



FEDERAL ELECTION COMMISSION  
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2009 MAY -5 P 2:46

May 5, 2009

MEMORANDUM

**AGENDA ITEM**

For Meeting of: D5-14-09

To: The Commission

Through: Robert A. Hickey  
Staff Director

From: John D. Gibson  
Chief Compliance Officer

Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

By: Alex R. Boniewicz  
Audit Manager

Subject: Report of the Audit Division on Friends of Weiner (A05-04)

Attached for your approval is the subject report. As requested, this report has received a legal analysis on Finding 5, Misstatement of Financial Activity. A copy of the legal analysis prepared by the Office of General Counsel is attached.

OGC's legal analysis supports the position presented by Friends of Wiener. It concludes that as long as assets remain stocks, bonds, or other similar investments, there is no requirement to report unrealized gains or losses that reflect fluctuations in current fair market value. The report has been revised accordingly. For the future, this is an area where the Commission may wish to reconsider its regulations.

**Recommendation**

The Audit staff recommends that the report be approved.

It is recommended that the report be considered at the next regularly scheduled open session. If you have any questions, please contact Alex Boniewicz at 694-1200.

Attachment:  
Report of the Audit Division on Friends of Weiner  
Legal Analysis, dated March 4, 2009



# Report of the Audit Division on Friends of Weiner

January 1, 2003 – December 31, 2004

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## Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.<sup>1</sup> The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

## 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 Campaign (p. 2)

Friends of Weiner is the principal campaign committee for Anthony Weiner, Democratic candidate for the U.S. House of Representatives from the state of New York, 9<sup>th</sup> Congressional District and is headquartered in Forest Hills, New York. For more information see the Campaign Organization Chart, p. 2.

## Financial Activity (p. 2)

- **Receipts**
  - From Individuals \$ 426,484
  - From Political Committees 114,417
  - Offsets to Expenditures 733
  - Other Receipts 142,799
  - **Total Receipts \$ 684,433**
- **Disbursements**
  - Operating Expenditure \$ 493,008
  - Contribution Refunds 495,747
  - Other Disbursements 426,574
  - **Total Disbursements \$ 1,415,329**

## Findings and Recommendations (p. 3)

- Receipt of Contributions that Exceed Limits (Finding 1)
- Failure to Disclose Debts and Obligations (Finding 2)
- Disclosure of Contributions from Political Committees (Finding 3)
- Disclosure of Occupation/Name of Employer (Finding 4)
- Misstatement of Financial Activity (Finding 5)
- Untimely Deposit of Contributions (Finding 6)
- Disclosure of Allocable Activity (Finding 7)

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<sup>1</sup> 2 U.S.C. §438(b).

# **Report of the Audit Division on Friends of Weiner**

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January 1, 2003 – December 31, 2004



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# **Part I**

## **Background**

### **Authority for Audit**

This report is based on an audit of Friends of Weiner (FOW), undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 2 U.S.C. §438(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 2 U.S.C. §434. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. 2 U.S.C. §438(b).

### **Scope of Audit**

This audit examined:

1. The receipt of excessive contributions and loans.
2. The receipt of contributions from prohibited sources.
3. The disclosure of contributions received.
4. The disclosure of disbursements, debts and obligations.
5. The consistency between reported figures and bank records.
6. The completeness of records.
7. Other committee operations necessary to the review.

### **Scope Limitation**

Although it met the recordkeeping requirements of 2 U.S.C. §432(c), FOW did not maintain externally generated documentation such as invoices, bills, or receipts for about 30% of its disbursements. The lack of these records limited our testing for the proper reporting of debts and obligations, personal use of campaign funds and the adequacy of disclosure information such as payee, address and purpose of disbursements. In addition, the records made available did not allow for a determination of what portion, if any, could have been attributable to the Candidate's concurrent mayoral campaign.

## Part II

# Overview of Campaign

### Campaign Organization

<b>Important Dates</b>	<b>Friends of Weiner</b>
• Date of Registration	May 28, 1997
• Audit Coverage	January 1, 2003 – December 31, 2004
<b>Headquarters</b>	Forest Hills, New York
<b>Bank Information</b>	
• Bank Depositories	Four
• Bank Accounts	Three checking accounts and two investment accounts
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Ms. Francis Weiner (10/14/05-10/15/06) Mr. Nelson Braff (10/16/06 to present)
• Treasurer During Period Covered by Audit	Mr. Ira Spodek
<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	Campaign staff

### Overview of Financial Activity (Audited Amounts)

<b>Cash on hand @ January 1, 2003</b>	<b>\$ 1219,194</b>
<b>Receipts</b>	
○ From Individuals	\$ 426,484
○ From Political Committees	114,417
○ Offsets to Expenditures	733
○ Other Receipts	142,799
<b>Total Receipts</b>	<b>\$ 684,433</b>
<b>Disbursements</b>	
○ Operating Expenditures	\$ 493,008
○ Contribution Refunds	495,747
○ Other Disbursements	426,574
<b>Total Disbursements</b>	<b>\$ 1,415,329</b>
<b>Cash on hand @ December 31, 2004</b>	<b>\$ 488,298</b>

## **Part III**

### **Summaries**

#### **Findings and Recommendations**

##### **Finding 1. Receipt of Contributions that Exceed Limits**

The interim audit report concluded FOW received 41 excessive contributions from 26 individuals totaling \$63,200, most of these excessive contributions resulted from improper redesignations to the general election. Of these excessive contributions: \$28,000 could be resolved by presumptive redesignation/retribution letters. FOW has now provided such letters for contributions totaling \$26,000. Of the remaining excessive contributions \$25,200 has been refunded, although no documentation of the negotiation of the refund checks has been provided; three contributions totaling \$4,000 although recorded by FOW were apparently not received; and, \$8,000 appears resolvable only by refund. (For more detail see p. 5)

##### **Finding 2. Failure to Disclose Debts and Obligations**

FOW did not report debts owed to eight vendors totaling \$40,484. In response to the interim audit report, FOW only disputed the amount of debt to be reported for two vendors; no amended reports were filed as part of its response. (For more detail, see p. 9)

##### **Finding 3. Disclosure of Contributions from Political Committees**

FOW did not adequately disclose 22 contributions from political committees totaling \$27,025. In response to the interim audit report, FOW acknowledged minor errors disclosing these contributions and states that an amendment will be filed. To date, these disclosure errors have not been corrected. (For more detail see p. 11)

##### **Finding 4. Disclosure of Occupation/Name of Employer**

Based on a sample, FOW did not adequately disclose occupation and/or name of employer for about 30% of contributions from individuals tested. Amended reports filed subsequent to completion of audit fieldwork materially corrected these errors. In response to the interim audit report, FOW submitted additional comments disputing the validity of the Audit staff's sample and its results. (For more detail, see p. 13)

##### **Finding 5. Misstatement of Financial Activity**

A comparison of FOW reported activity to bank records revealed a misstatement of receipts, disbursements and cash on hand in both 2003 and 2004. For 2003, FOW overstated beginning cash on hand by \$77,831; overstated receipts by \$23,687; understated disbursements by \$91,018 and overstated ending cash on hand by \$192,537. In 2004, FOW understated receipts by \$8,128 and disbursements by \$96,874. Additionally, ending cash on hand for 2004 was overstated by \$281,283. Amended reports filed subsequent to the completion of audit fieldwork materially corrected the

reported activity. In response to the interim audit report, FOW acknowledged that the misstatement resulted primarily from the reporting of an investment account. (For more detail, see p. 15)

