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**September 3, 2008**

**Via Hand Delivery  
Jeff S. Jordan  
Supervisory Attorney  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463**

**RE: MUR 6035 – The Northern Trust Company**

**Dear Mr. Jordan:**

**On behalf of the Northern Trust Company ("Northern Trust"), a Respondent in the matter designated MUR 6035, we are hereby responding to the Complaint filed by Judicial Watch on July 8, 2008. According to the Complaint, in 2005, Northern Trust provided Senator Barack Obama and Michele Obama, his wife, a \$1.32 million mortgage loan with an interest rate of 5.625% to purchase a \$1.65 million dollar home. Relying on one newspaper article, the Complaint alleges that the rate was approximately 0.315% below an average rate of various banks, and this "suggests" the bank made an illegal contribution to Senator Obama's Senatorial campaign.**

**As explained below, it is well settled that the mere fact that a person is a candidate when he or she takes out a loan to purchase a home does not make that loan in connection with an election. Therefore, this matter is not within the jurisdiction of the Federal Election Commission ("FEC"). Even if Senator and Ms. Obama's mortgage loan was considered to be in connection with the election, the Complaint lacks any evidence that it was not provided by Northern Trust in the ordinary course of business and should be treated as a contribution. Indeed, the loan was made in the ordinary course of Northern Trust's business. For all these reasons, the FEC should find no reason to believe a violation has occurred and dismiss the Complaint.**

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**I. Summary of Relevant Facts**

On November 2, 2004, Barack Obama was first elected to the United States Senate for a term beginning January 2005. In early 2005, Senator Obama expressed an interest with Northern Trust in a mortgage for a new home. Soto Aff. ¶ 4 (Attachment 1). Northern Trust was informed that Senator Obama had been quoted an interest rate of 5.625% from a competing bank. *Id.* Senator Obama and Northern Trust discussed the mortgage as well as additional services that he and Ms. Obama might need. *Id.* In an effort to obtain the business of Senator and Ms. Obama, Northern Trust decided to match the mortgage offer of the competing bank and offered them an interest rate of 5.625%. *Id.* ¶ 5. On June 17, 2005, the mortgage was closed and funded.

On July 2, 2008, the *Washington Post* published an article about the mortgage that Northern Trust provided to Senator and Ms. Obama. Joe Stephens, Obama Got a Discount on Home Loan, *Washington Post*, July 2, 2008, at A03. According to the article, after the income of Senator Obama and his wife increased in early 2005 due to the Senator's \$2.27 million book deal and a job promotion for Michele Obama, which "more than doubled her pay," the couple sought a larger home and secured a mortgage with Northern Trust. *Id.* The article further claims that the interest rate on Senator and Ms. Obama's mortgage of 5.625% was approximately 0.315% less than the average interest rate as surveyed by an association that publishes mortgage and consumer loan information. *Id.*

Six days after the *Washington Post* article was published, Judicial Watch filed the Complaint in this matter. See Complaint. The Complaint, relying solely on the *Washington Post* article, claims that "[t]his information suggests that Northern Trust's discounted mortgage loan is actually a disguised campaign contribution to Senator Obama of at least \$108,000." Complaint, at 3.

On July 13, 2008, the article relied upon by Judicial Watch was publicly criticized by the *Washington Post's* own Ombudsman, Deborah Howell, for having "a negative cast to it." Deborah Howell, More Story Than a Loan Merited, *Washington Post*, July 13, 2008, at B06 (Attachment 2). According to Ms. Howell, the article "also lacked the important context that other wealthy and savvy borrowers could have done as well under similar circumstances," leaving the impression that there was something wrong with the loan when the evidence did not support that

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conclusion. Id. Ms. Howell further noted that a number of financial experts she talked to agreed that the loan looked like it was in the ordinary course of business.<sup>1</sup>

## II. The FEC Does Not Have Jurisdiction Over This Matter Because the Mortgage Was Not Provided in Connection with an Election

### A. Applicable Law

Pursuant to the Federal Election Campaign Act of 1971, as amended, ("FECA"), it is unlawful for any corporation to make a contribution or expenditure "in connection with" any federal election. 2 U.S.C. § 441b(a) (emphasis added). The FEC has found that there is "a common sense judgment that standard bank loans do not raise the concerns that underlie the campaign finance regulatory regime. Treating such loans for a candidate's home purchase or other personal living expenses as not 'in connection with the campaign' and as made 'irrespective of the candidacy' is well founded, in our view." Statement of Reasons of Commissioners McDonald, Mason, Sandstrom, Smith, and Thomas, FEC Matter Under Review ("MUR") 4944, at 5 (August 28, 2001).

The FEC does not have the authority to regulate matters that are outside the campaign finance regulatory regime and thereby outside its jurisdiction. Indeed, as one FEC Commissioner has stated, "while administrative agencies sometimes must pursue cases which define the limits of jurisdiction, doing so too aggressively or too reflexively is detrimental to vigorous enforcement of the law by sapping resources, diverting attention from core enforcement and undermining the policy consensus necessary to the continuing support of any agency." Additional Statement of Commissioner Mason in MUR 4766, at 2-3.

