



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

FEDERAL ELECTION COMMISSION  
SECRETARIAT

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April 30, 2010

MEMORANDUM

AGENDA ITEM

To: The Commission

For Meeting of 07-15-10

Through: Alec Palmer  
Acting Staff Director *AP*

From: Patricia Carmona *PC*  
Chief Compliance Officer

Joseph F. Stoltz *JFS*  
Assistant Staff Director  
Audit Division

Alex Boniewicz *AB*  
Audit Manager

By: Paula Nurthen *PN*  
Lead Auditor

Subject: Report of the Audit Division on Biden for President, Inc.

Attached for your approval is the subject report. On February 1, 2010, Biden for President, Inc. requested a hearing; subsequently on April 8, 2010, it withdrew that request.

In response to the Draft Final Audit Report, BFP submitted a revised attestation which indicated the staff member prepared and sent "presumptive designation" notices within 60 days of receipt of the contributions. The report has been revised to reflect this. In addition, a copy of the attestation was provided to Counsel's office for review and they are in agreement that it does not alter the report's conclusion.

**Recommendation**

The Audit staff recommends that the report be approved.

This report is being circulated on a tally vote basis. Should an objection be received, it is recommended that the report be considered at the next regularly scheduled

open session. If you have any questions, please contact Alex Boniewicz or Paula Nurthen at 694-1200.

Attachments:

Report of the Audit Division on Biden for President, Inc.

Legal Analysis, dated December 8, 2009

Legal Comments on Revised Declaration, April 27, 2010



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

December 15, 2006 – April 30, 2008

## Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a candidate who receives public funds for the primary campaign.<sup>1</sup> The audit determines whether the candidate was entitled to all of the matching funds received, whether the campaign used the matching funds in accordance with the law, whether the candidate is entitled to additional matching funds, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

## Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

## About the Committee (p. 2)

Biden for President, Inc. is the principal campaign committee of Joseph R. Biden, Jr., a candidate for the Democratic Party's nomination for the office of President of the United States. The Committee is headquartered in Wilmington, DE. For more information, see chart on the Campaign Organization, p. 2.

## Financial Activity (p. 3)

• <b>Receipts</b>	
○ Contributions from Individuals	\$ 8,210,947
○ Contributions from Political Committees	166,045
○ Transfers from Affiliated Committees	1,900,000
○ Loans Received	1,468,614
○ Matching Funds Received	857,189
○ Offsets to Operating Expenditures	270,611
○ Other Receipts	12,650
○ <b>Total Receipts</b>	<b>\$ 12,886,056</b>
• <b>Disbursements</b>	
○ Operating Expenditures	\$ 10,656,525
○ Loan Repayments	857,189
○ Transfers to Other Authorized Committees	639,408 <sup>2</sup>
○ Contribution Refunds	578,032
○ <b>Total Disbursements</b>	<b>\$ 12,731,154</b>

## Findings and Recommendations (p. 4)

- Net Outstanding Campaign Obligations (Finding 1)
- Receipt of Contributions that Exceed Limits (Finding 2)
- Prohibited In-Kind Contribution (Finding 3)
- Stale-Dated Checks (Finding 4)
- Disclosure of Disbursements (Finding 5)
- Reporting of Debts and Obligations (Finding 6)

<sup>1</sup> 26 U.S.C. §9038(a).

<sup>2</sup> These monies represent general election contributions subsequently redesignated to the candidate's senate committee.

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

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December 15, 2006 – April 30, 2008



# Table of Contents

	<b>Page</b>
<b>Part I. Background</b>	
Authority for Audit	1
Scope of Audit	1
Inventory of Campaign Records	1
Changes to the Law	1
<b>Part II. Overview of Campaign</b>	
Campaign Organization	2
Overview of Financial Activity	3
<b>Part III. Summaries</b>	
Findings and Recommendations	4
Summary of Amounts Potentially Owed to the U.S. Treasury	5
<b>Part IV. Findings and Recommendations</b>	
Finding 1. Net Outstanding Campaign Obligations	6
Finding 2. Receipt of Contributions that Exceed Limits	9
Finding 3. Prohibited In-Kind Contribution	15
Finding 4. Stale-Dated Checks	17
Finding 5. Disclosure of Disbursements	20
Finding 6. Reporting of Debts and Obligations	20

# Part I

## Background

### Authority for Audit

This report is based on an audit of Biden for President, Inc. (BFP), undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9038(a) of Title 26 of the United States Code. That section states “After each matching payment period, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of every candidate and his authorized committees who received [matching] payments under section 9037.” Also, Section 9039(b) of the United States Code and Section 9038.1(a)(2) of the Commission’s Regulations state that the Commission may conduct other examinations and audits from time to time as it deems necessary.

### Scope of Audit

This audit examined:

1. The receipt of excessive contributions and loans.
2. The receipt of contributions from prohibited sources.
3. The receipt of transfers from other authorized committees.
4. The disclosure of contributions and transfers received.
5. The disclosure of disbursements, debts and obligations.
6. The recordkeeping process and completeness of records.
7. The consistency between reported figures and bank records.
8. The accuracy of the Statement of Net Outstanding Campaign Obligations.
9. The campaign’s compliance with spending limitations.
10. Other campaign operations necessary to the review.

### Inventory of Campaign Records

The Audit staff routinely conducts an inventory of campaign records before it begins the audit fieldwork. BFP records were materially complete and the fieldwork began immediately.

### Changes to the Law

On September 14, 2007, the President signed into law the Honest Leadership and Open Government Act of 2007 (HLOGA), which included many revisions to the ethics rules that govern the conduct of U.S. Senators and members of the House of Representatives. One of the effects of HLOGA was to establish new rules governing presidential non-commercial travel after September 14, 2007. Section 439(a)(c) of Title 2 of the United States Code was amended to prohibit Senate and Presidential candidates, and their authorized committees, from spending campaign funds for travel on non-commercial aircraft, unless they pay their pro-rata share of the charter rate. The Commission intends to amend its current regulations to implement the new law. However, in a press release dated September 24, 2007, the Commission Chairman indicated that “until regulations are issued, the Commission would not pursue a political committee if it operates under a reasonable interpretation of the statute, even if our subsequent regulations reach a different interpretation.” Since the travel noted in Finding 3, Prohibited In-Kind Contribution, occurred before September 14, 2007, the new travel rules were not applicable.

## Part II

### Overview of Campaign

#### Campaign Organization

<b>Important Dates</b>	<b>Biden for President, Inc.</b>
• Date of Registration	January 31, 2007
• Eligibility Period <sup>3</sup>	December 3, 2007 – January 3, 2008
• Audit Coverage	December 15, 2006 – April 30, 2008 <sup>4</sup>
<b>Headquarters</b>	Wilmington, DE
<b>Bank Information</b>	
• Bank Depositories	One
• Bank Accounts	Three checking, one certificate of deposit
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Melvyn Monzak
• Treasurer During Period Covered by Audit	Melvyn Monzak
<b>Management Information</b>	
• Attended FEC Campaign Finance Seminar	No
• Used Commonly Available Campaign Management Software Package	Yes
• Who Handled Accounting, Recordkeeping Tasks and Other Day-to-Day Operations	Paid staff

<sup>3</sup> The period during which the candidate was eligible for matching funds began on the date of certification of his matching fund eligibility and ended on the date the candidate announced his withdrawal from the campaign. See 11 CFR §9033.

<sup>4</sup> Limited reviews of receipts and expenditures were performed after April 30, 2008, to determine whether the candidate was eligible to receive additional matching funds.