### **Finding 6. Untimely Deposit of Contributions**

Based on a review of all contributions from political committees and a sample review of contributions from individuals, FOW failed to deposit contributions in a timely manner. The Audit staff determined that contributions from political committees of \$76,500 and projected contributions from individuals of at least \$330,000 were not deposited timely. FOW acknowledged the problem but did not explain how the errors had occurred. FOW has also stated it has since retained a professional consultant to administer its financial and reporting activities and that procedures have been put in place to correct the error. In response to the interim audit report, FOW stated the audit results were “exaggerated,” reiterated its retention of a consultant to correct problems with receipt processing and presented mitigating arguments. (For more detail, see p. 18)

### **Finding 7. Disclosure of Allocable Activity**

The Audit staff identified expenditures made by both FOW (\$155,956) and the Candidate’s concurrent mayoral campaign (\$52,988) during 2004 that did not appear to be properly allocated nor disclosed as allocable expenditures. Contributions received by each entity were used to develop an allocation ratio of 5.99% FOW and 94.01% for the Candidate’s mayoral campaign. Based on that ratio, FOW’s allocable share of these expenditures was \$12,516 and the Candidate’s mayoral campaign share was \$196,428. In its response to the interim audit report, FOW restated earlier arguments it has offered and asserts these expenditures do not require allocation. The response did not contain work papers or analyses to support its arguments, nor did FOW file amended reports to disclose these transactions. (For more detail, see p. 19)

## Part IV

# Findings and Recommendations

### Finding 1. Receipt of Contributions That Exceed Limits

#### Summary

The interim audit report concluded FOW received 41 excessive contributions from 26 individuals totaling \$63,200, most of these excessive contributions resulted from improper redesignations to the general election. Of these excessive contributions: \$28,000 could be resolved by presumptive redesignation/retribution letters. FOW has now provided such letters for contributions totaling \$26,000. Of the remaining excessive contributions \$25,200 has been refunded, although no documentation of the negotiation of the refund checks has been provided; three contributions totaling \$4,000 although recorded by FOW were apparently not received; and, \$8,000 appears resolvable only by refund.

#### Legal Standard

**A. Authorized Committee Limits.** An authorized committee may not receive more than a total of \$2,000 per election from any one person. Increased contribution limits are provided for candidates facing self-financed candidates once the self-financed candidates make expenditures from their personal funds that exceed a specific amount. 2 U.S.C. §441a(a)(1)(A) and 11 CFR §§110.1(a) and (b) and 110.9(a).

**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(1)(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. 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(1)(4)(ii).

**E. 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. 11 CFR §100.52(a).

**F. Refund or Disgorge Questionable Contributions.** If the identity of the original contributor is known, the committee should either refund the funds to the source of the original contribution or pay the funds to the U.S. Treasury. AO 1996-5.

## **Facts and Analysis**

The interim audit report concluded that FOW received 41 excessive contributions from 26 individuals that exceeded their primary election limits by \$63,200. Evidence that FOW sought and received signed redesignation or reattribution letters was not provided nor was evidence provided that the contributors were notified that their contributions were presumptively redesignated and/or reattributed and offered a refund. Of these excessive contributions:

- For 21 contributions totaling \$30,200 received before the primary election (with no specific designation by the contributor), FOW redesignated them to the general election without notifying the contributor;
- For 17 contributions totaling \$28,000, FOW improperly reattributed the contribution to someone other than the actual contributor; and
- For the remaining three contributions totaling \$5,000, FOW neither redesignated nor reattributed any portion of the contribution. These three were properly designated to the primary election; however, in doing so, the primary election contribution limit was exceeded.

It is noted that FOW maintained a sufficient balance in its bank account to refund the excessive contributions.

The Audit staff's review of these excessive contributions determined that:

- FOW could resolve 18 of the above excessive contributions, totaling \$28,000, by sending notification to the contributor to inform them of the redesignation/reattribution and offer a refund,
- For 11 excessive contributions (\$13,500), refund checks have been issued but they were not timely, and
- The remaining 12 excessive contributions (\$21,700), absent a demonstration that the contributions are not excessive, appear resolvable only through refund.

With respect to the apparent excessive contributions from individuals, the Audit staff presented these matters to FOW representatives during an exit conference, along with a schedule of apparent excessive contributions. Subsequent to the exit conference, an FOW representative provided a written response that no contributions were excessive; however, the representative failed to provide any documentation to support the statement. FOW later provided copies of redesignation letters, dated April 23, 2007, which adequately addressed 15 excessive contributions totaling \$23,000.

## **Interim Audit Report Recommendation**

The Audit staff recommended that FOW:

- Send notices to those contributors that were eligible for presumptive redesignation and/or reattribution (\$5,000) to inform those contributors how the contribution was designated and/or attributed and offer a refund of the excessive portion. Absent a request for a refund by the contributors, these notices would obviate the need for a refund or payment to the U.S. Treasury. For notices sent to contributors, FOW should have provided a copy of each notice and evidence that it was sent. Such

notice must demonstrate that both the contributor and the individual to whom the contribution was reattributed were notified; and

- Provide evidence demonstrating that the 12 contributions totaling \$21,700 were not excessive. Such evidence should have included, but not been limited to, documentation that the contributions were reattributed or redesignated in a timely manner or that the excessive contributions were timely refunded; or
- Absent such evidence, refund \$21,700 to the contributors and provide evidence of all such refunds (copies of the front and back of negotiated refund checks); or pay the amount to the U.S. Treasury and
- If funds were not available to make the necessary refunds, disclose the contributions requiring refunds on Schedule D (Debts and Obligations) until funds became available to make such refunds.
- In addition, the Audit staff recommended FOW provide evidence that the 11 excessive contributions which had been untimely refunded (\$13,500) were in fact refunded (copies of the front and back of negotiated refund checks).

### **Committee Response and Audit Staff Analysis**

FOW's response explains that it has reviewed the 41 potentially excessive contributions and it believes that it has taken the necessary steps to resolve each item. The response states that three excessive contributions, totaling \$4,000, are erroneously included by the Audit staff. These contributions are included in FOW's contribution database but no record of a bank deposit was found. FOW suggests that they appeared on the database as the result of a data processing mistake, an incorrectly dated check from a prior cycle, or a pledged record marked as cash instead of a pledge. In addition, the response noted that detailed bank records were provided during fieldwork demonstrating that no checks from the individuals were deposited on the recorded dates. The response further concludes that the contributions in question could not have been received via credit card since FOW had stopped accepting credit card contributions prior to these dates. The Audit staff accepts that these contributions were not deposited by FOW.

The response also addresses each of the other contributions as discussed below<sup>2</sup>:

#### 1. Excessive Contributions Resolvable by Sending Untimely Presumptive Reattribution/Redesignation Letter

FOW's response lists \$29,000 as contributions addressed by untimely presumptive reattributions or redesignations; \$1,000 more than the interim audit report figure. The difference is explained by FOW omitting an item from its list for which a letter was previously provided and its inclusion of items for which refunds had already been issued (See refunds below). Additionally, the amounts of some excessive contributions differed from those provided by the Audit staff. As was noted in the interim audit report, untimely presumptive reattribution or redesignation letters had been provided in response to the exit conference. With its response FOW provided

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<sup>2</sup> The response states that two contributions are from different individuals with the same name and should not be aggregated causing an apparent excessive contribution. Those contributions were not included among the contributions addressed in the interim audit report.

two more untimely presumptive redesignation letters dated March 8, 2008, covering an additional \$3,000. Finally, FOW provided a presumptive reattribution letter for a \$2,000 excessive contribution made by credit card. The contribution could have been presumptively redesignated to the general election, but because there is no indication the credit card account is a joint account, the presumptive reattribution is not proper. This contribution is considered unresolved.

