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| In the Matter of | ) | |
| Mike Braun for Indiana; | ) | |
| Thomas Datwyler, | ) | AR 22-02 |
| in his official capacity as | ) | |
| Treasurer. | ) | |

## INTRODUCTION

The Federal Election Commission ("FEC" or "Commission") is only authorized to initiate enforcement if there is "reason to believe" that a respondent has violated either: (i) some provision of the Federal Election Campaign Act of 1971, as amended (the "FECA" or "Act"); or (ii) its implementing regulations.[1] The Commission may not initiate enforcement on any other basis.[2]

The bulk of Finding 1 ("Misstatement of Financial Activity") of Audit Referral 22-02 describes a violation of neither the Act nor Commission regulations by Mike Braun for Indiana "MBFI." Rather, Finding 1 describes the ignorance of MBFI's former treasurer of certain secret, idiosyncratic, aesthetic standards that the FEC's Reports Analysis Division ("RAD") and Audit Division have concocted on their own for reporting the conversion of candidate loans into contributions to a candidate's "authorized committee."

These secret reporting standards are not described in any publicly available guidance and lack any legal authority. And but for the conversions of $6.4 million in candidate loans into contributions that failed to conform to these secret reporting standards, the rest of the issues described in Finding 1 never would have been referred or even triggered an audit finding in the first instance.[3]

[1] 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9.

[2] *See id.*

[3] The other issues involve $96,520 in candidate loans that inadvertently were not reported, $2,736 in disbursements that inadvertently were not reported or reported incorrectly, $4,472 in credit card fees that inadvertently were overreported, and "Unexplained differences" in receipts and disbursements of $1,312 and $708, respectively.

Accordingly, the Commission should find **no reason to believe** that MBFI violated any provisions of the Act or Commission regulations on the basis of Finding 1 of this Audit Referral.

## DISCUSSION

The main issue in Finding 1 that the Final Audit Report of MBFI for the 2018 election cycle (*hereinafter*, "FAR") finds fault with is how MBFI reported the conversion of personal loans totaling $6,388,558 that Senator Braun made to MBFI into contributions. While MBFI has since fully amended the reporting of those transactions to the Audit Division's satisfaction,[4] MBFI disputes the premise in the FAR and audit referral that the way in which MBFI originally reported those transactions violated any part of the FECA or Commission regulations or otherwise harmed the public record in any manner.

According to the FAR:

> The converted loan amounts *should* have been disclosed *as memo entries on Schedule A* (Itemized Receipts) *and Schedule B* (Itemized Disbursements), *given the campaign finance software used* by MBFI. Instead, MBFI reported the loan amounts as *transactions on Schedules A and B*, which overstated receipts and disbursements, respectively.[5]

Tellingly, the FAR uses the precatory language of "should," rather than the mandatory language of "were required to." The FAR cites no legal authorities—because there are none—addressing the particular issue of how authorized committees are to report the conversion of candidate loans into contributions.

The only authority included in Finding 1 under the "Legal Standard" section is "52 U.S.C. § 30104(b)(1), (2), (3), (4), and (5)." While those FECA provisions generally address the reporting of loans (including loans from the candidate) made to an authorized committee, they do not address the particular issue here: whether the conversion of candidate loans into contributions must be reported as "memo entries on Schedule A (Itemized Receipts) and Schedule B (Itemized Disbursements)" (as the FAR demands) rather than as "transactions on Schedules A and B" (as MBFI reported them).[6] Needless to say, the statute also does not

[4] FAR at 10 ("In response to the Draft Final Audit Report, MBFI filed amended disclosure reports that corrected the public record.")

[5] FAR at 9 (emphasis added).

[6] *Id.*

address how MBFI should have reported the loan conversions "given the campaign finance software used."[7]

Although not cited as authorities in the FAR, we note that the following authorities also do not address the particular issue here:

- 11 C.F.R. § 104.3: Subparagraph (a)(3)(ii) and (vii) of this regulation specifically *do not* address how committees are to report "loans made, guaranteed, or endorsed by a candidate to his or her authorized committee," let alone how the conversion of such loans into contributions is to be reported, either generally or "given the campaign finance software used."

- 11 C.F.R. § 100.52: This regulation specifies that any loan to a committee "is a contribution to the extent that it remains unpaid." However, this regulation also does not specify how the conversion of a loan to an authorized committee that a candidate forgives is to be reported, either generally or "given the campaign finance software used."