## Overview of Financial Activity (Audited Amounts)

<b>Cash on hand @ December 15, 2006</b>	<b>\$ 0</b>
o Contributions from Individuals	\$ 8,210,947 <sup>5</sup>
o Contributions from Political Committees	166,045
o Transfers from Affiliated Committees	1,900,000
o Loans Received	1,468,614
o Matching Funds Received	857,189 <sup>6</sup>
o Offsets to Operating Expenditures	270,611
o Other Receipts	12,650
<b>Total Receipts</b>	<b>\$ 12,886,056</b>
o Operating Expenditures	\$ 10,656,525
o Loan Repayments	857,189
o Transfers to Other Authorized Committees	639,408 <sup>7</sup>
o Contribution Refunds	578,032
<b>Total Disbursements</b>	<b>\$ 12,731,154</b>
<b>Cash on hand @ April 30, 2008</b>	<b>\$ 154,902</b>

<sup>5</sup> Approximately 33,000 contributions from more than 20,000 individuals.

<sup>6</sup> As of April 30, 2008, BFP had made 5 matching fund submissions totaling \$2,016,725 of which \$1,992,225 was certified by the Commission; however, BFP had only received \$857,189. As of June 30, 2009, BFP had submitted 9 requests totaling \$2,070,557 of which \$2,033,472 was certified and has been received, representing 10% of the maximum entitlement (\$21,025,000).

<sup>7</sup> These monies represent general election contributions subsequently redesignated to the candidate's senate committee.



## **Part III**

### **Summaries**

#### **Findings and Recommendations**

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

The Audit staff's review of BFP's financial activity through September 30, 2009, and estimated winding down costs indicated that the candidate did not receive matching fund payments in excess of his entitlement. (For more detail, see p. 6)

##### **Finding 2. Receipt of Contributions that Exceed Limits**

The Audit staff's review of contributions from individuals indicated that BFP failed to resolve a material number of excessive contributions. Based on a sample of contributions, the projected dollar value of the unresolved excessive contributions in the population is \$106,216. In its response to the preliminary audit report, BFP stated it would make a payment of \$106,216 to the U.S. Treasury after service of the final audit report.

In addition, the projected amount of excessive contributions that were not resolved in a timely manner is \$1,092,899. In response to the preliminary audit report recommendation, BFP provided several declarations from contributors and staff to support that letters had been sent to resolve excessive contributions. No documentation supporting these declarations or establishing that the actions were timely was included. (For more detail, see p. 9)

##### **Finding 3. Prohibited In-Kind Contribution**

The review of campaign travel identified one flight by BFP on a private aircraft that was reimbursed using the lowest unrestricted and non-discounted first-class commercial airfare. However, the plane utilized was certified by the Federal Aviation Administration and operated in a manner that required its use be paid at a charter rate. The difference between what BFP paid and the charter rate resulted in the receipt of an in-kind contribution of \$26,889 from a corporation. In response to the preliminary audit report recommendation, BFP indicated that it would make a payment to the U.S. Treasury after service of the final audit report. (For more detail, see p. 15)

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

The Audit staff identified stale-dated checks totaling \$137,757 issued by BFP. Subsequent to the exit conference, BFP made a payment to the U.S. Treasury for stale-dated checks in the amount of \$8,457 resulting in an unresolved balance of \$129,300. In response to the preliminary audit report recommendation, BFP provided documentation which resolved \$43,400 in stale-dated checks, leaving \$85,900 unresolved. BFP indicated that it would make a payment to the U.S. Treasury after service of the final audit report. (For more detail, see p. 17)

### **Finding 5. Disclosure of Disbursements**

The Audit staff identified 49 disbursements, totaling \$3,779,976, that were not adequately disclosed. Problems noted included incorrect or inadequate purpose as well as incorrect addresses. Subsequent to the exit conference, BFP filed amended reports that materially corrected the disclosure of these disbursements. BFP's response to the preliminary audit report provided no additional comments relevant to this matter. (For more detail, see p. 19)

### **Finding 6. Reporting of Debts and Obligations**

The Audit staff identified debt totaling \$870,296 that was not disclosed on Schedules D (Debts and Obligations) as required. Subsequent to the exit conference, BFP filed amended reports that materially corrected the disclosure of these debts. BFP's response to the preliminary audit report provided no additional comments relevant to this matter. (For more detail, see p. 20)

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

• Finding 2	Receipt of Contributions that Exceed Limits	\$ 106,216
• Finding 3	Prohibited In-Kind Contribution	26,889
• Finding 4	Stale-Dated Checks	85,900
	<b>Total Due U.S. Treasury</b>	<b>\$ 219,005</b>

## Part IV

# Findings and Recommendations

### Finding 1. Net Outstanding Campaign Obligations

#### Summary

The Audit staff's review of BFP's financial activity through September 30, 2009, and estimated winding down costs indicated that the candidate did not receive matching fund payments in excess of his entitlement.

#### Legal Standard

**A. Net Outstanding Campaign Obligations (NOCO).** Within 15 days after the candidate's date of ineligibility (see definition below), the candidate must submit a statement of "net outstanding campaign obligations." This statement must contain, among other things:

- The total of all committee assets including cash on hand, amounts owed to the committee and capital assets listed at their fair market value;
- The total of all outstanding obligations for qualified campaign expenses; and
- An estimate of necessary winding-down costs. 11 CFR §9034.5(a).

**B. Date of Ineligibility.** The date of ineligibility is whichever of the following dates occurs first:

- The day on which the candidate ceases to be active in more than one state;
- The 30th day following the second consecutive primary in which the candidate receives less than 10 percent of the popular vote;
- The end of the matching payment period, which is generally the day when the party nominates its candidate for the general election; or
- In the case of a candidate whose party does not make its selection at a national convention, the last day of the last national convention held by a major party in the calendar year. 11 CFR §§9032.6 and 9033.5.

**C. Qualified Campaign Expense.** Each of the following expenses is a qualified campaign expense.

- An expense that is:
  - Incurred by or on behalf of the candidate (or his or her campaign) during the period beginning on the day the individual becomes a candidate and continuing through the last day of the candidate's eligibility under 11 CFR §9033.5;
  - Made in connection with the candidate's campaign for nomination; and
  - Not incurred or paid in violation of any federal law or the law of the state where the expense was incurred or paid. 11 CFR §9032.9.
- An expense incurred for the purpose of determining whether an individual should become a candidate, if that individual subsequently becomes a candidate, regardless of when that expense is paid. 11 CFR §9034.4.

- An expense associated with winding down the campaign and terminating political activity. 11 CFR §9034.4(a)(3).

**D. Value of Capital Assets.** The fair market value of capital assets is 60% of the total original cost of the assets when acquired, except that assets that are received after the date of ineligibility must be valued at their fair market value on the date received. A candidate may claim a lower fair market value for a capital asset by listing the asset on the NOCO statement separately and demonstrating, through documentation, the lower fair market value. 11 CFR §9034.5(c)(1).

**E. Entitlement to Matching Payments after Date of Ineligibility.** If, on the date of ineligibility (see above), a candidate has net outstanding campaign obligations as defined under 11 CFR §9034.5, that candidate may continue to receive matching payments provided that he or she still has net outstanding campaign debts on the day when the matching payments are made. 11 CFR §9034.1(b).

