



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Preliminary Report of the Audit Division on Biden for President, Inc. (LRA 742)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Preliminary Audit Report ("proposed Report") of the Audit Division on Biden for President, Inc. ("the Committee") that you submitted to this Office on December 9, 2008.¹ This memorandum addresses our comments on the

¹ This audit pertains to Mr. Biden's campaign for the Office of President in the primary election. This audit does not pertain to Mr. Biden's status as a Vice Presidential candidate in the general election.

proposed Report.² We concur with any portions of findings not specifically discussed in this memorandum. In this memorandum, we address issues pertaining to the Committee's potential receipt of excessive contributions (Finding 2). If you have any questions, please contact Margaret J. Forman or Allison T. Steinle, the attorneys assigned to this audit.

II. RECEIPT OF CONTRIBUTIONS THAT EXCEED LIMITS (FINDING 2)

A. Proposed Report Should Specify Each Type of Excessive Contribution

In the proposed Report, the auditors state that the Committee has a projected dollar value of unresolved excessive contributions in the amount of \$120,938, which the auditors have revised to \$106,015.93. The proposed Report, however, does not specify the exact breakdown of these unresolved excessive contributions. We recommend that the auditors include a breakdown of each type of excessive contribution that makes up the \$106,015.93 sample. By providing a breakdown and description of why these paper and online contributions fail to meet the requirements for designations or attributions, the Commission will be able to understand and analyze the precise type and amount of excessive contributions included in the sample.

The online contributions account for \$6,104.39 of the \$106,015.93 sample. The remaining unresolved excessive contributions, totaling \$99,911.54, resulted from contributions not made online, either by check or credit card contributions. The breakdown is as follows:

	Projected \$
Check – Attribution Issue	\$29,843.70
Other Credit Card – Attribution Issue	\$59,687.42
Other Credit Card – Designation Issue	\$10,380.42
Online Credit Card – Designation Issue	\$6,104.39
Total	\$106,015.93

We recommend that the auditors describe why the contributions not made online fail to meet the requirements for designation or attributions, as the paper credit card forms and checks include different information and therefore involve a different analysis than the online form. We also include an analysis of why the online contributions fail to meet the requirements for designations, and recommend that the auditors include a more thorough analysis and description of the online designation issue.

B. Online Contributions Fail to Designate the Election

The cover memorandum for the proposed Report concludes that the Committee's online contribution screen fails to meet the Commission's designation requirements. We agree with this



conclusion, and we recommend that the auditors raise this issue in their cover memorandum to the Commission.

The Committee's online system for accepting contributions states that it "may accept contributions from an individual totaling up [to] \$2,300.00 per election."³ The online solicitation, however, does not state that the individual may contribute \$2,300 to the primary and \$2,300 to the general election. It requires the contributor to provide an electronic signature authorizing the contribution when it is made.

We conclude that the online contribution screen fails to meet the requirements for the designation of contributions, in that it fails to provide enough information to designate a contribution greater than \$2,300 to the general election, when that contribution is made prior to the primary election. Contributions designated in writing and signed by the contributor for a particular election are made with respect to the election so designated. 11 C.F.R. § 110.1(b)(2)(i) and (4). Contributions made prior to the primary election are considered to be designated to the primary election unless the contributor designates otherwise. 11 C.F.R. § 110.1(b)(2)(ii). To enable a contributor to "effectuate a designation," a committee may also provide a preprinted form "that clearly states the election to which the contribution will be applied...." *Explanation and Justification for 11 C.F.R. § 110.1(b)*, 52 Fed. Reg. 760, 763 (Jan. 9, 1987). In the Craig Romero for Congress, Inc. audit, the Commission concluded that contributor forms were sufficient to determine the designation of contributions greater than \$2,000 among the three elections, provided that the contributor returned the completed forms with their payment, and where the contributor forms stated:

Individual contributions are limited to \$2,000 per individual per election cycle.

Louisiana has three election cycles this year:

1. The primary election, which ends at the close of qualifying on August 6, 2004;
2. The general election on Tuesday, November 2, 2004; and,
3. The run-off election on Saturday, December 4, 2004.

This will allow an individual donor to make a contribution of \$6,000 before August 6, 2004, designating \$2,000 to each of the three election cycles.