## 2. Excessive Contributions Resolved by Untimely Refunds

The interim audit report noted that there were 11 excessive contributions (\$13,500), for which refund checks have been issued but not timely. FOW's response provides no evidence that the refunds have been negotiated. Rather, FOW's response notes that presumptive redesignation/reattribution letters were sent for many of these on April 23, 2007, long after the refunds were made. It appears that all of these excessive contributions could have been permissibly resolved, albeit untimely, with these letters, however, it is assumed that the refund checks were issued for cause and the presumptive reattribution or redesignation letters are not considered. FOW's response includes evidence that three additional refunds were made on March 19, 2008, totaling \$11,700. Again no evidence has been provided that the refund checks were negotiated.

## 3. Excessive Contributions Resolvable Only by Refund

Finally, with respect to the remaining \$8,000 in excessive contributions, FOW provided copies of (non-presumptive) redesignation/reattribution letters it had sent. However, for these excessive contributions, this was not an option. Such letters are not an acceptable method of resolution at this time and, as such, they should have been refunded.

In conclusion, after consideration of FOW's response to the interim audit report, the Audit staff determined that the \$63,200 of excessive contributions questioned in the interim audit report fall into the following categories:

• Resolved by Untimely Presumptive Reattribution/Redesignation Letters	\$ 26,000
• Refunded Untimely But Without Negotiated Refund Checks	25,200
• Contributions Requiring Refund	8,000
• <u>Contributions Shown Not to Be Excessive</u>	<u>4,000</u>
Total	<u>\$ 63,200</u>

## **Finding 2. Failure to Disclose Debts and Obligations**

### **Summary**

FOW did not report debts owed to eight vendors totaling \$40,484. In response to the interim audit report, FOW only disputed the amount of debt to be reported for two vendors; no amended reports were filed as part of its response.

## **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. 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**

Reports filed by FOW during the audit period did not disclose any debts and obligations owed. The Audit staff identified debts owed to eight vendors totaling \$40,484 which FOW failed to disclose.

One of these debts involved unpaid balances on the FOW's Citi Advantage credit card, which the Audit staff calculated to be \$16,627. This amount is based on available statements. The Audit staff had requested that statements be produced for the period so that the Audit staff could accurately determine the reportable debt. Another debt arose from a consultant's undated invoice for monthly fees, which totaled \$22,500, that had accrued from February 2004 to June 2004; none of which had been reported as a debt. The remaining debts involved lesser amounts which had remained outstanding in excess of 60 days.

The Audit staff presented this matter at an exit conference. FOW representatives indicated amended reports would be filed as necessary.

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

The Audit staff recommended that FOW demonstrate the debts were not reportable (i.e. - provide copies of statements for Citi Advantage) or amend its reports to disclose the debts.

In its response, FOW acknowledged that it did not on all occasions pay the full amount due on the credit card; however, it does dispute the aggregate amount (\$16,627) of debt addressed in the interim audit report. It believed the amount to be overstated as charges were incurred and paid for by the two other committees maintained by the Candidate. Further, the outstanding balance at the end of 2003 was paid by Friends of Weiner '04, an affiliated committee, and the debt should properly be attributed to that committee. The response stated that, although FOW made regular payments on the credit card, it did on the closing dates of two reports have an unpaid balance of approximately \$4,000 or an aggregate of about \$8,000 in debt for the two reports. FOW's response stated that unfortunately it cannot provide a precise amount because the bank statements are unavailable; however, it noted that the Audit staff's schedules support these figures. The

delay in payment resulted from the need to properly assign charges to the respective committees.

Additionally, FOW stated it believed it timely paid the political consultant referenced by the interim audit report. The consultant had an oral agreement with FOW; there was no contract specifying the due date for his compensation. FOW's response included copies of invoices previously provided to the Audit staff. Though dated, the invoices do not stipulate terms or a payment date; rather they were prepared to comply with Commission documentation requirements and do not appear to have been issued on a monthly basis.

FOW's response does not contest any of the other debts addressed in this finding; nor were any amended reports filed.

With respect to the credit card debt, FOW indicated it does not have the documentation to support any of its assertions, nor has it provided any analyses in support of its arguments. The payment made by Friends of Weiner '04 does not mitigate FOW's need to report this debt; available credit card statements indicate the holder to be "Friends of Weiner/Anthony D. Weiner." With respect to the political consultant's fees the lack of monthly billing statements does not establish that the amounts were not owed. Payment was made well after provision of the services giving rise to a debt. The Audit staff's position remains unchanged; FOW has failed to report debts to eight vendors totaling \$40,484.

### **Finding 3. Disclosure of Contributions from Political Committees**

#### **Summary**

FOW did not adequately disclose 22 contributions from political committees totaling \$27,025. In response to the interim audit report, FOW acknowledged minor errors disclosing these contributions and states that an amended report will be filed. To date, these disclosure errors have not been corrected.

#### **Legal Standard**

**A. When to Itemize.** Authorized candidate committees must itemize any contribution from a political committee which makes a contribution to the reporting committee during the reporting period, together with the date and amount of any such contribution. 2 U.S.C. §434(b)(3)(B).

**B. Election Cycle.** The election cycle begins on the first day following the date of the previous general election and ends on the date of the next general election. 11 CFR §100.3(b).

**C. Definition of Itemization.** Itemization of contributions received means that the recipient committee discloses, on a separate schedule, the following information:

- The amount of the contribution;

- The date of receipt (the date the committee received the contribution);
- The full name and address of the contributor;
- In the case of contributions from individual contributors, the contributor's occupation and the name of his or her employer; and
- The election cycle-to-date total of all contributions from the same contributor. 11 CFR §§100.12 and 104.3(a)(4) and 2 U.S.C. §434(b)(3)(A) and (B).

### **Facts and Analysis**

Of the 98 contributions from political committees disclosed by FOW, 22 items, totaling \$27,025, were inadequately disclosed. These errors related to name, address and aggregate election cycle to date. The following table details the disclosure errors by number and dollar value.

<b>Disclosure Error Type</b>	<b># Errors</b>	<b>\$ Errors</b>
<b>Name Only</b>	2	\$3,000
<b>Address Only</b>	15	\$14,025
<b>Name &amp; Address</b>	4	\$9,000
<b>Aggregate election cycle to date</b>	1	\$1,000
<b>Totals</b>	<b>22</b>	<b>\$27,025</b>

Of the errors noted, 19 related to address or name and address. During fieldwork, Audit staff questioned the addresses used for reporting some of these contributions as the report detail did not match the source documents. A FOW representative stated that the reporting software contained such detail and that the software was updated annually. Review of address errors indicates either the software detail was incorrect or was not used. Research by the Audit staff could not link the address disclosed to the political committee. The source documentation maintained by FOW reflected the names and addresses for the political committees based on the statements of organization filed with the Commission.

FOW filed amended reports during the audit fieldwork period which adequately corrected only one item. The Audit staff addressed this matter at an exit conference and provided a schedule detailing the errors. FOW representatives indicated amended reports would be filed as necessary.

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

The Audit staff recommended that FOW amend its reports to correctly disclose the remaining transactions.

FOW's response asserted that each identified error was minor and that most involved a discrepancy between the reported address and the address that the contributing committee used on its FEC Form 1 (Statement of Organization). The response noted that Commission regulations require use of the mailing address. The response noted that for a number of reasons a committee's address may be different from the address filed on FEC Form 1; "the committee may have moved, may use the address of the person completing the reports, may use a local address or the address of a connected organization." To

resolve this FOW indicated it would file an amended report in the form of a miscellaneous submission to update the names and addresses of the political committees as shown on FEC Form 1. The response then detailed for each item what address was used.