### **Facts and Analysis**

The Candidate's date of ineligibility (DOI) was January 3, 2008. The Audit staff reviewed BFP's financial activity through September 30, 2009, analyzed estimated winding down costs and prepared the Statement of Net Outstanding Campaign Obligations that appears on the next page:

**Biden for President, Inc.**  
**Statement of Net Outstanding Campaign Obligations**  
As of January 3, 2008  
Prepared September 30, 2009

**Assets**

Primary Election Cash in Bank	\$ 403,900	[a]	
General Election Cash in Bank	1,213,933	[b]	
Accounts Receivable	173,184		
Capital Assets	<u>38,774</u>		
<b>Total Assets</b>			<b>\$1,829,791</b>

**Liabilities**

Primary Election Accounts Payable	\$ 968,572		
General Election Accounts Payable	1,130,333		
Winding Down Costs:			
Paid 1/4/08 – 9/30/09	\$ 827,822		
Estimated Winding Down Costs (10/1/09 - 6/30/10)	<u>38,800</u>	866,622	[c]
Loan Payable at 1/3/08		1,132,114	
Amounts Payable to U.S. Treasury for:			
Unresolved Excessive Contributions (See Finding 2)	\$106,216		
Prohibited In-Kind Contribution (See Finding 3)	26,889		
Stale-Dated Checks (See Finding 4)	<u>85,900</u>	<u>219,005</u>	
<b>Total Liabilities</b>			<b><u>4,316,646</u></b>
<b>Net Outstanding Campaign Obligations (Deficit) as of January 3, 2008</b>			<b>(\$2,486,855)</b>

[a] Adjusted for stale-dated checks totaling \$8,457 issued prior to DOI.

[b] General election contributions received do not affect the NOCO or matching fund entitlement. This asset is offset by equal amounts in the liability section. General Election Accounts Payable \$1,130,333 plus \$83,600 of the amount listed as Due to the U.S. Treasury for Stale-Dated Checks.

[c] The Audit staff will review BFP's disclosure reports to compare actual figures with the estimates and prepare adjustments accordingly.

Shown below are adjustments for funds received after January 3, 2008, through September 30, 2009, based on the most current financial information available at the close of fieldwork:

Net Outstanding Campaign Obligations (Deficit) as of 1/3/08	(\$2,486,855)
Private Contributions and Other Receipts Received 1/4/08 through 9/30/09	358,966
Matching Funds Received 1/4/08 through 9/30/09	2,033,472
Remaining Net Outstanding Campaign Obligations (Deficit)	(\$94,417) <sup>8</sup>

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

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

The Audit staff recommended that BFP demonstrate an adjustment(s) is required to any component of the NOCO statement or provide any other comments it so desires. In response to the preliminary audit report recommendation, BFP provided no adjustments or comments on the NOCO statement or the Audit staff conclusion.

## **Finding 2. Receipt of Contributions that Exceed Limits**

### **Summary**

The Audit staff's review of contributions from individuals indicated that BFP failed to resolve a material number of excessive contributions. Based on a sample of contributions, the projected dollar value of the unresolved excessive contributions in the population is \$106,216. In its response to the preliminary audit report, BFP stated it would make a payment of \$106,216 to the U.S. Treasury after service of the final audit report.

In addition, the projected amount of excessive contributions that were not resolved in a timely manner is \$1,092,899. In response to the preliminary audit report recommendation, BFP provided several declarations from contributors and staff to support that letters had been sent to resolve excessive contributions. No documentation supporting these declarations or establishing that the actions were timely was included.

### **Legal Standard**

**A. Authorized Committee Limits.** An authorized committee may not receive more than a total of \$2,300 per election from any one person. 2 U.S.C. §441a(a)(1)(A), and (f); 11 CFR §§110.1(a) and (b) and 110.9.

<sup>8</sup> Subsequent to date of ineligibility, BFP incurred and repaid a \$161,500 loan. This has no effect on the analysis and is not included in the above figures.

**B. Handling Contributions That Appear Excessive.** If a committee receives a contribution that appears to be excessive, the committee must either:

- return the questionable contribution to the donor; or
- deposit the contribution into its federal account and keep enough money on account to cover all potential refunds until the legality of the contribution is established. 11 CFR §103.3(b)(3) and (4).

The excessive portion may also be redesignated to another election or reattributed to another contributor as explained below.

**C. Redesignation of Excessive Contributions.** The committee may ask the contributor to redesignate the excess portion of the contribution for use in another election.

- The committee must, within 60 days of receipt of the contribution, obtain and retain a signed redesignation letter which informs the contributor that a refund of the excessive portion may be requested; or
- refund the excessive amount. 11 CFR §§110.1(b)(5), 110.1(l)(2) and 103.3(b)(3).

Notwithstanding the above, when an authorized political committee receives an excessive contribution from an individual or a non-multi-candidate committee, the committee may presumptively redesignate the excessive portion to the general election if the contribution:

- Is made before that candidate's primary election;
- Is not designated in writing for a particular election;
- Would be excessive if treated as a primary election contribution; and
- As redesignated, does not cause the contributor to exceed any other contribution limit.

Also, the committee may presumptively redesignate the excessive portion of a general election contribution back to the primary election if the amount redesignated does not exceed the committee's primary net debt position.

The committee is required to notify the contributor in writing of the redesignation within 60 days of the treasurer's receipt of the contribution and must offer the contributor the option to receive a refund instead. For this action to be valid, the committee must retain copies of the notices sent. Presumptive redesignations apply only within the same election cycle between the committee's primary and general elections. 11 CFR §110.1(b)(5)(ii)(B) & (C) and (l)(4)(ii).

**D. Reattribution of Excessive Contributions.** When an authorized committee receives an excessive contribution, the committee may ask the contributor if the contribution was intended to be a joint contribution from more than one person.

- The committee must, within 60 days of receipt of the contribution, obtain and retain a reattribution letter signed by all contributors; or
- refund the excessive contribution. 11 CFR §§110.1(k)(3), 110.1(l)(3) and 103.3(b)(3).

Notwithstanding the above, any excessive contribution that was made on a written instrument that is imprinted with the names of more than one individual may be attributed

among the individuals listed unless instructed otherwise by the contributor(s). The committee must inform each contributor:

- how the contribution was attributed; and
- the contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(ii)(B).

For this action to be valid, the committee must retain copies of the notices sent. 11 CFR §110.1(l)(4)(ii) and (5).

**E. General Election Contributions.** If a candidate is not a candidate in the general election, any contributions made for the general election shall be refunded to the contributors, redesignated in accordance with 11 CFR §§110.1(b)(5) or 110.2(b)(5), or reattributed in accordance with 11 CFR §110.1(k)(3), as appropriate. 11 CFR §102.9(e)(3).

**F. Sampling.** In conducting an audit of contributions, the Commission uses generally accepted statistical sampling techniques to quantify the dollar value of related audit findings. Apparent violations (sample errors) identified in a sample are used to project the total amount of violations. If a committee demonstrates that any apparent sample errors are not errors, the Commission will make a new projection based on the reduced number of errors in the sample. Within 30 days of service of the final audit report, the committee must submit a check to the United States Treasury for the total amount of any excessive contributions not refunded, reattributed, or redesignated in a timely manner; or take any action required by the Commission with respect to sample-based findings. 11 CFR § 9038.1(f).

### **Facts and Analysis**

The Audit staff's sample review of contributions from individuals indicated that BFP received a significant number of excessive contributions that either were unresolved or were not resolved in a timely manner. The projected dollar value of the unresolved excessive contributions in the sample population was \$106,016<sup>9</sup>. An additional error of \$200 was identified as the result of a separate review of contributions not included as part of the sample population. Sample errors included:

- Check – Attribution Issue – The errors were for contributions from single account holder checks. Such contributions cannot be presumptively reattributed to another individual.
- Other Credit Card – Attribution Issue - The documentation provided in support of these contributions included credit card authorizations and, if available, solicitation response devices. The excessive portion of the contribution was reattributed to another individual without obtaining the signature of the second individual acknowledging both the contribution and joint liability for the credit card used to make the contribution.

