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05/16/2012 12:28 PM

To aboniewicz@fec.gov, jmiller <jmiller@fec.gov>

cc Barry Garcia <barrettgarcia@hotmail.com>, alex Tomescu
<alex@wewerlacy.com>

bcc

Subject Final audit response - NCF

History:

📧 This message has been forwarded.

Dear Mr. Boniewicz:

We are not requesting a hearing on the Final Audit but we are submitted the attached letter supplemental to our prior letter in this matter. We will also send the attached by regular mail.

Thank you.

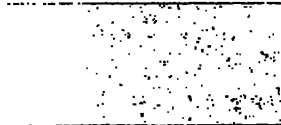
Sincerely,

James V. Lacy
Wewer & Lacy, LLP

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May 11, 2012

To: Tom Hintermister
Assistant Staff Director
Audit Division
Federal Election Commission
999 E Street, NW, Washington, D.C. 20463

Re: Response to Draft Final Audit Report on National Campaign Fund (LRA 847)

The National Campaign Fund ("The Committee") has received the Draft Final Audit Report of the Audit Division of the Office of General Counsel, and we would like to present this supplemental letter in response to the Memorandum. Initially, The Committee would like to express our strong opinion that The Committee demonstrated through clear and objective facts, and the Audit Division agreed, that The Committee's intention was to raise funds via direct-mail letters. Furthermore, The Committee continues to believe that the occasional inclusion of express advocacy language in fund-raising direct-mail letters should not automatically lead to a finding that the letters meet the definition of an independent expenditure. The communications were fund-raising letters and not intended to influence a vote, clearly evidenced by the fact that the letters were not timed to a particular election and sent only to those on donor lists.

The Committee found several objective markers that clearly indicate that the direct-mail letters were not independent expenditures. First, The Committee stated, and the Audit Division agreed, that the timing of all the mailings had no reference to the timing of primary elections during 2008. The timing of the distribution of the mailings makes this point abundantly clear. For comparison, the Internal Revenue Service Revenue Ruling 2004-6 applied a "facts and circumstances" test to determine whether a communication by a tax-exempt organization is subject to a penalty for engaging in political campaigns on behalf of or opposition to candidates for public or party office.

One of the factors considered under the "facts and circumstances" test is whether "the timing of the communication coincides with an electoral campaign". This, the ruling goes on to explain, is dependent on whether the timing of the communication coincides with a specific event outside the control of the organization that the organization hopes to influence. In the present controversy, The Committee has shown that the direct-mail letters were not timed to coincide with the primary election during 2008, and therefore could not have expressly advocated for the election or defeat of a clearly identified candidate. As such, the direct-mail letters sent out for the purpose of political fund-raising could not conceivably be considered an independent expenditure.

Another objective marker that The Committee put forth to demonstrate to the Audit Division that the communications did not meet the definition of an independent expenditure is that The Committee did not target voters in a particular election; rather, The Committee sought and obtained lists of proven donors to Republican and conservative causes, without regard to whether the lists had any propensity to vote, or were even registered voters. The facts demonstrate the intended audience for the direct-mail letters were selected for its fund-raising value, not its electoral value. Again, Revenue Ruling 2004-6 proves instructive in the type of communications that should not subject tax-exempt organizations to penalty.

One of the factors listed in the "facts and circumstances" test is whether the communication "targets voters in a particular election". Already, The Committee has clearly shown that no recipient of the communication was targeted "in a particular election". Furthermore, Revenue Ruling 2004-6 states that the tax-exempt organization is prohibited from an advocacy communication that identifies a candidate in an election, appearing shortly before that election, "and targets the voters in that election". The Committee has proven, and no contrary finding of fact contradicts, that The Committee obtained lists of proven donors, not voter lists, to serve as the audience for the communications.

The Committee strongly believes that direct-mail fund-raising letters, sent with no regard to the timing of the primary elections of 2008, to an audience sought out only for its fund-raising value, cannot be interpreted as "a communication expressly advocating the election or defeat of a clearly identified candidate", as an independent expenditure is defined. The Audit Division

does not dispute that The Committee's intention was to raise funds, yet the FEC staff states that "express advocacy language" exists in the communications and the regulation does not exclude direct-mail fund-raising letters from the definition of independent expenditure, so the letters must be independent expenditures. However, The Committee has shown, with no contrary statement from the Audit Division, that the letters were not timed to any particular election, nor were the letters targeted to voters in a particular election. It logically follows that there is no express advocacy in favor of or in opposition to a candidate, since the letters are sent to donors with no consideration to the timing of an election.

The Committee urges the Commission to discount the conclusions of the Audit Division of the General Counsel's office that our legal position is that you just need trust our "subjective intent" that the direct-mail fund raising letters are not independent expenditures. To the contrary, the facts objectively establish, consistent with the markers published and recognized by a another Federal agency under a different statute, the Internal Revenue Service no less, that The Committee has presented facts and reasoning which clearly show the communications to be what they are: direct-mail letters sent to proven donors to Republican and conservative causes for the express purpose of fund-raising, and not independent expenditure election activity. The Commission should so find.

Sincerely,



James V. Lacy

For The National Campaign Fund