To date, no amended reports or miscellaneous submission have been filed.

## **Finding 4. Disclosure of Occupation/Name of Employer**

### **Summary**

Based on a sample, FOW did not adequately disclose occupation and/or name of employer for about 30% of contributions from individuals tested. Amended reports filed subsequent to completion of audit fieldwork materially corrected these errors. In response to the interim audit report, FOW submitted additional comments disputing the validity of the Audit staff's sample and its results.

### **Legal Standard**

**A. Recordkeeping Requirements for Receipts.** Political committees must keep records of:

- All contributions received by or on behalf of the committee;
- The name and address of any person who makes a contribution in excess of \$50, together with the date and amount of the contribution; and
- The occupation and name of employer of any individual whose contributions aggregate more than \$200 during a calendar year, together with the date and amount of any such contributions. 2 U.S.C. §432(c).

**B. Preserving Documents.** Committees must preserve these records for 3 years after a report is filed. 2 U.S.C. §432(d).

**C. Best Efforts Ensures Compliance.** When the treasurer of a political committee shows that the committee used best efforts (see below) to obtain, maintain, and submit the information required by the Act, the committee's reports and records will be considered in compliance with the Act. 2 U.S.C. §432(h)(2)(i).

**D. Definition of Best Efforts.** The treasurer and the committee will be considered to have used "best efforts" with respect to contributions if the committee satisfied all of the following criteria:

- All written solicitations for contributions included:
  - A clear request for the contributor's full name, mailing address, occupation, and name of employer; and
  - The statement that such reporting is required by Federal law.
- Within 30 days after the receipt of the contribution, the treasurer made at least one effort to obtain the missing information, in either a written request or a documented oral request.

- The treasurer reported any contributor information that, although not initially provided by the contributor, was obtained in a follow-up communication or was contained in the committee's records or in prior reports that the committee filed during the same two-year election cycle. 11 CFR §104.7(b).

### **Facts and Analysis**

Available solicitation response devices indicate FOW requested occupation/name of employer information from contributors initially. FOW, however, failed to disclose occupation and/or employer or provide evidence that "best efforts" to obtain and submit the information had been exercised for 30% of itemized contributions for individuals for the sample tested. Although its disclosure reports noted in many instances "information requested," FOW did not provide any evidence that at least one additional effort to obtain, maintain and submit the missing information, in either a written request or a documented oral request had been made.

The Audit staff presented this matter to the FOW representative during an exit conference. The representative stated that she was aware of this issue and they had been researching this matter. Subsequent to the exit conference, the representative provided a narrative that stated various follow up efforts to collect the missing information were made but are sparsely documented. Amended reports filed by the FOW contain additional information received in response to follow up and other efforts.

Amended reports filed by FOW subsequent to the audit notification letter materially corrected the disclosure of occupation/name of employer.

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

The Audit staff recommended that FOW submit any additional comments it may have related to this matter.

In its response, FOW submitted comments disputing this finding. FOW noted that based on a review of reports, it believed that employer occupation information was missing for less than 10% of contributions. However, FOW provided no documentation to support its review; nor does it address which set of reports it reviewed. The response noted that the interim audit report indicated amended reports filed subsequent to audit notification materially corrected this disclosure problem.

The response further stated that the Audit staff's 30% error rate was based on a sample which was not provided for FOW to review and it believes the sample for whatever reason failed to accurately reflect the information contained in reports. Again, FOW provided no evidence to support its assertion.

## **Finding 5. Misstatement of Financial Activity**

### **Summary**

A comparison of FOW reported activity to bank records revealed a misstatement of receipts, disbursements and cash on hand in both 2003 and 2004. For 2003, FOW overstated beginning cash on hand by \$77,831; overstated receipts by \$23,687; understated disbursements by \$91,018 and overstated ending cash on hand by \$192,537. In 2004, FOW understated receipts by \$8,128 and disbursements by \$96,874. Additionally, ending cash on hand for 2004 was overstated by \$281,283. Amended reports filed subsequent to the completion of audit fieldwork materially corrected the reported activity. In response to the interim audit report, FOW acknowledged that the misstatement resulted primarily from the reporting of an investment account.

### **Legal Standard**

**Contents of Reports.** Each report must disclose:

- The amount of cash on hand at the beginning and end of the reporting period;
- The total amount of receipts for the reporting period and for the election cycle;
- The total amount of disbursements for the reporting period and for the election cycle; and
- Certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 2 U.S.C. §434(b)(1), (2), (3), (4) and (5).

**Reporting Investments.** Each committee must report invested amounts in its cash on hand balance. A committee must also report investment income (interest, dividends or capital gains/losses) on Schedule A. 11 CFR § 104.3(a)(1) & (4)(vi).

### **Facts and Analysis**

The Audit staff reconciled FOW reported financial activity to its bank records for 2003 and 2004. The following charts outline the discrepancies. Succeeding paragraphs address the reasons for the misstatements for both 2003 and 2004.

<b>2003 Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Opening Cash Balance at January 1, 2003	\$1,297,025	\$1,219,194	\$77,831 Overstated
Receipts	\$562,582	\$538,895	\$23,687 Overstated
Disbursements	\$93,138	\$184,156	\$91,018 Understated
Ending Cash Balance at December 31, 2003	\$1,766,469	\$1,573,933	\$192,537 Overstated

The \$77,831 overstatement of the beginning cash balance on January 1, 2003 could not be explained.

The understatement of receipts in 2003 was the net result of the following:

• Realized Investment income/gains overreported <sup>3</sup>	-	\$ 4,963
• Reported by FOW deposited Weiner'04 (affiliate)	-	4,000
• Reported receipts not supported by a deposit or credit	-	15,563
• Receipts supported by a deposit or credit not reported	+	4,300
• Contributions reported with incorrect amounts	-	1,000
• Reported receipts not adjusted for a returned deposit	-	200
• Unexplained difference	-	2,261
• <b>Net Understatement of Receipts</b>	-	<u>\$ 23,687</u>

The understatement of disbursements was the net result of the following:

• Realized Investment losses/fees not reported	+	\$ 74,166
• Operating expenditures not reported, which includes a \$12,000 tax payment	+	13,731
• Unreported credit card processing fees	+	1,956
• Disbursement reported not supported by a check or debit	-	2,178
• Unexplained difference	+	3,343
• <b>Net Understatement of Disbursements</b>		<u>\$ 91,018</u>

As a result of the misstatements detailed above, the ending cash on hand for 2003 was overstated by \$192,537.

<b>2004 Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Opening Cash Balance @ January 1, 2004	\$1,766,469	\$1,573,933	\$192,537 Overstated
Receipts	\$137,410	\$145,538	\$8,128 Understated
Disbursements	\$1,134,298	\$1,231,173	\$96,874 Understated
Ending Cash Balance @ December 31, 2004	\$769,581	\$488,298	\$281,283 Overstated

Beginning cash balance on January 1, 2004, was overstated as the result of the discrepancies for 2003 discussed above.

<sup>3</sup> When FOW did report investment income and gains, it was on line 15 (Other Receipts) and based on statement values or an estimate. FOW did not routinely report realized investment losses during the audit cycle.