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<sup>9</sup> A Monetary Unit Sample was used with a 95% confidence level. The estimate is subject to a sampling error of \$91,693 for unresolved excessive contributions. For untimely resolved excessive contributions the estimate is subject to a sampling error of \$348,491.



- Other Credit Card – Designation Issue - The documentation provided in support of this contribution included a credit card authorization and a solicitation response device. The response device was not adequate to constitute a designation of the contribution to the general election and the excessive contribution was not refunded.
- Online Credit Card – Designation Issue - Some of the contributions were received through BFP’s internet website. The website did not provide sufficient notice to the contributor to constitute an attribution of a portion of the contribution to another person or to designate a portion of the contribution to the general election. BFP’s online contribution screen stated it could “accept contributions from an individual totaling up to \$2,300 per election.” It did not state that an individual could contribute \$2,300 to the primary election and \$2,300 to the general election or a total of \$4,600 to both elections, and failed to provide an opportunity for the contributor to designate a contribution for each election. In addition, the online contribution screen did not provide an opportunity for the contributor to attribute a contribution to another individual. Accordingly, it was not discernable whether a contributor intended to contribute part of his or her contribution to the general election or attribute that contribution to another individual when that contribution was made during the primary election period.

The Audit staff also identified excessive contributions that were resolved but not in a timely manner, totaling \$1,092,899. The projected dollar value of such excessive contributions in the sample population was \$1,055,399. Additional errors totaling \$37,500 were identified as the result of a separate review of contributions not included as part of the sample population. All of these excessive contributions were presumptively designated for the general election; however, BFP did not provide copies of letters sent to contributors as notification for the election designation. However, BFP did provide the Audit staff with letters obtaining redesignations of these general-designated contributions to the Candidate’s Senate campaign committee, Citizens for Biden (CFB). The letters were all signed by the contributors and mailed after the Candidate’s date of ineligibility (1-3-08), well after the receipt of these contributions. Although these letters were not presumptive redesignations as specified in the Commission’s regulations, the Audit staff considered these letters to be an adequate, though untimely, substitute to support the “general election” designation of these contributions for BFP.

This conclusion is consistent with the notice provision of presumptive redesignations. A presumptive redesignation does not require a written authorization from the contributor. Rather, BFP may send a notice to the contributor of the redesignation and inform the contributor of his or her option to request that the contribution be refunded. The Audit staff concluded that the signed forms authorizing the redesignation of Presidential contributions to the Senate election(s) also serve to put the contributor on notice that BFP had presumed that the portion of the otherwise excessive Presidential primary election contribution was redesignated to the Presidential general election. The contributions to the Presidential primary election, however, were excessive until the Presidential general to Senate redesignation forms were sent. Given that these redesignation forms, serving as the functional equivalent of the presumptive redesignation notices, were sent much later

than 60 days after the excessive Presidential primary contributions, they are untimely as to the redesignations from the Presidential primary to the Presidential general election.

At the exit conference, the Audit staff provided BFP representatives with schedules of all the errors for both the unresolved excessive contributions and the untimely resolved excessive contributions. A discussion ensued regarding the adequacy of letters used to support redesignations of contributions to the general election.

On September 26, 2008, BFP submitted its response to the matters presented at the exit conference. The response acknowledged that the untimely redesignation issue arises from BFP's inability to provide presumptive redesignation letters. Although confident that such letters were timely sent, BFP staff was unable to locate the letters or evidence that they were sent and believe they were inadvertently lost when its location changed in the spring of 2008. BFP further explained the letter would have been prepared using a template on a BFP computer that was subsequently "wiped clean" and sold when its assets were liquidated following the Candidate's withdrawal from the presidential campaign.

BFP offered the following circumstantial evidence to support that the letters had in fact been sent:

- BFP submitted a complete library of "cure" letters, whether for excessive contributions or missing contributor information. In addition, its Contribution Review Procedures make reference to presumptive redesignation and/or reattribution letters and templates for obtaining redesignations and reattributions are provided. BFP files contained other compliance letters sent for problematic contributions and those requesting additional information. BFP noted that it is unlikely that it would send this array of compliance letters and omit presumptive redesignation and/or reattribution letters.
- The individual primarily responsible for sending the compliance letters, including letters to resolve excessive contributions, had specific recollection that presumptive redesignation and/or reattribution letters had been sent. However, this individual is now deceased; and, therefore, BFP is unable to obtain a signed affidavit. BFP staff confirmed her recollections, and that she was meticulous and conscientious in performing her duties.
- BFP has been contacting recipients of presumptive redesignation and/or reattribution letters and although some do recollect receiving such a letter, none have been able to furnish a copy. Should any be located, copies will be forwarded to the Audit staff. No such copies have been provided to the Audit staff.
- Finally, BFP concurred with the Audit staff's position that those letters sent to redesignate contributions to Citizens for Biden serve to demonstrate that BFP did not fail to resolve a material number of excessive contributions. According to BFP, these letters reflected an understanding by the contributor and BFP that the excessive portion had been properly resolved and expressed the donative intent of the contributor.

The Audit staff did not believe that BFP's response was sufficient to document that presumptive redesignation and/or reattribution letters had been sent.

### **Preliminary Audit Report Recommendation**

The Audit staff recommended BFP provide:

- Documentation demonstrating that the unresolved excessive contributions (\$106,216) were not excessive. Such documentation could have included copies of timely negotiated refund checks or timely signed and dated reattribution/redesignation letters. Absent such documentation, the Audit staff recommended that BFP make appropriate refunds to contributors or make a payment of \$106,216 to the U.S. Treasury and provide evidence of such action (copies of the front and back of negotiated refund checks). Should documentation be presented that demonstrated any sample exceptions were not excessive contributions, it was noted that the Audit staff would calculate a revised amount payable to the U.S. Treasury. This revised amount or the unrefunded portion thereof, would be payable within 30 calendar days of service of the final audit report; and
- Documentation demonstrating that excessive contributions (\$1,092,899) were timely reattributed and/or redesignated. Such documentation was to include evidence that timely presumptive reattribution or redesignation letters were sent; copies of timely signed and dated reattribution/redesignation letters; or, any other documentation which indicated a timely reattribution and/or redesignation was obtained. BFP was invited to provide any other comments it felt were relevant to this issue.

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

In its response to the preliminary audit report:

- BFP provided no additional documentation demonstrating that the unresolved excessive contributions (\$106,216) were not excessive. Rather, BFP indicated that it would make all payments to the U.S. Treasury after service of the final audit report.
- With respect to the excessive contributions (\$1,092,899) that were not timely reattributed and/or redesignated, BFP provided information reiterating its earlier response to this issue. Declarations were submitted from four contributors who recalled receiving a presumptive redesignation notice from BFP. The response notes that none of these individuals retained a copy of the notice, because, unlike other "cure" letters, no action was required by the contributor unless he or she objected to the redesignation. In addition, a declaration was submitted from a BFP staff member who worked directly for the now deceased individual responsible for managing BFP's sending and retention of cure letters. His declaration states at the direction of his now deceased supervisor he regularly sent presumptive designation letters to contributors who made primary election contributions in excess of \$2,300. The response concluded by asking the Commission to accept its contention that presumptive designation letters had been sent.

