A.
WASHINGTON, DC

15-52
540

10951

DATE

AMOUNT

5/24/94

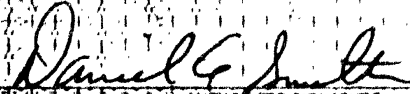
\$35,316.00

Thirty-Five Thousand, Three Hundred and Sixteen Dollars and no/cents-----

PAY
TO THE
ORDER
OF

U.S. Treasury

AMERICANS FOR HARKIN



AUTHORIZED SIGNATURE

payment

⑈010951⑈ ⑆054000522⑆ 206550537⑈

OLDAKER, RYAN & LEONARD

ATTORNEYS AT LAW

818 CONNECTICUT AVENUE, N.W.

SUITE 1100

WASHINGTON, D.C. 20006

(202) 728-1010

FACSIMILE (202) 728-4044

Costa
Received in Audit
5/27/94
FEB 23 3 00 PM '94

May 25, 1994

Kim Bright-Coleman, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 26 12 01 PM '94

Dear Ms. Bright-Coleman:

Enclosed is a check in the amount of \$35,316 payable to the United States Treasury, as requested by the Federal Election Commission in its letter of March 22, 1994. As the Committee set forth in its Response to the Interim Audit Report, the Committee believes there are significant legal issues underlying the Commission's request that this amount be paid to the Treasury. However, the Committee has decided to make the payment, and bring these issues to the Commission's attention as reasons why the Commission should take no further action with respect to these matters.

For the reasons set forth below, the Committee respectfully requests that the Commission accept this payment as final resolution of the excessive and prohibited refund issues and take no further action with respect to them.

I. As the Committee noted in its response to the Interim Audit Report, there are significant problems and uncertainties with the application of sampling and the projection of the amounts of violations. These problems are summarized below.

1. The Commission's authority to request payments to the Treasury based on projections is uncertain. This is a departure from past practice and was implemented, not through regulations as was the Commission's policy regarding stale-dated checks, but through the issuance of a policy statement without any opportunity for comment. Thus, there are two legal issues -- the authority of the Commission to require payment to the Treasury instead of refunds to the contributors, and the legality of the use of statistical sampling to project the amount of violations.

As to the payment to the Treasury, this is a major departure from the Commission's past practice, and the Committee believes that such a policy should be implemented, if at all, through regulations, as the Commission did with stale-dated checks. The Committee believes that the requirement to pay these amounts to the treasury is a new rule of law that the Commission is required to establish through regulations. 2 USC §437f(b). Moreover,

because this policy was not published for comment, there are several issues that we believe the Commission may not have fully considered. For example, if excessive contributions are not refunded to the contributor, what will the effect be on a contributor who may have exceeded his or her \$25,000 annual limit? Ordinarily, such contributors seek to mitigate their violation by requesting refunds. Yet, under the Commission's policy the Committee would either be required to refund such contributions twice -- once to the Treasury and once to the contributor -- or to leave a contributor without the ability to mitigate.

Thus, in order to fully consider the impact of this policy we believe that the Commission should implement this policy only after an opportunity for public comment.

As to the use of statistical sampling for projecting the amount of violations, it is unclear whether the Commission has the authority to use sampling to establish the amount of violations. The cases cited by the Commission are in the dramatically different context of Medicare and Medicaid fraud, where the courts noted that there was no practical way to audit each and every transaction. In fact, in the case of publicly financed candidates, the auditors do review each and every contribution check. The Commission may have difficulty in persuading the courts that this is the same type of situation as the Medicare fraud cases relied upon. Moreover, medicare fraud is unlike regulation of campaign activity in which there are core First Amendment issues at stake.

2. In addition to the legal uncertainties underlying this policy, there are several additional reasons why the Commission should implement such a policy, if at all, only through regulations. First, the auditors have stated that this method has been "approved" as valid. Yet, the approved use of the sampling technique was for a very different purpose -- the review of matching fund submissions. In fact, that is a very different use and it operated very differently from the use of sampling to project violations. In reviewing matching fund submissions, the sampling was done on a rolling basis. Thus, as the Committee's expertise in reviewing contributions and preparing submissions increased, the hold back percentage could decrease. The auditor's current use of sampling to project violations does not take such changes over time into account.¹

Second, the auditors' selection of some portions of the population to perform a 100% review may skew the results. The auditors admit that they selected some subsets of contributions to perform a 100% review precisely because they believed those portions of the contribution population would include more problems. It is unknown what is the effect of such a method of

¹ The apparent corporate contributions found by the auditors illustrate the possibility that the auditors' method does not accurately reflect the Committee's changing ability to screen for prohibiteds and excessives. The auditors found only 3 prohibited contributions, totaling \$750. All three were received on or before October 10, 1991. The Committee registered on September 23, 1991. The fact that the auditors found no later prohibited contributions suggests strongly that the Committee staff simply became more sophisticated at finding them and rejecting them, and that there were no prohibited contributions received after October 10, 1991, instead of \$7,000 in prohibiteds after that date.

combined sampling with 100% review. Thus, it is incorrect for the auditors to imply that this method has somehow been approved or found valid as the auditors are using it to project the amounts of violations. This is an additional reason why the use of the sampling and the specific methodology used should be put out for comment so that the Commission can obtain expert advice on its validity.

The Committee believes that the amounts of the projected excessive and prohibited contributions are likely to be overstated based on the auditors' methodology. As a result, the Commission should not in addition seek any penalties from the Committee since the payment made to the Treasury is likely to be more than the actual amounts of such unresolved contributions.

II. The amounts of unresolved excessive and prohibited contributions identified by the auditors, even if the projected numbers are accepted, are statistically insignificant. The Committee received contributions of over 3,500,000. The total amount of prohibiteds found was \$750; the projected amount was \$7,373 (0.2% of total individual contributions). The total amount of excessive individual contributions found was \$18,150; the projected amount was \$22,060 (0.7% of total individual contributions). The total amount of excessive PAC contributions was \$3,600 (0.8% of total PAC contributions).

Although the audit report notes that these amounts are deemed material, it is hard to imagine what materiality threshold would find 0.2%, 0.7% and 0.8% to be material. Certainly, these are extremely small percentages of Committee receipts and suggest that the Committee did an excellent job in reviewing and processing its contributions. With over \$3.5 million in contribution receipts, the Committee was bound to make some mistakes. These percentages of errors are very small. For this reason, the Commission should take no further action with respect to these issues.²

III. As noted in the Committee's response to the Initial Repayment Determination, the Committee has insufficient funds left to pay its outstanding obligations and winding down costs. Thus, the Committee has no funds to pay any civil penalties. The Committee would like to disburse its remaining funds and terminate as quickly as possible. For this reason, the Committee decided to pay the amount requested by the Commission in the belief that the Commission should accept this payment as final settlement of these matters. The Committee urges the Commission to consider the Committee's financial situation in resolving this matter.

CONCLUSION

For the reasons outlined above, the Committee respectfully requests that the Commission

² The Commission should also take into account that the Committee followed the Commission's instruction in the June 2, 1992 letter. It is the Committee's belief that all presidential campaigns were not treated the same with respect to this refund issue, and the Committee should certainly not be penalized for following the Commission's direction and holding onto these excessives and prohibiteds instead of refunding them.

accept this payment and take no further action with respect to the Committee's unresolved excessive and prohibited contributions. To the best of the Committee's knowledge, the Commission has found no other violations of any provisions of the Act or regulations with respect to the Committee. This is unusual for a presidential campaign and demonstrates that the Committee made significant good faith efforts to comply with the requirements of the Act and the regulations and was successful in so doing. Under these circumstances, no further action is warranted.

Respectfully submitted,



Lyn Utrecht
General Counsel
Americans for Harkin, Inc.

0507012104

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

May 26 12 01 PM '94

AMERICANS FOR HARKIN 7-91

P. O. BOX 2308
WASHINGTON, DC 20013

CRESTAR BANK, N.A.
WASHINGTON, DC

15-52
540

10951

DATE

5/24/94

AMOUNT

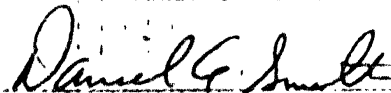
\$35,316.00

Thirty-Five Thousand, Three Hundred and Sixteen Dollars and no/cents-----

PAY
TO THE
ORDER

U.S. Treasury

AMERICANS FOR HARKIN



AUTHORIZED SIGNATURE

Payment

10951 10951005330 65505370



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20461

June 1, 1994

RECEIPT FROM THE
UNITED STATES DEPARTMENT OF TREASURY
FOR A
PAYMENT TO THE GENERAL FUND OF THE U. S. TREASURY

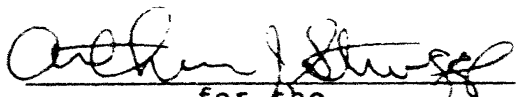
Received on June 1, 1994, from the Federal Election Commission (by hand delivery), a check drawn on Crestar Bank (Check #10951) in the amount of \$35,316. The check represents a payment from Americans For Harkin for stale dated checks (\$2,283), receipt of prohibited contributions (\$7,373) and receipt of contributions in excess of contributor's limitation (\$25,660).

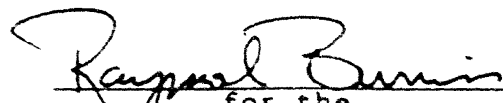
The payment should be deposited into the General Fund of the U. S. Treasury.

Americans for Harkin
Amount of Payment: \$35,316

Presented by:

Received by:


for the
Federal Election Commission


for the
United States Treasury

Bright-Coleman

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Americans for Harkin, Inc. -- Proposed) LRA #402
Final Repayment Determination and)
Statement of Reasons.)

CERTIFICATION

I, Marjorie W. Emmons, Secretary of the Federal Election Commission, do hereby certify that on July 19, 1994, the Commission decided by a vote of 5-0 to take the following actions in the above-captioned matter:

1. Make a final determination that Americans for Harkin, Inc. repay \$2,283 to the United States Treasury.
2. Approve the Statement of Reasons supporting the Final Repayment Determination, as recommended in the General Counsel's Report dated July 13, 1994.

(continued)

3. Cancel the oral presentation scheduled for August 3, 1994.
4. Approve the appropriate letter, as recommended in the General Counsel's Report dated July 13, 1994.

Commissioners Aikens, Elliott, McGarry, Potter, and Thomas voted affirmatively for the decision; Commissioner McDonald did not cast a vote.

Attest:

7-19-94
Date

Marjorie W. Emmons
Marjorie W. Emmons
Secretary of the Commission

Received in the Secretariat: Wed., July 13, 1994 4:15 P.M.
Circulated to the Commission: Thur., July 14, 1994 11:00 A.M.
Deadline for vote: Tues., July 19, 1994 4:00 P.M.

mck

Bright-Coleman



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20542

July 25, 1994

Lyn Utrecht
Oldaker, Ryan & Leonard
818 Connecticut Ave., N.W.
Suite 1100
Washington, D.C. 20006

Dear Ms. Utrecht:

The Commission has considered the response filed on behalf of Americans for Harkin, Inc. ("the Committee") to the Commission's initial repayment determination contained in the Report of the Audit Division on the Committee issued on March 15, 1994. On July 19, 1994, the Commission made a final determination that the Committee must repay \$2,283 to the United States Treasury. The Commission also canceled the Committee's oral presentation scheduled for August 3, 1994.

Enclosed is the Statement of Reasons in support of the Commission's final repayment determination. 11 C.F.R. § 9038.2(c)(4). Judicial review of the Commission's determination is available pursuant to 26 U.S.C. § 9041, if the petition is filed with the United States Court of Appeals for the District of Columbia Circuit within thirty (30) days from July 19, 1994, the date of the Commission's final determination.

Under 11 C.F.R. § 9038.2(d)(2), repayment must be made within thirty (30) days from the date of service of this notice. We note that the Committee submitted a check for the repayment amount on May 25, 1994, payable to the United States Treasury. Please contact me at (202) 219-3690, if you have any questions.

Sincerely,

Kim Bright-Coleman

Kim Bright-Coleman
Associate General Counsel

Enclosure
Statement of Reasons

cc: Larry Hawkins, Treasurer

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of)
)
Americans for Harkin, Inc.)
Final Repayment Determination)

STATEMENT OF REASONS

On July 19, 1994, the Commission made a final determination that Americans for Harkin, Inc. ("the Committee") must repay \$2,283 to the United States Treasury. The repayment amount constitutes an amount owed for stale-dated Committee checks. The Committee submitted the repayment on May 25, 1994. This Statement sets forth the bases for the Commission's determination. 11 C.F.R. § 9038.2(c)(4).

I. BACKGROUND

Americans for Harkin, Inc. is the principal campaign committee of Tom Harkin, a candidate for the 1992 Democratic presidential nomination. The Committee received \$2,103,362 in federal matching funds under 26 U.S.C. § 9034(a). Pursuant to 26 U.S.C. § 9038(a), the Commission conducted an audit and examination of Committee qualified campaign expenses. The issues relevant to the Commission's final determination first arose in the Interim Audit Report which was approved by the Commission on June 17, 1993. Attachment 1. The Committee responded to the Interim Audit Report on September 7, 1993. Attachment 2. The Commission approved a Final Audit Report on

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March 15, 1994. Attachment 3. The Final Audit Report included the Commission's initial determination that the Committee repay \$26,878 to the United States Treasury. The initial repayment determination represents \$24,595 in matching funds received in excess of the Committee's entitlement and \$2,283 in stale-dated Committee checks.^{1/} The Committee submitted a written response on May 23, 1994 disputing the Commission's initial determination that the Committee received matching funds in excess of its entitlement.^{2/} Attachment 4. On May 25, 1994, the Committee made a \$2,283 repayment for the stale-dated checks. Attachment 5.

The Commission has reviewed the Committee's written response to the initial repayment determination. The Commission concludes that the Committee did not receive public funds in excess of its entitlement. The Committee did not dispute the Commission's finding that the Committee maintained stale-dated checks. Therefore, the Commission has made a final determination that the Committee must repay \$2,283 to the United States Treasury.

^{1/} The Final Audit Report also recommended that the Committee pay the United States Treasury \$33,033 which represents contributions received from prohibited sources or in excess of the contribution limits of 2 U.S.C. § 441a(a). The Committee made a payment for the excessive and prohibited contributions on May 25, 1994. Attachment 5.

^{2/} As part of its response, the Committee requested an oral presentation, which the Commission granted on June 20, 1994, and scheduled for August 3, 1994. The oral presentation was canceled because the Committee's written response supported the Commission's conclusion that the public funds were not received in excess of entitlement.

II. RECEIPT OF FUNDS IN EXCESS OF ENTITLEMENT

During the candidate's period of eligibility, the candidate is entitled to receive public funds to the extent that the candidate receives matchable contributions. 11 C.F.R. § 9034.1(a). After the candidate's date of ineligibility, the candidate is entitled to receive additional matching payments for matchable contributions received and deposited on or before December 31 of the Presidential election year provided that on the date of payment there are remaining debts reflected in the Statement of Net Outstanding Campaign Obligations ("NOCO Statement"). 11 C.F.R. § 9034.1(b). Any portion of the payments made to a candidate from the matching payment account in excess of the aggregate amount of payments to which the candidate was entitled to under section 9034, shall be repaid to the Secretary of the Treasury. 26 U.S.C. § 9038(b)(1). The Commission may seek a repayment of public funds received in excess of the candidate's entitlement to the extent that payments made after the candidate's date of ineligibility are greater than the debts reflected on the NOCO Statement. 11 C.F.R. § 9038.2(b)(1)(i).

The candidate's date of ineligibility was March 9, 1992. The Final Audit Report stated that the Committee received \$388,659 in public and private funds from the candidate's date of ineligibility until February 1, 1993. On February 2, 1993, the Committee received a matching fund payment of \$73,603. The Committee received another matching fund payment of \$14,547 on March 2, 1993. Attachment 3 at 28. Therefore, it appeared that

the Committee received \$476,809 to cover the Committee's deficit after the candidate's date of ineligibility.

The NOCO Statement included in the Final Audit Report found that the Committee had net outstanding campaign obligations of \$452,214 at its date of ineligibility, as calculated through August 3, 1992. Attachment 3 at 23-24. Since the Committee had already received \$388,659 in public and private funds by February 1, 1993, a portion of the matching fund payment of February 2, 1993, \$10,048 [$\$73,603 - (\$452,214 - \$388,659)$] and the entire \$14,547 matching fund payment of March 2, 1993 was received in excess of the candidate's entitlement. Therefore, the Commission made an initial determination that the Committee must repay \$24,595 ($\$10,048 + \$14,547$) to the United States Treasury. Attachment 3 at 26.

In a written response to the initial repayment determination, the Committee contends that it has not received funds in excess of its entitlement. The Committee raises two points. First, the Committee argues that the NOCO Statement does not accurately reflect the Committee's financial status, because it: (1) understates winding down expenses by \$22,205.74; (2) overstates accounts receivable by \$1,070; and (3) disallows an account payable of \$4,940 for which the Committee provided documentation. Attachment 4 at 3-4. The Committee argues that these adjustments would increase the Committee's net outstanding campaign obligations to \$480,429.74, so that the Committee would not owe a repayment. Second, the Committee argues that it was impossible for it to have received funds in excess of its

entitlement because it incurred no non-qualified campaign expenses, and after winding down, will have no funds in its accounts. Attachment 4 at 4-5. Therefore, the Committee contends that an error must exist in the NOCO calculation. The Committee argues that the Commission is in a better position to review the financial records and discover the reason for the discrepancy between the Committee's actual financial position and the NOCO Statement's calculation.

The Commission has reviewed the Committee's response and supporting documentation and concludes that the NOCO Statement included in the Final Audit Report: (1) overstates wind down expenses by \$6,887; (2) overstates accounts receivable by \$2,517; and (3) should be revised to allow an account payable of \$4,940 which previously was undocumented. See Attachment 6 at 2. By adjusting the NOCO Statement to reflect these changes, the Committee's net outstanding campaign obligations are \$452,784. Compare Attachment 3 at 23-24 with Attachment 6 at 3-4.

The Commission also reviewed the Committee's public and private contributions that were applied to the candidate's deficit. The Commission concludes that the Final Audit Report overstated these receipts in the period from August 4, 1992 through February 28, 1993 by \$30,108.^{3/} Id. Therefore, the public and private funds available to be applied against the Committee's August 3, 1992 deficit is \$434,342, as calculated

^{3/} The Commission notes that the Committee did not raise the issue of an overstatement of its receipts.

through February 28, 1993. Id. Since this amount is less than the Committee's deficit, the Commission concludes that the candidate did not receive public funds in excess of his entitlement. Accordingly, the Commission does not address the Committee's second point.

III. FINAL REPAYMENT DETERMINATION

Therefore, the Commission has made a final determination pursuant to 11 C.F.R. § 9038.2(c)(4) that for the foregoing reasons Americans for Harkin, Inc. must repay \$2,283 to the United States Treasury for maintaining stale-dated checks. The Committee submitted the repayment on May 25, 1994.

Attachments

1. Interim Audit Report, approved June 17, 1993.
2. Committee's Response to the Interim Audit Report (September 7, 1993).
3. Final Audit Report, approved March 15, 1994.
4. Committee's Response to the Final Audit Report (May 23, 1994).
5. Memorandum to the Commission, Re: Payment of \$35,316 Received from Americans for Harkin (June 2, 1994).
6. Memorandum to Lawrence M. Noble, Re: Analysis of the Americans for Harkin, Inc. Response to the Final Audit Report (July 1, 1994).



FEDERAL ELECTION COMMISSION

WASHINGTON, D.C. 20463

AK003711

INTERIM REPORT OF THE AUDIT DIVISION
ON
AMERICANS FOR HARKIN, INC.

I. Background

A. Audit Authority

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

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

B. Audit Coverage

The audit covered the period from the Committee's inception, June 3, 1991 through August 31, 1992. During this period, the Committee reports reflect an opening cash balance of \$-0-, total receipts of \$5,668,467.64, total disbursements of \$5,387,092.07, and a closing cash balance of \$144,133.60.1/ In addition, a limited review of the Committee's transactions was conducted through September 30, 1992, for purposes of determining the Committee's remaining matching fund entitlement based on its financial position.

1/ These totals do not cross foot due to various math errors.
(See Finding II.C.)

C. Campaign Organization

The Committee registered with the Federal Election Commission on September 23, 1991. The Treasurer of the Committee during the period covered by the audit was Larry Hawkins. The current Treasurer is also Larry Hawkins.

During the period audited, the campaign established offices in 15 states in addition to its national headquarters located in Bethesda, Maryland. The campaign's current offices are in Washington, D.C.

To manage its financial activity, the campaign maintained nine bank accounts at various times. From the above accounts, the Committee issued approximately 4,108 checks in payment for goods and services. Also, the Committee received approximately 43,388 contributions from roughly 34,275 individuals totaling \$2,655,641.43.