The understatement of receipts was the net result of the following:

• Realized Investment income/gains not reported	+ \$ 38,035
• Contributions reported not supported by a deposit or credit	- 32,450
• Contributions from political committees not reported	+ 1,500
• Bank credit not reported	+ 471
• Math discrepancy relative to amount disclosed on detailed summary	- 100
• Unexplained difference	+ 672
• <b>Net Understatement of Receipts</b>	<b>\$ 8,128</b>

The net understatement of disbursements was the result of the following:

• Realized Investment losses/fees not reported	+ \$ 41,368 <sup>4</sup>
• Operating expenditures not reported including \$47,000 fine	+ 60,077
• Miscellaneous reporting errors	- 279
• Disbursement reported not supported by a check or debit	- 26,535
• Unreported refund	+ 2,500
• Unexplained difference	+ 19,743
• <b>Net Understatement of Disbursements</b>	<b>\$ 96,874</b>

As a result of the misstatements detailed above, the ending cash on hand at December 31, 2004 was overstated by \$281,283.

### **Amended Report Filings**

A second bank reconciliation was prepared based on the amended reports filed subsequent to audit notification in July 2006. Although FOW's calculations of realized gains and/or losses could not be verified by the Audit staff, the reconciliation showed that these amended reports materially corrected the misstatements detailed above.

The Audit staff presented this matter to FOW representatives during an exit conference along with schedules detailing the discrepancies.

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

The Audit staff recommended that FOW:

- File amended reports to correct the remaining misstatements; and,
- Amend the cash balance of its most recent report with an explanation that it resulted from audit adjustments from a prior period.

Initially, the Audit staff recommended that all investment gains and losses should be reported regardless of whether they had been realized, thus reflecting the investment's market value at the close of the reporting period. FOW argued that only realized gains or

<sup>4</sup> One large investment loss was reported by FOW in 2004 on line 17 (\$56,038) (Operating Expenditures). Amendments filed in 2006 reported losses on line 21 (Other Disbursements) and fees on line 17 (Operating Expenditures). Market losses for securities held were not reported by FOW until the asset was sold.

losses needed to be reported and provided a worksheet that calculates those gains and losses. The Audit staff accepts that reporting realized gains and losses is acceptable, but notes that it cannot verify FOW's calculations.

FOW's response noted that amended reports were filed in July 2006 to correct cash on hand, receipts and disbursements for the 2004 and 2006 election cycle reports. As stated above, amended reports filed by FOW have materially corrected the misstatements noted above.

## **Finding 6. Untimely Deposit of Contributions**

### **Summary**

Based on a review of all contributions from political committees and a sample review of contributions from individuals, FOW failed to deposit contributions in a timely manner. The Audit staff determined that contributions from political committees of \$76,500 and projected contributions from individuals of at least \$330,000 were not deposited timely. FOW acknowledged the problem but did not explain how the errors had occurred. FOW has also stated it has since retained a professional consultant to administer its financial and reporting activities and that procedures have been put in place to correct the error. In response to the interim audit report, FOW stated the audit results were "exaggerated," reiterated its retention of a consultant to correct problems with receipt processing and presented mitigating arguments.

### **Legal Standard**

**A. Deposit of Receipts.** The treasurer of a political committee must deposit contributions (or return them to the contributors without being deposited) within 10 days of the treasurer's receipt. 11 CFR §103.3(a).

**B. Receipt of Contributions.** Every person who receives a contribution for an authorized political committee shall, no later than 10 days after receipt, forward such contribution to the treasurer. 11 CFR §102.8(a).

### **Facts and Analysis**

The Audit staff reviewed all contributions from political committees and determined that 55 of 98 such contributions, totaling \$76,500, were not deposited in a timely manner. In addition, a sample of contributions from individuals indicated 71 of 96 items tested were not deposited timely, a 74 percent error rate. FOW took between 14 and 80 days (in one case, 265 days) to deposit these receipts. The Audit staff projected that contributions from individuals of at least \$330,000 had not been deposited timely.

This matter was presented at the exit conference to FOW representatives who acknowledged the problem but did not explain how the errors had occurred. FOW has also stated it has since retained a professional consultant to administer its financial and reporting activities and that procedures have been put in place to correct the error.

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

The Audit staff recommended that FOW submit a description of the new procedures implemented to ensure compliance and provide any other comments it may have relative to this matter.

FOW's response began by noting it finds the interim audit reports statements to be "exaggerated." It first questioned the use of 265 days as the "outer limit" and the use of the date of on the check as the date of receipt on that one check. FOW stated this is the only check in that timeframe and after reviewing its records notes it was not received until several months after it was dated and was deposited timely. The response speculated that the check may have been misdated by the contributor and concluded by stating that using the date on a check instead of the date of record that a contribution was received, as in this case, is often inaccurate.

FOW has provided no documentation to support its assertion that the one check it details was deposited timely. Further, FOW records, with the exception of some contributions from other political committees, did not allow for confirmation of date of receipt; however, even utilizing that date, as FOW suggests, would have resulted in a material problem.

The response notes that there were 88 contributions from political committees totaling \$114,000, "...more than half (totaling \$56,000) of which were deposited timely, within 10 days of receipt, and all but 9 were deposited within 30 days." Although an apparent attempt to mitigate the problem, it supports the Audit staff's conclusion that a material portion of contributions from other political committees were not timely deposited within 10 days.

Next, the response acknowledged that, as a result of technical issues in the processing of credit card receipts, such contributions "...were not actually deposited into the bank account for three months." FOW stated that 68 contributions totaling \$62,040 were affected and, as a result, FOW ceased to accept contributions via credit card.

FOW stated that, with the exception of credit card receipts, FOW deposited contributions in question within 60 days, the average number of days being 24, and suggested that this average number of days would provide a more accurate picture of its operations.

In summation, the response noted FOW's hiring of a firm that specializes in federal election compliance services to process all contributions and ensure receipts are deposited in a timely manner. This firm has implemented and oversees procedures to collect, record, photocopy and deposit contributions on a weekly schedule to ensure timely deposit.

### **Finding 7. Disclosure of Allocable Activity**

#### **Summary**

The Audit staff identified expenditures made by both FOW (\$155,956) and the Candidate's concurrent mayoral campaign (\$52,988) during 2004 that did not appear to

be properly allocated nor disclosed as allocable expenditures. Contributions received by each entity were used to develop an allocation ratio of 5.99% FOW and 94.01% for the Candidate's mayoral campaign. Based on that ratio, FOW's allocable share of these expenditures was \$12,516 and the Candidate's mayoral campaign share was \$196,428. In its response to the interim audit report, FOW restated earlier arguments it has offered and asserted these expenditures do not require allocation. The response did not contain work papers or analyses to support its arguments, nor did FOW file amended reports to disclose these transactions.

### **Legal Standard**

**A. Use of contributed amounts for certain purposes.** A contribution accepted by a candidate may be used for, among other things, any other lawful purpose unless prohibited by this section. For purposes of this section, no contribution shall be converted to personal use. 2 U.S.C. §439a.

### **B. Allocation of expenses between candidates.**

- If an individual is a candidate for a Federal office and a State office, he or she must designate separate principal campaign committees. The campaigns may share personnel and facilities, as long as expenditures are allocated between the campaigns, and the payment made from each campaign account reflects the allocation. 11 CFR §110.8(d) (1) and (3).
- Expenditures made on behalf of more than one clearly identified Federal and non-Federal candidate shall be attributed to each candidate according to the benefit reasonably expected to be derived. 11 CFR §106.1(a).

### **Facts and Analysis**

The Audit staff's review of disbursements raised concerns about FOW's payment of expenses which appear to relate to the Candidate's concurrent Mayoral campaign. The Candidate was unopposed in the September 14<sup>th</sup> primary and had little in the way of opposition in the general election, which he won with 71% of the vote. The Audit staff noted the following indicators of the interrelationships between FOW and Anthony Weiner for New York (the Candidate's Mayoral committee):

- FOW purchased and paid for \$1,397 of campaign related supplies on its Citi Advantage credit card which appear to have been also reported as disbursements by the Mayoral committee. Amended reports filed by FOW also included memo entries for these disbursements. The Mayoral committee did not reimburse FOW for the purchases. Although other questionable charges were identified, available records were insufficient to determine if they may have benefited the mayoral campaign.
- The same "Disbursements Form" appears to have been used by both committees as the form provides space to indicate which committee it applies to.