### **Committee Response to Draft Final Audit Report**

In response to the draft final audit report, BFP submitted a revised attestation from the staff member discussed above. His declaration now states that he personally “..prepared and sent ‘presumptive designation’ notices to contributors who had contributed in aggregate more than \$2,300” and that he would send those letters within 60 days of receipt of the contributions.

### **Audit Staff’s Assessment of Committee Responses**

The response to the preliminary audit report reiterates points made in BFP’s response to the exit conference and provides declarations containing information similar to that provided in response to the exit conference. In response to the draft final audit report, the declaration was revised to address the staff member’s personal knowledge and the timeliness of the presumptive letters. However, no documentation supporting these declarations or establishing that the actions were timely was included as part of these responses.

Although BFP has provided some circumstantial evidence that redesignation letters were sent, 11 CFR §110.1(l)(4)(ii) and (5) requires that copies of all notices be retained for the presumptive redesignations to be effective. BFP has not satisfied that requirement.

## **Finding 3. Prohibited In-Kind Contribution**

### **Summary**

The review of campaign travel identified one flight by BFP on a private aircraft that was reimbursed using the lowest unrestricted and non-discounted first-class commercial airfare. However, the plane utilized was certified by the Federal Aviation Administration and operated in a manner that required its use be paid at a charter rate. The difference between what BFP paid and the charter rate resulted in the receipt of an in-kind contribution of \$26,889 from a corporation. In response to the preliminary audit report recommendation, BFP indicated that it would make a payment to the U.S. Treasury after service of the final audit report.

### **Legal Standard**

**A. Corporate Contributions Impermissible.** A corporation is prohibited from making any contribution in connection with a federal election. 2 U.S.C. §441b(a).

**B. Travel by airplane.** Campaign use of an airplane licensed to operate for hire by the Federal Aviation Administration (FAA) under 14 CFR part 121, 129, or 135 are governed by the definition of a contribution at 11 CFR §100.52(a) and (d). 11 CFR §100.93(a)(2).

**C. Contribution defined.** A gift, subscription, loan (except when made in accordance with 11 CFR §§100.72 and 100.73), advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office is a contribution. The term anything of value includes all in-kind contributions.

The usual and normal charge for a service is the commercially reasonable rate that one would expect to pay at the time the services were rendered.

The provision of services at a charge less than the usual and normal charge results in an in-kind contribution. The value of such a contribution would be the difference between the usual and normal charge for the services and the amount the political committee was billed and paid. 11 CFR §100.52(a) and (d).

**D. Contributions by a Limited Liability Company (LLC).** An LLC not electing treatment as corporation under federal tax law or having publicly-traded shares may make contributions to influence federal elections. Such a contribution will be considered as having been made from a partnership and governed by the rules pertaining to partnerships and subject to a single election limit per candidate of \$2,300. 11 CFR §110.1(b)(1) and (g)(2) and (4).

### **Facts and Analysis**

BFP reimbursed GEH Air Transportation, LLC (GEH) \$7,911 for first-class airfare for three people who made a roundtrip flight between New Hampshire and Iowa in June 2007. This roundtrip flight was on a plane which was certified for commercial service by the FAA under 14 CFR part 135 and documentation provided by BFP indicated the flight took place under this part; and thus, it was not eligible for this manner of payment.

Payment for this flight should have been made at a charter rate which reflected the usual and normal charges for services. Based on the charter rate and flight time noted on BFP's internal documentation for this trip, BFP should have paid \$34,800 (\$6,000 charter rate per hour x 5.8 hours). By failing to pay a charter rate, BFP received an in-kind contribution of \$26,889 (the \$34,800 owed less the \$7,911 paid) from GEH.

The entire amount represents a corporate contribution if GEH elected tax treatment as a corporation under Internal Revenue Service rules. However, if GEH elected to be treated for tax purposes as a partnership, or if GEH did not elect treatment as a either a partnership or corporation, the contribution is considered as made by a partnership. The partnership would have made an excessive contribution in the amount of \$24,589 (\$26,889 - \$2,300).

Although documentation indicated that the flight was flown under 14 CFR part 135, the Audit staff provided BFP with an opportunity to obtain additional documentation from GEH indicating that the flight was not flown under 14 CFR part 135 and therefore not subject to the charter rate. The required information had not been obtained at the time of the exit conference.

At the exit conference, the Audit staff provided information regarding this item to BFP representatives. The representatives were requested to provide documentation demonstrating that BFP did not receive a prohibited contribution or make a payment to

the U.S. Treasury. The representatives agreed to review the matter and respond accordingly.

On September 26, 2008, BFP submitted its response. BFP representatives indicated that they agreed with the finding and would write a check for \$26,889 to the U.S. Treasury.

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

Although BFP's response to the exit conference indicated that it agreed with the Audit staff analysis, the Audit staff recommended that BFP provide documentation from GEH which showed how GEH elected to be treated under Internal Revenue Service rules. Also, if GEH was treated as a partnership for tax purposes, information should be provided showing how the contribution should have been attributed to the various partners and that only those partners' profits are decreased or losses are increased as a result of the contribution. BFP was also offered the opportunity to produce documentation which:

- demonstrated a lower charter rate;
- established a different minimum flight time requirement; and/or,
- proved that the plane was not certified for commercial service by the FAA at the time the flight occurred under 14 CFR parts 121, 129 or 135; and

Absent such a demonstration, the Audit staff recommended that BFP make a payment of \$26,889 to the U.S. Treasury. In response to the preliminary audit report, BFP indicated that it would make a payment to the U.S. Treasury after service of the final audit report.

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

### **Summary**

The Audit staff identified stale-dated checks totaling \$137,757 issued by BFP. Subsequent to the exit conference, BFP made a payment to the U.S. Treasury for stale-dated checks in the amount of \$8,457 resulting in an unresolved balance of \$129,300. In response to the preliminary audit report recommendation, BFP provided documentation which resolved \$43,400 in stale-dated checks, leaving \$85,900 unresolved. BFP indicated that it would make a payment to the U.S. Treasury after service of the final audit report.

### **Legal Standard**

**Handling Stale-Dated (Uncashed) Checks.** If a committee has issued checks that the payees (creditors or contributors) have not cashed, the committee must notify the Commission of its efforts to locate the payees and encourage them to cash the outstanding checks. The committee must also submit a check payable to the U. S. Treasury for the total amount of the outstanding checks. 11 CFR §9038.6.

### **Facts and Analysis**

During our reconciliation of BFP's bank activity, the Audit staff identified 88 stale-dated checks totaling \$137,757 dated between January 1, 2007 and April 30, 2008.

The Audit staff provided a schedule of the stale-dated checks to BFP representatives at the exit conference. The representatives were requested to either provide evidence that the checks are not outstanding or make a payment to the U.S. Treasury for the amount of the stale-dated checks. They agreed to review the schedule to determine whether they agreed with the list and respond accordingly.

Subsequent to the exit conference, BFP submitted a check for \$8,457 to the U.S. Treasury for the stale-dated checks issued during 2007. The remaining stale-dated checks (\$129,300), were all refunds of contributions to contributors issued during 2008. BFP indicated that when it was able to determine the status of these refunds, a final payment would be made to the U.S. Treasury for the amount of those checks that had not cleared and for which an obligation still exists.

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

The Audit staff recommended that BFP provide evidence that:

- The checks or a reissued check were not outstanding. Such evidence was to include copies of the front and back of the negotiated checks along with bank statements; or
- The outstanding checks had been voided by providing copies of the voided check with evidence that no obligation existed.