Campaign Finance Fact Sheet, Craig Romero for Congress, Inc.; see Interim Audit Report on Craig Romero for Congress, Inc. (Mar. 29, 2007).⁴

³ The auditors' copy of this online solicitation is missing some wording at one end of the page. The word "to" is placed in brackets because it appears to be the word used in this online solicitation; however, most of this word is missing. The auditors have been seeking to obtain a complete copy of this online solicitation from the Committee. The Committee claims that it looked for, but cannot find another copy.

⁴ The Craig Romero for Congress committee is a primary respondent in an Enforcement Matter, AR 07-08, referred after the Commission approved the final Audit Report. On January 28, 2009, the Commission found reason to believe that Craig Romero for Congress and the treasurer violated sections 441b(a) (prohibited contributions) and 441a(f) (excessive contributions), and approved conciliation prior to a finding of probable cause to believe.

In our facts, the Committee's electronic system for accepting contributions states that the contributor may make a contribution of up to the maximum contribution allowed per election, but, unlike the Romero forms, is no more specific. The image from the Committee's website states that the Committee "may accept contributions from an individual totaling up [to] \$2,300.00 per election." See note 3, *supra*. The contributor screen provides no opportunity for the contributor to designate a contribution for each election (primary and general), nor does it state the total amount, \$4,600, that can be contributed to both elections. Therefore, the contributor screen supplied by the committee does not "clearly state[] the election to which the contribution will be applied." See *Explanation and Justification for 11 C.F.R. § 110.1(b)*, 52 Fed. Reg. 760, 763 (Jan. 9, 1987). As a result, we cannot discern whether the contributor intended to contribute part of his or her contributions to the general election, when that contribution is made prior to the primary election. *Id.* Therefore, the amount of a contributor's online contribution of greater than \$2,300 made prior to the primary election would not be properly designated for the general election. *Id.*; see 11 C.F.R. § 110.1(b)(2)(i) and (4)(i).

C. Untimely Resolved Excessive Contributions Should Include Additional Analysis and Conclusion

1. Presidential General to Senate Written Redesignations Are the Functional Equivalent of Untimely Presumptive Redesignations of These Same Contributions from the Presidential Primary to the Presidential General Election

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 Democratic nomination contest, thus ensuring that he would not be a candidate in the Presidential general election, the Committee then obtained written redesignations from these contributors to redesignate the contributions to Mr. Biden's 2008 Senate elections.⁵ The Committee claims that it sent redesignation forms and/or presumptive redesignation notices to the contributors that would authorize the redesignations from the Presidential primary to the Presidential general election, but has not yet 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 the 2008 Senate general election to the extent that the contribution to the Senate primary election would result in an excessive contribution.

⁵ In the proposed Report, the auditors state that "presumptive redesignations apply only within the same election cycle." Proposed Report at 10. Our facts involve a candidate who campaigned in overlapping elections for two offices: President and United States Senator. Therefore, rather than generally refer to an election cycle, we recommend that the auditors more clearly articulate that the redesignation regulations provide that presumptive redesignations may be made only between that authorized committee's primary and general elections. 11 C.F.R. § 110.1(b)(5)(ii)(B) and (C).

The auditors conclude that the redesignation forms authorizing the Committee to redesignate Presidential general election contributions to the 2008 Senate election(s) are an adequate substitute for a presumptive redesignation of the contributions from the Presidential primary election to the Presidential general election. We agree with this conclusion, in that we view these redesignation forms authorizing redesignation of Presidential general election contributions to the Senate election(s) as the functional equivalent of late presumptive redesignations of these same contributions from the Presidential primary to the Presidential general election. We recommend, however, that the auditors revise the proposed Report to provide more information in support of their conclusion consistent with our comments.

[REDACTED] we also recommend that the auditors raise the substantive redesignation issue in their cover memorandum to the Commission.