- The forwarding of mail from FOW's PO Box to the Mayoral committee's PO Box or the Mayoral street address.
- Assorted vendor documents were addressed to Friends of Weiner at the Mayoral committee's street address
- Copier lease costs were paid by both during late 2004. The Mayoral committee paid Marlin Leasing for July 2004. FOW then made payments through October, 2004; after which the Mayoral committee again made payments to Marlin Leasing.
- Phone charges for service which appears to have been located at the Mayoral campaign office (opened February 2004) at 139 5<sup>th</sup> Avenue, 3<sup>rd</sup> Floor, Manhattan, NY 10010, were paid by FOW. A review of disbursements to Verizon made by both committees' shows payments made in a manner similar to that described for the copier above.

The Audit staff identified allocable costs totaling \$155,956 made by FOW during 2004; and, by utilizing reports filed with the State of New York, \$52,988 in such expenditures made by the Mayoral committee during 2004. Although requested by the Audit staff, FOW did not provide sufficient information to determine the actual benefit derived to each of these committees; as such, the Audit staff allocated these expenditures based on the funds received method. During 2004, FOW received contributions totaling \$83,252 and the Mayoral committee raised contributions totaling \$1,307,208. These figures result in an allocation ratio of 5.99% for FOW and 94.01% for the Mayoral committee.

Therefore, \$155,956 in allocable expenditures made by FOW would be allocated \$9,342 to FOW and \$146,614 to the Mayoral committee. The \$52,988 in such expenditures paid by the Mayoral committee would be allocated \$3,174 to FOW and \$49,814 to itself. FOW did not disclose the allocable nature of such expenditures it made; nor did it disclose allocable expenditures made by the Mayoral committee.

This matter was presented at a meeting with FOW representatives held subsequent to the exit conference, FOW's representative indicated that, although difficult to separate such costs with concurrent campaigns, 2 U.S.C. §439a provides that campaign funds may be used by the candidate for any other lawful purpose.

In a narrative response submitted subsequent to this meeting which contests the Audit staff's categorization of these expenses, an FOW representative stated:

- At best only minimal congressional work would have been done at the Mayoral committee office;
- Salaries and fees were split between the Mayoral committee and FOW based on an estimate of time that would be spent on each campaign;
- With respect to the copier lease, it was housed at the Mayoral committee offices and payments by FOW were not for the lease but likely for copies made.

**Interim Audit Report Recommendation and Committee Response**

The Audit staff recommended that FOW submit information supporting a different allocation formula<sup>5</sup> and provide any other comments it may have relative to this matter. Further, it was recommended that FOW amend its reports to acknowledge these allocable expenditures.

In its response to the interim audit report, FOW restated earlier arguments that it has offered. The response also disputes the use of a funds received method to allocate expenditures.

The response again points out that federal campaign funds may be used for any lawful purpose. FOW maintained the expenditures from the congressional campaign accounts (\$155,956) were for “re-election activities” and there is no prohibition if there were some “spillover” benefit to a campaign for a different office. Furthermore, FOW noted Commission regulations do not require or provide a method for identifying and disclosing such indirect benefit as an allocable expense.

FOW’s response disputed that the \$52,988 disbursed from the mayoral campaign should be allocated to the congressional committee. With respect to \$19,227 in office rent, telephone, equipment and supplies, the response noted that the congressional campaign’s main office was in the Candidate’s home. FOW continued that although a lease was signed by the congressional campaign for other office space, because the Candidate was unopposed and most administrative and operational activity was for the mayoral race, the rent was [not] allocated and was paid by the mayoral campaign. The response contended that only de minimus congressional activity was conducted from the rented office, but the payment records indicate that there was an effort to allocate payments between the campaigns based on current activity and use. The response also noted that since the Candidate was frequently in Washington, DC, the rented office address was used for mail, delivery and shipping purposes since it was staffed and not vacant.

Further, the response represented that \$33,761 in consulting fees and reimbursements to individuals, payments to the primary fundraiser, Dolev Azaria, were allocated and paid from each committee. The response questioned why the Audit staff listed her fees paid by one committee as allocable to the other campaign. Likewise, the response noted that Jason Bayne provided administrative and data processing for both campaigns, and was paid from the campaign to which the expenses related.

FOW believes it has properly assigned and paid these administrative expenses pursuant to the “benefits derived” method, which FOW accomplished by making separate payments to staff and vendors. FOW’s response stated, “The Committee’s method for determining

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<sup>5</sup> The New York City Campaign Finance Board covered this issue in its report noting that the Candidate’s mayoral campaign failed to keep the required records to document an allocation and accepted a payment in the amount of \$57,235 from the Candidate’s mayoral campaign representing a reallocation of costs from FOW; noting this payment did not represent an admission of guilt nor did it represent a civil penalty for that failure.

the proper amount to be paid from each committee was the correct method under the Commission's regulations."

The Audit staff notes that, although requested previously, including in the interim audit report, FOW has yet to provide to the Audit staff with an analysis or other documentation to support its determination of the actual benefit derived to each of the committees or to support its assertion of the de minimus nature of congressional activity in mayoral offices. Additionally, the Audit staff does not dispute the lawful nature of these expenditures, but merely seeks the correct disclosure of such activity. In response to the Audit staff's questioned use of the funds received method to allocate such costs, the interim report itself notes that this method was used in the absence of information and documentation that could lead to a usage based allocation. This conclusion is supported by the audit conducted by the New York City Campaign Finance Board. Therefore, the Audit staff's position remains unchanged. Additionally, it should be noted no amended reports disclosing these disbursements have been filed by FOW.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

March 4, 2009

**MEMORANDUM**

**TO:** Wanda J. Thomas  
Acting Assistant Staff Director  
Audit Division

**THROUGH:** Joseph F. Stoltz *JFS*  
Acting Staff Director

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

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

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

Albert Veldhuyzen *AV*  
Attorney

**SUBJECT:** Final Audit Report on Friends of Weiner (LRA # 728)

**I. INTRODUCTION**

The Office of General Counsel has reviewed the Final Audit Report ("Proposed Report") on Friends of Weiner ("Committee"). The Audit Division submitted the Proposed Report for a Commission vote on November 19, 2008, but withdrew it from consideration and subsequently submitted it for legal review on December 16, 2008. The Proposed Report was withdrawn as a result of a Commissioner requesting a legal opinion on Finding 5.

The Audit Division made seven findings, but we have specific comments on Finding 5 (Misstatement of Financial Activity) and Finding 7 (Disclosure of Allocable Activity).<sup>1</sup> We concur with the remaining findings that are not specifically discussed in this memorandum. If you have any questions, please contact Albert R. Veldhuyzen, the attorney assigned to this audit.<sup>2</sup>

Finding 5 is a misstatement of financial activity finding relating to the Committee's statement of cash on hand and, specifically, the effect on the Committee's cash on hand of activity in a Committee brokerage account. After withdrawing the report, and based as we understand it on concerns raised by objecting Commissioners, the audit staff requested our opinion as to the Committee's arguments that unrealized gains/losses in investment accounts should not be reported as cash available to the Committee. We now understand that the auditors have maintained that the Committee's investment account gains/losses are reportable because there appears to be realized income, but both the Proposed Report and the Committee appear to frame the issue as whether unrealized market gains in investment accounts must be reported in the same manner as other Committee investments valued at cost. We explore this issue first because it was initially raised by the Committee and it also lays a foundation for the principal question, namely the Committee's failure to report realized gains. We conclude that the Committee need not report unrealized market gains, but more importantly, we suggest the auditors revise the Proposed Report to make clearer that notwithstanding the Committee's arguments, the auditors' position has been that the committee failed to properly report realized, as opposed to unrealized, gains and losses.

