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Washington, D.C. 20463
2003 MAR 10 P 4: 10

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SENSITIVE

FIRST GENERAL COUNSEL'S REPORT

MUR 5199

Date Complaint Filed: April 27, 2001

Date of Notification: May 4, 2001

Date Activated: July 25, 2002

Expiration of Statute of Limitations:
December 2005¹

Staff Member: Tracey L. Ligon

COMPLAINANT:

Democratic National Committee

RESPONDENTS:

Bush-Cheney 2000, Inc. and David Herndon,
as Treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(a)(3)

2 U.S.C. § 434(b)(2)(J)

2 U.S.C. § 434(b)(4)(G)

2 U.S.C. § 434(b)(4)(I)

2 U.S.C. § 434(b)(3)(G)

2 U.S.C. § 434(b)(6)(A)

11 C.F.R. § 100.7(b)(20)

11 C.F.R. § 100.8(b)(20)

11 C.F.R. § 104.3(a)(3)(x)

11 C.F.R. § 104.3(b)(2)(vi)

11 C.F.R. § 104.3(a)(4)(vi)

11 C.F.R. § 104.3(b)(4)(vi)

INTERNAL REPORTS

CHECKS:

Disclosure Reports

FEDERAL AGENCIES

CHECKED:

None

¹ The potential reporting violations at issue in this matter began in December 2000. The violations were on-going through a date that is not definite at this time; thus, the precise date on which the statute of limitations would finally run is presently undetermined. However, the general time-frame that the reporting violations ended is believed to be December 2001.

I. GENERATION OF MATTER

The Democratic National Committee ("DNC") filed a complaint with the Federal Election Commission ("the Commission") on April 27, 2001, alleging that Bush-Cheney 2000, Inc., and David Herndon, as Treasurer ("the Respondents"), violated 2 U.S.C. §§ 434(a)(3) and 434(b) and 11 C.F.R. Part 104 by failing to report any of the receipts or disbursements of the Bush-Cheney Recount Fund ("BCRF"). This Office reviewed the complaint and the Respondents' arguments. The facts and this Office's analysis are set forth below.

II. BACKGROUND

In the wake of the recount following the November 7, 2000 presidential election, the Respondents formed the BCRF in order to raise funds and pay costs associated with the recount and election contest. Respondents state that the BCRF was established in mid-November 2000, as a part of Bush-Cheney 2000, and that no monies associated with the BCRF were either raised or expended to finance activities that constituted "qualified campaign expenses" or activities permitted to be paid for by the General Election Legal and Accounting Committee. The BCRF did not register with or file disclosure reports with the Commission. The BCRF also apparently did not register with or file reports with the Internal Revenue Service.

The complaint states that "Bush-Cheney, Inc., has publicly claimed that its recount fund is actually part of the presidential campaign committee, thereby relieving the recount fund from the requirement to file periodic disclosure reports with the Internal Revenue Service, as mandated by the 'stealth PAC' law enacted in 1999 (P.L. 106-230)."

1 Public Law 106-230 (July 1, 2000). The complaint posits that "If the Bush-Cheney
2 recount fund is not required to file reports with the IRS because it is part of the
3 presidential campaign committee, then Bush-Cheney must report the receipts and
4 disbursements of the recount fund to the Commission."² Complaint, pp. 1-2. The
5 complaint cites Advisory Opinion 1978-92 and Advisory Opinion 1998-26 in support of
6 the position that Bush-Cheney 2000, Inc. was required to disclose all receipts and
7 disbursements of the BCRF in disclosure reports filed with the Commission.

8 In response to the complaint,³ Respondents argue that the Federal Election
9 Campaign Act of 1971, as amended ("the Act"), the Presidential Election Campaign Fund
10 Act, the Commission's regulations, and its advisory opinions do not require the reporting
11 of the receipts and disbursements of a fund established by a publicly-funded Presidential
12 campaign for recount purposes. In this vein, the Respondents note that there is no
13 requirement that a separate account established solely for recount purposes within a
14 publicly-funded presidential campaign report its receipts and disbursements; that the
15 record-keeping and reporting regulations applicable to publicly-funded presidential
16 campaigns require the reporting of "all expenditures" and "contributions or loans;" and
17 that donations to and disbursements by a fund established by a publicly-funded

² The complaint notes that Section 527 of the Internal Revenue Code, as amended by P.L. 106-230, requires any political organizations with annual gross receipts of over \$25,000 to file a notice of status with the Internal Revenue Service ("IRS"), unless the organization is a federal political committee registered with and reporting to the Commission. (Internal Revenue Code §§ 527(i)(5)-(6)).