The issue is whether the written redesignations signed by contributors authorizing the redesignation of funds from the Committee's Presidential general election to his Senate primary election (or Senate general election, if there is an excess), are the functional equivalent of late presumptive redesignations of these same contributions from the Presidential primary to the Presidential general election.⁶

In the 2008 election cycle, a contributor may contribute no more than \$2,300 per election to the authorized committee of a candidate for Federal office. See 2 U.S.C. § 441a(a)(1)(A). A contributor may designate in writing a contribution for a specific election; however, if the contributor fails to do so, the contribution is considered made with respect to the next election. 11 C.F.R. § 110.1(b)(2). Thus, a contribution made prior to the primary election, but not designated by the contributor, is made in connection with the primary election. A committee may request a written redesignation of an excessive contribution made with respect to or designated for one election to a different election, so long as the committee satisfies certain requirements. 11 C.F.R. §§ 110.1(b)(3)(1), 110.1(b)(5). Alternatively, a committee may make a presumptive redesignation, where a committee may treat all or part of an otherwise excessive primary election contribution as made with respect to the general election, so long as the committee satisfies certain requirements, including the submission of a written notice to the contributor that includes an option for the contributor to request a refund. 11 C.F.R. § 110.1(b)(5)(ii)(B). The purpose of the redesignation requirements is to demonstrate that it is the contributor's intent to make the designation or redesignation. See *Explanation and Justification for 11 C.F.R. § 110.1(b)*, 52 Fed. Reg. 760, 760-62 (Jan. 9, 1987) (stating that designated contributions indicate contributor intent and the Commission considers redesignated contributions to be properly designated); *Explanation and Justification for 11 C.F.R. § 110.1(b)(5)*, 67 Fed. Reg. 69,928, 69,931 (Nov. 19, 2002) (stating that the rationale for presumptive redesignations is that the committee may reasonably infer that a contributor of an excessive primary contribution would probably not object to the redesignation of a portion of

⁶ We have no indication from the auditors that the Presidential general election campaign ever made expenditures from the excessive contributions that were redesignated from the Presidential primary election to the Presidential general election.

that contribution to the general election). If the committee fails to retain written records of the redesignation or reattribution, including contributor notices, the redesignation "shall not be effective, and the original designation or attribution shall control." 11 C.F.R. § 110.1(l)(5).

In our facts, the Committee has been unable to produce copies of written redesignations from the contributors or presumptive redesignation notices sent by the Committee to the contributors for contributions redesignated by the Committee from the Presidential primary to the Presidential general election. We have redesignation forms signed by these same contributors, stating that they authorize their Presidential general election contributions to be redesignated to the Senate primary election, or Senate general election to the extent that the Senate primary contribution would be excessive: *See Redesignation Form.*

The Committee claims that it retained, but cannot locate, documentation supporting the redesignations of contributions from the Presidential primary election to the Presidential general election. The Committee, in its response to the exit conference, states that it routinely tracks excessive contributions and sends out redesignation letters, however, "[a] complete set" of such records are missing. The Committee states that it has been attempting to contact contributors to retrieve copies of any redesignation letters retained by the contributors, but has not received any copies at this time. *See Correspondence from Oldaker, Biden & Belair, LLP to Paula Nurthern, Lead Auditor, Audit Division, Federal Election Commission (Sept. 26, 2008).* The Committee also asserts that the individual with primary responsibility for sending compliance letters to contributors specifically recalled sending out the presumptive redesignation notices; however, she was very ill at the time and is now deceased. Therefore, the Committee asserts that it was unable to obtain an affidavit from her. *Id.* Furthermore, the Committee asserts that contributor letters authorizing redesignations from the Presidential general election to the Senate election(s) "reflects an understanding, both by the contributor and the Committee, that the excessive portion of the contributor's contribution previously had been properly resolved." *Id.*

We begin this analysis by examining the redesignations from the Presidential primary election to the Presidential general election. The Committee has failed to produce written records of these redesignations.⁷ According to the auditors, up to \$639,000 in these contributions may have been excessive as to the Presidential primary election.⁸ The Committee asserts that the written redesignations from the Presidential general election to the Senate election(s) "expresses the donative intent of the contributor." *See Correspondence from Oldaker, Biden & Belair, LLP to Paula Nurthern, Lead Auditor, Audit Division, Federal Election Commission (Sept. 26, 2008).*

⁷ Should the Committee produce the redesignation records during the audit as required pursuant to the Commission's regulations, the auditors may consider the documentation in lieu of our conclusion.