In addition to contributions, the campaign received \$2,015,212.09 in matching funds from the United States Treasury as of January 5, 1993. This amount represents 14.6% of the \$13,810,000 maximum entitlement that any candidate could receive. The candidate was determined eligible to receive matching funds on November 27, 1991. Through December 31, 1992, the campaign has made a total of 13 matching funds requests totaling \$2,160,931. The Commission has certified 93% of the requested amount. For matching fund purposes, the Commission determined that Senator Harkin's candidacy ended March 9, 1992. This determination was based on a public statement by the Candidate. The Committee has continued to receive matching fund payments to defray expenses incurred through March 9, 1992 and to help defray the cost of winding down the campaign.

Attachment 1 to this report is a copy of the Commission's most recent Report on Financial Activity for this campaign. The amounts shown are as reported to the Commission by the Committee.

D. Audit Scope and Procedures

In addition to a review of the the Committee's expenditures to determine the qualified and non qualified campaign expenses incurred by the campaign, the audit covered the following general categories:

1. The campaign's compliance with statutory limitations with respect to the receipt of contributions or loans (see Findings II.B.1. and 2.);
2. the campaign's compliance with the statutory requirements regarding the receipt of contributions from prohibited sources, such as those from corporations or labor organizations (see Findings II.A.1. and 2.);

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 (see Finding II.D.1. and E.1.);
4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed (see Findings II.D.2. and E.2.);
5. proper disclosure of campaign debts and obligations;
6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (see Finding II.C.);
7. adequate recordkeeping for campaign transactions;
8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by the campaign to disclose its financial condition and establish continuing matching fund entitlement (see Finding III.A.);
9. the campaign's compliance with spending limitations; and
10. other audit procedures that were deemed necessary in the situation.

In addition, on April 20, 1992, the Audit staff conducted an inventory of the Committee's records to determine if they were materially complete and in auditable condition. A letter dated May 5, 1992, notified the Committee that records pertaining to several areas of the pending audit were not made available for review. Furthermore, the letter informed the Committee that if at the conclusion of a 30 day period ending June 8, 1992, the items listed on the letter had not been provided, the Commission would issue subpoenas for the production of those records.

At the entrance conference on June 15, 1992, the Audit staff informed the Committee that a request would be made to the Office of General Counsel for subpoenas to be issued to its direct mail vendor for the production of all mailing detail documents.

The subpoena to the Committee's direct mail vendor was approved by the Commission on July 13, 1992. On August 20, 1992, in response to the subpoena issued, the Audit staff received sufficient records from the Committee's direct mail vendor.

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

II. Findings and Recommendations - Non-Repayment Matters

A. Prohibited Contributions

1. Apparent Corporate Contribution

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

The Commission notified the Committee by letter, dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of prohibited contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited. (See 11 C.F.R. 103.3(b)(1) and (2)). The Commission will no longer recognize any untimely refunds made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified two prohibited contributions totaling \$500. The identified exceptions, when used to estimate the total dollar value of prohibited contributions in the population sampled, resulted in a projection of \$7,122.72. As of the conclusion of audit fieldwork, the Committee had made no refunds relative to the aforementioned items. In addition, one prohibited contribution of \$250 was identified in a 100% review of selected contributions. See Attachment #2.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the prohibited contributions deposited. (See 11 C.F.R. §103.3(b)(4).)

All prohibited contributions identified during the reviews were verified by the appropriate Secretaries of State.

At the exit conference, the Committee was provided schedules and relevant check copies to support the prohibited contributions identified. Committee personnel had no comments with respect to the items noted above. Further, the Committee

stated that they would respond to our findings after receipt of the Interim Audit Report.

Recommendation #1

The Audit staff recommends that within 30 calendar days of the service of this report, the Committee:

- demonstrate that the contributions discussed above are not prohibited; or
- make a payment to the United States Treasury in the amount of \$7,372.72.

2. Use of Corporate and Labor Organization Aircraft

Section 114.9(e)(1)(i) of Title 11 of the Code of Federal Regulations states that a candidate, candidate's agent, or person traveling on behalf of a candidate who uses an airplane which is owned or leased by a corporation or labor organization other than a corporation or labor organization licensed to offer commercial services for travel in connection with a Federal election must, in advance, reimburse the corporation or labor organization in the case of travel to a city served by regularly scheduled commercial service, the first class air fare.

During the review of the Committee's transactions relative to payments for air transportation services, the Audit staff identified Committee disbursements to one corporation and one labor organization. The name of the corporation was HealthSouth Rehabilitation Corporation and the labor organization identified was the Machinists and Aerospace Workers International Association (Machinists Association). These organizations do not appear to be licensed to offer commercial services for travel as part of their normal business operations. The corporate status of the firm noted above was confirmed with the appropriate secretary of state. The Audit staff compared the Committee's payments for flights which occurred between December 1991 and March 1992 to the lowest non-discounted first class fares charged by commercial airlines who regularly served the same cities.

Our analysis of the corporate aircraft usage revealed that the corporation billed the Committee \$5,473 and received a like payment prior to the flights. However, an apparent underbilling and underpayment of \$1,193 exists; this represents the difference between the amount billed/paid (\$5,473) and the value (\$6,666) calculated by the Audit staff using the lowest non-discounted first class fare available on the date of the flight (See Attachment 3).

Based on the analysis of the Machinists Association's aircraft usage by the Committee, it was noted that the Machinists Association billed the Committee \$35,705 and was paid \$35,961.40 prior to or on the date of the flight. However,

an apparent underbilling and underpayment of \$5,842.60 exists; this represents the difference between the amount paid (\$35,961.40) and the value (\$41,804) calculated by the Audit staff using the lowest non-discounted first class fare available on the date of the flight (See Attachment 3).

Thus a total of \$41,434.40 (\$35,961.40 + \$5,473) was paid for the above flight activity which resulted in a total underpayment of \$7,035.60 (\$1,193 + \$5,842.60). The Committee was provided copies of audit workpapers detailing the aforementioned matter.

The Committee responded that it used appropriate first class airfares in calculating the amounts paid. The Committee noted that their rates were obtained in each case by the campaign scheduler who contacted Carroll Travel Agency for the first class fares for each leg of the trip as of the date of travel.

To support its first class fares, the Committee provided the Audit staff with copies of a statement from its campaign scheduler, the scheduler's notes of conversations with Carroll Travel, and a statement from the owner of Carroll Travel.

The Audit staff's analysis of the information provided by the Committee indicated that the first class fares obtained by the Committee were, in many cases, discounted. In some instances, Committee trip payments and Audit staff computed first class fares were identical. Notwithstanding the Committee's efforts, the Audit staff reaffirms its position that the Committee's corporate and labor organization flight activity resulted in an underpayment of \$7,035.60

Recommendation #2

The Audit staff recommends that within 30 calendar days of service of this report, the Committee provide information which demonstrates that the aforementioned activity is in accordance with 11 C.F.R. §114.9(e); or absent such a showing, make a payment to the U.S. Treasury of \$7,035.60.

B. Apparent Excessive Contributions

1. Contributions from Individuals

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000.00.

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 a contribution 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 C.F.R. §§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 110.1(1) of Title 11 of the Code of Federal Regulations states, 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.

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of excessive contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited, and 60 days in which to seek reattribution, redesignation or refund of excessive contributions (11 C.F.R. 103.3.(b)(1) (2) and (3)). The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in

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violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified three unresolved excessive contributions totaling \$1,550. The identified exceptions, when used to estimate the total dollar value of unresolved excessive contributions in the population sampled, resulted in a projection of \$5,459.99. To date the Committee has not provided the Audit staff information relative to any refunds of the items noted. In addition, twenty-two unresolved excessive contributions totaling \$16,600 were identified in a 100% review of selected contributions. See Attachment #4.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the aforementioned excessive contributions. (See 11 C.F.R. §103.3(b)(4).)

At the exit conference the Committee was provided with a schedule of the apparent excessive contributions. The Committee had no comments with regard to the excessive contributions. Further, the Committee stated that they would respond to our findings after receipt of the Interim Audit Report.

Recommendation #3

The Audit staff recommends that within 30 calendar days of service of this report, the Committee either:

- provide evidence that the contributions in question are not excessive; or
- make payment to the United States Treasury in the amount of \$22,059.99 (\$5,459.99 + \$16,600).

2. Excessive Contributions From Political Committees

Section 441a(a)(2)(A) of Title 2 of the United States Code states that no multicandidate political committee shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000.00.

The Audit staff performed a review of contributions received from political committees and identified three excessive contributions totaling \$3,600 (see Attachment #5). As of the end of audit fieldwork, no refunds were made.

The Committee did not establish a separate bank account for making refunds; however, the account balances

maintained in the bank accounts were greater than the cumulative total of the excessive contributions. (See 11 C.F.R. §103.3(b)(4).)

At the exit conference the Committee was provided with a detailed schedule, as well as relevant check copies relative to these unresolved excessive contributions. The Committee did not provide any explanation for the above noted errors. Further, the Committee stated that they would respond to our findings after receipt of the Interim Audit Report.

Recommendation #4

The Audit staff recommends that within 30 calendar days of service of this report, the Committee either:

- provide evidence that the contributions in question are not excessive; or
- make payment to the United States Treasury in the amount of \$3,600.

C. 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 the reporting period, and the total amount of receipts and disbursements received or made during the reporting period and calendar year.

The Audit staff performed a reconciliation of the Committee's bank account activity to the activity on its disclosure reports for the period June 3, 1991 through August 31, 1992. The reconciliation indicated that the reports initially filed contained material misstatements. The Committee filed amended reports for the period June 3, 1991 through January 31, 1992. However, the amendments did not correct the misstatements.

For the period June 3, 1991 through December 31, 1991, the Committee's disbursements were overstated by a net amount of \$19,511.28. The components of the misstatement are:

Reported Disbursements as Amended	\$2,011,203.17
Disbursements Reported Twice	(65,930.50)
Disbursements not Reported	12,560.25
Unexplained Difference	<u>33,858.97</u>
Adjusted 1991 Disbursements	<u>\$1,991,691.89</u>

The reported ending balance at December 31, 1991 was understated by \$23,992.01, resulting primarily from the misstatement detailed above.

For the period January 1, 1992 through August 31, 1992, the Committee's disbursements were understated by \$194,085.29. Ending cash for the period was overstated by \$78,404.38, resulting primarily from the misstatement in disbursements.

According to the Committee's Assistant Treasurer, the disbursements were not reported due to the following reasons: 1) For the period 2/1/92 - 2/29/92, amounts coded to certain expense codes in the Committee's computer system were omitted from the disclosure report; 2) For the period 3/1/92 - 3/31/92, the Committee did not maintain the information required to be reported for disbursements from its field account, however the information was subsequently obtained from the Committee's bank.

In addition, the Committee did not report \$12,744.82 in disbursements from its payroll account or \$49,386.71 in disbursements made during the period 4/1/92 - 8/31/92.

At the exit conference the Committee was given schedules which outlined the misstatements.

Recommendation #5

The Audit staff recommends that within 30 calendar days of service of this report, the Committee file amended reports to correct the misstatements described above.

D. Itemization of Receipts and Disbursements

1. Receipts

Section 434(b)(3)(A) of Title 2 of the United States Code states, in part, that each report shall disclose the identification of each person who makes a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution.

The Audit staff conducted a sample review of contributions, the results of which indicated that a material amount of contributions were not itemized as required on disclosure reports initially filed. The identified exceptions, when used to estimate the total amount of contributions not itemized resulted in a projected amount of \$136,877. Further, we identified twenty two additional contributions totaling \$5,950 which were not itemized as required.

Subsequent to the commencement of audit fieldwork, the Committee filed amended reports which materially corrected the errors noted above.

Recommendation #6

The Audit staff recommends no further action.

2. Disbursements

Sections 434(b)(4)(A) and (5)(A) of Title 2 of the United States Code state that each report shall disclose expenditures made to meet candidate or committee operating expenses; and the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.3(b)(4)(i) of Title 11 of the Code of Federal Regulations, states in part, that each report shall disclose the total amount of all disbursements for the reporting period and for the calendar year. Each authorized committee shall report the full name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet the committee's operating expenses, together with the date, amount and purpose of each expenditure.

a. Regular Accounts

The Audit staff performed a sample review of Committee disbursements made from its regular (excludes field and payroll accounts) bank accounts for the period of inception (6/3/91) through June 30, 1992. With respect to itemization, the Audit staff identified a material number of disbursement transactions that were not itemized as required on Committee disclosure reports filed prior to the beginning of audit fieldwork. The Committee's Assistant Treasurer attributed the itemization problems to the Committee's late start and a failure to have sufficient systems in place.

On August 26, 1992, the Committee filed amended disclosure reports for the period from inception through January 31, 1992 which materially corrected the problems noted for that period. However, at the close of fieldwork the Committee had not filed amended reports for the period subsequent to January 31, 1992. At the exit conference held on November 17, 1992, the Committee had no further comment on the itemization errors noted above. Further, the Committee stated that they would respond to our findings after receipt of the Interim Audit Report.

Recommendation #7

The Audit staff recommends that within 30 calendar days of service of this report, the Committee file amended Schedules B-P to correct the itemization errors made subsequent to January 31, 1992.

With respect to the itemization of disbursement activity for the period inception through January 31, 1992, the Audit staff recommends no further action.

b. Field Account (Drafts)

The Audit staff performed a sample review of disbursements made from the Committee's field account. Although this account was opened in 1991, most of the activity occurred between January 1992 and March 1992. Our review indicated that nearly all disbursements made from the field account were not itemized on the Committee's disclosure reports filed prior to the commencement of audit fieldwork. Further, for the report covering March 1992, \$27,289.13 in disbursement activity was not even reported.

Before this matter was brought to the Committee's attention, the Committee stated that all disbursement items were itemized on Schedules B-P regardless of amount. When asked, during the fieldwork, to explain why the March 1992 draft activity was omitted from the disclosure reports, the Assistant Treasurer noted that the Committee had only recently (9/92) obtained information from the bank relative to the drafts which cleared the March bank statement. The Assistant Treasurer further stated that the February 1992 disclosure reports needed to be amended because Schedules B-P contained only partial disbursement amounts for some vendors.

On August 26, 1992, the Committee filed amended disclosure reports for the period from inception through January 31, 1992 which materially corrected the problems noted for that period. However, at the close of fieldwork the Committee had not filed amended reports for the period subsequent to January 31, 1992. At the exit conference, the Committee had no additional comments with regard to field account activity. Further, the Committee stated that they would respond to our findings after receipt of the Interim Audit Report.

Recommendation #8

The Audit staff recommends that within 30 calendar days of service of this report, the Committee file amended schedules B-P which reflect the required itemization of draft account disbursements made subsequent to January 31, 1992.

c. Payroll Account

The Audit staff reviewed, on a sample basis, disbursements made from the Committee's payroll account for the period inception through August 31, 1992. This review indicated that the Committee failed to itemize a material number of payroll transactions which required itemization. It was also noted that the Committee did not itemize any payroll transactions on its

March 1992 disclosure report. When asked during fieldwork, to explain this omission, Committee personnel stated that they had merely forgotten to report the March Payroll and would be filing amended disclosure reports.

Amended disclosure reports were filed by the Committee on June 18, 1992 and August 26, 1992, however the itemization errors discussed above were not materially corrected.

Recommendation #9

The Audit staff recommends that within 30 calendar days of service of this report, the Committee file amended Schedules B-P to correct the itemization errors noted above.

d. Selected Review of Disbursements

The Audit staff conducted a review of selected Committee disbursements for the period inception through June 30, 1992, and noted 38 disbursements, totaling \$265,417.67, that were not itemized as required on Committee disclosure reports filed prior to the commencement of audit fieldwork. Our review of amendments filed on August 26, 1992 indicated that the Committee had materially corrected the itemization problems noted above.

At the exit conference, the Committee made no comments with regard to the above omissions. The Committee stated that they would respond to our findings after receipt of the Interim Audit Report.

Recommendation #10

The Audit staff recommends no further action.

E. Omission of Disclosure Information

1. Receipts

Section 434 (b)(3)(A) of Title 2 of the United States Code states, in part, that each political committee shall disclose the identity of all persons who make a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year. Section 431(13) of this Title defines "identification" to mean, "in the case of any individual, the name, mailing address, and the occupation of such individual, as well as the name of his or her employer, and in the case of any other person, the full name and address of such person." In addition, 11 CFR § 104.3(a)(4) requires that in addition to the above, the aggregate year-to-date totals for such contributions be reported.

Section 102.9(d) of Title 11 of the Code of Federal Regulations states, in part, that in performing recordkeeping

duties, the treasurer or his or her authorized agent shall use his or her best efforts to obtain, maintain, and submit the required information and shall keep a record of such efforts. 4

Section 104.7 of Title 11 of the Code of Federal Regulations states that if best efforts have been used to obtain, maintain, and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act. With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of \$200 in a calendar year (pursuant to 11 CFR 104.3(a)(4), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless he or she has made at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such information from the contributor. For purposes of 11 CFR 104.7(b), such effort shall consist of a clear request for the information (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

The Audit staff performed a review of contributions from individuals and identified a material number of errors relative to the itemization (or lack thereof) of contributors' occupation and name of employer. The errors, when used to estimate the dollar value of all report errors, result in a projection of \$605,313.68, which represents approximately 50% of the dollar value of all itemized contributions. In most cases, the Committee had no documentation in the receipts file to show that they requested the information or that the contributor submitted the information. In other cases, the information was provided by the contributor but the Committee did not report the information.

Our review of response devices found in Committee receipt records and a review of the Committee database did not establish that the Committee exercised best efforts to obtain, maintain and disclose the required information. The Committee's receipts files made available did not contain any other information (such as copies of letters to the contributors or phone logs) which could be used to demonstrate "Best Efforts."

At the exit conference the Committee was informed of the aforementioned errors. A Committee representative stated that the Committee could establish an association between the receipts on the data base and a fundraising code which could then be related to a solicitation device. The Committee noted that the relationship of the receipts to the solicitation devices sent out to the contributors for each fundraising drive would establish that "Best Efforts" had been demonstrated by the Committee.

Within the 10 day period following the exit conference, the Committee submitted information in an effort to

support that it had exercised "Best Efforts." The information consisted of the program language used to extract the names from the database which did not have full occupation and name of employer information, and a listing of contributors to whom the Committee was in the process of sending letters requesting the required information. In addition, the Committee also submitted response devices which, according to the Committee, were examples of the response devices "always" included with solicitations for contributions. The devices contained requests for the required information.

The information provided, in our opinion, does not demonstrate that the Committee exercised "Best Efforts."

Recommendation #11

The Audit staff recommends that within 30 calendar days of service of this report, the Committee either:

- demonstrate that "Best Efforts" were exercised in attempting to obtain the occupation and name of employer; or
- amend its Schedules A-P to include the occupation and name of employer in the instances where the information is omitted.

2. Disbursements

a. Regular Accounts

Section 434(b)(4) and (5)(A) of Title 2 of the United States Code states, in part, that each report shall disclose for the reporting period and calendar year, the total amount of all disbursements, the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.3(b)(4)(i)(A) of Title 11 of the Code of Federal Regulations states, in relevant part, that each report filed shall disclose the total amount of all disbursements for the reporting period and for the calendar year. Each authorized committee shall report the full name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet the committee's operating expenses, together with the date, amount and purpose of each expenditure. As used in 11 C.F.R. 104.3(b)(4), purpose means a brief statement or description of why the disbursement was made.

The Audit staff's review of Committee disbursements made from its regular (excludes payroll and field accounts) accounts and itemized on the reports for the period of

inception through June 30, 1992 indicated that a material number of the itemized entries were incorrect as to the amount or the payee's address was missing. For example, the March 1992 disclosure report, although prepared manually, had no addresses (street, number, city and state) posted for those transactions. On June 18, 1992 and August 26, 1992, the Committee filed amended disclosure reports which did not materially correct the disclosure problems noted above.

Recommendation #12

The Audit staff recommends that within 30 calendar days of service of this report, the Committee file amended Schedules B-P to correct the public record.

b. Payroll Account

Our review of disbursements made from the payroll account for the period of inception through August 31, 1992 and itemized on Committee reports revealed that for a material number of itemized entries the payee's address was omitted. It was noted that a majority of those errors occurred during the month of July 1992.

On June 18, 1992 and August 26, 1992, the Committee filed amended disclosure reports, however no corrections were made with respect to the items mentioned above. The Committee was notified of the above noted errors.

Recommendation #13

The Audit staff recommends that within 30 days of service of this report, the Committee file amended Schedules B-P to correct the public record.

III. Findings and Recommendations - Repayment Issues

A. Determination of Net Outstanding Campaign Obligations

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

In addition, Section 9034.1(b) of Title 11 of the Code of Federal Regulations states, in part, that if on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 C. F. R. §9034.5, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations.