³ In a letter dated May 21, 2001, the Respondents requested that the Commission hold this matter in abeyance pending resolution of the audit of Bush-Cheney 2000, Inc. On August 9, 2001, the Commission rejected the Respondents' request. The Commission approved a Preliminary Audit Report of Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc. on June 26, 2002; the committees responded to the Preliminary Audit Report on August 29, 2002. The Commission approved the Final Audit Report on Bush-Cheney 2000, Inc. and Bush-Cheney 2000 Compliance Committee, Inc. on December 23, 2002.

1 presidential campaign are specifically exempted from the definition of contribution and
2 expenditure.

3 **III. FACTUAL AND LEGAL ANALYSIS**

4 **A. The Law**

5 An authorized committee of a candidate for Federal office must report the
6 following categories of receipts: (i) contributions from persons other than political
7 committees; (ii) contributions from the candidate; (iii) contributions from political party
8 committees; (iv) contributions from other political committees; (v) total contributions;
9 (vi) transfers from other authorized committees of the same candidate; (vii) loans; (viii)
10 federal funds received under Chapter 95 and Chapter 96 of Title 26 of the U.S. Code; (ix)
11 offsets to operating expenditures; (x) other receipts; and (xi) total receipts. 11 C.F.R.
12 § 104.3(a)(3)(i)(xi); *see* 2 U.S.C. § 434(b)(2)(A)-(K). The committee must also report,
13 *inter alia*, the identification of each person who provides any dividend, interest, or other
14 receipt to the committee in an aggregate value or amount in excess of \$200 within the
15 election cycle, together with the date and amount of any such receipt. 2 U.S.C.
16 § 434(b)(3)(G); 11 C.F.R. § 104.3(a)(4)(vi). The requirement that the committee report
17 the "identification" of such contributors means the committee must report, in the case of
18 an individual, his or her full name; mailing address; occupation; and the name of his or
19 her employer; and, in the case of any other person, the person's full name and address.
20 11 C.F.R. §§ 100.12 and 104.3(a)(4)(vi).

21 An authorized committee of a candidate for Federal office must report the
22 following categories of disbursements: (i) operating expenditures; (ii) transfers to other
23 committees authorized by the same candidate; (iii) repayment of loans; (iv) for an

1 authorized committee of a candidate for the office of President, disbursements not subject
2 to the limitations of 11 C.F.R. § 110.8 (concerning dollar limits on expenditures);
3 (v) offsets; (vi) other disbursements; and (vii) total disbursements. 11 C.F.R.
4 § 104.3(b)(2)(i)-(vii); *see* 2 U.S.C. §§ 434(b)(4)(A)-(I). The committee must also report,
5 *inter alia*, the name and address of each person who has received a disbursement that
6 falls within the "any other disbursement" category in an aggregate amount or value in
7 excess of \$200 within the election cycle, together with the date, amount, and purpose of
8 any such disbursement. 2 U.S.C. § 434(b)(6)(A); 11 C.F.R. § 104.3(b)(4)(vi).

9 **B. Analysis**

10 The issue in this matter is whether the receipts and disbursements of the Bush-
11 Cheney Recount Fund are reportable transactions of Bush-Cheney 2000, Inc. This issue
12 turns on whether the recount fund was established within the political committee or
13 established as a separate organizational entity. In Advisory Opinions 1998-26 and 1978-
14 92, the Commission concluded that a separate organizational entity established solely for
15 purposes of funding a recount effort would not become a political committee and would
16 not be required to file disclosure reports; however, if a federal political committee
17 establishes any bank account for recount purposes, the receipts and disbursements of
18 those accounts would be reportable transactions of the committee, within the categories
19 of "other receipts" and "other disbursements."

