



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Draft Final Audit Report on Mississippi Republican Party (LRA 1077)

I. INTRODUCTION

The Audit Division has submitted for our review the Draft Final Audit Report (“DFAR”) for the Mississippi Republican Party. The DFAR has three findings: Misstatement of Financial Activity (Finding 1), Reporting of Debts and Obligations (Finding 2), and Reporting of Apparent Independent Expenditures (Finding 3). We comment on Finding 3, and otherwise agree with the DFAR. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 3).

Finding 3 discusses eight mailers and explains why each mailer contains express advocacy as this term is defined in 11 C.F.R. § 100.22. The Committee opposes this finding on several grounds and we address its arguments and provide further comments on certain aspects of the finding. First, we address the Committee’s general argument that the mailers cannot be classified as independent expenditures because they served a fundraising, rather than an

electoral, purpose. Second, we address the Committee's argument that the mailers do not contain express advocacy. We agree with the Audit Division's classification of all eight mailers as express advocacy communications. In several instances, however, we disagree whether a particular mailer contains express advocacy under section 100.22(a) or 100.22(b). We also recommend that the Audit Division include a ninth mailer in the DFAR because the mailer contains express advocacy. Finally, we discuss how the Committee's failure to file 24-hour reports of independent expenditures as required by 11 C.F.R. § 104.4(c) should be addressed in light of the evidence currently available to the Audit Division.

A. Communications Containing Express Advocacy are Independent Expenditures Regardless of Whether Their Primary Purpose is to Solicit Contributions.

The Committee argues that none of its disbursements for these communications should be classified as independent expenditures because its primary purpose for creating and disseminating communications was to raise funds for its operations and not to advocate the election or defeat of candidates. It states that any identification of candidates in the communications was incidental to this fundraising purpose. The Committee also argues that the communications' "calls to action" are solicitations of contributions or exhortations to register to vote, rather than explicit directives to vote for or against a clearly identified federal candidate. We disagree with the Committee's arguments.

Commission regulations define an "independent expenditure" as "an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . .". 11 C.F.R. § 100.16(a); *see also* 52 U.S.C. § 30101(17). On several occasions the Commission has concluded that a solicitation was an independent expenditure because it was a communication containing express advocacy even though the solicitation's purpose was to raise funds. *See, e.g.*, Final Audit Report on National Campaign Fund, at 9, 12-13 (approved Oct. 22, 2012); Final Audit Report on Legacy Committee Political Action Committee ("Legacy PAC"), at 8, 10 (approved Jul. 31, 2012); Final Audit Report on Freedom's Defense Fund, at 11-13 (Dec. 6, 2017) and Final Audit Report on Conservative Majority Fund, at 16, 18 (Dec. 6, 2017).¹ *See also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35294 (Jul. 6, 1995) ("exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy.")

B. The Communications Contain Express Advocacy as Defined in 11 C.F.R. § 100.22.

The Committee also argues that the mailers do not contain express advocacy and thus the cost of the mailers cannot be independent expenditures.

¹ These publicly available audit reports also belie the Committee's contention that it and similarly situated entities lacked adequate advance notice of the Commission's conclusion that a fundraising purpose does not immunize a communication otherwise containing express advocacy from classification as an independent expenditure.

Under Commission regulations, a communication expressly advocates the election or defeat of a clearly identified federal candidate if it uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One”, “Carter ‘76”, “Reagan/Bush” or “Mondale!” 11 C.F.R. § 100.22(a).

Under Commission regulations, a communication also constitutes express advocacy if, when taken as a whole and with limited reference to external events, such as the proximity to the election, it could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s), because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. § 100.22(b).

In the chart immediately below, we outline the Committee’s arguments respecting each of the mailers² and our view respecting the classification of the mailers as express advocacy under section 100.22.³

² The chart includes a ninth mailer not discussed in the DFAR, which possesses different content from that of the other eight mailers that are discussed in the report. We recommend that this ninth mailer be added to the discussion section of the DFAR. The Committee may then have the opportunity to contest the classification of this mailer should it wish to do so, and to argue that the cost attributable to the mailer should be subtracted from the overall amount of Finding 3, if it is able to separate the costs in this manner. It is our understanding that the cost of this ninth mailer is already incorporated into the overall cost of mailer 4 and that the Audit Division lacks a clear means for attributing a portion of the cost of mailer 4 to this ninth mailer. The Committee should be given an opportunity to show whether this is feasible.

