



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

**STATEMENT OF CHAIR ELLEN L. WEINTRAUB AND
COMMISSIONERS CYNTHIA L. BAUERLY AND STEVEN T. WALTHER**

**AUDIT OF MCCAIN-PALIN 2008, INC.
AND MCCAIN-PALIN COMPLIANCE FUND, INC.**

One of the most critical issues on which the Commission deliberated during its audit of McCain-Palin 2008, Inc., will not even be mentioned in the Commission's Final Audit Report – the issue of so called "Hybrid Communications."

Hybrid Communications are communications made by a political party (1) that refer to one or more clearly identified Federal candidates and (2) that also generically refer to other candidates of a political party without clearly identifying them. How political party committees should attribute disbursements for Hybrid Communications has been a perennial issue for the Commission, and was most recently addressed in relation to radio and television advertisements run during the 2004 Presidential election.¹

In June of 2011, when the Audit Division first circulated its Preliminary Audit Report on McCain-Palin 2008, Inc. (the "PAR") to the Commission for approval, the report did not include a proposed finding related to Hybrid Communications. Nevertheless, the issue was raised and addressed by Commission staff in three separate instances: (1) the Audit Division's cover memo to the PAR; (2) the Office of General Counsel's legal analysis memo (*see* Attachment 1 to the PAR at pages 14-19); and (3) Attachment 2 to the PAR showing what a Hybrid Communications finding would look like, had it been included in the PAR (*see* Attachment 2 to the PAR at pages 3-5, which we have attached hereto).

¹ See Final Audit Report on Bush-Cheney '04, Inc. and the Bush-Cheney '04 Compliance Committee, Inc. and Final Audit Report on Kerry-Edwards 2004, Inc. and the Kerry-Edwards 2004 Inc. General Election Legal and Accounting Compliance Fund, both available at www.fec.gov/audits/audit_reports_pres.shtml. See also Statement of Chairman Robert D. Lenhard and Commissioners Steven T. Walther and Ellen L. Weintraub Audit of Bush-Cheney '04, Inc., available at www.fec.gov/audits/2004/20070322bush_cheney_stmt_03.pdf. The Commission also addressed Hybrid Communications in the context of mass mailings in Advisory Opinion 2006-11 (Washington Democratic State Central Committee), available at www.fec.gov/searchao.

Statement of Reasons of Chair Weintraub and Commissioners Bauerly and Walther
Final Audit on McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc.

In the attachments to the PAR, the staff explained that the Republican National Committee ("RNC") and McCain-Palin 2008, Inc. had jointly spent \$61,498,018 on Hybrid Communications related to the general election and that they had split the cost of the communications evenly (50/50) between them. Accordingly, based on the agreed-upon allocation, the RNC spent \$30,749,009 on Hybrid Communications without treating any of this spending as coordinated party communications,² and without applying any of the spending against McCain-Palin 2008, Inc.'s expenditure limitation.³

Even though the Audit Division did not include a proposed finding related to Hybrid Communications in its draft of the PAR, on August 30, 2011, the Commission voted on a motion by then-Commissioner Weintraub "to direct the Audit Division to include in the Preliminary Audit Report a finding regarding the Hybrid Communications issue discussed in Attachment 2 . . . and to provide [McCain-Palin 2008, Inc.] with the opportunity to respond to the finding."⁴ We supported that motion, but it failed to receive the four affirmative votes necessary for Commission approval, so the PAR did not include the finding. As a result, the issue of Hybrid Communications appeared nowhere in the PAR that was sent to McCain-Palin 2008, Inc.,⁵ nor will it appear anywhere in the Final Audit Report.

Nevertheless, we write this statement now to make clear that, despite its unfortunate absence in the PAR and in the Final Audit Report, the issue of how political party committees attribute disbursements for Hybrid Communications remains of paramount concern.⁶

² Each national party committee had a coordinated spending limit of \$19,151,200 for its 2008 general election candidate. See 2 U.S.C. § 441a(d) (coordinated spending limit). Separate from the Hybrid Communications at issue here, the RNC had already applied expenditures totaling \$18,834,336 toward its coordinated spending limit.

³ Because McCain-Palin 2008, Inc. accepted public funds of \$54,103,800 under the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001, *et seq.*, the campaign had agreed to a spending limit of the same amount.

⁴ See Certification in Preliminary Audit Report on McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, dated August 30, 2011 (then-Chair Bauerly and Commissioners Walther and Weintraub voted in favor of the motion and then-Vice-Chair Hunter and Commissioners McGahn and Petersen voted against the motion).

⁵ On September 27, 2011, the Commission unanimously approved a motion to "[a]t the conclusion of the audit, place the cover memo to the PAR and the attachments on the public record." These materials are available at www.fec.gov/audits/audit_reports_prvg.shtml.

⁶ At the Commission's December 6, 2012, open meeting, then-Vice Chair Weintraub informed representatives of McCain-Palin 2008, Inc. who were present at the meeting, about our concerns with the Hybrid Communications at issue here. An audio archive of the Commission's December 6, 2012, open meeting is available at www.fec.gov/agenda/2012/agenda20121206.shtml.

Statement of Reasons of Chair Weintraub and Commissioners Bauerly and Walther
Final Audit on McCain-Palin 2008, Inc. and McCain-Palin Compliance Fund, Inc.