20 The facts in this matter show that the recount fund was established and conducted
21 within Bush-Cheney 2000, Inc. By the Respondents' own account, the BCRF "was
22 established in mid-November *as a part of Bush-Cheney 2000.*" (emphasis added)
23 Attachment 2 at 4. Furthermore, the Respondents' admission is borne out by its conduct.

1 During the general election campaign, the Respondents held a bank account designated
2 "Bush-Cheney 2000, Inc. – Media." In November, 2000, the Respondents redesignated
3 this account the "Bush-Cheney 2000, Inc. – Recount Fund" and used the account for
4 recount activities. For its entire lifespan -- from mid-November 2000 until approximately
5 November 2001 -- the recount fund existed only as an account established as a part of,
6 and conducted within, the Committee.⁴ Because the recount fund was a part of Bush-
7 Cheney 2000, Inc., the Respondents were required to report the recount receipts and
8 disbursements as reportable transactions of the Committee, within the categories of
9 "other receipts" and "other disbursements." See 2 U.S.C. §§ 434(b)(2)(J) and 2 U.S.C.
10 § 434(b)(4)(G) and (I); *see also* Advisory Opinions 1998-26 and 1978-92.

11 The Internal Revenue Code ("the Code") imposes reporting and disclosure
12 requirements on political organizations that have tax-exempt status under the Code and
13 receive or expect to receive \$25,000 or more in gross receipts in any taxable year. See 26
14 U.S.C. § 527. Under the Code, such a political organization must file a Political
15 Organization Notice of Section 527 Status form with the Internal Revenue Service (IRS)
16 within twenty-four hours after the date on which the organization was established, and
17 must also file periodic reports disclosing its "contributions" and "expenditures." 26
18 U.S.C. § 527.

19 On July 15, 2002, the Respondents filed a Political Organization Notice of
20 Section 527 Status form with the IRS, and on July 27, 2002, filed disclosure reports with

⁴ According to a news article, the recount fund was shut down in November 2001, at which time \$270,000 in surplus funds were transferred to the Republican National Committee ("RNC"). Scott Lindlaw, *Bush-Cheney Recount Fund Shifts \$270,000 to GOP in Parting Gift*, The Associated Press, Dec. 29, 2001; Attachment 4--Disclosure reports filed by the RNC reflect that it received \$270,000 from the "Bush-Cheney Recount Fund" on November 30, 2001. A disclosure report filed by the recount fund with the IRS shows a disbursement of \$270,000 to the "RNC State Elections Committee."

1 the IRS reflecting receipts and disbursements of the BCRF. These disclosure reports
2 included a 2000 Year-End Report, 2001 Mid-Year Report, 2001 Year-End Report, 2002
3 First Quarterly Report, 2002 Second Quarterly Report, 2002 Post-Election Report, and a
4 2002 Year-End Report.

5 The Respondents, interestingly, did not have reporting obligations to the IRS.

6 The Code exempts political committees under the Act from the Section 527 filing
7 requirements. 26 U.S.C. § 527(i). Even if the BCRF had reporting obligations with the
8 IRS, the Respondents did not timely comply with those requirements.⁵ The Respondents
9 filed reports with the IRS disclosing financial activity of the BCRF on the last day of an
10 IRS amnesty program that allowed out-of-compliance groups to turn in reports and avoid
11 substantial fines. These reports were filed twenty months after the inception of the BCRF
12 and eight months after it ceased operation.

13 In any event, the Respondents' filing with the IRS does not erase two basic facts:
14 1) a political committee must report its recount receipts and disbursements to the
15 Commission if the recount fund is a part of the political committee; and 2) the
16 Respondents established and conducted the BCRF within the Bush-Cheney 2000, Inc.
17 committee. The Respondents may have subsequently filed with the IRS. However, this
18 does not retroactively change the Respondents' legal obligations under the Act.

⁵ A political organization subject to the periodic reporting requirements under the Internal Revenue Code may choose to file on a monthly basis or on a quarterly/semi-annual basis, but must file on the same basis for the entire calendar year. 26 U.S.C. § 527. A political organization that chooses to file monthly must file reports not later than the 20th day after the end of the month, except in an election year, the organization shall not file the reports regularly due in November and December, but file a pre-election report and a post-election report instead. 26 U.S.C. § 527(j)(2)(B). If a political organization chooses not to file on a monthly basis, it must file semi-annual reports in non-election years and quarterly reports plus a pre-election and a post-election report in election years. 26 U.S.C. § 527(j)(2)(A).