A review of the brokerage statements shows the receipt of other types of income in addition to realized gains such as dividends, interest, and distributions. The Committee must report income resulting from these brokerage account transactions, but we discuss below the reporting ramifications of such transactions.

Finding 7 was necessitated because the Committee failed to keep documentation to show the proper allocation of resources between itself and the Candidate's Mayoral Committee ("Mayoral Committee"). In the absence of such documentation showing the actual benefit derived by each committee, this Office concludes that the Audit Division is justified in using an alternate allocation methodology, the fundraising allocation formula.

## **II. THE COMMITTEE MUST REPORT BROKERAGE ACCOUNT TRADES THAT PRODUCE INCOME (FINDING 5)**

The Proposed Report found that the Committee misstated its financial activity because it underreported its cash on hand. The Committee submitted a letter to the Commission, dated

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<sup>1</sup> Commissioners raised objections to both of these findings, but one Commissioner requested a legal analysis of Finding 5 prior to the withdrawal of the Proposed Report from Commission consideration by the Audit Division.

<sup>2</sup> The Office of General Counsel recommends that the Commission consider this document in open session since the Proposed Report does not include matters exempt from public disclosure. *See* 11 C.F.R. § 2.4.

March 20, 2008, which objected to the Audit Division's Misstatement of Financial Activity finding. Both the Audit Division and the Committee acknowledge that the misstatements of financial activity originate primarily from an investment account, where gains/losses were not reported as cash on hand. As noted, the Committee contended that the Audit Division was incorrectly asserting that it should include in cash on hand unrealized investment gains and losses. The controlling regulation is 11 C.F.R. § 104.3(a)(1), which requires the reporting of cash on hand. Cash on hand includes "currency; balance on deposit in banks, savings and loan institutions; traveler's checks owned by the committee; certificates of deposit, treasury bills and any other committee investments valued at cost." 11 C.F.R. § 104.3(a)(1).

"Valued at cost" means precisely what it says. This principle was recognized as far back as Advisory Opinion 1980-46, in which the Commission noted that when a committee purchases an asset for investment purposes (as opposed to the situation in which a valuable investment is donated to the committee as an in-kind contribution, *see* 11 C.F.R. § 104.13), the use of committee funds to acquire the asset is not a disbursement, but rather the "conversion of one form of 'cash on hand' to another." As long as the assets remain stocks, bonds, or other similar investments, and they are not transferred or converted, there is no requirement to report unrealized gains or losses that reflect no more than fluctuations in current fair market value.

Past Advisory Opinions are clear that campaign expenditures may only be made from campaign depository accounts, and that transfers from an investment account to a depository account and vice versa need not be reported because they are not "expenditures" but rather a conversion of one form of cash on hand to another. *See* AO 1999-08, at 3; AO 1997-06, at 2. However, any income earned, even if only reinvested, is reportable as an "other receipt." AO 1999-08, at 3. Consequently, any Committee transfers from its depository account to fund its brokerage account and vice-versa are not reportable but income earned is reportable in a timely manner as an "other receipt." However, unrealized gains or losses are not income.<sup>3</sup> Investment income is not realized simply because an account statement reflects an increase or decrease in market value, or because transactions are made through a brokerage account; rather, proceeds from the investment or investment account must be received, or "realized."

Investment income may take a number of different forms. For instance, it could take the form of interest, like that paid on a bond or from a money market account. It could take the form of dividends paid by a corporation on shares of stock. It could take the form of partnership distributions, which at least one of the Committee's brokerage account statements indicates it received. All of these types of income are generally considered to be realized when paid, and must be reported as "other receipts" even if immediately reinvested in the investment that

<sup>3</sup> In the context of Federal tax law, the Supreme Court has stated that income is "not a gain accruing to capital, not a growth or increment of value in the investment; but a gain, a profit, something of exchangeable value proceeding from the property, severed from the capital however invested or employed, and coming in, being 'derived,' that is, received or drawn by the recipient (the taxpayer) for his separate use, benefit and disposal." *Eisner v. Macomber*, 252 U.S. 189, 207 (1920). *See also Cottage Sav. Ass'n v. Comm'r*, 499 U.S. 554, 559 (1991) ("Rather than assessing tax liability on the basis of annual fluctuations in the value of a taxpayer's property, the Internal Revenue Code defers the tax consequences of a gain or loss in property value until the taxpayer 'realizes' the gain or loss.").

generates them. Advisory Opinions 1999-8, 1997-6. It could also take the form of the capital gain realized when an investment is sold for more than the price the seller paid to acquire it. This type of income is not realized until the asset is sold and the gain received. It is at that point that the amount of the capital gain realized by the committee, if any, must be reported as "other receipts," and not earlier (Similarly, a capital loss, which occurs when the asset is sold for less than its acquisition cost, would have to be reported as an "other disbursement.").

Although the auditors have clarified that they have consistently maintained that changes in the Committee's investment account are reportable because they appear to be realized gains, the Proposed Report, by responding to the Committee's arguments regarding unrealized gains, tends to leave the impression that, in the auditors' view, investment income includes "unrealized" capital gains and losses and that such gains and losses should be reported on Schedule A. *See* Weiner Audit Report, at 18 (countering Committee's arguments about unrealized gains by citing AO 1997-6 and the Commission's Campaign Guide for Congressional Candidates and Committees, at 86 (June 2004)). We recommend the Proposed Report be clarified to reflect that the Committee is correct when it states that it is not required to report unrealized gains and losses, but that in the Audit Division's view the Committee failed to properly report realized gains and losses.

In addition, the large volume and diverse nature of the activity in the account raises a number of reporting issues that would appear to be questions of first impression for the Commission. We comment briefly here on those, with the caveat that all of our comments apply only to situations in which a committee, like FOW, uses its own funds to acquire investment assets and not situations, like those addressed in AOs 2000-30 and 1989-6, in which a committee receives an asset as an in-kind contribution.

None of the previous advisory opinions dealing with the reporting of investment income appears to deal directly with the proper reporting of capital gains or capital losses. As noted above, in our view the amount of a capital gain or a capital loss on investment income should be reported as an "other receipt" or an "other disbursement," as the case may be, when the gain or loss is realized.<sup>4</sup> If the amount of the gain or loss exceeds \$200, the transaction should be itemized. This raises the issue of who should be identified in the Committee's reports as the other party to the transaction. Because the investment activity was conducted through a brokerage account, it appears that all sales of Committee assets through the account were conducted through an established market mechanism in which the identity of the purchaser was unknown to the Committee; thus, the purchaser did not make a contribution to the Committee by acquiring the asset, and the committee does not need to – indeed, cannot – report the identity of the purchaser. Advisory Opinion 1989-6. Consequently, in our opinion, the Committee could permissibly report the brokerage account as the payer or recipient of "other receipts" or "other disbursements" that are in the form of capital gains or losses, identifying as the "purpose" of each receipt or disbursement "capital gain on activity from brokerage account" or "capital loss on activity from brokerage account." Moreover, under these circumstances, in our opinion the

<sup>4</sup> We also note that it would be the amount of the gain or loss that should be reported, not the full price paid by the purchaser of the asset. The price the Committee originally paid to acquire the asset, or its "basis," would already be included in the Committee's cash on hand under the "valued at cost" principle of 11 CFR § 104.3(a)(1).