### B. The Complaint Does Not Allege Any Facts That, If True, Would Establish That the Mortgage Was Provided in Connection with an Election

In order for the FEC to have jurisdiction over this matter, the Complaint must include something on which to base an allegation that the Northern

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<sup>1</sup> The Columbia Journalism Review ("CJR"), in a column appearing on its Web site, also criticized the Washington Post story for unfairly implying there was a problem with the loan when the facts in the story did not support that conclusion. Justin Peters, Why Did the Post Run Its Obama Mortgage Story?, Columbia Journalism Review, July 2, 2008 (Attachment 3). According to CJR, the "story ... raises more questions than it answers. And the questions have more to do with the Post's news judgment than they have to do with Barack Obama." Id. (The column appears at [http://www.cjr.org/campaign\\_desk/behind\\_baracks\\_suspicious\\_mort.php](http://www.cjr.org/campaign_desk/behind_baracks_suspicious_mort.php).)

Trust loan was in connection with an election. For example, such allegations should include reference to facts supporting the claim that the loan was used to finance a campaign directly or that the loan "freed up" funds that were in turn used by Senator Obama to finance his campaign. There must be some allegation of a real connection between the loan and financial support of the campaign. It is not even sufficient to allege that the need for the loan was related to being a candidate. For example, the FEC has found that "[t]he mere fact that a candidate decides to move to a particular location at a particular time for campaign-related reasons does not transform a loan the candidate receives for use in connection with a new home into a loan for use in connection with a campaign." MUR 4944, at 2.

The best the complainant can allege is that at the time he "secured the mortgage (on June 8, 2005) [sic], it appears that Senator Obama was raising funds for his previous 2004 Senate campaign (Obama for Illinois, Inc.) and his 2010 reelection (Obama 2010, Inc.) to the United States Senate." Complaint, at 3. However, this is nothing more than an allegation that Senator Obama was a candidate when he and his wife obtained a mortgage to buy a house. The Complaint does not dispute that funds from the loan were used for the purchase of the new home. Moreover, the Complaint does not allege that any of the proceeds from the mortgage were given to the campaign or even that the money "freed up" money for Senator Obama that he in turn used for campaign expenses.

Even complainant's allegation that the Washington Post article "suggests" Senator Obama received "special treatment because he is a United State Senator," is not supported by the quote relied upon. To the contrary, Northern Trust Vice President John O'Connell is quoted as saying, "[a] person's occupation and salary are two factors; I would expect those are two things we would take into consideration." Complaint, at 2. Mr. O'Connell is merely stating a person's occupation will be considered in making a loan. This states normal, ordinary course of banking practice and does not at all "suggest" the mortgage was given because Senator Obama was a candidate. Moreover, Mr. O'Connell goes on to specifically say that the mortgage was a business decision and in line with other mortgage loans Northern Trust was making at that time. Consequently, even if all of the allegations in the Complaint are taken as true, there is no support for finding that the loan was in connection with Senator Obama's campaign and therefore this matter does not fall within the jurisdiction of the FEC.

If the FEC were to be required to review Senator and Ms. Obama's home mortgage interest rate just because he was a candidate, the agency would be charged with evaluating whether the home mortgages received by all federal candidates have interest rates that are within a range deemed acceptable by potential

complainants. The FEC has recognized the magnitude of such a broad reading of its jurisdiction and commented that "[g]iven the number of candidates who move to new locations after reapportionment and redistricting changes, FEC intrusion into such matters could prove unwieldy, at best." MUR 4944, at 2, n.2 (explaining why the FEC would not consider a loan in connection with a new home to be interpreted as in connection with a campaign).

Finally, the Complainant's allegations regarding the reporting of the mortgage do not add anything to bring this under the FEC's jurisdiction. The campaign was not required to report the mortgage unless it was for use" in connection with" the campaign. See 11 C.F.R. §104.3(d) Since there is no substance to the allegation that there was a connection to the campaign, there is no substance to the allegation the mortgage had to be reported. The FEC should not have to use valuable resources and tie up a campaign in an investigation based on baseless and insupportable allegations. See MUR 4766, at 1 (stating the FEC is urged "to take steps to ensure that the Commission and respondents do not become unnecessarily ensnared in reviewing or investigating baseless or insupportable allegations").

**III. Even If the FEC Has Jurisdiction Over This Matter, There is No Reason To Believe the Mortgage was a Contribution from Northern Trust**

**A. Applicable Law**

Pursuant to FECA, "contribution" is defined to exclude a loan of money by a bank "made in accordance with applicable law and in the ordinary course of business." 2 U.S.C. § 431(8)(B)(vii). "A loan will be deemed to be made in the ordinary course of business if it: (1) Bears the usual and customary interest rate of the lending institution for the category of loan involved; (2) Is made on the basis that assures repayment; (3) Is evidenced by a written instrument; and (4) Is subject to a due date or amortization schedule." 11 C.F.R. § 100.82.