Senator Harkin's date of ineligibility was March 9, 1992. The Audit staff reviewed the Committee's financial activity through August 31, 1992, analyzed winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations ("NOCO") as of August 3, 1992, which appears below:

05 00121

Americans for Harkin, Inc.
Audited Statement of Net Outstanding Campaign Obligations (NOCO)
at August 3, 1992

Assets

Current Assets:

Cash on Hand	\$ 86,684.52 <u>1/</u>
Accounts Receivable	15,625.40
Matching Funds (Certified 7/31/92)	28,497.98

Total Current Assets \$130,807.90

Capital Assets 7,000.00

Total Assets \$137,807.90

Liabilities

Accounts Payable for Qualified Campaign Expenses through 7/31/92	\$368,803.12 <u>2/</u>
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Payable to U.S. Treasury:

Prohibited Contributions	\$ 7,372.72
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Corporate Aircraft	7,035.60
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Excessive Contributions:

Individuals	22,059.99
Political Committees	3,600.00
State-Dated Checks	<u>10,860.17</u>

Payable to U.S. Treasury \$ 50,928.48 3/

Estimated Winding Down Paid through 3/22/93:	\$104,244.03 <u>4/</u>
---	------------------------

Estimated Winding Down 3/22/93 through End of Audit	<u>85,000.00</u> <u>5/</u>
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Estimated Winding Down \$189,244.03

Total Liabilities \$608,975.63

Net Outstanding Campaign Obligations (\$471,167.73)

FOOTNOTES TO NOCO

- 1/ This amount does not reflect a reduction for certain outstanding checks determined to be stale-dated.
- 2/ The Audit staff initially confirmed \$332,792.66 at August 3, 1992 in Committee accounts payable. However, subsequent to Audit fieldwork, the Committee provided a listing of accounts payable which reflected an increase in that figure by \$36,010.46. No documentation was provided to support the increase in Committee accounts payable (see Attachment 7).
- 3/ Consists of amounts discussed in Findings:
- | | | |
|-----|---------|--------------------|
| (a) | II.A.1. | \$ 7,372.72 |
| (b) | II.A.2. | 7,035.60 |
| (c) | II.B.1. | 22,059.99 |
| (d) | II.B.2. | 3,600.00 |
| (e) | III.B. | <u>10,860.17</u> |
| | | <u>\$50,928.48</u> |
- 4/ This number represents the Committee's record of its actual winding down expenditures paid for the period August 3, 1992 through March 22, 1993.
- 5/ This represents the Committee's calculation of its winding down estimates from March 23, 1993 through the end of the audit. The Committee did not provide workpapers identifying the components of this estimation.

Therefore, as of August 3, 1992, the candidate's maximum remaining matching fund entitlement was \$471,167.73. Using the Committee's contribution records, bank records and disclosure reports through December 31, 1992, and the Commission's matching fund records through that date, it was determined that the Committee received \$370,198.07 in combined private and public funding between July 31 and December 31, 1992.

Based on the NOCO as presented, the candidate had not received matching funds in excess of the amount to which he was entitled. However, as stated in "Footnotes to NOCO", the NOCO reflects adjustments presented by the Committee subsequent to audit fieldwork. The Audit staff conditionally accepts the adjustments presented by the Committee pending the receipt of supporting documentation. If documentation is not provided or is deemed inadequate, the Audit staff may recommend a Committee repayment pursuant to 26 USC 9038(b)(1) and/or 9038(b)(2).

Recommendation #14

The Audit staff recommends that within 30 calendar days of service of this report, the Committee provide documentation which supports the adjustments noted in the above NOCO Statement. Documentation shall include but not be limited to the following:

- ° Copies of vendor invoices, statements, or receipted bills and any other source document relative to the \$36,010.46 in expenditures and open accounts payable;
- ° Workpapers or documents showing the derivation of the \$85,000 estimate for winding down costs presented by the Committee.
- ° Copies of documents which support payments to the IRS and State taxing authorities for withholding, interest, and penalties; including IRS notices of intent to levy and State notices of delinquent employer withholding status or assessment (see Attachment 8).
- ° Additional recommendations will be made pending review of the documentation.

B. Stale Dated Committee Checks

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

During the review of Committee disbursement activity, the Audit staff identified nineteen checks made payable to vendors which had yet to be cashed as of August 31, 1992. Those checks totaled \$11,208.17 and were dated from January 9, 1992 through March 12, 1992.

At the exit conference on November 17, 1992, the Audit staff provided the Committee with a schedule of the stale-dated checks. When asked whether those vendors had been contacted to determine the status of the outstanding checks, Committee officials replied that they had not seen the outstanding checks list before. Further, the Committee stated that they would respond to our findings after receipt of the Interim Audit Report.

On December 3, 1992, the Committee provided a memorandum to the Audit staff in which ten stale-dated checks (\$9,360.55) were addressed. The Committee stated that the checks were; (a) lost (one check for \$127), (b) not paid by its bank (four checks for \$360), (c) apparently voided and replaced or related to instances where no obligation now exists due to cancellation of the event or planned purchase (five checks for \$8,873.55). However, no documentation such as the actual voided check, replacement check, or correspondence from the named payee was presented. Notwithstanding the above, the Audit staff was able to reduce the amount of outstanding checks by \$348. Attachment 6 is a list of stale-dated checks which in the opinion of the Audit staff remain unresolved.

Recommendation #15

The Audit staff recommends that within 30 calendar days of service of this report the Committee present evidence that:

- The checks were not outstanding (i.e., copies of the front and back of the negotiated checks) or
- the outstanding checks were voided (copies of the voided checks with evidence that no Committee obligation exists, or copies of negotiated replacement checks); and
- the Committee attempted to locate the payees to encourage them to cash the outstanding checks.

Absent evidence to the contrary the Audit staff will recommend that the Commission make an initial determination that \$10,860.17 in outstanding checks are payable to the U. S. Treasury.

IV. Recap of Amounts Due to the United States Treasury

Section 9038.1(c)(1)(v) of Title 11 of the Code of Federal Regulations states that preliminary calculations regarding future repayments to the U. S. Treasury may be contained within the interim audit report. Pursuant to §9038.2(a)(2) of this Title

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the Commission will notify the candidate of any repayment determinations not later than three years after the end of the matching payment period. The issuance of this interim audit report to the candidate constitutes notice of any repayment determinations for purposes of the three year period.

Reflected below are amounts due the United States Treasury as noted in this report.

<u>Finding</u>	<u>Subject</u>	<u>Amount</u>
II.A.1.	Apparent Prohibited Contributions- Individuals	\$ 7,372.72
II.A.2.	Corporate Aircraft	7,035.60
II.B.1.	Apparent Excessive Contributions- Individuals	22,059.99
II.B.2.	Apparent Excessive Contributions- Political Committees	3,600.00
III.B.	Stale-dated Checks	<u>10,860.17</u>
	Total	<u>\$50,928.48</u>

Received
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FEDERAL ELECTION COMMISSION
ADM. STAFF

9/7/93

SEP 7 4 56 PM '93

OLDAKER, RYAN & LEONARD

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September 7, 1993

Robert J. Costa
Assistant Staff Director
for the Audit Division
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

Dear Mr. Costa:

Enclosed please find the Americans for Harkin, Inc. response to the Interim Report of the Audit Division.

Sincerely,



Lyn Utrecht
General Counsel
Americans for Harkin

Enclosure

ATTACHMENT 2
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**RESPONSE OF AMERICANS FOR HARKIN
TO THE INTERIM REPORT OF THE AUDIT DIVISION**

This response to the Interim Report of the Audit Division of the Federal Election Commission ("FEC" or "Commission") is submitted on behalf of Americans for Harkin, Inc. ("the Committee"), the principal campaign committee of Senator Tom Harkin who sought nomination in 1992 to the office of President of the United States. Based on the information set forth below, the Committee respectfully disagrees with the Audit Division's proposed repayment determination, and recommends that the Final Report on the Audit be modified in accordance with the Committee's response to each finding.

I. GENERAL COMMENTS

The Committee would like to address two matters of general concern pertaining to the audit. First, the Committee disagrees with the assertion that the Interim Report of the Audit Division constitutes a notification pursuant to 26 USC. Section 9038(c). Second, the Committee respectfully submits that the Commission has no authority to require "payments" to the U.S. Treasury which are neither repayments pursuant to 26 USC. §9038, nor civil penalties pursuant to 2 USC. §437g. The Committee also challenges the validity of these requests for "payments" to the Commission to the extent that they are based upon statistical projections.

1. Notification of Repayment Determination

26 USC. Section 9038 (c) requires that the Commission notify

a candidate of a repayment within 3 years after the end of the matching payment period. For the following reasons, the Committee does not accept the assertion that the Interim Report of the Audit Division constitutes the required Commission notification of a repayment determination pursuant to Section 9038.

According to 11 CFR §9038.1(c)(v), the Interim Audit Report provides "[p]reliminary calculations regarding future repayments to the United States Treasury" (emphasis added). Although the Commission amended the regulations in response to challenges from committees in prior election cycles to state that the interim report constitutes the required notification (11 CFR §9038.2-a.(2)), the Committee contends that the regulation is contrary to the plain meaning of the statute and the Congressional intent that candidates have a final resolution of their repayment obligation within three years.

2. FEC Requests for "Payments" to the U.S. Treasury

In a departure from past practice, the Interim Report of the Audit Division requires a "payment" to the Commission in the amount of any prohibited or excessive contributions not refunded by a Committee within 60 days after the candidate's date of ineligibility or after the date of receipt of a letter from the Commission notifying committees of the new Commission practice with respect to prohibited and excessive contributions. Notification of this new Commission position was included in a

June 2, 1992 letter to committees regarding this apparent new rule adopted by the Commission. This letter was received by the Committee nearly three months after Senator Harkin ceased to be a candidate. Committees were further advised in this letter that the Commission intended to use sampling techniques to project the amount of such payments.

As instructed, upon receipt of this letter, the Committee ceased refunding excessive or prohibited contributions. However, the Committee respectfully objects to the new Commission policies stated in this letter for the following reasons.

**A. The Commission Has No Authority
in the Audit Process to Require "Payments" of
Prohibited or Excessive Contributions**

The audit report styles the requested remedy for alleged prohibited and excessive contributions as a "payment" to the United States Treasury. The Committee disputes that the Commission has the authority to require such a payment.

26 USC. § 9038 sets forth the Commission's repayment authority through the audit process. Under this section,

In prior election cycles, the comparable section of the Interim Audit Report was "Findings and Recommendations Related to Title II". This cycle, it is "Findings and Recommendations - Non-Repayment Matters". While no explanation is given for the change in format, it appears that the Commission is not asserting authority under 26 USC. § 9038(b) to require repayment of unrefunded prohibited and excessive contributions. However, these amounts are included in Section IV of the Report as "Amounts Due to the United States Treasury". It is unclear whether the Commission considers these payments to be a part of the Commission's proposed repayment determination.

repayments may be required for two reasons alone: when a candidate received funds in excess of entitlement (26 USC §9038 b 1) and when a candidate made non-qualified campaign expenditures (26 USC §9038-b)(2). The "payments" requested by the Commission for prohibited and excessive contributions fit neither of these categories.

To implement its statutory authority to require repayments, the Commission has adopted regulations. 11 CFR §9038.2. These regulations delineate only four "bases" for a Commission repayment determination: (1) Where a candidate receives public funds in excess of entitlement; (2) where a candidate spends public funds on non-qualified campaign expenses; (3) where a candidate fails to document expenditures of public funds; and (4) where a candidate has surplus funds. 11 CFR §9038.2(b).

Other than the repayment authority outlined in the statute and regulations, the only other authority granted the Commission to require any payment of money is found in the civil penalty provisions. 2 USC §437g. Civil penalties may be imposed only after completion of the enforcement process. The payments for prohibited or excessive contributions sought in this audit are obviously not resulting from the enforcement process.

² In addition to the repayment regulations, there is one provision which permits the Commission to require payments in the audit process. Section 9038.6 requires such payments where a candidate committee has outstanding uncashed checks payable to creditors. The payments at issue obviously do not fall within this regulation.

In the past, the Commission required committees to refund prohibited or excessive contributions to the contributors. Only if the contributor could not be located were such amounts to be donated to charity or repaid to the Treasury. The amounts required to be refunded were limited to actual prohibited or excessive contributions specifically documented during the audit process. The amounts required to be refunded were never based on a statistical sampling.

The Commission's letter of June 2, 1992 drastically changed past practices on an after-the-fact basis. The letter was distributed after virtually all of the candidates had dropped out of the race. The letter certainly was not prospective in nature and certainly does not qualify as a validly issued rule or regulation.

Moreover, even if the Commission could find some statutory authority to require a payment, the Commission would certainly have to do so by regulation. The Commission's authority to issue regulations is clearly delineated by statute, which requires their submission to Congress before they become effective. 2 USC §9039. Further, 2 USC §437f(b) explicitly states that "any rule of law which is not stated in the Act in chapter 95 or chapter 96 of Title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 438(d) of this title." Since these payments are neither repayments nor civil penalties, the Commission is establishing a

new rule of law by demanding their payment to the Treasury. This new rule of law is clearly unenforceable because it has not been promulgated as a regulation.

The Commission cannot simply grasp authority to require a payment from this act; such authority must be solidly based on a statute or a regulation. The payment at issue fails to qualify either as a civil penalty levied for violating the law or as a repayment. Therefore, the Commission is totally without authority to require such a payment.

**B. The Auditors' Method of Sampling
to Project These Payments Is Invalid**

In the June 2, 1992 letter, the Commission further notified the Committee that it would use a sampling technique to identify the dollar amount of prohibited and excessive contributions received by the Committee. There was no opportunity provided the Committee to comment on the proposed use of sampling, and the Commission failed to promulgate any rules or regulations governing the use of sampling technique. The Committee thus objects to the use of statistical sampling to project the amounts of prohibited and excessive contributions.

First, an attempted use of statistical sampling in the manner utilized by the Audit Division is likely to produce invalid projections and is inconsistent with standard accounting practice. Second, the Commission does not have the statutory authority to require such payments where no actual prohibited or

excessive contribution has been found, and certainly does not have the authority to do so absent a rule-making proceeding.

i. **The Auditors' Methodology is Invalid**

There are at least two problems with the methodology used by the Audit Division in using sampling techniques to project receipt of prohibited and excessive contributions: the combination of sampling with selected 100% review of certain transactions is an invalid methodology that may result in overstated projections; and, the methodology used by the auditors achieves a skewed result because it incorrectly assumes a homogeneous pool. Both problems render the auditors' projections invalid.

The auditors' method combined both a sampling technique and a selective 100% review to project an amount that is, therefore, invalid and highly likely to be overstated.³ Instead of just relying on a sample to project the amount-- perhaps because of well-founded concerns about the validity of such a method-- the auditors combined both a sample and a 100% review to produce their number. This combined method is invalid. The auditors sampled a population (contributions received by the Committee) and on the basis of the number of prohibited or excessive contributions found in the sample, used a statistical estimate to

³ Although the June 2 letter was not very specific, it indicated the auditors would use both a non-sample review of contributions, as well as a sampling method. No explanation was given as to how the 100% review and the sample would both be used consistent with standard accounting practice.

project an amount based on the total population. In addition to the estimate based on the sample, the auditors conducted an additional selected 100% review of certain items either in the same population or in a discretely identified portion of the overall population, and included those items as additional prohibited and excessive amounts on top of the statistical estimate based on the population. This method clearly results in an overstated amount. No explanation is given by the auditors as to how the items were selected for the 100% review and there is no explanation in the Interim Report as to how duplication was avoided when the 100% review was added to the projection based on the sample.

Perhaps even more troublesome is the fact that the auditors' methodology assumes a homogeneous population, i.e., that the same number of errors are likely to occur throughout the course of the campaign. This assumption is invalid. There is no basis for the assumption that committees make the same number of errors after they have become fully staffed and operational as they do in the first few months of their existence. In fact, the prohibited contributions found by the auditors in this audit and discussed more fully below) support this conclusion. The auditors found no prohibited contribution after October of 1991 through either their sample or their 100% review.

Moreover, sampling is not generally used in auditing to

change a number on a financial statement.* It is used to determine whether the numbers appear fairly presented. Contrary to the auditors' assertion, this method is not consistent with standard AICPA practices. See attached pages from Section 3 of the AICPA Audit Sampling Guide, Exhibit R. This indicates that, if the use of one of these methods suggests a material misstatement on the financial statement, the auditors may recommend that the underlying numbers be corrected, but not change them on the basis of that sampling. Then, if the sample reveals a certain level of variation or error, the result³⁻²¹⁻⁷¹ of the sample is used as the basis for expanding the review. The sample projections are not used, however, to alter numbers on the financial statement. That is done only upon identification of specific errors.

The Committee does not have the resources to put together a comprehensive critique of the auditors' method or to hire experts to explain to the Commission in detail the difficulties of using sampling techniques to project prohibited or excessive contributions that may have been received. The problems outlined above, however, are sufficient to illustrate why the Commission, assuming it has statutory authority, should not use such a technique unless the method is first published for comment and

* Even if the auditors have correctly utilized the sampling methods identified in the FEC June 2 letter, the use of these samples to alter numbers is not in accordance with standard accounting procedures.

fully tested

ii. The Use of Those Projections As a Basis for a Payment Also Circumvents The Statutory Enforcement Scheme

The use of projections to demand these payments could also be viewed as a circumvention of the specific limitations on civil penalties in the enforcement process 2 USC. § 437g. In addition to the fact that the Commission has never before used projections to calculate "payments" or repayments, the Commission has never before used projections to estimate the amount of a violation in the enforcement process. Similarly, the Committee contends that the Commission would have no authority to do so, since pursuant to 2 USC. § 437g, the amount of a permissible civil penalty is tied to the actual amount of the violation. Since the actual amount of the violation is limited to the actual prohibited or excessive contributions received by a committee, the Commission could not impose civil penalties based on projected amounts. Indeed, it appears that the treatment of these projected prohibited and excessive contributions as "payments" in the audit process and not as repayments or civil penalties could be viewed as an attempt to circumvent what the statute permits the Commission to do. Thus, the Commission is exceeding its statutory authority by demanding such payments, since they are permitted neither under 26 USC. §9039 nor 2 USC. § 437g.

II. RESPONSE TO SPECIFIC FINDINGS AND RECOMMENDATIONS

In assessing the Committee's compliance and reporting,

the Commission should be aware of the late start of this election cycle, and the difficulties that created for committees in establishing tested compliance systems and training staff.

The Interim Report does not contain any 11 CFR §9038(b)(1) or (b)(2) repayment request for the Committee. The only request for payment based on a regulation is the request for payment of stale-dated checks made pursuant to §9038.6. The Committee believes that the stale-dated check payment to the U.S. Treasury should be \$450. Excessive or prohibited contributions which the Committee inadvertently accepted should be refunded to the contributors. The Committee believes that refunds should total \$750 to corporate contributors, \$15,900 to individual contributors, and \$3,600 to PAC contributors.

Finding II.A. - Prohibited Contributions
(Interim Report p.4)

1. Apparent Corporate Contribution
(Interim Report p.4)

For the reasons set forth in Section I above, the Committee specifically objects to the Commission's demand for payments of \$7,372.72 for alleged apparent corporate contributions. The Committee contends that the Final Report should be revised to require the Committee to refund to the contributors the \$750 in actual corporate contributions inadvertently accepted.

At the outset of the campaign in September 1991, the Committee established procedures for review of contributions to screen possible corporate contributions. Notwithstanding these

procedures the three prohibited contributions identified by the auditors were accepted inadvertently. All three contributions were received very early in the campaign, when the campaign staff had very little experience in reviewing such contributions.

All three contributions had designations on the checks that were susceptible of the conclusion that they were not corporate checks. One was from an individual physician; one was from "Ear Nose & Throat Professional Associates" which on its face does not indicate its corporate status; and the third included the designation "Development Account".

The total amount of the contributions was \$750, which out of total contributions of \$3.5 million is minuscule and statistically insignificant, and suggests that the Committee in fact did an outstanding job in identifying and screening prohibited contributions.

The batch numbers of the contributions listed on the audit report attachment 2, Schedule of Prohibited Contributions, indicate that the contributions were deposited on July 29, 1991, September 30, 1991, and October 10, 1991. Two of the contributions are used by the audit division to estimate the total of all prohibited contributions received and deposited by the committee from its inception on June 3, 1991 to August 31, 1992. The third contribution was found in a 100% review of selected contributions and inexplicably added to the amount previously determined to be the amount of prohibited

contributions.

As described in Section I above, there are serious problems with the methodology used in the interim audit report to take three contributions totaling \$750 and project a repayment of \$7,372.72. First, you cannot sample a population, arrive at a statistical estimate, and then increase the estimate for items found in a 100% review. The audit division's logic would allow for an estimate by sample, followed by a 100% review of a certain segment of the population known to contain errors (such as all refunds). This would, of course, lead to an overestimate of prohibited contributions just as the auditors have done.

The second, and more serious, problem is that the methodology assumes that each item in the population was treated in the same way by the committee. The methodology assumes a static and homogeneous pool. It assumes that a contribution received in July of 1991, when the committee was just formed and the staff was incomplete and inexperienced, would be processed in the same manner as a contribution received in January of 1992 when the staff was enlarged, better trained and more experienced. That assumption is wrong and the interim audit report proves it by discovering no prohibited contributions after early October of 1991.

2. Use of Corporate and Labor Organization Aircraft
(Interim Report p. 5)

For the reasons set forth below and in Section I above, the Committee objects to the demand in the Interim Report that the

Committee pay the U.S. Treasury in the amount of \$7,035.60

The Committee fully responded to this issue in response to the Exit Conference. The Committee's letter to the auditors is attached. Exhibit A. It is a waste of the Committee's resources and time to have to respond again to this issue.