³ The Committee argues that the Commission should disregard express advocacy conclusions based upon section 100.22(b) because certain Commissioners have in the past expressed skepticism regarding whether section 100.22(b) is a lawful criterion for finding that a communication contains express advocacy. *See, e.g., Statement of Reasons of Chairman Lee E. Goodman and Commissioners Caroline C. Hunter and Matthew S. Petersen in the matter of Checks and Balances for Economic Growth*, MUR 6729, at 3 n.14 (Oct. 24, 2014). Section 100.22(b) is, however, a valid regulation, which we are not at liberty to decline to apply.

Mailer	Committee's Argument(s)	OGC determination as 100.22(a) or (b)	Basis for OGC determination and Comments
1	The statement used for the determination merely identifies the Committee's goal and it should be read in the broader context of the letter's enumeration of issues.	(a)	<p>"We must elect a Republican as the 45th President of the United States"</p> <p>This statement is a direct exhortation to elect a Republican presidential candidate and is nearly identical to the phrase "re-elect your Congressman" in section 100.22(a). <i>Cf.</i> Advisory Opinion 2003-23 (WE LEAD) (Undetermined candidate "clearly identified" for earmarking purposes where specific office, party affiliation and election cycle identified. Definition of "earmarked" (11 C.F.R. § 110.6(b)(1)) and of express advocacy (11 C.F.R. § 100.22(a)) use phrase "clearly identified candidate", defined in 11 C.F.R. § 100.17.)</p>
2	The statement used for the determination used is a political statement lacking an electoral call to action.	(a)	<p>"If we unite to support Donald Trump, we still have a chance to save our country for the future"</p> <p>This statement urges the reader to "support Donald Trump", and therefore is express advocacy under section 100.22(a) ("support the Democratic nominee" is express advocacy).</p>
3	The statement used for the determination should be interpreted in the context of the observation that Obama-Clinton policies weakened the nation's world standing.	(a)	<p>"Stop Hillary!"; "STOP HILLARY from becoming President of the United States"; "support Donald Trump"</p> <p>The statement "stop Hillary" closely resembles the phrase "reject the incumbent" that constitutes express advocacy in section 100.22(a). "Support Donald Trump" also is nearly identical to the phrase "support the Democratic nominee" in section 100.22(a).</p>
4	This statement used for the determination is not express advocacy, but only a statement of how a contribution	(a)	<p>"... you can make a difference to support Donald Trump and stop Hillary Clinton from moving back into the White House"</p> <p>This statement urges the reader to "support Donald Trump" and "stop Hillary Clinton from moving back into the White House", and therefore qualifies as express advocacy under section 100.22(a) (phrases "support the Democratic nominee" and "reject the incumbent" are express advocacy).</p>