⁸ The \$639,000 amount represents the amount that the Committee moved to the Biden Senate committee. According to the auditors, because the excessive contributions were based on a sampling, they cannot determine with certainty that all \$639,000 of the contributions moved to the Senate committee were excessive contributions from the primary election. Some contributors may have originally designated their contributions to the Presidential general election.


There is no basis on which the auditors may conclude, consistent with the Commission's regulations, that there was some earlier, timely redesignation of the contributions in question from the Presidential primary election to the Presidential general election. If a political committee does not retain the written evidence of a redesignation in writing or a presumptive redesignation notice, "the redesignation or reattribution shall not be effective, and the original designation shall control." 11 C.F.R. § 110.1(I)(5). Accordingly, the original contributions must be considered to be excessive Presidential primary election contributions at least up until the point at which the contributors received the notices asking them to redesignate Presidential general election contributions to the Senate campaign.

On the other hand, we conclude that the redesignation forms signed by the contributors, authorizing the redesignation of their Presidential general election contributions to the Senate election(s) may also serve as the functional equivalent of untimely presumptive redesignations from the Presidential primary to the Presidential general election.

This conclusion is consistent with the notice provision of presumptive redesignations. A presumptive redesignation does not require a written authorization from the contributor. Rather, the Committee 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. 11 C.F.R. § 110.1(b)(5)(ii)(B). To be timely, the presumptive notice must be sent within 60 days of the date that the Committee received the contribution. 11 C.F.R. § 110.1(b)(5)(ii)(B)(6). The rationale for presumptive redesignations is based on the presumption that "the contributor intended to contribute any excessive amount to that candidate's general election, without obtaining written permission from the contributor to treat the excess as a general election contribution." 67 Fed. Reg. at 69,930. In our facts, the contributor has explicitly authorized, with his or her signature, the Committee to redesignate a Presidential general election contribution (originally part of an otherwise excessive Presidential primary election contribution) to the Senate primary or general election. We conclude that the signed contributor forms authorizing the redesignation of Presidential general election contributions to the Senate election(s) also serve to put the contributor on notice that the Committee has also presumed that the portion of the otherwise excessive Presidential primary election contribution was previously redesignated to the Presidential general election, though it is now redesignated for the Senate election(s). 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. 11 C.F.R. § 110.1(b)(5)(ii)(B)(6). We recommend that the auditors revise the proposed Report to provide more information in support of their conclusion and consistent with the above analysis.⁹

⁹ We contemplated whether the auditors could conceivably infer that the written redesignations reflect the contributors' intent to redesignate their Presidential primary election contributions directly to the Senate election, rather than from the Presidential general election to the Senate election. The auditors, however, would then have to consider these redesignations untimely, because the contributors provided the written redesignations significantly longer than 60 days after the dates the Committee received the contributions. See 11 C.F.R. § 110.1(b)(5)(ii)(A)(2).

The Commission has permitted committees to resolve problems pertaining to otherwise excessive primary contributions, at least for purposes of the audits, by sending untimely presumptive notification letters to the contributors.¹⁰ *See, e.g.,* Audits for Kerry Edwards 2004, Clark for President, Martinez for Senate, and Craig Romero for Congress. These were all 2004 cycle audits, and some of them pertained to publically funded 2004 presidential campaigns, while others were audits authorized pursuant to 2 U.S.C. § 438(b). In our facts, if we permit the redesignation notices signed by the contributors authorizing the redesignation of their Presidential general election contributions to the Senate election(s) also to serve as the functional equivalent of untimely presumptive redesignation notices from the Presidential primary election to the Presidential general election, the Committee does not need to send out further presumptive redesignation notices.

 we recommend that the auditors raise the substantive redesignation issue in their cover memorandum to the Commission.

2. Refunds and Redesignations from the Presidential General Election to the Senate Election Were Timely

We address two additional issues regarding the timeliness of the written redesignations from the Presidential general election to the Senate election(s), as well as any other refunds or redesignations of contributions originally designated for the Presidential general election. The auditors note in their cover memorandum to the proposed Report that "although letters requesting redesignation to the candidate's Senate campaign were obtained timely, the subsequent transfer of contributions to the candidate's Senate campaign did not appear initially to have been done timely." However, the auditors note that they have tolled the Committee's 60 day period for issuing refunds and obtaining redesignations from the Presidential general election to the Senate election until September 8, 2008, consistent with Advisory Opinion 2008-04 (Dodii). Consequently, the auditors treated refunds and redesignations from the Presidential general election to the Senate election as timely, and therefore did not include these issues in the proposed Report. While we agree that the refunds and redesignations from the Presidential general election to the Senate election should be treated as timely, we arrive at that conclusion through a somewhat different analysis.