Under 41 CFR. § 114.9(e)(2), the Committee was required to reimburse in advance for the use of corporate or labor aircraft, in the case of travel to a city served by regularly scheduled commercial service, in the amount of the first class airfare to such city. The auditors do not dispute that the Committee reimbursed in advance for the correct number of people for any leg of any trip. Instead, the auditors contend that the Committee is required to reimburse in the amount of the highest first class airfare available on any particular date. Nothing in the regulations requires this.

The Interim Report is simply incorrect that the fares used by the Committee were "discounted" first class fares. The Affidavit of Stuart Carroll refutes this contention. Exhibit B. As Mr. Carroll states, both the F and F9 codes on the GSA schedule represent unrestricted first class fares. The days when there may have been a single valid unrestricted first class fare are long gone, just as the days of a regular coach fare are gone. The auditors' contention that they used the lowest non-discounted first class fare is incorrect. On the contrary, they selected the highest possible first class fare. The airlines do not all

use the same fares on the same day for the same journeys, and nothing in the Commission's regulations requires that a Committee select the highest available first class fare.' The fares quoted to the Committee were first class fares, available to the Committee without restriction on the days the Committee traveled. The regulations simply do not require anything more.

The Commission cannot possibly expect a Committee to be more scrupulous in its effort to comply with this regulation than was the Harkin Committee. The Committee scheduler kept detailed notes of her calls to the travel agent; she used the same travel agent in each instance; and the travel agent quoted the Committee the lowest valid unrestricted first class fare for each date. These fares are backed up by the Affidavit of Stuart Carroll, the contemporaneous notes of JoDee Winterhoff, the Committee scheduler (Exhibit C), and by the records of an independent tariff company, the Airline Tariffs Publishing Company, also attached to this response. Exhibit D. In every instance the Committee paid in advance in full for the correct number of people.

If in the future the Commission wants to require that campaigns use the highest available first class fare as published

⁵ In fact, the Commission's regulations do not state that a committee must use a non-discounted first class fare. If such a fare were available on the day and at the time a Committee used a corporate or labor plane there is nothing in the regulations that would prohibit the Committee from using that fare in reimbursing the corporation.

in some GSA print-out, then it should do so by regulation and not because the auditors discovered a new government print-out. There is simply no basis for the request in the Interim Report for a payment of \$7,035.60 relating to the Committee's use of corporate and labor aircraft.

Finding II.B. - Apparent Excessive Contributions
(Interim Report p. 6)

1. Contributions from Individuals

For the reasons set forth in Section I above and below, the Committee objects to the demand in the Interim Report that the Committee pay \$22,059.99 to the U.S. Treasury.

At the outset of the campaign, the Committee established systems for monitoring contribution limits to insure that no excessive contributions were received, or that excessives were properly reattributed or refunded. Due to the inexperience and workload of Committee staff, some excessive contributions were inadvertently accepted. The vast majority of these excessives were received in 1991. Moreover, even if the auditors' total number of \$22,059.99 is valid, that represents a very small percentage of the more than \$3 million in individual contributions received by the Committee.

As instructed in the Commission's letter of June 2, 1992, the Committee did not refund any contributions not refunded by that date, although as stated above, the Committee objects to this instruction.

Through their sample the auditors identified excessive individual contributions totaling \$1,550. In addition, in a 100% review of selected contributions chosen on an unspecified basis, the auditors identified an additional amount of \$16,600 in excessive individual contributions. The Committee is willing to refund the excessive contributions specifically identified by the auditors, as it would have done absent the Commission's specific June 2 instruction not to refund them. \$2,250 of these excessives had already been refunded by the Committee prior to receipt of the Commission's June notification.⁶ Thus, although untimely, these contributions have already been refunded and were refunded prior to the time the Commission advised the Committee of its new policy regarding refunds. Thus, the Committee contends that it should refund to contributors a total amount of \$15,900.

2. Excessive Contributions From Political Committees
Interim Report p. 8

For the reasons set forth in Section I above, the Committee objects to the demand in the Interim Report to pay \$3,600 to the U.S. Treasury for excessive contributions inadvertently received from political committees. The Committee contends that because the Commission has no basis for requiring payment of these amounts to the U.S. Treasury, these contributions should be

⁶ Thus, even if the Commission had the authority to require "payment" of excessive contributions to the Treasury, this \$2,250 should not be included in that amount since it was refunded prior to receipt of the FEC's June 2 letter.

refunded to the contributors

As described in previous sections, the Committee established systems for reviewing contributions and monitoring limits, but due to the inexperience of Committee staff and problems with data entry, \$3,600 in excessive PAC contributions were received out of a total of \$492,000. The auditors arrived at this number by a 100% review of Committee PAC contributions. In light of this review, this small amount of excessive contributions is testimony to the outstanding efforts of the Committee to review and refund excessive contributions.

Since these contributions had not been refunded as of June 2, 1992, the Committee did not refund these amounts per instruction of the Commission on that date.

Finding II.C. - Misstatement of Financial Activity
Interim Report p. 91

The Committee has filed amended reports materially correcting the mistakes that resulted primarily from inadvertent errors in reporting disbursements. As noted in the Interim Report, and as explained by the Committee's Assistant Treasurer at the exit conference, these errors were primarily as a result of the following: data entry errors; mistakes in the system in

The aggregation problems for these PAC contributions are attributable to the different ways the data entry staff entered these contributions into the system. The names of these labor political committees can be confusing particularly if an inexperienced person is entering the data. The Committee had to rely on temporary personnel for data entry, so it was extremely difficult to train and monitor their performance.

that certain codes in the computer system were omitted when preparing particular reports; double reporting of some disbursements; information from the Committee's draft/field account that was not available until after certain reports were filed; reporting of a payroll account in an incorrect month; and staff disruptions due to the Committee's move to a new office. These mistakes were due primarily to staff shortages and the inexperience of those staff in the accounting department.

Amendments filed by the Committee in August 1992 and on August 31, 1993 have materially corrected these errors.

Finding II.D. - Itemization of Receipts and Disbursements
(Interim Report p. 9)

1. Receipts (Interim Report p. 10)

The Interim Report requests no additional action since the amended reports materially correcting itemization of receipts were filed in 1992. However, the Committee would like to bring to the Commission's attention that the auditors appear to have used both a sample and a selected 100% review in determining the amount of unitemized contributions. For the reasons explained in Section I above, this method of sampling a population and making a projection on that basis, and then, in addition, including a 100% review is guaranteed to produce incorrect and overstated results.

2. Disbursements (Interim Report p. 11)

As noted in the Interim Report, the itemization errors were

corrected in August 1992 for the regular accounts and draft account through January 31, 1992. Amendments filed on August 31, 1993 have materially corrected the errors in the itemization of regular accounts and the draft account subsequent to January 31, 1992, and for the payroll account for all relevant reports, thus satisfying the recommendations of the Interim Report.

Finding II.E. - Omission of Disclosure Information
(Interim Report p. 13)

1. Receipts (Interim Report p. 13)

The Committee strongly disagrees with the auditors' contention that it has not demonstrated best efforts to obtain contributor occupation and employer information.

As set forth in the attached affidavit of Betsy Schwengel, the Committee's Finance Director, copies of contributor cards were included with every solicitation sent out by the Committee. Exhibit E. Copies of these two cards are attached to the affidavit. Both cards contain a clear request and convey that the information is required, thus satisfying the requirements of 11 CFR. §104.7(b).¹

¹ The Committee's contributor cards state that the information is "required by the FEC" or "needed for FEC purposes". The Commission sent a letter to presidential campaigns stating that for purposes of determining "best efforts", the contributor card or solicitation must state that the information is "required by law". Unfortunately, that letter was sent after the campaign was in full in swing. Given the timing of that notification it would be unfair for the Commission to hold committees to that specific language in order to satisfy the best efforts requirement, when in fact a clear written request was made stating that the information was required for

In addition, the Committee advised the auditors at the Exit Conference that the contributors who had failed to produce the contributor information had been sent an additional letter requesting the information. That letter was sent to 2,607 individuals, and responses were received from 998 individuals. All contributor information received in response to this additional letter has been included on amended reports filed by the Committee. The list of contributors who received letters is attached, as are copies of the responses. Exhibits F and G.

2. Disbursements (Interim Report p. 15)

The Committee filed amendments on August 31, 1993 materially correcting the omitted itemization information on disbursements. The Committee exercised every effort to obtain and report full information on disbursements, notwithstanding the fact that the Committee had severely limited resources and inexperienced staff.

Finding III.A. - Determination of Net Outstanding Campaign Obligations (Interim Report p. 16)

The Committee has attached as Exhibit H, copies of documentation pertaining to the \$36,010.46 in expenditures and open accounts payable; work papers showing the estimate for additional winding down costs; and copies of documents supporting payments to the IRS. Exhibits I and J.

While it is not presently an issue in this audit, the Committee notes that it disputes the auditors' methodology for

FEC purposes.

determining whether a candidate has received funds in excess of his or her entitlement. In order to make this determination, the auditors create a fictional NOCO statement modified with hindsight but purportedly creating a picture of a committee as of an arbitrary date-- in this case August 3, 1992. In fact, the auditors' NOCO does not provide an accurate financial picture of the committee either as of the date of ineligibility or at any later date. The Committee believes that its NOCO statements filed periodically as required by the regulation present the most accurate snap shot of the Committee's financial status as of each particular date.

The Committee thus objects to the use of the auditors' revised NOCO as of August 3, 1992 as the basis for determining when it was no longer eligible to receive additional matching funds.

Finding III.B. - Stale Dated Committee Checks
(Interim Report p. 20)

The Committee responded to the auditors' proposed finding on this issue in December 1992 and believe that the auditors should have accepted that response as sufficient. Exhibit K. However, since the auditors were unwilling to accept the information provided by the Committee at that time, which included check numbers of replacement checks, we are responding once again to this. On the basis of the information set forth below, the Committee contends that no repayment is appropriate.

1. Check #1641 to 900 Associates for the amount of \$350.

This check was written for rent for a Pennsylvania campaign office. The Committee is unable to ascertain the status of this check. Efforts to contact 900 Associates have proved futile. Although the Committee has received no invoices from this vendor and believes that no outstanding balance is due to 900 Associates, in accordance with the FEC regulations, the Committee does not dispute payment to the Treasury of this amount.

2. Check #1805 to Trover Books for the amount of \$127.

This check was written for the intended purchase of books for the campaign. However, before any purchase was made, the committee decided not to buy the books. The check was subsequently voided and destroyed. Please refer to the attached affidavit of David Jones for confirmation of this. Exhibit L.

3. Check #1866 to the U.S. Postmaster for the amount of \$1,660.

This check was written for postage for a fundraising event in Florida. The check was lost and replaced with Committee check #1874 for the full amount due. The Postmaster does not provide postage without advance payment. No remaining debt is owed by the Committee as a result of this transaction.

4. Check #2077 to WMMJ-FM/WOL-AM for the amount of \$1,457.75.

This check was written for 24 radio spots which were to air between February 29 and March 3, 1993. However, these spots were canceled before they were aired, and the Committee was not charged the designated amount. The Committee thus incurred no

monetary obligation to WMMJ-FM/WOL-AM as a result of this transaction. Please refer to the attached affidavit of Jack Malloy for confirmation of this. Exhibit M.

5. Check #2182 to Chicago Hilton Towers for the amount of \$500.

This check was written for a fundraiser to be held at the Chicago Hilton Towers. However, Senator Harkin dropped out of the campaign before this time. The Committee has no financial obligation to Chicago Hilton Towers. Please refer to the affidavit of Elsie Blair for confirmation of this. Exhibit N.

6. Check #10007 to Manatt, Phelps, & Phillips for the amount of \$5,407.80.

The Committee incurred \$5,407.80 in legal expenses for services rendered by Manatt, Phelps, & Phillips from December 1 to December 31, 1991. Check #10007 was replaced by the Committee with check #10038 to pay the full amount owed to the firm by the Committee. There is no outstanding monetary obligation owed to the firm as a result of this transaction. Please refer to the attached affidavit of Karen van Allen and a copy of check #10038 for confirmation of this. Exhibit O.

7. Check #20190, #20191, #20192, #21094, #20232, #20233, and #20237 to National School Bus Service, Inc. for the aggregate amount of \$885.

These checks were written to pay for transportation services provided to the campaign by the National School Bus Services, Inc. These checks bounced and were subsequently replaced by

check #10800 for the amount of \$1080, which covered the amount owed from the bounced checks, as well as additional expenses incurred by the Committee for subsequent services. All debts owed to National School Bus Service, Inc. by the Committee resulting from the above transactions have been paid in full. Please refer to the attached affidavit of Linda Foley and a copy of check #10800 for confirmation of this. Exhibit P.

8. Check # 20237 to PIP Printing for the amount of \$100.

This check was written to pay for printing of blueprints in New Hampshire. The check did not clear the bank. The Committee is unable to ascertain the result of this transaction. Although the Committee has received no invoices from PIP Printing and believes that no debt is owed this vendor, in accordance with the FEC regulations, the Committee does not dispute payment to the Treasury of this amount.

9. Check #20429 and #20430 to William Montfort for the aggregate amount of \$200.

These checks were written to reimburse Mr. Montfort for gas and phone expenses which he incurred while he coordinated the Committee's petition efforts in the northeastern New York counties. Mr. Montfort has subsequently released the Committee from these financial obligations and has agreed to the above being reported as an in-kind contribution to the Committee. The Committee has no outstanding monetary obligations to Mr. Montfort. Please refer to the attached affidavit of William

Montfort for confirmation of this. Exhibit Q.

10. Check #20382 to John Thorsen for the amount of \$72.62.

Check #1929 to Mike Bermin for the amount of \$600.

Check #20382 was written to reimburse Mr. Thorsen for travel expenses which he incurred while campaigning for Senator Harkin in New Hampshire. The check bounced. Upon efforts to pay Mr. Thorsen the amount owed him, the Committee was unable to locate him, despite best efforts made.

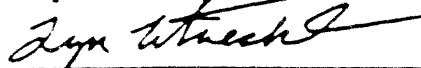
Check #1929 was written to cover expenses incurred by Mr. Bermin while campaigning for Senator Harkin in New Hampshire. Upon efforts to pay Mr. Bermin the amount owed him, the Committee was unable to locate him, despite best efforts made.

Since these amounts were for expense reimbursements, they can be treated either as exempt travel expenditures under 11 CFR or as in-kind contributions. The Committee proposes this resolution of these two items.

In summary as to stale-dated checks, the Committee does not dispute payment of \$450.

For the reasons set forth above, the Committee respectfully requests that the Commission modify the Final Audit Report in accordance with the comments set forth above.

Respectfully submitted,


Lyn Utrecht, General Counsel



REPORT OF THE AUDIT DIVISION
ON
AMERICANS FOR HARKIN, INC.

I. Background

A. Audit Authority

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

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

B. Audit Coverage

The audit covered the period from the Committee's inception, June 3, 1991 through August 31, 1992. During this period, the Committee reports reflect an opening cash balance of \$-0-, total receipts of \$5,668,468, total disbursements of \$5,387,092, and a closing cash balance of \$144,134.1^{1/} In addition, a limited review of the Committee's transactions was conducted through March 22, 1993, for purposes of determining the Committee's remaining matching fund entitlement based on its financial position.

^{1/} These totals do not foot due to various math errors. (See Finding II.C.). All figures are rounded to the nearest dollar.

C. Campaign Organization

The Committee registered with the Federal Election Commission on September 23, 1991. The Treasurer of the Committee during the period covered by the audit was Larry Hawkins. The current Treasurer is also Larry Hawkins.

During the period audited, the campaign established offices in 15 states in addition to its national headquarters located in Bethesda, Maryland. The campaign's current offices are in Washington, D.C.

To manage its financial activity, the campaign maintained nine bank accounts at various times. From the above accounts, the Committee issued approximately 4,108 checks in payment for goods and services. Also, the Committee received approximately 43,388 contributions from 34,275 individuals totaling \$2,655,641 and 193 contributions from political committees totaling \$325,025.

In addition to contributions, the campaign received \$2,103,362 in matching funds from the United States Treasury. This amount represents 15% of the \$13,810,000 maximum entitlement that any candidate could receive. The candidate was determined eligible to receive matching funds on November 27, 1991. Through February, 1993, the campaign made a total of 15 matching funds requests totaling \$2,253,220. The Commission certified 93% of the requested amount. For matching fund purposes, the Commission determined that Senator Harkin's candidacy ended March 9, 1992. This determination was based on a public statement by the Candidate. The Committee has continued to receive matching fund payments to defray expenses incurred through March 9, 1992 and to help defray the cost of winding down the campaign.

Attachment 1 to this report is a copy of the Commission's most recent Report on Financial Activity for this campaign. The amounts shown are as reported to the Commission by the Committee.

D. Audit Scope and Procedures

In addition to a review of the the Committee's expenditures to determine the qualified and non-qualified campaign expenses incurred by the campaign, the audit covered the following general categories:

1. The campaign's compliance with statutory limitations with respect to the receipt of contributions or loans (see Findings II.B.1 and 2.)

2. the campaign's compliance with the statutory requirements regarding the receipt of contributions from prohibited sources, such as those from corporations or labor organizations (see Findings II.A.1. and 2.);
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 (see Finding II.D.1. and E.1.);
4. proper disclosure of disbursements including the itemization of disbursements when required, as well as, the completeness and accuracy of the information disclosed (see Findings II.D.2. and E.2.);
5. proper disclosure of campaign debts and obligations;
6. the accuracy of total reported receipts, disbursements and cash balances as compared to campaign bank records (see Finding II.C.);
7. adequate recordkeeping for campaign transactions;
8. accuracy of the Statement of Net Outstanding Campaign Obligations filed by the campaign to disclose its financial condition and establish continuing matching fund entitlement (see Findings III.A. and III.B.);
9. the campaign's compliance with spending limitations; and
10. other audit procedures that were deemed necessary in the situation.

In addition, on April 20, 1992, the Audit staff conducted an inventory of the Committee's records to determine if they were materially complete and in an auditable condition. A letter, dated May 5, 1992, notified the Committee that records pertaining to several areas of the pending audit were not made available for review. Furthermore, the letter informed the Committee that if at the conclusion of a 30 day period ending June 8, 1992, the items listed on the letter had not been provided, the Commission would issue subpoenas for the production of those records. Records provided in response to our May 5, 1992 request were deemed sufficient to commence fieldwork.

At the Entrance Conference on June 15, 1992, the Audit staff informed the Committee that a request would be made to the Office of General Counsel for subpoenas to be issued to its direct mail vendor for the production of all documents which detailed the amount and destination of direct mail distributed by the committee.

The subpoena to the Committee's direct mail vendor was approved by the Commission on July 13, 1992. On August 20, 1992, in response to the subpoena issued, the Audit staff received sufficient records from the Committee's direct mail vendor.

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

II. Findings and Recommendations - Non-Repayment Matters

Introduction to Findings

In light of an October 22, 1993 decision by the Court of Appeals for the D.C. Circuit in FEC v. NRA Political Victory Fund et al., the Commission reconsidered the interim audit report and voted its approval on November 9, 1993. As a result of this action, the Committee was afforded an additional 30 days to supplement its earlier response received on September 7, 1993. On November 22, 1993, Counsel to the Committee indicated that no supplemental response would be made.

A. Prohibited Contributions

1. Apparent Corporate Contributions

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

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of prohibited contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited. (See 11 C.F.R. 103.3(b)(1) and (2)). The Commission will no longer recognize any untimely refunds made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified a material dollar amount of prohibited contributions. The sample projected that the total dollar value of prohibited contributions

in the population was \$7,123. As of the conclusion of audit fieldwork, the Committee had made no refunds relative to the aforementioned items. In addition, one prohibited contribution of \$250 was identified in a 100% review of selected contributions.

The Committee did not establish a separate bank account for the deposit of potential prohibited contributions; however, the account balances maintained in the Committee's regular accounts were greater than the cumulative total of the prohibited contributions deposited. (See 11 C.F.R. §103.3(b)(4)).

All prohibited contributions identified during the reviews were verified by the appropriate Secretaries of State.

At the Exit Conference, the Committee was provided schedules and relevant check copies to support the prohibited contributions identified. Committee personnel had no comments with respect to the items noted above. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

In the interim audit report, the Audit Staff recommended that the Committee demonstrate that the contributions discussed above are not prohibited or make a payment to the United States Treasury in the amount of \$7,373.

In response to the interim report, Counsel for the Committee objected to the Commission's demand for payments of \$7,373 for alleged apparent corporate contributions. The objection is based on arguments that the Commission has no authority in the audit process to require payments of prohibited or excessive contributions and that the auditors' method of sampling to project these payments is invalid.

Counsel states correctly that the Federal Election Campaign Act requires publicly funded presidential candidates/committees to make repayments to the United States Treasury under very specific circumstances (26 U.S.C. §9038 (b)(1) and (2)) and that the payments requested for prohibited and excessive contributions fit neither of the categories. Further, Counsel notes that the only other authority granted the Commission to require any payment of money is found in the civil penalty provisions at 2 U.S.C. §437(g).

However, the payments at issue are not repayments or civil penalties. These payments are in accordance with the policy adopted by the Commission for use in 1992 Title 26 audits.