Absent such evidence, the Audit staff recommended that BFP make a payment of \$129,300 to the U.S. Treasury.

In response to the preliminary audit report, BFP provided documentation supporting that stale-dated checks totaling \$48,400 had been resolved, either by issuance of a replacement check (which had been negotiated), or by the contributor's authorization to transfer the funds to Citizens for Biden and/or Unite Our States<sup>10</sup>. BFP's response also indicated it would make an appropriate payment upon service of the final audit report.

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

The Audit staff verified that stale-dated checks totaling \$43,400 had been resolved as follows:

- \$20,700<sup>11</sup> was redesignated by contributors to Citizens for Biden;
- \$17,100 was redesignated by contributors to Unite Our States;

<sup>10</sup> Citizens for Biden was the Candidate's Senate campaign committee and Unite Our States was the Candidate's Leadership PAC.

<sup>11</sup> BFP submitted redesignation letters from contributors authorizing these transfers to Citizens for Biden (CFB). However, based upon previous schedules provided by BFP, \$11,900 of this amount did not appear to have been included in the actual transfer of funds. Therefore, \$11,900 is included on the Statement of Net Outstanding Campaign Obligations as an account payable.

- \$5,600 was resolved through the issuance of a replacement check (which had been negotiated; and
- \$5,000 was disputed by the Audit staff. These checks were not included in the stale-dated checks to arrive at the \$129,300.

As a result, there remain unresolved stale-dated checks of \$85,900 (\$129,300 less \$43,400).



## **Finding 5. Disclosure of Disbursements**

### **Summary**

The Audit staff identified 49 disbursements, totaling \$3,779,976, that were not adequately disclosed. Problems noted included incorrect or inadequate purpose as well as incorrect addresses. Subsequent to the exit conference, BFP filed amended reports that materially corrected the disclosure of these disbursements. BFP's response to the preliminary audit report provided no additional comments relevant to this matter.

### **Legal Standard**

**A. Reporting Operating Expenditures.** When operating expenditures to the same person exceed \$200 in an election cycle, the committee must report the:

- Amount;
- Date when the expenditures were made;
- Name and address of the payee; and
- Purpose (a brief description of why the disbursement was made—see below). 2 U.S.C. §434(b)(5)(A) and 11 CFR §104.3(b)(4)(i).

### **B. Examples of Purpose.**

- **Adequate Descriptions.** Examples of adequate descriptions of “purpose” include the following: dinner expenses, media, salary, polling, travel, party fees, phone banks, travel expenses, travel expense reimbursement, catering costs, loan repayment, or contribution refund. 11 CFR §104.3 (b)(4)(i)(A).
- **Inadequate Descriptions.** The following descriptions do not meet the requirement for reporting “purpose”: advance, election day expenses, other expenses, expense reimbursement, miscellaneous, outside services, get-out-the-vote, and voter registration. 11 CFR §104.3 (b)(4)(i)(A).

### **Facts and Analysis**

The Audit staff identified 49 disbursements, totaling \$3,779,976, that were not adequately disclosed. For approximately half of these disbursements to its media vendor, the purpose was incorrect or inadequately disclosed. For the remaining disbursements to its credit card vendor, the address of the credit card vendor was incorrectly disclosed. When questioned, BFP representatives responded that the person who had been primarily responsible for data entry had been dismissed for poor data entry and reporting.

At the exit conference, BFP representatives were provided a schedule detailing these items. The representatives were requested to file amended Schedules B to correct the disclosure of these transactions. They agreed to comply with the recommendation.

Subsequent to the exit conference, BFP filed amended reports that materially corrected the disclosure of the disbursements noted above.

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

The Audit staff recommended that BFP provide any additional comments it felt were relevant to this matter. BFP provided no additional comments.

## **Finding 6. Reporting of Debts and Obligations**

### **Summary**

The Audit staff identified debt totaling \$870,296 that was not disclosed on Schedules D (Debts and Obligations) as required. Subsequent to the exit conference, BFP filed amended reports that materially corrected the disclosure of these debts. BFP's response to the preliminary audit report provided no additional comments relevant to this matter.

### **Legal Standard**

**A. Continuous Reporting Required.** A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 2 U.S.C. §434(b)(8) and 11 CFR §§104.3(d) and 104.11(a).

**B. Separate Schedules.** A political committee must file separate schedules for debts owed by the committee and debts owed to the committee, together with a statement explaining the circumstances and conditions under which each debt and obligation was incurred or extinguished. 11 CFR §104.11(a).

**C. Itemizing Debts and Obligations.**

- A debt of \$500 or less must be reported once it has been outstanding 60 days from the date incurred (the date of the transaction); the committee reports it on the next regularly scheduled report.
- A debt exceeding \$500 must be disclosed in the report that covers the date on which the debt was incurred. 11 CFR §104.11(b).

### **Facts and Analysis**

The Audit staff identified debts totaling \$870,296 that were not disclosed on Schedules D. These debts consisted of nine transactions to two vendors, all of which were more than \$500. The debts were typically incurred during the middle of the month and paid in full the subsequent month. However, BFP did not disclose them as debts in the report covering the date on which the debt was incurred.

At the exit conference, BFP representatives were provided a schedule detailing these items. The representatives were requested to amend the reports to correct the disclosure of these transactions. They agreed to comply with the recommendation.

Subsequent to the exit conference, BFP filed amended reports that materially corrected the disclosure of the debts noted above.

**Preliminary Audit Report Recommendation and Committee Response**

The Audit staff recommended that BFP provide any additional comments it felt were relevant to this matter. BFP provided no additional comments.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

December 8, 2009

**MEMORANDUM**

**TO:** John D. Gibson  
Chief Compliance Officer

Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

**THROUGH:** D. Alec Palmer  
Acting Staff Director

**FROM:** Christopher Hughey  
Deputy General Counsel

Lawrence L. Calvert, Jr.  
Associate General Counsel  
General Law and Advice

Lorenzo Holloway  
Assistant General Counsel  
Public Finance and Audit Advice

Allison T. Steinle  
Attorney

**SUBJECT:** Proposed Final Audit Report on Biden for President, Inc. (LRA 742)

**I. INTRODUCTION**

The Office of the General Counsel has reviewed the proposed Final Audit Report ("FAR") of the Audit Division on Biden for President, Inc. ("the Committee"),<sup>1</sup> which you submitted to this Office on August 31, 2009. Our comments address Finding 1 (Net Outstanding Campaign Obligations) and Finding 2 (Receipt of Contributions that Exceed

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<sup>1</sup> This audit pertains to Mr. Biden's campaign for the Office of President in the primary election. It does not pertain to Mr. Biden's campaign for the Office of Vice President in the general election.

Limits). We concur with any portion of findings not specifically discussed in this memorandum. If you have any questions, please contact Allison T. Steinle, the attorney assigned to this audit.

## II. FINDING 1 – NET OUTSTANDING CAMPAIGN OBLIGATIONS

The Committee accepted private general election contributions during the primary election period under the conditions set forth in Advisory Opinion (“AO”) 2007-03 (Obama). When Mr. Biden withdrew from the Presidential primary race on January 3, 2008, the Committee was required to refund or redesignate those contributions. *See* 11 C.F.R. § 102.9(e)(3); AO 2008-04 (Dodd); AO 2007-03 (Obama); AO 2003-18 (Smith). Although it is not clear from the proposed FAR, we understand that the Committee’s Statement of Net Outstanding Campaign Obligations (“NOCO Statement”) currently includes the private general election contributions as part of cash on hand, and the subsequent general election refunds and redesignations as part of accounts payable. The Audit Division’s cover memorandum to the proposed FAR raises the question of whether these general election contributions, refunds, and redesignations should be included in the NOCO Statement.