Committee would not need separately to report gains or losses realized on each transaction; it could merely report the aggregate of its capital gains and the aggregate of its capital losses in each reporting period.<sup>5</sup>

The Committee brokerage statements we have reviewed, which the Committee apparently received monthly, report an aggregate figure for a change in the value of the account, but do not report an aggregate specifically of realized capital gains or capital losses. Moreover, the transaction volume in the account was very high, and many assets were held for very short periods. Consequently, it may not be practical to reconstruct for purposes of this audit the capital gains or capital losses received in each reporting period. However, we assume that, at least for capital gains, the committee received an annual statement of capital gains for income tax purposes.<sup>6</sup> To the extent this analysis indicates that the Committee should amend its reports, it may well be that the best the Committee can do with respect to capital gains is to report the amount of gains for the calendar year based on these statements. On a going forward basis, however, if it maintains the investment account, it should ask its broker to provide the information it needs to report realized capital gains and losses during each reporting period.

The Committee also appears to have purchased some assets on margin. To the extent that this activity resulted in any debts owed by the Committee to its brokerage or any other party at the end of the reporting period, such debts are reportable on Schedule D (and, to the extent they are loans, on Schedule C) as are any other debt.

### **III. AUDIT MAY DETERMINE ALLOCABLE ACTIVITY USING THE FUNDRAISING ALLOCATION FORMULA (FINDING 7).**

This Office commented on this finding at the Interim Audit Report stage, and the auditors followed our legal comments in preparing the Final Audit Report. We offer our comments on this finding as it appears in the Final Audit Report because of a Commissioner's objection. Also, the Commission will consider similar allocation issues in the Kuhl Final Audit Report and it would be helpful to the Commission to compare both matters. Of particular interest, as described below, is the fact that a state audit agency came to the same conclusion that the Committee failed to properly allocate expenditures in accordance with state law.

The audit uncovered instances of the Committee assisting the operations of the Mayoral Committee during the 2005 Mayoral election campaign which raise the question whether the Committee shared expenses with the Mayoral Committee that were not properly allocated

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<sup>5</sup> This is in contrast to interest, dividend, and similar income, for which each such payment must be itemized if the payments exceed the itemization threshold, and the entity making the payment must be identified. Advisory Opinion 1999-8 (requiring identification of various Vanguard mutual and bond funds as payers of interest and dividends).

<sup>6</sup> Contributions and other "exempt function income" of political organizations, including Federal political committees, are exempt from taxation, but investment income is not "exempt function income." 26 U.S.C. § 527(c).

between the two committees in accordance with 11 C.F.R. § 110.8(d)(3).<sup>7</sup> The Audit Report states that the Committee failed to keep and provide sufficient information to determine the proper allocation of resources between the two committees according to the actual benefit derived method. However, the Committee's response denies that there were allocable expenditures and that the Committee made separate payments to staff and vendors for federal and local expenditures. The Committee also objects to Audit's use of the fundraising allocation formula.

Both Federal and local law permit candidates running simultaneous campaigns to share resources, such as staff and office space, as long as an allocation account is created and detailed records are kept. Generally, the Federal law requires an individual who is a candidate for both a Federal and state office to designate separate committees and establish completely separate campaign organizations. Furthermore, no transfers of funds, goods or services between campaigns are permitted (except transfers between the committees of an individual seeking nomination or election to more than one Federal office under section 110.3(c)(5)). 11 C.F.R. § 110.8(d); *see* 2 U.S.C. § 441i(e); 11 C.F.R. § 110.3(d). The campaigns may share personnel and facilities, however, as long as expenditures are allocated between the committees and the payment made from each campaign account reflects the allocation. 11 C.F.R. § 110.8(d)(3);<sup>8</sup> *see* Advisory Opinion ("AO") 1994-37, AO 1978-67. Payments should be allocated to each Federal and non-Federal candidate, (or the same person who is seeking both Federal and non-Federal office) according to the benefit expected to be derived by each candidate. 11 C.F.R. § 106.1(a)(1); AO 1994-37, AO 1978-67. Under local law, the NYC Campaign Finance Board ("NYC Board") requires an allocation account and detailed records documenting which personnel and resources are used for the respective campaigns. NYC AO 1996-2.<sup>9</sup>

The NYC Board audited the Mayoral Committee, and that audit found that the committees did not properly allocate the expenses. The NYC Board found that both within and after the period covered by the Commission's audit, there was commingling of 2005 election

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<sup>7</sup> These shared expenses included the Committee's purchase of campaign related supplies for the Mayoral Committee, copier lease costs paid by both Committees at various intervals, and phone charges for the Mayoral campaign offices paid by the Committee.

<sup>8</sup> We note that although section 110.8 is titled "Presidential candidate expenditure limitations," section 110.8(d) does not appear to apply solely to presidential candidates. The Commission has applied section 110.8(d) in several advisory opinions that did not involve presidential campaigns. For example, AO 1994-37 concerned then-Congressman Charles Schumer's allocation of expenses between his Federal committee and a potential New York gubernatorial campaign.

<sup>9</sup> NYC AO 1996-2 states the following:  
When a participant is running for two offices, one subject to the Program and one not, the two campaigns may share personnel and facilities, as long as the shared expenditures are accurately allocated between the two campaigns and the payment made from each campaign account correctly reflects the allocation. The participating candidate is also subject to the documentation and submission requirements of Rule 1-08(l) to substantiate the Federal portion of the allocation account expenditures that is exempt from Program limits. To meet this burden, [a committee] must keep detailed records, unless it has previously obtained Board approval to use a methodology that would allow it to substantiate its claims with reduced record keeping.

cycle receipts and expenditures and an absence of documentation to justify the allocation of staff time between the Federal and non-Federal campaigns. *See* Campaign Finance Board Final Audit Report of Anthony Weiner for New York (Aug. 14, 2007).

Both our audit and the NYC Board's audit confirmed that there were allocable expenditures and that the committees failed to keep proper documentation to make a proper allocation according to the actual benefit derived method. 11 C.F.R. § 106.1(a)(1). In another audit, Kuhl for Congress, where there was not enough documentation to determine the actual benefit derived, the Audit Division used the fundraising allocation formula. If the information is not available in this audit, we recommend that the Audit Division follow the allocation methodology that it used in the Kuhl for Congress Interim Audit Report.

On November 13, 2008, the Commissioners requested that the Audit Division revise the Kuhl Final Audit Report in order to provide more details regarding the allocation. This Office recommends that the Audit Division review and, if necessary, revise Finding 7 in light of the Commission's request in the Kuhl Final Audit Report.

## CASE INDEX FORM

**CASE NO. & NAME:** A05-04 Friends of Weiner

**STAFF ASSIGNED:** Alex R. Boniewicz, Audit Manager

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

<u>DATE</u>	<u>DOCUMENT</u>
March 3, 2005	RAD Referral
April 15, 2005	Audit Scope Determination
December 8, 2005	Adjustments to Audit Scope
December 4, 2007	Legal Analysis on Interim Audit Report
February 1, 2008	Interim Audit Report
March 20, 2008	Response to Interim Audit Report
May 15, 2008	Final Audit Report (as originally circulated)
March 4, 2009	Legal Analysis on Final Audit Report
May 5, 2009	Final Audit Report (Revised)

**The above documents can be found at the following server location:  
\\Ntsrv1\ voting ballot matters\Audit\Friends of Weiner**

**If you have any questions, please contact Alex Boniewicz at 694-1200.**