This sampling technique is the same technique used by the Commission since 1980 to determine the value of matchable

2/ The Commission approved this policy on May 5, 1992. Committees were informed by letter dated June 2, 1992.

contributions contained in a submission made by a presidential primary candidate.^{3/}

Counsel for the Committee contends that "the combination of sampling with selected 100% review of certain transactions is an invalid methodology that may result in overstated projections." Counsel states,

"The auditors sampled a population (contributions received by the Committee) and on the basis of the number of prohibited or excessive contributions found in the sample, used a statistical estimate to project an amount based on the total population. In addition to the estimate based on the sample, the auditors conducted an additional selected 100% review of certain items either in the same population or in a discretely identified portion of the overall population, and included those items as additional prohibited and excessive amounts on top of the statistical estimate based on the population. This method clearly results in an overstated amount." [Emphasis not in original]

Counsel further states,

"The audit division's logic would allow for an estimate by sample, followed by a 100% review of a certain segment of the population known to contain errors (such as all refunds). This would, of course, lead to an overestimate of prohibited contributions just as the auditors have done."

Contrary to the contention apparently being made by Counsel to the Committee, it should be noted that the Audit staff performed two separate and distinct reviews. Certain contributions were tested on a sample basis while other contributions were tested on a 100% basis. Contributions reviewed on a 100% basis were not included in the population from which the sample was selected. Rather, as explained below, the 100% review items were a separate group of contributions.

On June 30, 1992, the Committee's Assistant Treasurer was informed that contributor information for 20 deposits into the Committee's bank account was not entered into the Committee's receipts database. The Committee requested the

^{3/} This technique was recommended by the firm of Ernst & Whinney (now Ernst & Young) in a 1979 report to the Commission entitled Report on Study of Selected Sampling Procedure.

information from the bank. It was received on August 26, 1992, subsequent to the Audit staff's sample review of contributions contained on the receipts database.

No overstatement occurs when the amount resulting from the separate and distinct 100% review is added to the projected amount based on the sample. Counsel's arguments on methodology used are flawed at best.

Counsel also states that the final audit report should be revised to require the Committee to refund to the contributors the \$750 (\$500 in corporation contributions identified in the sample and \$250 identified in the 100% review) in actual corporate contributions inadvertently accepted.

The Committee has not complied with the recommendation contained in the interim audit report. Arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive^{4/}; therefore a payment (\$7,373) to the United States Treasury is warranted. Further, the Audit staff has recognized this amount as a qualified campaign expense, and as such, included this amount on the NOCO statement (See Finding III. A.)

Recommendation #1

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$7,373, representing the value of unresolved corporate contributions.

2. Use of Corporate and Labor Organization Aircraft

Section 114.9(e)(1)(i) of Title 11 of the Code of Federal Regulations states that a candidate, candidate's agent, or person traveling on behalf of a candidate who uses an airplane which is owned or leased by a corporation or labor organization other than a corporation or labor organization licensed to offer commercial services for travel in connection with a Federal election must, in advance, reimburse the corporation or labor organization in the case of travel to a city served by regularly scheduled commercial service, the first class air fare.

During the review of the Committee's transactions relative to payments for air transportation services, the Audit staff identified Committee disbursements to one corporation and one labor organization. The name of the corporation was HealthSouth Rehabilitation Corporation and the labor organization

^{4/} Please refer to attached legal analysis (pages 2-5), dated 1/19/94, for a discussion of selected court cases which support both the Commission's authority to require payment and the methodology employed.

identified was the Machinists and Aerospace Workers International Association (Machinists Association). These organizations do not appear to be licensed to offer commercial services for travel as part of their normal business operations. The corporate status of the firm noted above was confirmed with the appropriate Secretary of State. The Audit staff compared the Committee's payments for flights which occurred between December 1991 and March 1992 to the lowest non-discounted first class fares charged by commercial airlines which regularly served the same cities.

Our analysis of the corporate aircraft usage revealed that the corporation billed the Committee \$5,473 and received a like payment prior to the flights. However, an apparent underbilling and underpayment of \$1,193 exists; this represents the difference between the amount billed/paid (\$5,473) and the value (\$6,666) calculated by the Audit staff using the lowest non-discounted first class fare available on the date of the flight.

Based on the analysis of the Machinists Association's aircraft usage by the Committee, it was noted that the Machinists Association billed the Committee \$35,705 and was paid \$35,961 prior to or on the date of the flight. However, an apparent underbilling and underpayment of \$5,843 exists; this represents the difference between the amount paid (\$35,961) and the value (\$41,804) calculated by the Audit staff using the lowest non-discounted first class fare available on the date of the flight.

Thus a total of \$41,434 (\$35,961 + \$5,473) was paid for the above flight activity which resulted in a total underpayment of \$7,036 (\$1,193 + \$5,843). The Committee was provided copies of audit workpapers detailing the aforementioned matter.

The Committee responded that it used appropriate first class airfares in calculating the amounts paid. The Committee noted that their rates were obtained in each case by the campaign scheduler who contacted Carroll Travel for the first class fares for each leg of the trip as of the date of travel.

To support its first class fares, the Committee provided the Audit staff with copies of a statement from its campaign scheduler, the scheduler's notes of conversations with Carroll Travel, and a statement from the owner of Carroll Travel.

The Audit staff's analysis of the information provided by the Committee indicated that the first class fares obtained by the Committee were, in many cases, discounted. In some instances, first class fares used by the Committee were identical to those identified by the Audit staff. Notwithstanding the Committee's efforts, the Audit staff maintains its position that the Committee's use of corporate and labor organization aircraft resulted in an underpayment of \$7,036.

The interim audit report recommended that the Committee provide information which demonstrates that the aforementioned activity is in accordance with 11 C.F.R. §114.9(e) or absent such a showing, make a payment of \$7,036 to the United States Treasury.

Counsel for the Committee raised the same objection to this recommendation as was raised in Section 1 above. For the reasons stated in Section 1 above, Counsel's arguments questioning the Commission's authority to require payments to the United States Treasury are not persuasive.

In addition, Counsel states that nothing in the regulations requires that the Committee reimburse in the amount of the highest first class airfare available on any particular date.

The Committee submitted an affidavit of Mr. Stuart Carroll, owner of Carroll Travel, the agency which regularly provided travel-related services to the Committee. The affidavit states, in part:

"The FEC's Interim Audit findings indicate that the Harkin Campaign Committee did not use fares that represented a non-discounted first class airfare. The term in dispute here is 'non-discounted'. I firmly state that I provided the Harkin Campaign Committee in every instance, to the best of my ability, a valid, industry standard, non-discounted first class air fare. The campaign committee has obtained a listing of the various first class airfares available for use on the dates in question. As you can see, there are a number of categories: 'F', 'F9', 'FN', and 'F28'. The 'F' and 'F9' categories represent non-discounted, unrestricted fares. In every instance, my agency quoted the campaign an 'F9' or other applicable non-discounted first class category fare."

According to airfare information provided by General Services Administration Transportation Audit Division, first class airfares are listed for unrestricted (code F), for night travel (code FN) and for other service (codes F9 and F28). The rates shown for code F first class accommodations are higher than the other first class rates. Generally this is because conditions accompany the lower fares, such as: the tickets must be purchased within a certain time, or travel is restricted to certain days or times.

The regulation at 11 C.F.R. §114.9(e) requires that first class airfare be used as a basis to determine the amount reimbursed, apparently in an attempt to equate a non-scheduled

corporate aircraft trip to that of a scheduled commercial flight with the same origin and destination points and of an equivalent level of service.^{5/} In the Audit staff's opinion, travel encumbered with conditions such as those stated above does not equate with the unrestricted use of a corporate or labor organization aircraft, therefore, reimbursement for less than a non-discounted first class rate with no conditions attached is contrary to the intent of the the regulation.

However, because of the specific facts presented in this report and the inherent difficulty presented to committees in determining first class rates in the context of 11 C.F.R. § 114.9(e)'s prepayment requirement, the Committee's approach is reasonable and further action does not seem warranted..

B. Apparent Excessive Contributions

1. Contributions from Individuals

Section 441a(a)(1)(A) of Title 2 of the United States Code states that no person shall make contributions to any candidate with respect to any election for Federal office which, in the aggregate, exceed \$1,000.00.

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 a contribution 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.

^{5/} When the regulations were adopted in 1976, prior to the deregulation of the airline industry, there was generally, little price variation between carriers for a given trip.

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 C.F.R. §§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 110.1(k) of Title 11 of the Code of Federal Regulations states, 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.

The Commission notified the Committee by letter dated June 2, 1992, that a sampling technique would be used to identify the dollar amount of excessive contributions received by the Committee. The letter states, in part, "Commission regulations provide 30 days in which to refund contributions which appear to be prohibited, and 60 days in which to seek reattribution, redesignation or refund of excessive contributions (11 C.F.R. 103.3.(b)(1) (2) and (3)). The Commission will no longer recognize any untimely refunds, redesignations or reattributions made more than 60 days following a candidate's date of ineligibility or after the date of receipt of this letter, whichever is later. Contributions resolved by the committees outside these time periods are considered untimely and in violation of the Commission's regulations. The Committee received the letter June 6, 1992.

Our sample review of contributions identified a material dollar amount of unresolved excessive contributions. The sample projected that the total dollar value of unresolved excessive contributions in the population was \$5,460. To date the Committee has not provided the Audit staff information relative to any refunds of the items noted. In addition, twenty-two unresolved excessive contributions, totaling \$16,600, were identified in a 100% review of selected contributions.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the aforementioned excessive contributions. (See 11 C.F.R. §103.3(b)(4)).

At the Exit Conference the Committee was provided with a schedule of the apparent excessive contributions. The Committee had no comments with regard to the excessive

contributions. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee either provide evidence that the contributions in question are not excessive or make a payment to the United States Treasury in the amount of \$22,060.

Counsel for the Committee raised the same objections to this recommendation as were raised in response to the recommendation in Finding II.A.1. above. Further, Counsel contends that \$2,250 had already been refunded by the Committee prior to the June notification and should not be included in the payment amount to the Treasury.

However, the Audit staff notes that only \$1,500 in refund checks written prior to the June notification letter are included in the excessive amount. Those checks had not cleared the Committee's bank as of November 1992 and are, therefore, considered unresolved.

The arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive; therefore a payment (\$22,060) is warranted. The Audit staff has recognized this amount as a qualified campaign expense, and as such, included the amount on the NOCO statement (see Finding III.A.)

Recommendation #2

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$22,060 representing the value of unresolved excessive contributions received from individuals.

2. Excessive Contributions From Political Committees

Section 441a(a)(2)(A) of Title 2 of the United States Code states that no multicandidate political committee shall make contributions to any candidate and his authorized political committees with respect to any election for Federal office which, in the aggregate, exceed \$5,000.

The Audit staff performed a review of contributions received from political committees and identified three contributors whose contributions exceeded the limit by \$3,600. As of the end of audit fieldwork, no refunds were made.

The Committee did not establish a separate bank account for making refunds; however, the account balances maintained in the bank accounts were greater than the cumulative total of the excessive contributions. (See 11 C.F.R. §103.3(b)(4)).

At the Exit Conference the Committee was provided with a detailed schedule, as well as relevant check copies relative to these unresolved excessive contributions. The Committee did not provide any explanation for the above noted errors. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee either provide evidence that the contributions in question are not excessive or make a payment to the United States Treasury in the amount of \$3,600.

Counsel for the Committee raised the same objections to this recommendation as were raised in response to the recommendation in Finding II.A.1. above.

The arguments submitted questioning the Commission's authority to require a payment or the methodology employed by the Audit staff are not persuasive; therefore a payment (\$3,600) is warranted. The Audit staff has recognized this amount as a qualified campaign expense, and as such, included the amount on the NOCO statement. (See Finding III.A.)

Recommendation #3

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$3,600 representing the amount of unresolved excessive contributions received from political committees.

C. 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 the reporting period, and the total amount of receipts and disbursements received or made during the reporting period and calendar year.

The Audit staff performed a reconciliation of the Committee's bank account activity to the activity on its disclosure reports for the period June 3, 1991 through August 31, 1992. The reconciliation indicated that the reports initially filed contained material misstatements. Prior to the conclusion of audit fieldwork the Committee filed amended reports for the period June 3, 1991 through January 31, 1992. However, the amendments did not correct the misstatements.

For the period June 3, 1991 through December 31, 1991, reported disbursements were overstated by a net amount of \$19,511.28. The components of the misstatement are:

Reported Disbursements as Amended	\$2,011,203
Disbursements Reported Twice	65,931)
Disbursements not Reported	12,560
Unexplained Difference	<u>33,859</u>
Adjusted 1991 Disbursements	<u>\$1,991,692</u>

The reported ending balance at December 31, 1991 was understated by \$23,992, resulting primarily from the misstatement detailed above.

For the period January 1, 1992 through August 31, 1992, reported disbursements were understated by \$194,085. Ending cash for the period was overstated by \$78,404, resulting primarily from the misstatement in disbursements.

According to the Committee's Assistant Treasurer, the disbursements were not reported due to the following reasons: 1) For the period 2/1/92 - 2/29/92, amounts coded to certain expense codes in the Committee's computer system were omitted from the disclosure report; 2) For the period 3/1/92 - 3/31/92, the Committee did not maintain the information required to be reported for disbursements from its field account, however the information was subsequently obtained from the Committee's bank.

In addition, the Committee did not report \$12,745 in disbursements from its payroll account or \$49,387 in disbursements made during the period 4/1/92 - 8/31/92.

At the Exit Conference the Committee was given schedules which outlined the misstatements.

The interim audit report recommended that the Committee file amended reports to correct the misstatements noted.

In response to the interim audit report, the Committee stated that amended reports had been filed which materially corrected mistakes that resulted from inadvertent errors in reporting disbursements. The Committee noted that the mistakes were due primarily to staff shortages and the inexperience of those staff in the accounting department.

The Committee filed amended reports on August 31, 1993, which materially corrected the misstatements.

D. Itemization of Receipts and Disbursements

1. Receipts

Section 434(b)(3)(A) of Title 2 of the United States Code states, in part, that each report shall disclose the identification of each person who makes a contribution to the

reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year, or in any lesser amount if the reporting committee should so elect, together with the date and amount of any such contribution.

The Audit staff conducted a sample review of contributions, the results of which indicated that a material amount of contributions were not itemized as required on disclosure reports initially filed. The identified exceptions, when used to estimate the total amount of contributions not itemized resulted in a projected amount of \$136,877. Further, we identified twenty-two additional contributions totaling \$5,950 which were not itemized as required.

Subsequent to the commencement of audit fieldwork, the Committee filed amended reports which materially corrected the errors noted above.

2. Disbursements

Sections 434(b)(4)(A) and (5)(A) of Title 2 of the United States Code state that each report shall disclose expenditures made to meet candidate or committee operating expenses; and the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.3(b)(4)(i) of Title 11 of the Code of Federal Regulations, states in part, that each report shall disclose the total amount of all disbursements for the reporting period and for the calendar year. Each authorized committee shall report the full name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet the committee's operating expenses, together with the date, amount and purpose of each expenditure.

a. Regular Accounts

The Audit staff performed a sample review of Committee disbursements made from its regular (excludes field and payroll accounts) bank accounts for the period of inception (6/3/91) through June 30, 1992. With respect to itemization, the Audit staff identified a material number of disbursement transactions that were not itemized as required on Committee disclosure reports filed prior to the beginning of audit fieldwork. The Committee's Assistant Treasurer attributed the itemization problems to the Committee's late start and a failure to have sufficient systems in place.

On August 26, 1992, the Committee filed amended disclosure reports for the period from inception through January 31, 1992 which materially corrected the problems noted for that period. However, at the close of fieldwork the Committee had not filed amended reports for the period subsequent to January 31, 1992. At the exit conference held on November 17, 1992, the Committee had no further comment on the itemization errors noted above. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

In the interim audit report, the Audit staff recommended that the Committee file amended Schedules B-P to correct the itemization errors made subsequent to January 31, 1992. On August 31, 1993, the Committee filed amended disclosure reports which materially corrected the itemization errors.

b. Field Account (Drafts)

The Audit staff performed a sample review of disbursements made from the Committee's field account. Although this account was opened in 1991, most of the activity occurred between January 1992 and March 1992. Our review indicated that very few disbursements made from the field account were itemized on the Committee's disclosure reports filed prior to the commencement of audit fieldwork. Further, for the report covering March 1992, \$27,289 in disbursement activity was not included in reported totals (See Finding II.C.).

Before this matter was brought to the Committee's attention, the Committee stated that all disbursement items were itemized on Schedules B-P regardless of amount. When asked, during the fieldwork, to explain why the March 1992 draft activity was omitted from the disclosure reports, the Assistant Treasurer noted that the Committee had only recently (9/92) obtained information from the bank relative to the drafts which cleared the March bank statement. The Assistant Treasurer further stated that the February 1992 disclosure reports needed to be amended because Schedules B-P contained only partial disbursement amounts for some vendors.

On August 26, 1992, the Committee filed amended disclosure reports for the period from inception through January 31, 1992 which materially corrected the problems noted for that period. However, at the close of fieldwork the Committee had not filed amended reports for the period subsequent to January 31, 1992. At the exit conference, the Committee had no additional comments with regard to field account activity. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

The interim audit report recommended that the Committee file amended Schedules B-P to reflect the required itemization of draft account disbursements made subsequent to

January 31, 1992. The amendments filed on August 31, 1993 by the Committee materially corrected the itemization errors.

c. Payroll Account

The Audit staff reviewed, on a sample basis, disbursements made from the Committee's payroll account for the period inception through August 31, 1992. This review indicated that the Committee failed to itemize a material number of payroll transactions which required itemization. It was also noted that the Committee did not itemize any payroll transactions on its March 1992 disclosure report. When asked during fieldwork, to explain this omission, Committee personnel stated that they had merely forgotten to report the March Payroll and would be filing amended disclosure reports.

Amended disclosure reports were filed by the Committee on June 18, 1992 and August 26, 1992, however the itemization errors discussed above were not materially corrected.

In the interim audit report, the Audit staff recommended that the Committee file Amended Schedules B-P within 30 calendar days to correct the above itemization errors.

In response to the recommendation in the interim audit report, the Committee filed amended disclosure reports on August 31, 1993 which materially corrected the itemization errors relative to its payroll activity.

d. Selected Review of Disbursements

The Audit staff conducted a review of selected Committee disbursements for the period inception through June 30, 1992, and noted 38 disbursements, totaling \$265,418, that were not itemized as required on Committee disclosure reports filed prior to the commencement of audit fieldwork. Our review of amendments filed on August 26, 1992 indicated that the Committee had materially corrected these itemization problems.

E. Omission of Disclosure Information

1. Receipts

Section 434 (c) (3)(A) of Title 2 of the United States Code states, in part, that each political committee shall disclose the identity of all persons who make a contribution to the reporting committee during the reporting period, whose contribution or contributions have an aggregate amount or value in excess of \$200 within the calendar year. Section 431(13) of this Title defines "identification" to mean, "in the case of any

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individual, the name, mailing address, and the occupation of such individual, as well as the name of his or her employer, and in the case of any other person, the full name and address of such person." In addition, 11 CFR §104.3(a)(4) requires that in addition to the above, the aggregate year-to-date totals for such contributions be reported.

Section 102.9(d) of Title 11 of the Code of Federal Regulations states, in part, that in performing recordkeeping duties, the treasurer or his or her authorized agent shall use his or her best efforts to obtain, maintain, and submit the required information and shall keep a record of such efforts.

Section 104.7 of Title 11 of the Code of Federal Regulations states that if best efforts have been used to obtain, maintain, and submit the information required by the Act for the political committee, any report of such committee shall be considered in compliance with the Act. With regard to reporting the identification as defined at 11 CFR 100.12 of each person whose contribution(s) to the committee and its affiliated committees aggregate in excess of \$200 in a calendar year (pursuant to 11 CFR 104.3(a)(4), the treasurer will not be deemed to have exercised best efforts to obtain the required information unless he or she has made at least one effort per solicitation either by a written request or by an oral request documented in writing to obtain such information from the contributor. For purposes of 11 CFR 104.7(b), such effort shall consist of a clear request for the information (i.e., name, mailing address, occupation, and name of employer) which request informs the contributor that the reporting of such information is required by law.

The Audit staff performed a review of contributions from individuals and identified a material number of errors relative to the itemization (or lack thereof) of contributors' occupation and name of employer. The errors, when used to estimate the dollar value of all report errors, result in a projection of \$605,314, which represents approximately 50% of the dollar value of all itemized contributions. In most cases, the Committee had no documentation in the receipts file to show that the information had been requested or that the contributor had submitted the information. In other cases, the information had been provided by the contributor but the Committee did not report the information.

Our review of response devices found in Committee receipt records and a review of the Committee database did not establish that the Committee exercised best efforts to obtain, maintain and disclose the required information. The Committee's receipts file made available did not contain any other information (such as copies of letters to the contributors or phone logs) which could be used to demonstrate "Best Efforts."