1 Inasmuch as the Respondents failed to report the Committee's recount receipts
2 and disbursements with the Commission, this Office recommends that the Commission
3 find reason to believe that Bush-Cheney 2000, Inc. and David Herndon, as Treasurer,
4 violated 2 U.S.C. §§ 434(b)(2)(J) and 2 U.S.C. § 434(b)(4)(G) and (I). In addition,
5 Respondents were required to itemize receipts and disbursements of the recount fund
6 when the receipt or disbursement was of an aggregate amount or value of \$200 within the
7 election cycle. 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A); 11 C.F.R. §§ 104.3(a)(4)(vi)
8 and 104.3(b)(4)(vi). Therefore, this Office recommends that the Commission find reason
9 to believe that Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2
10 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A).

11 The Respondents argue that the Committee was not required to report its recount
12 activities because donations to and disbursements by a recount fund are specifically
13 exempted from the definition of contribution and expenditure. However, the
14 Commission's regulations require political committees to report all "receipts" and
15 "disbursements" whether or not they constitute contributions or expenditures. 2 U.S.C.
16 § 434(a)(1); 11 C.F.R. § 104.3.

17 Respondents argue that Advisory Opinions 1978-92 and 1998-26,⁶ are not binding
18 on the BCRF because the BCRF involves a publicly-funded presidential campaign, which
19 is materially distinguishable from the privately-financed senatorial campaigns to which
20 Advisory Opinions 1978-92 and 1998-26 were issued. Specifically, Respondents state

⁶ As noted, *supra*, in Advisory Opinions 1998-26 and 1978-92, the Commission held that a separate organizational entity established solely for purposes of funding a recount effort would not become a political committee and would not be required to file disclosure reports, but if a federal political committee establishes any bank account for recount purposes the receipts and disbursements of those accounts would be reportable transactions of the committee, within the categories of "other receipts" and "other disbursements."

1 that campaigns which receive funding from the Treasury of the United States operate
2 under their own statutory scheme and implementing regulations that make their operation
3 different from campaigns for the United States Senate and House of Representatives, and
4 argue that this unique statutory and regulatory scheme and the receipt of public funding
5 make these campaigns materially distinguishable from a congressional or senatorial
6 campaign that is funded by private donations, citing by comparison *Colorado Republican*
7 *Federal Campaign Committee v. FEC*, 518 U.S. 604, 611-612 (1996). The Respondents
8 also argue that the Commission's precedents "limit a presidential campaign's ability to
9 rely on advisory opinions to fill gaps in the regulatory regime," citing *Statement of*
10 *Reasons for the Audits of the Dole and Clinton Presidential Campaigns* issued by then
11 Commissioner Darryl R. Wold.

12 We disagree that this matter involves "gaps" in the pertinent regulatory regime.
13 The reporting provisions of the Commission's regulations apply equally to publicly-
14 funded presidential campaigns and senatorial campaigns in all material respects. While
15 presidential campaigns and senatorial campaigns must file their respective reports on
16 different forms, *see* 11 C.F.R. § 104.2, both must adhere to the same requirements
17 regarding the contents of disclosure reports, *see* 11 C.F.R. § 104.3; *Federal Election*
18 *Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 491
19 (1985) ("FECA applies to all Presidential campaigns, as well as other federal elections,
20 regardless of whether publicly or privately funded").⁷ Furthermore, as a condition
21 precedent to receiving public funds, the Respondents agreed to comply with the reporting

⁷ In addition to adhering to the reporting requirements set forth at 11 C.F.R. § 104.3(a) and (b), authorized committees of presidential campaigns must also file separate reports to disclose different general election activities. *See* 11 C.F.R. § 9006.1; Explanation and Justification for 11 C.F.R. § 9006.1; 45 Fed. Reg. 43377 (June 27, 1980)(provision intended to facilitate accurate accounting of the use of public funds, and is in addition to requirements at 11 C.F.R. § 104.3(a) and (b)).