There is nothing that legally either requires or prohibits the inclusion of general election contributions, refunds, and redesignations in the NOCO Statement.<sup>2</sup> *See* 11 C.F.R. § 9034.5. Thus, we conclude that the Audit Division may take either approach, provided that, if the general election contributions and any subsequent refund and redesignation obligations are included in the NOCO Statement, they net each other out as assets (cash on hand) and liabilities (accounts payable).

In our opinion, however, it appears that excluding private general election contributions, refunds, and redesignations from the NOCO Statement is the approach most consistent with both the purpose of the NOCO Statement and two recent Commission AOs addressing the receipt of general election contributions by Presidential primary candidates. The purpose of a NOCO Statement is to determine a candidate’s financial status and entitlement to matching funds after the DOI with respect to that candidate’s participation in the primary election under the Presidential Matching Payment Account Act (“Matching Payment Program”). *See* 11 C.F.R. § 9034.5; Explanation and Justification for 11 C.F.R. § 9034.5, 44 Fed. Reg. 20,336, 20,340 (Apr. 4, 1979). Although section 9034.5 does not explicitly exclude private contributions made for the general election from the funds that should be included on the NOCO Statement, contributions designated for the general election but received during the primary election period should not affect a candidate’s financial status or entitlement to matching funds with respect to the primary election. While the Commission allows a candidate participating in the Matching Payment Program to raise general election contributions during the primary election period, once the candidate fails to qualify for the general election or elects to receive public financing for

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<sup>2</sup> This applies both to NOCO Statements submitted by committees after their dates of ineligibility (“DOI”) in support of their requests for matching funds, and to the NOCO Statements as adjusted by the Audit Division that are included in its audit report of any publicly financed presidential primary committee.

the general election, the general election contributions become impermissible funds that must be refunded, redesignated, or disgorged. *See* AO 2008-04 (Dodd); AO 2007-03 (Obama); AO 2003-18 (Smith). For this reason, a candidate who is participating in the Matching Payment Program is required to use an acceptable accounting method to distinguish between contributions designated for the primary and contributions designated for the general election, must limit access to the general funds, and may not use the general funds for any purpose. *See* 11 C.F.R. § 102.9(e); AO 2008-04 (Dodd); AO 2007-03 (Obama). Assuming that a committee has adequately segregated general election contributions from its primary election funds as required by section 102.9(e) and AO 2007-03, the general election contributions and any obligations to make general election refunds or redesignations should net each other out as assets and liabilities and thus should neither increase nor decrease the amount of post-DOI matching funds to which a committee may otherwise be entitled.

Based on the above analysis, we believe that the general election contributions, and the corresponding obligation to refund them that attaches to the campaign of an unsuccessful primary candidacy, should not be included in the NOCO Statement as a matter of policy.<sup>3</sup> Again, however, there is nothing that legally prevents these amounts from being included in the NOCO Statement. *See* 11 C.F.R. § 9034.5. Accordingly, the Audit Division may elect to include these amounts in the NOCO Statement, so long as the general election contributions and any obligations to make general election refunds or redesignations net each other out as assets and liabilities.

## **II. FINDING 2 – RECEIPT OF CONTRIBUTIONS THAT EXCEED LIMITS**

### **A. THE FAR SHOULD INCLUDE ADDITIONAL DETAIL ABOUT WHY THE ONLINE CONTRIBUTION SCREEN DID NOT PROVIDE ENOUGH INFORMATION TO ATTRIBUTE CONTRIBUTIONS TO OTHER CONTRIBUTORS OR DESIGNATE A PORTION OF EXCESSIVE PRIMARY CONTRIBUTIONS TO THE GENERAL**

Finding 2 in the proposed FAR includes a projected dollar value of \$106,016 in unresolved excessive contributions. This number includes sample errors related to contributions received through the Committee's online contribution screen. Consistent with the Commission's conclusion in the Preliminary Audit Report ("PAR"), the proposed FAR states that these errors are because "the website did not provide sufficient notice to the contributor to constitute an attribution of a portion of the contribution to another person or to designate a portion of the contribution to the general election." Proposed FAR at 12.

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<sup>3</sup> We recognize that one disadvantage to this approach is that it fails to provide an accurate "overall" picture of the Committee's financial status. However, this concern could be addressed by the Audit Division by adding an accompanying footnote to the NOCO Statement that explains the existence of the additional general election funds. Moreover, the general election funds will be reflected on the Committee's disclosure reports.

Regarding the attribution problem, we recommend that the proposed FAR include more detail about the sample errors, if any, related to the attribution of joint contributions, and explain how the attribution problem is related to the Committee's online contribution screen. *See* 11 C.F.R. § 110.1(k).

Regarding the designation problem, while we concur with the Audit Division that the online contribution screen did not provide enough information to properly designate the excessive primary election contributions, we recommend that the proposed FAR include more detail about why the online contribution screen was inadequate. Specifically, we know that the Committee's online contribution screen stated that the Committee could "accept contributions from an individual totaling up [to] \$2,300 per election." It did not state that an individual could contribute \$2,300 to the primary election and \$2,300 to the general election or a total of \$4,600 to both elections, and failed to provide an opportunity for the contributor to designate a contribution for each election. Accordingly, we cannot discern whether a contributor intended to contribute part of his or her contribution to the general election when that contribution was made during the primary election period. *See* 11 C.F.R. § 110.1(b)(2)(ii); Explanation and Justification for 11 C.F.R. § 110.1(b), 52 Fed. Reg. 760, 763 (Jan. 9, 1987) (stating that for a contributor to "effectuate a designation," a committee may provide a preprinted form "that clearly states the election to which the contribution will be applied"); *cf.* FAR on Craig Romero for Congress, Inc. (Oct. 18, 2007) (concluding that that a contributor fact sheet with language stating that it would allow "an individual donor to make a contribution of \$6,000 before [the primary election date], designating \$2,000 to each of the [primary, general, and runoff] election cycles" was sufficient to show contributor intent). The contrast between the contribution screen here and the detailed contributor notice at issue in the Romero audit is particularly compelling. The notice in Romero explained clearly the limits with respect to each election for which the candidate sought contributions, permitting an inference that a contribution above the primary election limit was intended for a later election. The screen here contained no such detail.

#### **B. ADDITIONAL DECLARATIONS PROVIDED BY THE COMMITTEE ARE NOT SUFFICIENT TO ESTABLISH THAT THE COMMITTEE TIMELY SENT PRESUMPTIVE REDESIGNATIONS**

Finding 2 in the proposed FAR also includes a projected dollar value of \$1,092,899 in late resolved excessive contributions. The Committee received undesignated contributions prior to the primary election greater than the primary election contribution limit and treated these contributions as redesignated to the general election. After Mr. Biden withdrew from the Presidential primary race, the Committee then obtained written redesignations from these contributors to redesignate the contributions to Mr. Biden's 2008 Senate elections. The Committee claims that it sent presumptive redesignation letters to the contributors that would authorize the redesignations from the Presidential primary election to the Presidential general election, but has not been able to produce them for the auditors. The Committee was able to produce redesignation forms completed by the contributors authorizing the Committee to redesignate Presidential general election contributions to the 2008 Senate primary election, or to the 2008 Senate general election to

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the extent that the contribution to the Senate primary election would result in an excessive contribution. Consequently, the PAR concluded that the Presidential general to Senate written redesignations were the functional equivalent of untimely presumptive redesignations of these same contributions from the Presidential primary to the Presidential general.