At the exit conference the Committee was informed of the aforementioned errors. A Committee representative stated that the Committee could establish an association between the receipts on the database and a fundraising code which could then be related to a solicitation device. The Committee noted that the relationship of the receipts to the solicitation devices sent out to the contributors for each fundraising drive would establish that "Best Efforts" had been made by the Committee.

Within the 10 day period following the exit conference, the Committee submitted information in an effort to demonstrate that it had exercised "Best Efforts." The information consisted of the program language used to extract from the database the contributor records which did not contain full occupation and name of employer information, and a listing of contributors to whom the Committee was in the process of sending letters requesting the required information. In addition, the Committee also submitted response devices which, according to the Committee, were examples of the response devices "always" included with solicitations for contributions. The devices contained requests for the required information.

Although the Committee stated that an association between the receipts database and a fundraising code could be established, the information submitted does not address this. Regarding the program language submitted, the Committee did not provide evidence of its use during the campaign period. In the Audit staff's opinion, the information provided does not demonstrate that the Committee exercised "Best Efforts."

The interim audit report recommended that the Committee demonstrate that "Best Efforts" were exercised in attempting to obtain the occupation and name of employer; or amend its Schedules A-P to include the occupation and name of employer in the instances where the information was omitted.

In response to the interim audit report, the Committee provided an affidavit from its Finance Director. The affidavit stated, in part, that:

"all solicitations for fundraising events which were sent out by the Committee always included one of two standard reply cards, as attached. If the card was not fully filled out, someone on the fundraising staff placed at least one call to the donor to try to obtain all the necessary contributor information."

Counsel for the Committee stated that,

"Both cards contain a clear request and convey that information is required, thus satisfying the requirements of 11 CFR §104.7(b)."

The Audit staff is unclear of the Committee's meaning, when it states, "all solicitations for fundraising events which were sent out by the Committee." The Audit staff questions whether "standard reply cards" were sent out with all solicitations for contributions, such as with direct mail solicitations or only in connection with specific events (e.g., "November 21st Reception" or "cocktail reception") such as those described on the copies of the "standard reply cards" submitted with the Committee's response.

The Committee also provided the Audit staff copies of response letters and a listing of contributors who received follow-up letters requesting the required information. The Committee's response stated that the request for contributor information was sent to 2,607 individuals and responses were received from 988 individuals; and the contributor information received was included on amended reports filed by the Committee. The Committee also noted that the auditors were advised at the Exit Conference that the contributors who had failed to produce the contributor information had been sent an additional letter requesting the information.

The Audit staff reviewed the Committee's amended reports and the material provided by the Committee. With respect to the "standard reply cards", the Audit staff acknowledges that language in compliance with the regulations is included. However, the "standard reply cards" submitted relate to specific fundraising events and do not demonstrate that the Committee exercised "best efforts" during the entire campaign period. The Committee did not submit a telephone log in support of its efforts to obtain information by telephone.

The Audit staff notes that the letters sent to contributors requesting additional information are dated November 17, 1992, - the date of the Exit Conference. In addition, our review of the listing provided, representing contributors who received follow-up letters identified 118 instances where no address is recorded for the contributor.

Notwithstanding the above, the Committee, based on its actions subsequent to November 17, 1992, has demonstrated "best efforts" to obtain, maintain and disclose the requested information.

2. Disbursements

a. Regular Accounts

Section 434(b)(4) and (5)(A) of Title 2 of the United States Code states, in part, that each report shall disclose for the reporting period and calendar year, the total amount of all disbursements, the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet a candidate or committee operating expense, together with the date, amount, and purpose of such operating expenditure.

Section 104.3(b)(4)(i)(A) of Title 11 of the Code of Federal Regulations states, in relevant part, that each report filed shall disclose the total amount of all disbursements for the reporting period and for the calendar year. Each authorized committee shall report the full name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 within the calendar year is made by the reporting committee to meet the committee's operating expenses, together with the date, amount and purpose of each expenditure. As used in 11 CFR 104.3(b)(4), purpose means a brief statement or description of why the disbursement was made.

The Audit staff's review of Committee disbursements made from its regular (excludes payroll and field accounts) accounts and itemized on the reports for the period from inception through June 30, 1992 indicated that a material number of the itemized entries were incorrect as to the amount or the payee's address was missing. For example, the March 1992 disclosure report, although prepared manually, contained no addresses (street, number, city and state) for those transactions. On June 18, 1992 and August 26, 1992, the Committee filed amended disclosure reports which did not materially correct the disclosure problems noted above.

The recommendation in the interim audit report required the Committee to file amended Schedules B-P to correct the public record. In its response, Counsel to the Committee stated that, "The Committee exercised every effort to obtain and report full information on disbursements, notwithstanding the fact that the Committee had severely limited resources and inexperienced staff." On August 31, 1993, the Committee filed amended Schedules B-P which materially corrected the public record.

b. Payroll Account

Our review of disbursements made from the payroll account for the period from inception through August 31, 1992 and itemized on Committee reports revealed that for a

material number of itemized entries the payee's address was omitted. It was noted that a majority of those omissions involved entries dated July 1992.

On June 18, 1992 and August 26, 1992, the Committee filed amended disclosure reports, however no corrections were made with respect to the items mentioned above. The Committee was notified of the above noted errors.

The interim audit report recommended that the Committee file amended Schedules B-P to correct the errors. The Committee's response stated that amendments were filed which materially corrected the omitted itemization information. On August 31, 1993, the Committee filed amended disclosure reports, however the errors noted in the interim audit report were not corrected.

III. Findings and Recommendations--Repayment Issues

A. Determination of Net Outstanding Campaign Obligations

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

In addition, Section 9034.1(b) of Title 11 of the Code of Federal Regulations states, in part, that if on the date of ineligibility a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that on the date of payment there are remaining net outstanding campaign obligations.

Senator Harkin's date of ineligibility was March 9, 1992. The Audit staff reviewed the Committee's financial activity through August 31, 1992, analyzed winding down costs, and prepared the Statement of Net Outstanding Campaign Obligations ("NOCO") as of August 3, 1992, which appears below:

Americans for Harkin, Inc.
 Audited Statement of Net Outstanding Campaign Obligations (NOCC
 at August 3, 1992
 (Determined as of 11/5/92)

Assets

Current Assets:

Cash on Hand	\$ 86,685 <u>a/</u>	
Accounts Receivable	15,625	
Matching Funds (Certified 7/31/92)	28,498	

Total Current Assets	\$130,808	
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Capital Assets	<u>7,000</u>	
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Total Assets		\$137,808
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Liabilities

Accounts Payable for Qualified Campaign Expenses through 7/31/92	\$366,520 <u>b/</u>	
---	---------------------	--

Amount Payable to U.S. Treasury:	\$ 35,316 <u>c/</u>	
----------------------------------	---------------------	--

Estimated Winding Down Costs paid through 3/22/93:	\$103,186 <u>d/</u>	
Estimated Winding Down Costs 3/22/93 through 1996	<u>85,000</u> <u>e/</u>	

Total Winding Down	\$188,186	
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Total Liabilities		<u>\$590,022</u>
-------------------	--	------------------

Net Outstanding Campaign Obligations (Deficit)		<u>(\$452,214)</u>
--	--	--------------------

FOOTNOTES TO NOCO

- a. This amount does not reflect a reduction for certain outstanding checks determined to be stale-dated.
- b. The Audit staff initially verified accounts payable of \$332,793 as of August 3, 1992. However, subsequent to Audit fieldwork, the Committee provided a listing of accounts payable totaling \$368,803 which reflected an increase in that figure by \$36,010. At that time, no documentation was provided to support this increase. In response to the interim audit report, the Committee provided documentation to support \$33,728 of the \$36,010.
- c. Consists of amounts discussed in Findings:
- | | |
|---|-----------------|
| II.A.1. - Prohibited Contributions | \$ 7,373 |
| II.B.1. - Excessive Contributions
Individuals | 22,060 |
| II.B.2. - Excessive Contributions
Political Committees | 3,600 |
| III.C. - Stale-dated Checks | <u>2,283</u> |
| | <u>\$35,316</u> |
- d. This figure represents actual winding down costs paid for the period August 3, 1992 through March 22, 1993. Not included is approximately \$1,000 in tax penalties and/or insufficiently documented payments to taxing authorities.
- e. This represents the Committee's calculation of its winding down estimates from March 23, 1993 through 1996. The Audit staff will review reports and records as necessary to compare actual expenses to these estimates.

In response to the interim audit report, Counsel for the Committee stated the following with respect to the NOCO:

"the Committee notes that it disputes the auditors' methodology for determining whether a candidate has received funds in excess of his or her entitlement. In order to make this determination, the auditors create a fictional NOCO statement modified with hindsight but purportedly creating a picture of a committee as of an arbitrary date-- in this case August 3, 1992. In fact, the auditors' NOCO does not provide an accurate financial picture of the committee either as of the date of ineligibility or at any later date. The Committee believes that its NOCO statements filed periodically as required by the regulation present the most accurate snapshot of the Committee's financial status as of each particular date.

The Committee thus objects to the use of the auditors' revised NOCO as of August 3, 1992 as the basis for determining when it was no longer eligible to receive additional matching funds."

The Committee's position is neither persuasive nor on point. While it is true that matching fund payments after the candidate's date of ineligibility are based on the representations made by the Committee in its NOCO statements, these statements are not audited at the time of payment. One of the purposes of the post-primary audit is to determine if the candidate received matching funds to which he was not entitled (see 26 U.S.C. §9038(a) and (b)). Such determination is based on an examination, after the fact, of the various components of the NOCO statement(s) on which such payments are based, as well as the impact on remaining entitlement of private contributions received by the Committee after the candidate's date of ineligibility.

B. Matching Funds Received in Excess of Entitlement

Section 9038(b)(1) of Title 26 of the United States Code states if the Commission determines that any portion of the payments made to a candidate from the matching payment account was in excess of the aggregate amount of payments to which such candidate was entitled under section 9034, it shall notify the candidate, and the candidate shall pay to the Secretary an amount equal to the amount of excess payments.

Section 9034.1(b) of Title 11 of the Code of Federal Regulations states if on the date of ineligibility a candidate has

net outstanding campaign obligations as defined under 11 CFR 9034.5, that candidate may continue to receive matching payments for matchable contributions received and deposited on or before December 31 of the Presidential election year provided that on the date of payment there are remaining net outstanding campaign obligations, i.e., the sum of the contributions received on or after the date of ineligibility plus matching funds received on or after the date of ineligibility is less than the candidate's net outstanding campaign obligations. This entitlement will be equal to the lesser of: (1) the amount of contributions submitted for matching; or (2) the remaining net outstanding campaign obligations.

As of August 3, 1992, the Candidate's remaining matching fund entitlement was \$452,214. Using the Committee's contribution records, bank records and disclosure reports, it was determined that as of February 1, 1993 the Committee received combined private and public funding of \$388,659. On February 2, 1993, the Committee received a matching fund payment in the amount of \$73,603. This payment exceeded the amount to which the Candidate was entitled by \$10,047. On March 2, 1993, the Committee received its final matching fund payment of \$14,547, bringing the total amount of matching funds received which exceeds the Candidate's entitlement to \$24,595.

Recommendation #4

The Audit Division recommends that the Commission make an initial determination that the Candidate was not entitled to \$24,595^{6/} in matching funds and therefore, the Committee repay \$24,595 to the United States Treasury pursuant to 26 U.S.C. §9038(b)(1).

C. Stale-dated Committee Checks

Section 9038.6 of Title 11 of the Code of Federal Regulations states, in part, that if the Committee has checks outstanding to creditors that have not been cashed, the Committee shall notify the Commission of its efforts to locate the payees, if such efforts have been necessary; and its efforts to encourage the payees to cash the outstanding checks. The Committee shall

6/ Since an estimate (\$85,000) for winding down costs through 1996 was a component of the NOCO statement presented on page 23, the Audit staff will review Committee records and reports after receipt of its response to this report. Any revision to the amount considered repayable will be contained in the Commission's final determination.

also submit a check for the total amount of such outstanding checks, payable to the United States Treasury.

During the review of Committee disbursement activity, the Audit staff identified nineteen checks made payable to vendors which had yet to be cashed as of August 31, 1992. Those checks totaled \$11,208 and were dated from January 9, 1992 through March 12, 1992.

At the Exit Conference on November 17, 1992, the Audit staff provided the Committee with a schedule of the stale-dated checks. When asked whether those vendors had been contacted to determine the status of the outstanding checks, Committee officials replied that they had not seen the outstanding check list before. Further, the Committee stated that they would respond to our findings after receipt of the interim audit report.

On December 3, 1992, the Committee provided a memorandum to the Audit staff in which ten stale-dated checks (\$9,361) were addressed. The Committee stated that the checks were: (a) lost (one check for \$127), (b) not paid by its bank (four checks for \$360), (c) apparently voided and replaced or related to instances where no obligation now exists due to cancellation of the event or planned purchase (five checks for \$8,874). However, no documentation such as the actual voided check, replacement check, or correspondence from the named payee was presented. Notwithstanding the above, the Audit staff was able to reduce the amount of stale-dated checks by \$348.

In the interim audit report, it was recommended that the Committee present evidence that:

- The checks were not outstanding (i.e., copies of the front and back of the negotiated checks) or
- the outstanding checks were voided (copies of the voided checks with evidence that no Committee obligation exists, or copies of negotiated replacement checks); and
- the Committee attempted to locate the payees to encourage them to cash the outstanding checks.

In response to the interim audit report, the Committee provided evidence to demonstrate that checks totaling \$8,573 either have been replaced and cashed or involve instances where no Committee obligation existed. Accordingly, the Audit staff has reduced the amount of stale-dated checks to \$1,283.

Recommendation #5

The Audit staff recommends that the Committee be required to make a payment to the United States Treasury in the amount of \$2,283 representing the amount of stale-dated Committee checks.

IV. Recap of Amounts Due to the United States Treasury

Section 9038.1(c)(1)(v) of Title 11 of the Code of Federal Regulations states that preliminary calculations regarding future repayments to the U.S. Treasury may be contained within the interim audit report. Pursuant to §9038.2(a)(2) of this Title the Commission will notify the candidate of any repayment determinations not later than three years after the end of the matching payment period. The issuance of the interim audit report to the candidate (date of service June 18, 1992) constituted notice for purposes of the three year period.

Reflected below are amounts due the United States Treasury as noted in this report.

<u>Finding</u>	<u>Subject</u>	<u>Amount</u>
II.A.1.	Apparent Prohibited Contributions- Individuals	\$ 7,373
II.B.1.	Apparent Excessive Contributions- Individuals	22,060
II.B.2.	Apparent Excessive Contributions- Political Committees	3,600
III.B	Matching Funds Received in Excess of Entitlement	24,595
III.C.	Stale-dated Committee Checks	2,283
	Total	<u>\$59,911</u>

OLDAKER, RYAN & LEONARD
ATTORNEYS AT LAW
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WASHINGTON, D.C. 20006

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 23 5 05 PM '94

2021 728-1010

FAX FILE 2021 728-4044

May 23, 1994

Ms Kim Bright-Coleman, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, DC 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL
MAY 24 10 17 AM '94

Dear Ms. Bright-Coleman:

Enclosed is the response of Americans for Harkin, Inc. to the Commission's Initial Repayment Determination.

Sincerely,



Lyn Utrecht

05070191613

ATTACHMENT 4
Page 1 OF 21

OLDAKER, RYAN & LEONARD

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COMMISSION
ADMIN

MAY 23 5 05 PM '94

May 23, 1993

**RESPONSE OF AMERICANS FOR HARKIN, INC.
TO THE INITIAL REPAYMENT DETERMINATION OF THE
FEDERAL ELECTION COMMISSION**

MAY 21 10 17 AM '94

RECEIVED
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

This response is filed on behalf of Americans for Harkin, Inc., ("the Committee") to the initial determination by the Federal Election Commission that Americans for Harkin should repay \$24,595 to the United States Treasury. This determination is based on the recommendation of the Audit Division that these funds were received in excess of the Candidate's entitlement. Since the Interim Audit Report submitted to the Committee for response on June 18, 1993, did not include any repayment determination, this is the Committee's first opportunity to address this issue.¹

In response to this initial determination, the Committee is providing additional documentation that demonstrates that the Statement of Net Outstanding Campaign Obligations (NOCO) upon which the Audit Division bases this recommendation is incorrect. This documentation is summarized in Section I of this response. On the basis of this information, no repayment is owed. In addition, for the reasons set forth in Section II of this response, the Committee believes that the Auditor's method for determining entitlement is flawed, as is demonstrated by the Committee's current financial situation.

I. The Auditor's NOCO Understates the Committee's Liabilities and Overstates the Committee's Assets

It is very difficult for committees to respond to the findings and recommendations of the Audit Division regarding payments in excess of entitlement. Unlike other audit findings that are supported by one specific analysis or schedule that the Committee can review and verify or dispute, an incorrect recommendation that the Committee has received funds in excess of entitlement could be the result of errors underlying any number on the NOCO as revised by the auditors. Thus, in the absence of a complete review of the source documents underlying each

¹ At a follow-up interim audit conference on March 9, 1993, the auditors indicated to the Committee that they thought the Committee might have received funds in excess of entitlement. In response, the Committee provided additional information to the auditors on March 23, 1993. There was no repayment proposed in the Interim Audit Report.

which amounts virtually to a repeat of the audit process-- it is very difficult to determine where the errors are.

In March 1993, with very limited staff available, the Committee made an effort to provide the auditors with information disputing various numbers on the NOCO. Without the resources to go back to the original source documentation at that time, the Committee simply provided the Audit Division with some print-outs from the Committee's computer system. On that basis, the auditors adjusted those particular numbers on the NOCO. After providing that information, the Committee did not believe that there was any entitlement issue remaining and did not perform any more in-depth review. Since the Final Audit Report now recommends a repayment, the Committee has attempted to go back to the original source documentation. This process is extremely time-consuming and the Committee does not have adequate resources or time to review every underlying source document for every number on the NOCO to determine where the errors are. We have, however, reviewed in detail the winding down costs and the accounts receivable. In addition, the Committee was able to review selected accounts payable.

Winding Down Costs -- On the basis of this review, the Committee believes that the Estimated Winding Down Costs paid through 3/22/93 are underestimated by at least \$22,205.74. The correct number, fully supported by the attached documentation, is \$125,391.74, and not the \$103,186 on the NOCO.² See Attachment 1, and the supporting documentation, and Affidavit of Jacki Bennett.³

Accounts Receivable -- The accounts receivable number is overstated in the amount of \$1,070, which represents the amounts owed by press entities as reimbursements that have never been collected and are at this point uncollectible. These amounts are being written off by the Committee and should not be included in the accounts receivable figure as there is no expectation of receipt. See Attachment 2.

Accounts Payable -- Of the accounts receivable provided by the auditors by the Committee, the auditors incorrectly disallowed certain Committee obligations. One such account was payable to Berger, Poppe, Janiec & Mackasek. The auditors disallowed \$4,940 paid to the

² In addition, the Committee has attached a print-out by check number, showing additional winding down costs paid since 3/22/93, in the amount of \$61,044.77. Based on this, the Committee believes its estimate from 3/22/93 to termination to be reasonable.

³ Payment to one vendor was originally included in the accounts payable numbers provided by the Committee, but was disallowed by the auditors because it was incurred post-date of ineligibility. This payment was in fact for winding down costs. The payment of \$4,515.60 to American Technology Exchange (check #10835) was for rental of the computers leased by the Committee and used for the Committee's winding down activities. This should have been included in the winding down number.

Firm. As noted in the attached documentation, this \$4,940 was properly billed to the Committee for work performed related to the delegate selection process. This represented a legitimate qualified campaign expense and should not have been deleted from the Committee's accounts payable list. See Attachment 3.

As a result of these modifications alone, there is no payment in excess of entitlement. The "Total Assets" number on the NOCO would be \$136,738, and the "Total Liabilities" number would be \$617,167.74. The Committee's NOCO deficit would be \$480,429.74, and the Committee's remaining entitlement at this time would be \$3,621.40.⁴

The Committee has provided a schedule listing all winding down costs, with back-up documentation consisting of canceled checks and invoices for those from 8/3/92 through 3/22/93; a schedule listing winding down costs paid from 3/22/93 through 4/30/94 (back-up documentation available upon request); a schedule and supporting Affidavit stating that \$1,070 in accounts receivable have not been collected and are uncollectible; back-up documentation that the additional amount of \$4,940 to the law firm of Berger, Poppe was a fully documented qualified campaign expense and should have been included in the Committee's Winding Down number.

On the basis of this documentation, the Commission should reject the Audit Division recommendation that matching funds were received in excess of the candidate's entitlement.

II. This Method of Determining Remaining Entitlement is Inaccurate and Is Difficult for Committees to Challenge

The Harkin Committee audit provides a good example of how the auditors' method for determining remaining entitlement is problematic. In the Harkin audit, the auditors found no non-qualified campaign expenses. This means that there were only very minor adjustments made by the auditors to the Committee's obligations.

Yet, as the Committee met with the auditors in April to discuss, based on the auditors' numbers in the Final Audit Report, the Committee would not have had sufficient cash on hand remaining to pay its remaining debts, make the payments requested by the Commission, pay remaining winding down costs, and have leftover funds to make a repayment of \$24,000. In the absence of significant adjustments for non-qualified campaign expenses, this should not occur. The Committee should have sufficient funds to pay all legitimate remaining campaign obligations.