We believe that there is no legal authority that requires a committee to move redesignated funds from one campaign to another within the 60 day period. Commission regulations only require that a committee receive the redesignation letters from contributors within that

¹⁰ The Commission has considered similar redesignation issues in Audit matters that have been referred to the Office of the General Counsel's Enforcement Division for consideration. The Commission has closed some of these matters after conciliation, including MUR 5959 (Martinez for Senate), MUR 5962 (Istook for Congress), MUR 5960 (Gephardt for President), and MUR 5961 (DeMint for Congress).

timeframe. There is nothing in 11 C.F.R. §§ 102.9(e) or 110.1(b), nor in Advisory Opinion 2007-03 (Obama) or Advisory Opinion 2008-04 (Dodd), that suggests a Presidential committee must move funds to the Senate committee within a certain amount of time. Rather, 11 C.F.R. § 110.1(b)(5)(ii)(A)(2) states that a contribution is considered to be properly redesignated for another election when "within sixty days from the treasurer's receipt of the contribution, the contributor provides the treasurer with a written redesignation of the contribution for another election, which is signed by the contributor." We recognize that where contributors have redesignated contributions between two different candidacies rather than just between the primary and general elections, there are additional practical concerns involving the timely movement of funds. Specifically, redesignated funds ultimately must be moved to another committee in order to practically effectuate the redesignation. Here, however, we believe these concerns are minimal, since the Committee did, in fact, move the funds to the Senate committee within a reasonable amount of time, albeit not within the 60 day period required under 11 C.F.R. § 110.1(b)(5)(ii)(A)(2).

To the extent that any refunds or redesignations remain untimely given the above, we agree with the auditors that they should toll the Committee's 60 day period until September 8, 2008, consistent with Advisory Opinion 2008-04 (Dodd). The basic principle underlying advisory opinions is that they may be relied upon by "any person involved in the specific transaction or activity with respect to which such advisory opinion is rendered, and . . . which is indistinguishable in all its material aspects from the transaction or activity with respect to which advisory opinion is rendered." 11 C.F.R. § 112.5(a). While Commission regulations suggest that a person may only rely upon an existing advisory opinion in order to avoid sanctions from the Commission, *see* 11 C.F.R. § 112.5(b), and Advisory Opinion 2008-04 had not yet been issued at the time the Committee acted, the Committee's facts and circumstances were materially indistinguishable from those of Senator Dodd's committee. Accordingly, we believe it would be fundamentally unfair to give one committee significantly more time to resolve excessive contributions than another simply because it filed an advisory opinion request.

In Advisory Opinion 2008-04, the Commissioners looked to either the existence of a novel legal question or the lack of a quorum of Commissioners as the basis for tolling the 60 day period, *see* Advisory Opinion 2008-04 at n.3, and here the Committee was faced with both the same novel legal question and a lack of quorum of Commissioners. Mr. Biden withdrew from the Presidential primary race on January 3, 2008, the same day as Senator Dodd. The Committee sent out the requests for redesignations in question in February, the same month as Senator Dodd's committee. And the Committee obtained the late redesignations and made the late refunds in mid-March, after its 60 day period had run, which is precisely the legal scenario Senator Dodd's committee presented in its advisory opinion request.

We suggest the auditors incorporate the above analysis in Finding 2 and specify the precise type and amount of contributions that the auditors have tolled in the proposed Report. As a general rule, the Commission is not required to toll any statutory or regulatory deadlines based on the existence of an unresolved legal question, even when an advisory opinion seeking guidance on that specific question is pending. *See* Advisory Opinion 2008-04 (Dodd). Because such tolling would be something done entirely at the Commission's discretion rather than a

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legally required mandate, we believe the auditors should include a detailed analysis and breakdown of the contributions affected by the tolling in order for the Commissioners to better understand and analyze the precise type and amount of late redesignations addressed in the audit.