1 requirements of the Act and the Commission's regulations. *See* 11 C.F.R. § 9003.1;
2 Letter of Candidate Agreements and Certifications. Attachment 5, p. 2.

3 Respondents argue that even if the receipts and disbursements of the BCRF are
4 found to be reportable transactions, pursuant to Advisory Opinion 1978-92, the BCRF
5 was required to report only the aggregate amount of recount disbursements and is
6 not required to itemize such disbursements. We disagree. It is true that in Advisory
7 Opinion 1978-92, the Commission concluded that disbursements made by a political
8 committee for recount purposes need not be itemized. At the time, however, the Act did
9 not require political committees to itemize disbursements other than expenditures.
10 However, in the Federal Election Campaign Act Amendments of 1979, Congress added
11 provisions that require itemization of receipts and disbursements that aggregate in excess
12 of \$200. Public Law 96-187 (January 8, 1980). These provisions were in effect at the
13 time of the activity at issue. *See* 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A); 11 C.F.R.
14 §§ 104.3(a)(4)(vi) and 104.3(b)(4)(vi).

15 Finally, Respondents assert that the financial information required to be reported
16 under the Commission's regulations was publicly disclosed on the Respondents' web site
17 and through the media. Even if this is true, the Commission has never permitted a
18 committee to satisfy the law's reporting obligations by choosing to disclose information
19 through other, unofficial means. *See* MUR 3721 (Commission rejected argument by
20 Perot '92 Committee that Commission's reporting requirements were obviated by media
21 coverage of candidate's statements that he planned to personally finance his campaign).

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1 **IV. DISCUSSION OF CONCILIATION AND CIVIL PENALTY**

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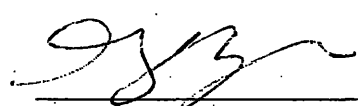
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V. RECOMMENDATIONS

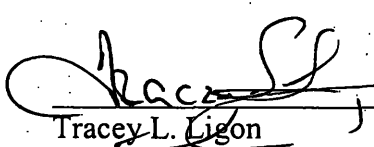
1. Find reason to believe Bush-Cheney 2000, Inc., and David Herndon, as Treasurer, violated 2 U.S.C. § 434(b)(2)(J) and 2 U.S.C. § 434(b)(4)(G) and (I).
2. Find reason to believe Bush-Cheney 2000, Inc., and David Herndon, as Treasurer, violated 2 U.S.C. § 434(b)(3)(G) and 2 U.S.C. § 434(b)(6)(A).
3. Enter into conciliation with Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, prior to a finding of probable cause to believe.
4. Approve the attached Factual and Legal Analysis.
5. Approve the attached Conciliation Agreement.
6. Approve the appropriate letter.

3/10/03
Date


Lawrence H. Norton
General Counsel


Gregory R. Baker
Acting Associate General Counsel


Lorenzo Holloway
Assistant General Counsel


Tracey L. Ligon
Attorney

Attachments:

1. Factual and Legal Analysis
2. Conciliation Agreement
3. Public Citizen Press Release, August 1, 2002

First General Counsel's Report

- 1 4. Associated Press article, December 29, 2001
- 2 5. Letter of Candidate Agreements and Certifications
- 3



FEDERAL ELECTION COMMISSION
Washington, DC 20463

MEMORANDUM

TO: Office of the Commission Secretary

FROM: Office of General Counsel

DATE: March 10, 2003

SUBJECT: MUR 5199 – 1st General Counsel's Report.

The attached is submitted as an Agenda document
for the Commission Meeting of _____

Open Session _____

Closed Session _____

CIRCULATIONS

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COMPLIANCE

☒

72 Hour TALLY VOTE ☒

24 Hour TALLY VOTE ☐

24 Hour NO OBJECTION ☐

INFORMATION ☐

96 Hour TALLY VOTE ☐

Open/Closed Letters ☐

MUR ☐

DSP ☐

STATUS SHEETS ☐

Enforcement ☐

Litigation ☐

PFESP ☐

RATING SHEETS ☐

AUDIT MATTERS ☐

LITIGATION ☐

ADVISORY OPINIONS ☐

REGULATIONS ☐

OTHER ☐