⁴ Should the auditors find yet another basis for requesting a repayment, the Committee believes that there are likely additional errors underlying the NOCO. However, given the amount of time and the Committee's lack of resources, the Committee has been unable to re-audit all of the NOCO numbers

Even the auditors at our meeting on April 6, conceded that, since there were not adjustments for nonqualified campaign expenses, the Committee should have sufficient funds remaining to meet the obligations identified by the auditors. The auditors' conclusion was that this must mean that there are errors somewhere. The auditors could not tell the Committee where, but rather, place the burden on the Committee to demonstrate where those errors lie. Yet, other than repeating the steps taken by the auditors and reviewing 100% of the underlying source documentation there is no way to demonstrate the errors

In light of the difficulties and costs of verifying every audit step taken by the auditors, the Commission should permit a Committee to demonstrate by another reasonable method that the auditors' numbers must be wrong and shift the burden to the auditors to defend their results. The Committee can clearly demonstrate that it has insufficient funds remaining to pay the outstanding obligations identified by the auditors. This can be demonstrated by working backwards from the present, working with actual real numbers known now, as opposed to numbers on a fictional NOCO (prepared with hindsight as of August 3, 1992 as determined as of 11/5/92 -- as the auditors' NOCO was prepared).⁵

As of 4/30/94 the Committee has:

TOTAL ASSETS	\$188,263.60
Vendor debts of --	144,000.00
Payments owed Treasury -- (per Final Audit Report)	35,316.00
Remaining winding down --	24,000.00
TOTAL AMOUNTS OWED --	\$203,316.00
COMMITTEE SHORTFALL --	\$ 15,052.40 ⁶

These vendor debts are all amounts still owed that were audited by the Commission and

⁵ Theoretically, if the numbers on the auditors' NOCO are correct, one should get the same result as one gets looking at real numbers at the very end of the campaign. Unfortunately, that does not work and the numbers are clearly different. That difference must be attributable to mistakes underlying the NOCO, but, as described above, short of recreating the audit, that is difficult to determine.

⁶ In fact, this means that there is a discrepancy of \$39,647.40 between the Auditors' NOCO numbers and the reality of the Committee's financial position. Since the Committee is actually short \$15,052.40 in cash and the auditors contend that a \$24,595 repayment is due, the total discrepancy between the auditors' numbers and reality is nearly \$40,000.

not have sufficient funds to pay all of its remaining obligations -- none of which are contested as legitimate. Thus, it is clear that the Committee could not have received funds in excess of entitlement and that no repayment should be required.⁷

CONCLUSION

For the reasons set forth above, the Committee respectfully requests that the Commission issue a Statement of Reasons that no repayment is due from Americans for Harkin, Inc. As noted in my letter of April 7, 1994, the Committee requests an opportunity to appear at a hearing on these issues, unless the Commission finds a hearing unnecessary because no repayment is required.

Respectfully submitted,



Lyn Utrecht
General Counsel
Americans for Harkin, Inc.

0507019113

⁷ Footnote "e" to the NOCO contained in the Final Audit report further notes that the auditors will continue to review the Committee's expenditures, leaving the implication that the auditors may seek an additional repayment. However, from the foregoing analysis, it is clear that the Committee does not have sufficient cash to pay all of its remaining obligations. It would be absurd if this cash shortfall itself resulted in an additional repayment.

ATTACHMENT 1

SCHEDULE OF WINDING DOWN COSTS PAID 8/2/92 - 3/22/93

CHECK #	PAYEE	EXPENSE	AMOUNT
Mar '93			
313	Jacki Bennett	payroll	\$243.20
10870	Claude McDonald	acct	\$401.68
10869	Crestar Bank	fed 1120 Pol taxes	\$1,794.00
10868	Staples	office supplies	\$211.78
Feb '93			
311	Jacki Bennett	payroll	\$242.72
312	Jacki Bennett	payroll	\$243.20
10866	Postmaster	stamps	\$870.00
10865	Manatt Phelps	off exp (12/92)	\$401.58
10864	VA Dept of Tax	VA w/h	\$10.24
10861	IRS	fed Unemploy	\$382.02
10860	IA Dept of Revenue	IA w/h	\$51.52
10859	DC Treasurer	DC w/h	\$141.85
10858	Dept of Employ Serv	employ tax	\$154.20
10857	Comp of Treasury	4th Quarter 1992	\$1,325.59
10856	Claude McDonald	acct	\$250.00
Jan '93			
305	Betsy Schwengel	payroll	\$1,804.90
306	Jacki Bennett	payroll	\$242.73
307	Jacki Bennett	payroll	\$460.50
308	Jacki Bennett	payroll	\$242.72
309	Betsy Schwengel	payroll	\$2,708.33
310	Betsy Schwengel	payroll	\$2,708.33
10855	Paul DiNino	FEC consult	\$1,354.62
10853	Charles Todd	FEC consult	\$36.00
10852	Claude McDonald	acct	\$145.00
10851	Manatt Phelps	office exp (9-11/92)	\$2,475.39
10850	Manatt Phelps	legal fees	\$2,250.00
10849	Manatt Phelps	legal fees (11/92)	\$3,196.61
10847	IA Dept of Finance	IA w/h	\$15.59
10848	Dept of Tax	VA W/H	36.95
10842	Chuck Todd	FEC consult	\$36.00
10840	MaryLee Bowen	FEC consult	\$140.00
1992			
Dec '92			
295	Crestar Bank	fed W/H	\$1,428.93
296	Betsy Schwengel	payroll	\$1,804.90
297	Denise Rathman	payroll	\$900.79
298	Jacki Bennett	payroll	\$205.55
299	Bruce Kieloch	payroll	\$253.62
300	Dennis Conway	payroll	\$301.40
301	VA Dept of taxaton	VA W/H	\$110.88
302	Dennis Conway	payroll	\$159.96
303	Jacki Bennett	payroll	\$242.73
304	Betsy Schwengel	payroll	\$1,804.90
10837	Manatt Phelps	off exp	\$2,037.12
10835	Amer Tech Exchange	computer rental	\$4,515.60
10836	Manatt Phelps	legal fees (9-10/92)	\$4,116.19
10826	Chuck Todd	FEC consult	\$12.00
10825	Chuck Todd	FEC consult	\$42.00

CHECK #	PAYEE	EXPENSE	AMOUNT
10822	Postmaster	business reply acct	\$750.00
10805	The University Club	FR	\$122.95
10798	Mindy's Catering	FR	\$150.80
10797	Manatt Phelps	off exp	\$3,895.57
10796	Manatt Phelps	legal fees (8-9/92)	\$8,984.69
10795	Peter mamacos	transportation	\$5.00
10791	Larry Hayes	acct	\$3,420.00
10780	Larry hayes	acct	\$5,863.87
Nov '92			
288	Betsy Schwengel	payroll	\$1,804.90
289	Bruce Kieloch	payroll	\$780.61
290	Dennis Conway	payroll	\$273.58
291	Denise Rathman	payroll	\$778.09
292	Crestar Bank	Fed WH	\$1,908.44
293	IA Dept of Revenue	IA WH	\$141.92
294	DC Govt	DC WH	\$48.48
10779	Postmaster	stamps	\$870.00
10778	Jeff Senter	computer consult	\$300.00
10777	Chuck Todd	FEC consult	\$81.00
10776	Claude McDonald	acct	\$160.00
10775	Comm Strategies	direct mail (FR)	\$8,382.90
10774	Postmaster	box rental	\$39.00
10773	Dennis Conway	transportation	\$10.00
10768	manatt Phelps	rent (11/92)	\$1,000.00
10767	BCBS	health insurance (11/92)	\$248.88
10766	BCBS	health insur (9-10/92)	\$622.15
Oct '92			
270	Bruce Kieloch	payroll	\$780.61
271	Denise Rathman	payroll	\$778.09
272	Crestar	fed WH	\$1,584.87
273	Betsy Schwengel	payroll	\$1,804.90
274	Dennis Conway	payroll	\$449.13
275	Crestar	fed WH	\$1,536.26
276	Betsy Schwengel	payroll	\$1,804.90
277	Denise Rathman	payroll	\$778.09
278	Bruce Kieloch	payroll	\$780.61
279	Dennis Conway	payroll	\$338.71
280	Crestar	Fed WH	\$1,543.07
281	Betsy Schwengel	payroll	\$1,804.90
282	Denise rathman	payroll	\$778.09
283	Bruce Kieloch	payroll	\$780.61
284	Dennis Conway	payroll	\$352.78
285	VA Dept of taxation	VA WH	\$73.90
286	Compt of Treas	MD WH	\$946.85
10765	DC Does	unemploy tax	\$824.03
10764	Postmaster	postage (FR)	\$290.00
10762	Jacki Bennett	FEC consult	\$200.00
10761	Charles Todd	FEC consult	\$90.00
10760	Stac es	off supplies	\$36.57
10756	Denise Rathman	transportation	\$20.00
10718	Larry Hayes	acct	\$1,000.00

CHECK #	PAYEE	EXPENSE	AMOUNT
10696	Manatt Phelps	rent (10/92)	\$1 000 00
10682	Charles Todd	FEC consult	\$99 00
10681	Jacki Bennett	FEC consult	\$250 00
Sept 92			
245	Chuck Todd	payroll	\$90 00
246	Crestar	Fed W/H	\$1 557 15
247	Betsy Schwengel	payroll	\$1 804 90
248	Denise Rathman	payroll	\$776 09
249	Dennis Conway	payroll	\$385 67
250*	"	"	\$55 36
251*	VA Dept of Tax	VA W/H	\$99 28
252*	VA Dept of Tax	VA W/H	\$108 48
253*	Treasurer State of IA	IA W/H	\$98 24
254*	Treasurer State of IA	IA W/H	\$131 07
255*	Treasurer State of IA	IA W/H	\$41 47
256	Compt of Treasury	MD W/H	\$1 217 86
257	Bruce Keiloch	payroll	\$780 61
258*	District of Columbia	DC W/H	\$339 42
259	Betsy Schwengel	payroll	\$1 804 90
260	Denise Rathman	payroll	\$776 09
261	Crestar Bank	Fed W/H	\$1 539 88
262	Dennis Conway	payroll	\$345 28
264	DC Treasurer	DC W/H	\$31 78
267	VA Dept of Tax	VA W/H	\$110 85
268	DC Tresurer	DC W/H	\$191 74
269	Comm of Revenue	employ tax	\$37 01
10679	Claude mcDonald	acct	\$165 00
10678	BCBS	health insur (8/92)	373 28
10677	Jeff Senter	computer consult	\$187 50
10675	Dennis Conway	transportation	\$20 00
10673	Claude mcDonald	acct	\$165 00
10672	Jeff Senter	computer consult	\$187 50
10670	Staples	off supplies	\$49 09
10669	Chuck Todd	FEC consult	\$63 00
10668	US Postal Service	business reply fee	\$260 00
10663	UPS	return TTD	\$7 38
10642	Manatt Phelps	rent (9/92)	\$1 000 00
10641	Jacki bennett	FEC Consult	\$200 00
10640	Dennis Conway	transporation	\$22 00
Aug 92			
244	Bruce Keiloch	payroll	\$780 61
243	Dennis Conway	payroll	\$478 25
242	Chuck Todd	payroll	\$351 00
241	David Blank	payroll	\$88 66
240	Cordelia Persen	payroll	\$368 93
239	Denise Rathman	payroll	\$776 09
238	Betsy Schwengel	payroll	\$1 804 90
237	Bruce Keiloch	payroll	\$780 61
10637	Postmaster	postage (FR)	\$870 00
10636	Vanety Club	FR	\$75 00
10633	Washington's Caterer	FR	\$41 80

CHECK #	PAYEE	EXPENSE	AMOUNT
10632	Jacku Bennett	FEC consult	\$200.00
10629	BCBS	health insur (5/92)	\$592.02
10621	Crestar	fed w/h	\$1,695.49
TOTALS (8/92-3/93)			\$125,391.74
			AMOUNT

• Cancelled checks were requested by the Committee and received from Crestar Bank via fax machine. Due to the inclarity of the fax, please refer to the attached bank statement.

Check # 250 did not transmit and will be delivered when when received by the Committee.

200001010000

CUSTOMER SERVICE-OPERATIONS CENTER
 P O BOX 26150, RICHMOND, VA 23260
 49
 C 1 C61 21

PAGE 1

CRESTAR BANK MD CORPORATE CHECKING
 ACCOUNT NUMBER 209056770

AMERICANS FOR HARKIN INC
 % MANATT & PHELPS
 1200 NEW HAMPSHIRE AVENUE NW #220
 WASHINGTON DC 20036-6801

Date Of Last Statement	Beginning Balance
08/31/92	13578.40
Number Of Deposits	Amount Deposited
2	12000.00
Number Of Deductions	Amount Deducted
21	12421.88
Average Balance	Service Charge
7938.01	NONE
Interest This Period	Interest Year To Date
N/A	N/A
Date Of This Statement	Ending Balance
09/30/92	13156.52

A QUESTION? CALL 800 752-2515

DEBITS				CREDITS	DATE	BALANCE
	CHECKS	248	776.09			12802.31
246	1557.15	242	351.00		0901	10894.16
	CHECKS	247	1804.90			9089.26
249	385.67				0903	8703.59
	CHECKS	252	106.48			8597.11
251	99.28	250	55.36		0904	8442.47
	CHECKS	256	1217.86		0908	7224.61
	CHECKS	258	339.42			6885.19
245	90.00				0910	6795.19
	CHECKS	254	131.07			6664.12
253	96.24	255	41.47		0911	6526.41
IT				6000.00		12526.41
	CHECKS	257	780.61			11745.80
260	776.09	261	1539.88		0915	9429.83
	CHECKS	259	1804.90			7624.93
262	345.28				0917	7279.65
	CHECKS	267	110.85			7168.80
205	12.28				0929	7156.52
IT				6000.00	0930	13156.52

CHECK SUMMARY
 * INDICATES SKIP IN CHECK NUMBERS

- 205 255
- 242* 256
- 245* 257
- 246 258
- 247 259
- 248 260
- 249 261
- 250 262
- 251 267*

ATTACHED 4

ATTACHMENT 1

SCHEDULE OF WINDING DOWN COSTS PAID 3/23/93 - Present

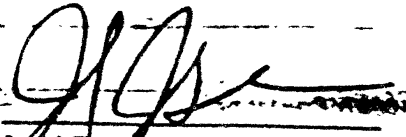
CHECK #	PAYEE	EXPENSE	AMOUNT
1994			
April '94			
333	Jacki Bennett	payroll	\$460.50
10948	ORL	legal fees	\$1,435.83
10947	DC Treasurer	Corp filing fee	\$25.00
Mar '94			
332	Jacki Bennett	payroll	\$460.50
10946	Dept of Taxation	VA w/h	\$49.83
10945	Comp of Treas.	employ tax	\$28.18
10944	Claude McDonald	acct	\$75.00
10943	VA Dept of Tax	VA w/h	\$10.04
10942	Crestar bank	1993 tax	\$1,018.34
10941	Dept of Tax	VA w/h	\$19.38
10940	Crestar	Fed w/h	\$165.71
Feb '94			
331	Jacki Bennett	payroll	\$460.50
10939	VA Dept of Tax	VA w/h	\$19.38
10938	Crestar bank	Fed w/h	\$165.71
10937	ORL	legal fees	\$1,818.36
10936	Pat Fiori	legal fees	\$400.00
Jan '94			
330	Jacki Bennett	Payroll	\$460.50
10935	Crestar bank	unemploy tax	\$71.57
10934	ORL	legal fees	\$984.17
10933	Dept of Employ Serv	employ ta	\$55.80
10932	Dept of Tax	VA w/h	\$19.38
10931	Dept of Tax	VA w/h	\$19.38
10929	Larry Hayes	acct	\$8,325.00
Dec '93			
329	Jacki Bennett	payroll	\$460.50
Nov '93			
328	Jacki bennett	payroll	\$460.50
10928	Dept of Tax	VA w/h(penalties)	
10927	Dept of Employ Serv	employ tax	\$37.20
10926	Claude McDonald	acct	\$75.00
10925	ORL	legal fees	\$806.43
10922	Claude McDonald	acct	\$75.00
Oct '93			
327	Jacki Bennett	payroll	\$460.50
10921	Dept of Tax	VA w/h	\$19.38
10920	Crestar Bank	fed w/h	\$166.02
10919	ORL	legal fees (9/93)	\$1,955.56
Sept '93			
325	Jacki bennett	payroll	\$460.50
326	Jacki Bennett	payroll	\$460.50
10918	Amer Tech Exchange	computer rental	\$1,505.20
10917	IRS	tax	75.13
10916	US Postal Service	business reply	\$260.00
10915	ORL	legal fees (8/93)	\$8,237.25
10914	Dept of Tax	VA w/h	\$19.38
10913	Crestar bank	Fed w/h	\$166.02

CHECK #	PAYEE	EXPENSE	AMOUNT
Aug 93			
324	Jacki Bennett	payrol	\$460.50
10912	DC DOES	unemploy tax	\$99.79
10910	ORL	legal fees (7/93)	\$1,378.50
10909	Claude mcDonald	acct	\$75.00
July 93			
10908	Dept of Tax	VA w/h	\$19.38
10907	Crestar Bank	fed w/h	\$166.02
10904	Dept of Treasury	4th quarter tax	\$3,757.33
10903	Dept of Treasury	tax	\$2,886.00
June 93			
322	Jacki bennett	payroll	\$243.20
323	Jacki Bennett	payroll	\$460.50
10902	Manatt Phelps	office expenses (4/93)	\$168.81
10901	Compt of Treasury	employ tax (4-5/94)	\$71.30
10899	Dept of TAX	VA w/h	\$4.63
10898	Dept of Tax	VA w/h	\$9.28
10897	Crestar bank	Fed w/h	\$575.02
10896	Jeff Senter	Computer consult	\$1,000.00
10895	American Home Products	fundraising	\$481.82
10894	Amer. Tech Exchange	computer rental	\$2,257.80
10893	ORL	legal fees (5/93)	\$1,031.25
May 93			
320	Jacki Bennett	payroll	\$243.20
321	Denise Rathman	payroll	\$118.64
10892	Betsy Schwengel	reimo (taxes)	\$903.63
10890	Claude McDonald	acct	\$165.00
10889	ORL	legal services (4/93)	\$1,800.00
10888	Manatt Phelps	off expenses (3/93)	\$64.80
April 93			
314	Jacki Bennett	payroll	\$243.20
315	Denise rathman	payroll	\$412.72
316	Denise Rathman	payroll	\$285.74
317	Jacki Bennett	payroll	\$243.20
318	Jacki Bennett	payroll	\$243.20
319	DeniseRathman	payroll	\$702.21
10887	Dept of Tax	VA w/h	\$32.78
10886	DC Employ Serv	DC w/h	\$65.00
10885	Crestar Bank	fed w/h	\$522.79
10884	Jeff Senter	computer consult	\$350.00
10883	State of MD	MD w/h	\$15.00
10880	Staples	office supplies	\$31.22
10879	Jeff Senter	computer consult	\$400.00
10878	Manatt Phelps	off exp (1-2/93)	\$236.20
10877	Manatt Phelps	legal fees (1-2/93)	\$4,625.43
10874	ORL	legal fees (3/93)	\$1,950.00
10873	Larry Hayes	acct	\$2,020.00
10872	Claude McDonald	acct	\$157.50
10871	DC Tresurer	DC corp filing fee	\$25.00
TOTALS (4/93-present)			\$61,044.77

AFFIDAVIT OF JACKI BENNETT

1. I am currently keeping the records and books for Americans for Harkin, Inc. (the "Committee").
2. When the campaign ended, the Committee began renting computer equipment from American Technology Exchange. The total cost per month to the Committee totaled \$752.60. The Committee continued renting the equipment on a monthly basis through June of 1993. These computers were used only for wind-down purposes.

I hereby swear or affirm, under penalty of perjury, that, to the best of my knowledge and belief, the above statements are true and correct.




Jacki Bennett
Date: 5/23/94

0507019105

STATEMENT OF JACKI BENNETT

1. I am currently keeping the records and books for Americans for Harkin, Inc (the "Committee").
2. The attached schedule shows several items which the auditors have listed as accounts receivable. As of this date, the Committee has not collected these amounts, totaling \$1,070, and has no prospect of collecting these debts in the future.
3. The Committee no longer considers these items as accounts receivable and has written them off.