A finding regarding Hybrid Communications should have been included in the PAR, which would have given McCain-Palin 2008, Inc. a chance to respond and the Commission the opportunity to give this issue the full consideration it deserves.

2/4/13
Date

Ellen L. Weintraub
Ellen L. Weintraub
Chair

2/1/2013
Date

Cynthia L. Bauerly
Cynthia L. Bauerly
Commissioner

2/1/13
Date

Steven T. Walther
Steven T. Walther
Commissioner

Hybrid Communications

Summary

The Republican National Committee spent \$30,749,009 on hybrid media ad communications related to the General election that were not applied to the coordinated spending limitation or the General Committee's spending limitation. Excessive in-kind contributions resulting from hybrid communications did not receive the four affirmative votes necessary for a finding in the audit reports of both 2004 general election candidates. Therefore, the following facts are provided for informational purposes only.

Legal Standard

A. Allocation of Expenses for Political Party Committee Phone Banks. Allocation of expenses for political party committee phone banks that refer to a clearly identified Federal candidate can be paid 50 percent by the Federal candidate and 50 percent by the national party with Federal funds subject to the limitations, restrictions and requirements of 11 CFR 109.32 and 109.33 without coordination if:

- (1) The communication refers to a clearly identified Federal candidate;
- (2) The communication does not refer to any other clearly identified Federal or non-Federal candidate;

- (3) The communication includes another reference that generically refers to other candidates of the Federal candidate's party without clearly identifying them;
- (4) The communication does not solicit a contribution, donation, or any other funds from any person; and
- (5) The phone bank is not exempt from the definition of "contribution" under 11 CFR 100.89 and is not exempt from the definition of "expenditure" under 11 CFR 100.149. 11 CFR §106.8.

B. Coordinated Party Expenditures in Presidential Elections.

- (1) The national committee of a political party may make coordinated party expenditures in connection with the general election campaign of any candidate for President of the United States affiliated with the party.
- (2) The coordinated party expenditures shall not exceed an amount equal to two cents multiplied by the voting age population of the United States, 11 CFR 110.18. This limitation shall be increased in accordance with 11 CFR 110.17.
- (3) The coordinated party expenditures shall be in addition to:
 - Any expenditure by a national committee of a political party serving as the principal campaign committee of a candidate for President of the United States; and
 - Any contribution by the national committee to the candidate permissible under 11 CFR 110.1 or 110.2.
- (4) Any coordinated party expenditures made by the national committee of a political party pursuant to paragraph (a) of this section or made by any other party committee under authority assigned by a national committee of a political party under 11 CFR 109.33, on behalf of that party's Presidential candidate shall not count against the candidate's expenditure limitations under 11 CFR 110.8. 11 CFR §109.32(a).

C. Expenditure Limitation for President. The national party committees have an expenditure limitation for their general election nominee for President. The formula used to calculate the Presidential expenditure limitation considers not only the price index but also the total state voting-age population (VAP) of the United States. The Department of Commerce also publishes the total VAP of the United States annually in the Federal Register. 11 CFR §110.18.

The formula used to calculate this expenditure is two cents multiplied by the total VAP of the United States (227,719,424), multiplied by the price index. Amounts are rounded to the nearest \$100. 2 U.S.C. §441a(d)(2) and 11 CFR §109.32(a). Based upon this formula, the expenditure limitation for 2008 Presidential nominees is \$19,151,200. Federal Register/Vol. 73, No. 31/Thursday, February 14, 2008/Notices.

Facts and Analysis

A. Facts

The Republican National Committee (RNC) spent \$30,749,009 on its share of media ads considered to be "hybrid communications." Such communications referenced Senator John McCain or his general election opponent, then-Senator Barack Obama, and made

references to one of the two major parties. These hybrid communications were paid 50/50 between the RNC and the General Committee. The General Committee's portion of the hybrid expenditures (50 percent) was applied to the spending limitation. The RNC's portion of the hybrid expenditures (50 percent) was not applied to its coordinated spending limit (2 U.S.C. §441a(d)).

National party committees each had a coordinated spending limit of \$19,151,200 for their respective 2008 general election candidates. As noted below, the RNC applied expenditures totaling \$18,834,336 toward its coordinated spending limit. Therefore, without applying any costs associated with hybrid communications, the RNC had \$316,864 remaining under the coordinated spending limitation for Senator McCain's presidential campaign.

441a(d) Coordinated Activity:

Media Ads	\$11,262,437
Calls/Surveys	\$1,559,472
Consultant Travel/Other	\$178,409
Printed Mailers/Postage	\$5,648,706
Campaign Accessories	\$135,048
Media Radio Buys	<u>\$50,264</u>
Total 441a(d) Coordinated	\$18,834,336

B. Spending Limitation Analysis

The General Committee accepted public funds of \$84,103,800 and therefore agreed to a spending limitation of the same amount. If the Commission were to consider the RNC's portion of hybrid communications as in-kind contributions to the General Committee by the RNC, then an excessive in-kind contribution totaling \$30,432,145 (\$30,749,009 - \$316,864) would result since the RNC had spent more than its 441a(d) limitation. The potential excessive amount received by the General Committee would be repayable to the U.S. Treasury. It is noted that possible excessive in-kind contributions resulting from hybrid communications did not receive the four affirmative votes necessary for a finding in the audit reports of both 2004 presidential candidates in the general election.