**B. The Complaint Provides No Support for The Allegations Concerning the Interest Rate**

Even if the proceeds from the mortgage were used to fund the campaign and the FEC has jurisdiction over the matter, the mortgage would still not be an illegal contribution to the campaign unless it was provided outside of the ordinary course of business. To establish that the loan was not in the ordinary course of business because of the interest rate, the Complaint must allege that the interest rate was not the usual and customary rate of Northern Trust for the type of loan involved. The Complaint cannot rely on speculation and unsupported legal

conclusions. Indeed, "[t]he Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of FECA." Statement of Reasons of Commissioners Mason, Smith, Sandstrom, and Thomas in MUR 4960, at 1. "Unwarranted legal conclusion from asserted facts, or mere speculation, will not be accepted as true." *Id.* at 2 (internal citations omitted).

The Complaint is deficient and does not offer any basis to support the allegation about the usual and customary interest rate for two reasons. First, the Complaint only cites the average of interest rates quoted by HSH Associates without listing the range of interest rates that were available at the time. It is axiomatic that if the average interest rate was 5.94%, many buyers received interest rates that were below 5.94%.

Second, the average interest rates provided by HSH Associates, Bankrate.com, or any other entity are irrelevant to the interest rate that Northern Trust provided at the time. The regulations require that the interest rate must be usual or customary to the institution that is providing the loan. 11 C.F.R. § 100.82. The Complaint does not allege that Senator Obama's mortgage interest rate is unlike the usual and customary rate provided to other Northern Trust clients. In fact, as explained below, the process for determining the rate was in line with other rates Northern Trust was then offering for comparable loans.

Therefore, even if the FEC takes all of the alleged facts as true, the Complaint provides no support for the proposition that the interest rate provided to Senator and Ms. Obama was different from the interest rate received by others at the time.

C. The Mortgage Interest Rate Was Made at the Usual and Customary Interest Rate of Northern Trust

As the attached affidavits show, Northern Trust determined the interest rate for Senator and Ms. Obama's mortgage pursuant to the company's standard practices.<sup>2</sup> First of all, the practices of Northern Trust cannot necessarily be compared to the practices of a typical mortgage originator. Northern Trust is a

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<sup>2</sup> This explanation of Northern Trust's internal practices and guidelines when negotiating a loan rate, including the specific amounts and percentages of any discounts and any consideration given to competing rates, comprises confidential business and trade information which is not public. Therefore, Northern Trust respectfully requests that the FEC redact all such confidential information prior to the public release of any documents or files in this matter. We further request that the FEC notify the respondent prior to any files being release so respondent can review the information to be put on the public record and raise any necessary objections in a timely fashion.

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financial services institution that focuses on, among other things, integrated personal wealth management solutions for successful individuals, families, foundations, etc., and looks to establish long-term financial relationships with these clients. Soto Aff. ¶ 2. Mortgage loans are commonly provided as a service for Northern Trust's existing customers and as a way to introduce new and potential clients to the institution and familiarize them with the other services that the institution can provide. Id. ¶ 3.

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D. The Mortgage Was Made on a Basis That Assures Repayment, Evidenced by a Written Instrument, and is Subject to a Due Date

The three remaining factors that establish whether a loan is provided in the ordinary course of business are not disputed. First, a loan is considered to be made on a basis that assures repayment if "[t]he lending institution making the loan has perfected a security interest in collateral owned by the candidate or political committee receiving the loan, the fair market value of the collateral is equal to or greater than the loan amount and any senior liens as determined on the date of the loan, and the candidate or political committee provides documentation to show that the lending institution has a perfected security interest in the collateral." 11 C.F.R. § 100.82(e). The Complaint does not allege that the mortgage is without a basis that assures repayment, and Senator and Ms. Obama's mortgage satisfies this requirement because the loan is secured by the collateral of the home, which was greater than the amount of the mortgage.

Second, it is not disputed that the mortgage is evidence by a written instrument because the Complaint attaches a copy of the document. Third, the mortgage is subject to a due date of July 1, 2035.

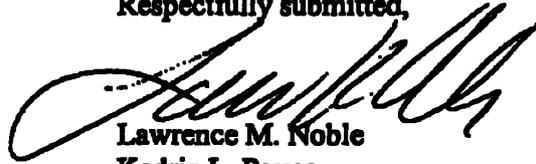
III. **Conclusion**

The mortgage Northern Trust provided Senator and Ms. Obama for the purchase of their new home was not in connection with the Senator's campaign and there are no allegations in the Complaint that establish otherwise. Therefore, the FEC does not have jurisdiction over this matter. Moreover, the interest rate provided in the mortgage was in the ordinary course of Northern Trust's business. For the

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foregoing reasons, we respectfully request that the FEC find no reason to believe that Northern Trust violated the law with regard to this matter.

Respectfully submitted,



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Attorneys for The Northern Trust Company

Enclosures

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