I hereby swear or affirm, under penalty of perjury, that to the best of my knowledge and belief, the above statements are true and correct



Jacki Bennett
Date: 8/20/94

05070191121

Attachment 2
Debts Owed to Committee Which Have Been Written Off

Boston Globe	\$270.00
Chicago Tribune	190.00
Newsday	610.00
TOTAL	1,070.00

05070121003

ATTACHMENT 3 - Accounts Payable

BERGER, POPPE, JANIEC & MACKASER

COUNSELLORS AT LAW

330 FIFTH AVENUE, 74TH FLOOR

NEW YORK, NEW YORK 10088

212) 695-1318

TELECOPIER (212) 629-8004

HENRY T. BERGER
JOHN J. JANIEC
ROBERT A. MACKASER
WILLIAM M. POPPE

MEMBER OF N. Y. AND N. J. BAR
MEMBER OF N. Y. AND PA. BAR

NEW JERSEY OFFICE
SUITE 300
ONE BRIDGE PLAZA
FORT LEE, NEW JERSEY 07024
201 268-0000
TELEX 335-000

March 3, 1992

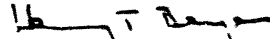
Lynn Utrecht, Esq.
Manatt, Phelps, Phillips & Kantor
1200 New Hampshire Avenue, N. W.
Suite 200
Washington, D. C. 20036

Re: Americans for Harkin

Dear Lynn:

Enclosed is a statement for my services together with a statement of my legal time since December. As you can see from comparing the statement with the time records, I have adjusted my bill to come closer to the number I previously talked about in my discussions with the campaign. Please let me know if my bill presents any problems. Also, if you need any more or different paperwork, let me know.

Very truly yours,



Henry T. Berger

HTB/me

BERGER, POPPE, JANIEC & MACKASEK

COUNSELLORS AT LAW
350 FIFTH AVENUE, 74TH FLOOR
NEW YORK, NEW YORK 10118

HENRY T. BERGER
JOHN J. JANIEC
ROBERT A. MACKASEK
WILLIAM M. POPPE

(212) 698-1515

TELECOPIER (212) 699-8001

MEMBER OF N.Y. AND N.J. BARS
MEMBER OF N.Y. AND PA. BARS

NEW JERSEY OFFICE
SUITE 400
ONE BRIDGES PLAZA
PORT LEE, NEW JERSEY 07084
201 868-0044
TELEX: 108-096

12- 0 0018

March 3, 1992

Lynn Utrecht, Esq.
Manatt, Phelps, Phillips & Kantor
1200 New Hampshire Avenue, N. W.
Suite 200
Washington, D. C. 20036

Re: Americans for Harkin

For Professional Services Rendered:

Legal services rendered pursuant to
retainer agreement dated December 5, 1991
as set forth in annexed time records in
connection with obtaining ballot position
for Sen. Tom Harkin and Delegate and
Alternate slates in support of his
candidacy in New York State

\$12,940.00

Previously paid

4,000.00

BALANCE DUE

8,940.00

0507012110

7 FIVE!

ATTACHMENT

Page 18 of 21

4

BERGER, POPPE, JANIEC & MACKASEK
350 Fifth Avenue New York, N.Y. 10118
Telephone 212-695-1515

Election Law

Date	Attorney	Description	Hours
b800010 Election Law - Harkin			
2/02/91	htb	Review Documents re: NYS Delegate selection rules;	1.10
2/03/91	htb	Office Conference with Socarides;	2.00
2/10/91	htb	Out of Office Conference with area coordinators;	1.20
2/13/91	htb	Review Documents re: letters to delegates;	.20
2/31/91	htb	Out of Office Conference with Socarides re: petitions and instructions;	1.00
1/02/92	htb	Drafting Documents re: Instructions for petitioners; TC - RS, State Board;	.80
1/03/92	htb	Review Documents re: instructions for petitioners, TC - RS;	.80
1/07/92	htb	Out of Office Conference with coordinators - delegate slating;	2.00
1/08/92	htb	Drafting Documents re: designation of representative; TC - RS;	.50
1/09/92	htb	Out of Office Conference with RS re: slating, affirmative action;	4.00
1/10/92	htb	Preparation of Delegate slates;	4.00
1/11/92	htb	Preparation of Delegate slates;	5.00
1/12/92	htb	Preparation of Delegate slates;	7.00
1/13/92	htb	Preparation of Delegate Slates; Petition training;	3.00
1/14/92	htb	Correspondence with Marino - Delegate list changes; Review petitions;	1.80

BERGER, POPPE, JANIEC & MACKASEK
350 Fifth Avenue New York, N.Y. 10118
Telephone 212-695-1515

Election Law

Date	Attorney	Description	Hours
b800010 Election Law - Harkin			
1/23/92	htb	Preparation of Affirmative Action Compliance;	1.20
1/27/92	htb	Out of Office Conference with RS and coordinators re: petition status;	3.20
1/28/92	htb	Drafting Documents re: cover sheet;	2.80
1/29/92	htb	Out of Office Conference with regional coordinators;	1.70
1/30/92	htb	Telephone Conference with Wooten, Asofsky, Socarides; Prepare cover sheet; Review petitions;	2.20
2/03/92	htb	Review Documents re: petitions;	1.50
2/04/92	htb	Review Documents re: petitions;	3.00
2/05/92	htb	Review Documents re: cover sheet; Revise; Review petitions;	2.20
2/06/92	htb	Review Documents re: petitions;	3.40
2/07/92	htb	Review Documents re: petitions;	2.80
2/08/92	htb	Review Documents re: petitions;	8.00
2/09/92	htb	Review Documents re: petitions;	12.00
2/10/92	htb	Review Documents re: petitions;	14.00
2/11/92	htb	Review Documents re: petitions;	12.50
2/12/92	htb	Review Documents re: petitions; Bind petitions;	14.00
2/13/92	htb	Complete binding; File petitions - Westchester and Albany; Review other petitions;	10.00

BERGER, POPPE, JANIEC & MACKASEK
350 Fifth Avenue New York, N.Y. 10118
Telephone 212-695-1515

Election Law

Date	Attorney	Description	Hours
b800010 Election Law - Harkin			
12/14/92	htb	Telephone Conference with State Board, RS;	.50
MATTER TOTAL			129.40 \$25,880.00

950701215



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20461

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

JUN 2 3 58 PM '94

June 2, 1994

MEMORANDUM

TO: THE COMMISSIONERS

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: ROBERT J. COSTA
ASSISTANT STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: PAYMENT OF \$35,316 RECEIVED FROM AMERICANS FOR HARKIN

This informational memorandum is to advise you of a \$35,316 payment received from Americans For Harkin (the Committee). The payment is a partial payment received in response to the \$59,911 initial repayment determination contained in the final audit report and represents stale dated checks (\$2,283), receipt of prohibited contributions (\$7,373) and receipt of contributions in excess of contributor's limitations (\$25,660). The Committee has not repaid \$24,595 which represents matching funds received in excess of entitlement. The Audit staff is currently reviewing the Committee's response to the matching fund entitlement finding.

Attached is a copy of the check, the letter which accompanied the payment, and the receipt showing delivery to the Department of Treasury.

Should you have any questions regarding the payment please contact Ray Lisi at 219-3720.

Attachments as stated

ATTACHMENT 5
Page 1 of 8

95000121114

05070121005

AMERICANS FOR HARKIN 7.91		CRESTAR BANK, N.A.	10951
P. O. BOX 2308		WASHINGTON, DC	
WASHINGTON, DC 20013		15-62	
		540	
		DATE	AMOUNT
		5/24/94	\$35,316.00
Thirty-Five Thousand, Three Hundred and Sixteen Dollars and no/cents			
RAY			
TO THE			
ORDER			
OF			
	U.S. Treasury	AMERICANS FOR HARKIN	
<i>payment</i>	<i>Daniel G. Smith</i>		
	AUTHORIZED SIGNATURE		

⑆010951⑆ ⑆054000522⑆ 206550537⑆

ATTACHMENT
Page 2 of 5

OLDAKER, RYAN & LEONARD

ATTORNEYS AT LAW

818 CONNECTICUT AVENUE, N.W.

SUITE 1100

WASHINGTON, D.C. 20006

(202) 728-1010

FACSIMILE (202) 728-4044

Received for Audit
5/27/94
MAY 23 3:00 PM '94

May 25, 1994

Kim Bright-Coleman, Esq.
Associate General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

MAY 26 12 01 PM '94
FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

Dear Ms. Bright-Coleman:

Enclosed is a check in the amount of \$35,316 payable to the United States Treasury, as requested by the Federal Election Commission in its letter of March 22, 1994. As the Committee set forth in its Response to the Interim Audit Report, the Committee believes there are significant legal issues underlying the Commission's request that this amount be paid to the Treasury. However, the Committee has decided to make the payment, and bring these issues to the Commission's attention as reasons why the Commission should take no further action with respect to these matters.

For the reasons set forth below, the Committee respectfully requests that the Commission accept this payment as final resolution of the excessive and prohibited refund issues and take no further action with respect to them.

1. As the Committee noted in its response to the Interim Audit Report, there are significant problems and uncertainties with the application of sampling and the projection of the amounts of violations. These problems are summarized below.

1. The Commission's authority to request payments to the Treasury based on projections is uncertain. This is a departure from past practice and was implemented, not through regulations as was the Commission's policy regarding stale-dated checks, but through the issuance of a policy statement without any opportunity for comment. Thus, there are two legal issues -- the authority of the Commission to require payment to the Treasury instead of refunds to the contributors, and the legality of the use of statistical sampling to project the amount of violations.

As to the payment to the Treasury, this is a major departure from the Commission's past practice, and the Committee believes that such a policy should be implemented, if at all, through regulations, as the Commission did with stale-dated checks. The Committee believes that the requirement to pay these amounts to the treasury is a new rule of law that the Commission is required to establish through regulations. 2 USC §437f(b). Moreover,

ATTACHMENT 5
Page 3 of 8

because this policy was not published for comment, there are several issues that we believe the Commission may not have fully considered. For example, if excessive contributions are not refunded to the contributor, what will the effect be on a contributor who may have exceeded his or her \$25,000 annual limit? Ordinarily, such contributors seek to mitigate their violation by requesting refunds. Yet, under the Commission's policy the Committee would either be required to refund such contributions twice -- once to the Treasury and once to the contributor -- or to leave a contributor without the ability to mitigate.

Thus, in order to fully consider the impact of this policy we believe that the Commission should implement this policy only after an opportunity for public comment.

As to the use of statistical sampling for projecting the amount of violations, it is unclear whether the Commission has the authority to use sampling to establish the amount of violations. The cases cited by the Commission are in the dramatically different context of Medicare and Medicaid fraud, where the courts noted that there was no practical way to audit each and every transaction. In fact, in the case of publicly financed candidates, the auditors do review each and every contribution check. The Commission may have difficulty in persuading the courts that this is the same type of situation as the Medicare fraud cases relied upon. Moreover, medicare fraud is unlike regulation of campaign activity in which there are core First Amendment issues at stake.

2. In addition to the legal uncertainties underlying this policy, there are several additional reasons why the Commission should implement such a policy, if at all, only through regulations. First, the auditors have stated that this method has been "approved" as valid. Yet, the approved use of the sampling technique was for a very different purpose -- the review of matching fund submissions. In fact, that is a very different use and it operated very differently from the use of sampling to project violations. In reviewing matching fund submissions, the sampling was done on a rolling basis. Thus, as the Committee's expertise in reviewing contributions and preparing submissions increased, the hold back percentage could decrease. The auditor's current use of sampling to project violations does not take such changes over time into account.¹

Second, the auditors' selection of some portions of the population to perform a 100% review may skew the results. The auditors admit that they selected some subsets of contributions to perform a 100% review precisely because they believed those portions of the contribution population would include more problems. It is unknown what is the effect of such a method of

¹ The apparent corporate contributions found by the auditors illustrate the possibility that the auditors' method does not accurately reflect the Committee's changing ability to screen for prohibiteds and excessives. The auditors found only 3 prohibited contributions, totaling \$750. All three were received on or before October 10, 1991. The Committee registered on September 23, 1991. The fact that the auditors found no later prohibited contributions suggests strongly that the Committee staff simply became more sophisticated at finding them and rejecting them, and that there were no prohibited contributions received after October 10, 1991, instead of \$7,000 in prohibiteds after that date.

combined sampling with 100% review. Thus, it is incorrect for the auditors to imply that this method has somehow been approved or found valid as the auditors are using it to project the amounts of violations. This is an additional reason why the use of the sampling and the specific methodology used should be put out for comment so that the Commission can obtain expert advice on its validity.

The Committee believes that the amounts of the projected excessive and prohibited contributions are likely to be overstated based on the auditors' methodology. As a result, the Commission should not in addition seek any penalties from the Committee since the payment made to the Treasury is likely to be more than the actual amounts of such unresolved contributions.

II. The amounts of unresolved excessive and prohibited contributions identified by the auditors, even if the projected numbers are accepted, are statistically insignificant. The Committee received contributions of over 3,500,000. The total amount of prohibiteds found was \$750; the projected amount was \$7,373 (0.2% of total individual contributions). The total amount of excessive individual contributions found was \$18,150; the projected amount was \$22,060 (0.7% of total individual contributions). The total amount of excessive PAC contributions was \$3,600 (0.8% of total PAC contributions).

Although the audit report notes that these amounts are deemed material, it is hard to imagine what materiality threshold would find 0.2%, 0.7% and 0.8% to be material. Certainly, these are extremely small percentages of Committee receipts and suggest that the Committee did an excellent job in reviewing and processing its contributions. With over \$3.5 million in contribution receipts, the Committee was bound to make some mistakes. These percentages of errors are very small. For this reason, the Commission should take no further action with respect to these issues.²

III. As noted in the Committee's response to the Initial Repayment Determination, the Committee has insufficient funds left to pay its outstanding obligations and winding down costs. Thus, the Committee has no funds to pay any civil penalties. The Committee would like to disburse its remaining funds and terminate as quickly as possible. For this reason, the Committee decided to pay the amount requested by the Commission in the belief that the Commission should accept this payment as final settlement of these matters. The Committee urges the Commission to consider the Committee's financial situation in resolving this matter.

CONCLUSION

For the reasons outlined above, the Committee respectfully requests that the Commission

² The Commission should also take into account that the Committee followed the Commission's instruction in the June 2, 1992 letter. It is the Committee's belief that all presidential campaigns were not treated the same with respect to this refund issue, and the Committee should certainly not be penalized for following the Commission's direction and holding onto these excessives and prohibiteds instead of refunding them.

accept this payment and take no further action with respect to the Committee's unresolved excessive and prohibited contributions. To the best of the Committee's knowledge, the Commission has found no other violations of any provisions of the Act or regulations with respect to the Committee. This is unusual for a presidential campaign and demonstrates that the Committee made significant good faith efforts to comply with the requirements of the Act and the regulations and was successful in so doing. Under these circumstances, no further action is warranted.

Respectfully submitted,



Lyn Utrecht
General Counsel
Americans for Harkin, Inc.

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FEDERAL ELECTION
COMMISSION
OFFICE OF GENERAL
COUNSEL

MAY 26 12 01 PM '94

ATTACHMENT 5
Page 2 of 8

AMERICANS FOR HARKIN 7-91 P. O. BOX 2308 WASHINGTON, DC 20013		CRESTAR BANK, N.A. WASHINGTON, DC 15-52 540	10951
		DATE: 5/24/94	AMOUNT: \$35,316.00
Thirty-Five Thousand, Three Hundred and Sixteen Dollars and no/cents-----			
PAY TO THE ORDER	U.S. Treasury	AMERICANS FOR HARKIN	
<i>payment</i>		<i>Daniel G. Smith</i> AUTHORIZED SIGNATURE	

10951 15 109510085331 208 525178 56



FEDERAL ELECTION COMMISSION
WASHINGTON, DC 20461

June 1, 1994

RECEIPT FROM THE
UNITED STATES DEPARTMENT OF TREASURY
FOR A
PAYMENT TO THE GENERAL FUND OF THE U. S. TREASURY

Received on June 1, 1994, from the Federal Election Commission (by hand delivery), a check drawn on Crestar Bank (Check #10951) in the amount of \$35,316. The check represents a payment from Americans For Harkin for stale dated checks (\$2,283), receipt of prohibited contributions (\$7,373) and receipt of contributions in excess of contributor's limitation (\$25,660).

The payment should be deposited into the General Fund of the U. S. Treasury.

Americans for Harkin
Amount of Payment: \$35,316

Presented by:

Received by:

Arthur J. Stumpf
for the
Federal Election Commission

Raymond B. ...
for the
United States Treasury



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20541

BJ005896

July 5, 1994

MEMORANDUM

TO: LAWRENCE H. NOBLE, CHIEF OF STAFF
GENERAL COUNSEL

THROUGH: JOHN C. SURINA
STAFF DIRECTOR

FROM: ROBERT J. COSTA, ASST. STAFF DIRECTOR
AUDIT DIVISION

SUBJECT: AMERICANS FOR HARKIN, INC. - AUDIT ANALYSIS OF
RESPONSE TO THE FINAL AUDIT REPORT

The following is a summary of the Audit Division's analysis of the Committee's response to the Final Audit Report.

On May 23, 1994, the Committee responded to the Commission's initial repayment determination contained in the Final Audit Report that the candidate was not entitled to \$24,595 in matching funds received and should repay that amount to the U.S. Treasury pursuant to 26 U.S.C. §9038(b)(1).

Analysis of Information Submitted

In its response the Committee provided copies of paid Committee checks, vendor statements and invoices in an attempt to demonstrate that the Statement of Net Outstanding Campaign Obligations (NOCO) was incorrect, as presented in the final report. Further, the Committee provided a schedule of winding down costs paid for the periods August 2, 1992 through March 22, 1993 and from March 23, 1993 to April 30, 1994. The winding down costs presented on the schedule totaled \$186,437.1/ It was noted that \$125,392 was paid between August 1992 and March 1993 while \$61,045 was paid between April 1993 and April 30, 1994. The Committee also anticipated its remaining winding down costs at April 30, 1994 to be \$24,000. A copy of the Committee's September 1992 bank statement was also provided.

1/ All amounts have been rounded to the nearest dollar.

The Audit staff reviewed the Committee's paid winding down costs and reduced the Committee's total (\$186,437) by \$29,138 to \$157,299. These reductions were the result of:

- (1) amounts already considered for NOCO purposes as an account payable (\$28,784), and
- (2) payments to taxing authorities representing penalties or payments without adequate supporting documentation and a re-issued vendor check listed twice (\$354).

With respect to accounts receivable, the response advises that accounts receivable is overstated in the amount of \$1,070. The Committee noted that certain amounts owed by press entities, have never been collected, and are uncollectible. Based upon our analysis of the Committee's accounts receivable, the Audit staff concurs with this treatment. Further, the Audit staff's analysis revealed additional accounts receivable that appear to be uncollectible. Relative to the treatment of the above amount, the Audit staff has also written off an additional \$1,447.

The Committee provided documentation to support a previously disallowed amount (\$4,940) as an account payable. Based on a review of the documentation provided, the Audit staff concurs and has increased the accounts payable figure accordingly. Based on the above, the deficit at 8/3/92 has been revised to \$452,784.

Finally, the Committee's receipt activity post 8/3/92 was re-examined. Based on this review, the total amount of matching funds and private contributions received during the period 8/4/92 through 2/28/93 to be applied against the 8/3/92 deficit is now calculated at \$434,342.2/

On March 2, 1993, the Committee received its final matching fund payment of \$14,547. At that time, based on the above analysis, the Candidate's remaining entitlement was \$18,442; therefore, the Candidate did not receive any matching funds in excess of his entitlement. Accordingly, no repayment pursuant to 26 U.S.C. §9038(b)(1) is required.

If you have any questions regarding this matter, please contact Lorenzo David or Wanda Thomas at 219-3720.

2/ The amount calculated and applied in the final report was overstated by approximately \$30,000.

Americans for Harkin, Inc.
 Audited Statement of Net Outstanding Campaign Obligations (NOCO)
 at August 3, 1992
 (Determined as of 11/5/92)
 REVISED 6/22/94

Assets

Current Assets:		
Cash on Hand	\$ 86,685 <u>a/</u>	
Accounts Receivable	13,108	
Matching Funds (Certified 7/31/92)	28,498	
Total Current Assets:	\$128,291	
Capital Assets	<u>7,000</u>	
Total Assets		\$135,291
 Liabilities		
Accounts Payable for Qualified Campaign Expenses through 7/31/92	\$371,460	
Amount Payable to U.S. Treasury:	\$ 35,316 <u>b/</u>	
Winding Down Costs paid through 4/30/94:	\$157,299 <u>c/</u>	
Estimated Winding Down Costs post 4/30/94	<u>24,000</u> <u>d/</u>	
Total Winding Down	\$181,299	
Total Liabilities		<u>\$588,075</u>
Net Outstanding Campaign Obligations (Deficit)		<u>(\$452,784)</u>

FOOTNOTES TO NOCO
(Revised 6/22/94)

- a/ This amount does not reflect a reduction for certain outstanding checks determined to be stale-dated.
- b/ Consists of amounts discussed in Final Report, Findings:
- | | |
|---|-----------------|
| II.A.1. - Prohibited Contributions | \$ 7,373 |
| II.B.1. - Excessive Contributions
Individuals | 22,060 |
| II.B.2. - Excessive Contributions
Political Committees | 3,600 |
| III.C. - Stale-dated Checks | <u>2,283</u> |
| | <u>\$35,316</u> |
- c/ This figure represents actual winding down costs paid for the period August 3, 1992 through April 30, 1994. Not included is approximately \$1,000 in tax penalties and/or insufficiently documented payments to taxing authorities.
- d/ This represents the Committee's estimate of its remaining winding down costs. The Audit staff will review reports and records as necessary to compare actual expenses to these estimates.