	would be used. The letter also calls upon the reader to register to vote.		
5	The statement used for the determination in no way constitutes electoral speech.	(b)	<p>“Donald Trump ... will nominate Supreme Court Justices who will protect the Constitution I’m asking you to please stand up in defense of the our Constitution by making a contribution today . . .”; “The Mississippi Republican Party has been hard at work not only to ensure that Donald Trump wins Mississippi by a wide margin, but also that he wins swing states such as Florida and Ohio”; Your generous contribution today will help keep Trump from losing the presidency. .”</p> <p>The mailing is express advocacy under section 100.22(b). It contains a clear, unmistakable and unambiguous reference to the upcoming presidential election in its first sentence, linking the election to the protection of constitutional rights. 100.22(b)(1). Reasonable minds could not differ about whether it encourages actions to elect Donald Trump, because only if Donald Trump were elected President would he be able to nominate Supreme Court justices committed to protecting the Constitution. The additional statements that the Committee is hard at work to ensure that the candidate wins certain states and that a contribution will help keep the candidate from being defeated is additional evidence of a call for electoral action. 100.22(b)(2).</p>
6	The statement used for the determination merely explains the Committee’s role and how it will use potential contributions.	(b)	<p>“I am asking you to please contribute \$100 to make sure that Donald Trump’s message of Making America Great Again can be delivered untainted by the media to undecided voters here in Mississippi and in key battleground states.”</p> <p>The mailer refers to the final presidential debate between the candidates and makes several unambiguous references to the election (“these final days before the election”; “as November 8th draws nearer”). . 100.22(b)(1). Further, while on its face the call to action is to help the candidate deliver a message free of media distortion, the message consists of the candidate’s campaign slogan and it is to be directed to undecided voters. Reasonable minds could not disagree, therefore, that the action involves helping to persuade undecided voters to elect the candidate. 100.22(b)(2).</p>
7	The statement used for the determination merely explains the Committee’s role and how it will use potential contributions.	(b)	<p>“The Mississippi Republican Party is working hard to make sure Republicans in Mississippi turn out to vote and send Donald Trump to a landslide victory here. And the Party is doing the same thing in the critical battleground state of Florida. . . Will you please contribute \$50, \$75, \$100 or more to enable our Party to do everything it can in these last days to turn out Republican voters in Mississippi and Florida?”</p> <p>This is express advocacy under section 100.22(b). The mailer contains a clear, unmistakable and unambiguous electoral portion, referring to “Our last chance to shape the outcome of this election”, and poses the question whether we will elect Donald Trump or Hillary Clinton. 100.22(b)(1). Further, the call to contribute is a call to help the party turn out voters who will send Donald Trump to a landslide victory;</p>

			reasonable minds could not disagree that this is a call for electoral action. 100.22(b)(2).
8	This mailing is styled as a presidential preference poll. The sentence “Here is the candidate I support as our Republican nominee for President” is the donor’s rather than the Committee’s.	(a)	<p>“We must elect a Republican President in 2016”</p> <p>This phrase is nearly identical to “re-elect your Congressman” in section 100.22(a). As in mailer #1, although the nominee is not named, the mailer clearly identifies a federal candidate by office, party affiliation and election cycle. AO 2003-23 (WE LEAD).</p>
9	[Not discussed in Interim Audit Report, therefore no Committee argument regarding it]	(b)	<p>“Recent polls suggest the presidential election is dead even and that’s good news for Donald Trump and Mike Pence as they build momentum to win the White House ... NOW is the time for a final surge in the momentum. Will you help make sure that happens?”</p> <p>The mailer contains a clear, unmistakable and unambiguous electoral portion, referring to the election’s being four weeks away, with time running out to make an impact on the outcome. 100.22(b)(1). The quoted statements ask the reader to help propel the candidates’ surge in momentum to win the White House. Reasonable people could therefore not disagree that this constitutes a call to help elect the candidates. 100.22(b)(2).</p>

C. The Conclusion of Finding 3 Respecting the Filing of 24-Hour Reports Should be Based Upon the Ship Date Appearing on the Invoice for each Mailer.

In addition to concluding that the Committee failed to report disbursements for the communications discussed above as independent expenditures, the DFAR also concludes that the Committee failed to file 24-hour reports of those expenditures that must be filed under 11 C.F.R. § 104.4(c). Political committees must report independent expenditures totaling \$1,000 or more that were made less than 20 days but more than 24 hours before an election on the day following the date on which the communication is publicly distributed or disseminated. 11 C.F.R.

§ 104.4(c). In this case, the Committee has not provided information regarding the dissemination or distribution dates of the mailers.

In the absence of the information on the dissemination date, we believe it is reasonable for the Audit Division to use the ship date that appears on the invoice to determine whether the Committee met the filing requirement for the mailer associated with that invoice.⁴ The DFAR, however, does not state that the Audit Division is using the ship date as the date of dissemination. We, therefore, recommend that the Audit Division revise the DFAR to indicate that the ship date appearing on the associated invoices is the basis for this conclusion.

⁴ The Committee has clarified that the ship date is the date on which its mail vendor delivered mailers to the post office.