In response to the PAR, the Committee has submitted sworn declarations from four contributors and a staff member that it claims are sufficient to establish that the untimely resolved excessive contributions addressed in Finding 2 were, in fact, timely. *See* Committee Response at 2-3. The declarations from the four contributors state that they “recall receiving a letter from the Committee in 2007 that in form and substance” matched the Committee’s boilerplate presumptive redesignation letter. The declaration from the staff member states that he worked with the deceased staff member who was primarily responsible for sending the presumptive redesignation letters and “recall[s] regularly preparing and sending notices to contributors that, in form and substance” matched the Committee’s boilerplate presumptive redesignation letter.

The issue presented here is whether the additional declarations provided by the Committee are sufficient to establish that the Committee timely sent the presumptive redesignations. As a legal matter, there is no specific legal or precedential basis for concluding that a declaration would be sufficient evidence with regard to timely reattributions or redesignations. In fact, the Commission’s regulations expressly state that a contribution will not be considered timely redesignated if a committee does not retain the written records concerning that redesignation. 11 C.F.R. § 110.1(l)(5); *see also* Explanation and Justification for Section 110.1(l)(4) and (5), 67 Fed. Reg. 69,928, 69,934 (Nov. 9, 2002) (rejecting a process by which committees could orally notify contributors of the redesignation and then write a memorandum of the conversation as documentation because it “would provide too great an opportunity for fraud and abuse”).

The D.C. Circuit has addressed whether declarations are sufficient supporting documentation in the context of cost attributions to state expenditure limits under Title 26. In *John Glenn Presidential Comm. v. FEC*, 822 F.2d 1097, 1103 (D.C. Cir. 1987), the court concluded that a one-sentence affidavit signed by a person whose relationship to the campaign was unknown was not sufficient to establish that bumper stickers were distributed to other states after they were shipped to New Hampshire. The court concluded that it was neither arbitrary nor irrational for the Commission to reject an affidavit that purported to convey common rather than personal knowledge and provided no specific information regarding the actual allocations. More recently in *LaRouche’s Comm. for a New Bretton Woods v. FEC*, 439 F.3d 733, 738 (D.C. Cir. 2006), the court concluded that the Commission was not required to find that a charged vendor mark-up was a qualified campaign expense based solely on an expert affiant’s “general, unsubstantiated, and conclusory opinion that the charged mark-up was reasonable.” In contrast, in *Robertson v. FEC*, 45 F.3d 486 (D.C. Cir. 1995), the court concluded that the Commission could not reject proof of postage and an affidavit by a campaign worker verifying that a mailing had taken place without explaining why it had done so. While the court noted that the



accounting burden fell on the committee, it stated that the Commission could not reject uncontroverted documentation relevant to the state expenditure limits.

Applying this caselaw to the case at hand, it is clear that the declarations provided by the Committee are more like those in *Glenn* and *LaRouche* than *Robertson*. The declarations provide no specific information regarding the main contested element of the finding: whether the Committee sent the presumptive redesignation notices within 60 days of its receipt of the excessive contributions. See 11 C.F.R. § 110.1(b)(5)(ii)(B)(5)-(6). The four contributors do not attest to when the presumptive redesignations were postmarked, or even the specific date they received them; they only attest to recalling receiving a letter in 2007. Moreover, it is unclear whether the declarations are from contributors who triggered the sample errors. Even if they were, they presumably would make up only a small percentage of the contributors whose presumptive redesignation letters the Committee could not produce. Likewise, the staff member does not attest to having personal knowledge that the presumptive redesignation notices at issue here were sent or when they were sent; he only generally attests that his job duties “included sending notices and other letters seeking re-designations, re-attributions, and authorizations from contributors to transfer funds between Biden for President and [Mr. Biden’s Senate committee],” and he recalls regularly doing so. Accordingly, we are of the view that the additional declarations are not sufficient to establish that the Committee timely sent the presumptive redesignations.

Nevertheless, we note that the Commission has recently accepted affidavits as supporting documentation in lieu of the documentation required by Commission regulations, although it has not yet done so in the context of reattributions or redesignations. Specifically, the Commission has accepted partial timesheets for seven staff members and one affidavit attesting that staff members spent 25 percent or less of their time in connection with a federal election for purposes of allocating staff salary. Commission regulations state that a committee must maintain a monthly log of the percentage of time each employee spends in connection with a federal election pursuant to 11 C.F.R. § 106.7(d)(1). See FAR on the Missouri Democratic Party (Feb. 3, 2009).



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

April 27, 2010

**MEMORANDUM**

**TO:** Patricia Carmona  
Chief Compliance Officer

Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

**THROUGH:** D. Alec Palmer  
Acting Staff Director

**FROM:** Christopher Hughey *ch*  
Deputy General Counsel

Lawrence L. Calvert, Jr. *llc*  
Associate General Counsel  
General Law and Advice

Lorenzo Holloway *lh*  
Assistant General Counsel  
Public Finance and Audit Advice

Margaret J. Forman *mjf*  
Attorney

Allison T. Steinle *ats*  
Attorney

**SUBJECT:** Draft Final Audit Report on Biden for President, Inc. (LRA 742)

The purpose of this memorandum is to address the legal implications of the additional declaration that Biden for President, Inc. ("the Committee") submitted in response to the Audit Division's draft Final Audit Report ("draft FAR").

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We continue to be of the view that the declarations submitted by the Committee are immaterial because 11 C.F.R. § 110.1(1)(5) governs here. As we noted in our earlier comments, 11 C.F.R. § 110.1(1)(5) provides that if the Committee does not retain copies of the actual presumptive redesignation notices, it is as if the presumptive redesignations never occurred. Here, the Committee has been unable to produce copies of its primary to general presumptive redesignation notices. There is no legal or precedential basis for concluding that anything other than the written records required under 11 C.F.R. § 110.1(1)(5) would be sufficient to establish that the presumptive redesignations were timely made.

However, if the Commission determines that it wishes to consider the declarations, the newly submitted declaration does address some, although not all, of the deficiencies that our earlier comments had noted in the same staff member's previous declaration. Specifically, the staff member now states that he personally "prepared and sent 'presumptive redesignation' notices to contributors who had contributed in aggregate more than \$2,300" and "would send these notices within 60 days of receipt of such contributions." The declaration, however, remains a blanket statement that does not address each of the contributions at issue. We recommend that the final FAR be revised to address these specific points.

If you have any questions, please contact Margaret J. Forman or Allison T. Steinle, the attorneys assigned to this audit.

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## CASE INDEX FORM

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

**STAFF ASSIGNED:** Alex R. Boniewicz, Audit Manager  
Paula Nurthen, Lead Auditor

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

<u>DATE</u>	<u>DOCUMENT</u>
03-17-09	Legal Analysis on Preliminary Audit Report
05-18-09	Preliminary Audit Report
07-20-09	Response to Preliminary Audit Report
12-08-09	Legal Analysis on Final Audit Report
01-12-10	DRAFT Final Audit Report to Committee
02-01-10	Committee Hearing Request Letter
04-08-10	Committee Withdrawal of Hearing Request
04-12-10	Response to DRAFT Final Audit Report
04-27-10	Legal Comments on Revised Declaration
04-30-10	Final Audit Report

The above documents can be found at the following server location:  
\\Ntsrv1\ voting ballot matters\Audit\Biden for President, Inc.

If you have any questions, please contact Alex R. Boniewicz at 694-1179.

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