- Form 3 instructions:[8] While the instructions generally address the reporting of loans, they also do not specifically address how to report the conversion of candidate loans into contributions, either generally or "given the campaign finance software used."

- The Commission's "Candidate's Guide":[9] The guide also merely addresses the general reporting of loans, and does not specifically address how to report the conversion of candidate loans into contributions, either generally or "given the campaign finance software used."[10]

In short, there is **no legal authority** (or even any publicly available Commission guidance) specifying how MBFI was to report the conversion of Senator Braun's loans to the committee into contributions. Unless someone has inside knowledge of the secret, idiosyncratic, aesthetic standards that RAD and the Audit Division have concocted on their

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[7] *Id.*

[8] https://www.fec.gov/resources/cms-content/documents/fecfrm3i.pdf. To the extent that the Act authorizes the Commission to prescribe reporting forms, *see* 52 U.S.C. § 30107(a)(8), the Form 3 instructions arguably carry some weight of legal authority.

[9] https://www.fec.gov/resources/cms-content/documents/candgui.pdf. We note that this is merely agency guidance and does not carry any legal authority.

[10] *See id.* at 119-123.

own, one would have no idea how these agency divisions expect committees to report these transactions.

To initiate an enforcement proceeding against MBFI for Finding 1 under these circumstances would violate MBFI's rights to "due process and fair notice. It [would] violate[] principles of fundamental fairness to hold respondents liable for violating legal rules that have not been previously announced . . . ."[11]

Moreover, the way in which MBFI reported the transactions at issue did not undermine the purposes of the Act's reporting requirements in any way. As the FAR itself describes the transactions, MBFI did not skew or obscure the loan conversions or understate or overstate them in any way. The transactions were fully reported.

While the FAR characterizes the reported transactions in terms of an "overstatement of receipts" and "overstatement of disbursements," this characterization appears to be skewed. Per the FAR, MBFI's reported financial condition does not appear to have been affected in any way; MBFI's ending cash on hand balance was only off by $1,132, and that discrepancy appears to have been due to "Unexplained differences" rather than the way in which the loan conversions were reported.[12]

In short, the way in which MBFI reported the loan conversions violated no provision of the Act or Commission regulations and resulted in no harm to the public record whatsoever. The only harm it inflicted was against the secret, idiosyncratic, aesthetic reporting standards that RAD and the Audit Division have concocted. Those, however, are not valid legal authorities that can form the basis for an RTB finding.[13]

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[11] Policy Statement of Chairman Allen Dickerson and Commissioners Sean J. Cooksey and James E. "Trey" Trainor, III Concerning the Application of 52 U.S.C. § 30104(c) at 6-7 (internal citations omitted).

[12] FAR at 9.

[13] *See* 52 U.S.C. § 30109(a)(2); 11 C.F.R. § 111.9; *see also* 52 U.S.C. § 30108(b) ("Any rule of law which is not stated in this Act or in chapter 95 or chapter 96 of title 26 may be initially proposed by the Commission only as a rule or regulation pursuant to procedures established in section 30111(d) of this title.")

**CONCLUSION**

For the reasons described above, the Commission should find **no reason to believe** that MBFI violated any provisions of the Act or Commission regulations on the basis of Finding 1 of this Audit Referral.

MBFI preserves its right to present information about mitigating factors during the conciliation process with respect to Finding 5 of the Audit Referral, as well as Finding 1, should the Commission find reason to believe on that finding (notwithstanding all of the above-stated reasons for why it should not).

Sincerely,

Chris K. Gober
Eric Wang
Counsel to Mike Braun for Indiana, and
Thomas Datwyler, in his official capacity as Treasurer

**FEDERAL ELECTION COMMISSION**
**1050 First Street, NE**
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# STATEMENT OF DESIGNATION OF COUNSEL

Provide one form for each Respondent/Witness

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The above-named individual and/or firm is hereby designated as my counsel and is authorized to receive any notifications and other communications from the Commission and to act on my behalf before the Commission.

8/8/2022
Date

DocuSigned by:
07640FE159C3485...
(Signature - Respondent/Agent/Treasurer)

Treasurer
Title

Thomas C. Datwyler
(Name – Please Print)

**RESPONDENT:** Mike Braun for Indiana
**(Please print Committee Name/ Company Name/Individual Named in Notification Letter)**

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This form relates to a Federal Election Commission matter that is subject to the confidentiality provisions of 52 U.S.C. § 30109(a)(12)(A). This section prohibits making public any notification or investigation conducted by the Federal Election Commission without the express written consent of the person under investigation.

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