



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Interim Audit Report on the Conservative Campaign Committee (LRA 996)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Interim Audit Report ("IAR") on the Conservative Campaign Committee ("Committee"). The IAR contains one finding: Failure to File Notices and Properly Disclose Independent Expenditures. Our comments address this finding. If you have any questions, please contact Danita C. Alberico, the attorney assigned to this audit.

II. FAILURE TO FILE NOTICES AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES¹

A. Reporting of Independent Expenditures Section

The Audit staff identified 173 media-related disbursements, totaling \$652,034, which Audit determined should have been reported as independent expenditures. The Committee disclosed these expenditures as operating expenditures. The audit report places these expenditures into two main categories of independent expenditures: 1) independent expenditures supported by the underlying communications and 2) independent expenditures for which no underlying communications were provided by the Committee.

For the independent expenditures supported by the underlying communications, the auditors identified 39 disbursements totaling \$294,036, for which the Committee provided a copy of the communication, invoices, television and radio advertisements, blast emails, and additional supporting documentation. The Audit staff concludes that the communications contained language expressly advocating the election or defeat of a clearly identified candidate under 11 C.F.R. § 100.22(a) because the communications included statements such as "Defeat Obama Tele-thon" and "We're going to stop Barack Obama from getting Wisconsin's 10 Electoral Votes." The IAR, therefore, concludes that these disbursements should have been disclosed as independent expenditures rather than operating expenditures. We reviewed the communications and concur with Audit staff that the disbursements should have been reported as independent expenditures because they contained express advocacy.

For the independent expenditures for which no underlying communications were provided, the auditors identified 134 media-related disbursements totaling \$357,998. Since the communications were not available for the auditors to review, the Audit staff reviewed other available documentation such as the Committee's reconciled disbursements database, invoices and bank statements. The auditors conclude that, in the absence of documentation demonstrating that the disbursements did not require reporting as independent expenditures, the Committee should amend its reports to disclose the disbursements as independent expenditures on Schedule E and submit revised procedures for reporting independent expenditures.

The auditors believe that the disbursements may be independent expenditures based on information they reviewed from the Committee's disbursement database, invoices, and bank statements. The auditors grouped the finding for the 134 media-related disbursements into three categories. In the first category, "Details on Invoice," the auditors inferred that 29 disbursements totaling \$166,825 were for communications containing express advocacy based on details listed on invoices provided by the Committee. For example, one invoice shows that the vendor calculated its charges for services based on the amount of funds raised by the Committee from a

¹ Before proceeding with our principal comments, we have a brief, ancillary comment relating to the presentation of this finding to the Committee. We recommend that the Audit Division furnish to the Committee, along with the IAR, lists or charts specifically identifying the advertisements the auditors believe may be independent expenditures so that the Committee may provide a fully informed response.

communication listing the name of a candidate. The auditors believe that the communication contained express advocacy because the invoice included the name of a Federal candidate. In the second category, "Use of Common Independent Expenditure Vendor (**with invoice**)," the auditors addressed 104 disbursements totaling \$186,498. In this category, the auditors surmised that disbursements were for independent expenditures because the Committee previously made payments to the same vendors for other communications containing express advocacy as verified by copies of the related communications. In the third category, "Use of Common Independent Expenditure Vendor (**without invoice**)," the auditors addressed one disbursement totaling \$4,675. In this category, the auditors considered the disbursement to be an independent expenditure because the vendor also provided other communications that the Committee reported as independent expenditures.

We believe, however, that more information is needed to support a finding that the disbursements meet the requirements to be considered independent expenditures.

To be an independent expenditure, the communication must expressly advocate the election or defeat of a clearly identified candidate and must not be made in concert or cooperation with or at the request or suggestion of that candidate, the candidate's authorized political committee, their agents, or a political party committee or its agents. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a). A candidate is clearly identified in a communication when the name of the candidate involved appears; a photograph or drawing of the candidate appears; or the identity of the candidate is apparent by unambiguous reference. 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

A communication can expressly advocate the election or defeat of a candidate in two ways. First, a communication expressly advocates the election or defeat of a clearly identified candidate when 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).

Second, a communication may contain 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).

With these standards in mind, we do not believe that Audit staff may infer that disbursements were for independent expenditures solely on the basis of invoice descriptions or the use of common vendors.² Since the communications are not available, it is difficult to determine whether they contain express advocacy. The information contained in invoices, generally, may not be adequate because invoices are not typically created for purposes of conveying the content of communications. Rather, invoices usually contain brief descriptors that are sufficient for both a vendor to identify the service provided and a committee to confirm that it is receiving the service for which it contracted prior to making payment. Similarly, although the auditors found that disbursements were made to some of the same vendors who had previously been paid by the Committee for prior communications containing express advocacy, its conclusion that these additional communications from the same vendors therefore contain express advocacy cannot be supported since it is possible that the same vendor provided services for communications that did not, in fact, contain express advocacy and thus were not independent expenditures. Given the difficulty of analyzing whether a communication contains express advocacy when the communication is available, we conclude descriptive information contained in an invoice, database, or bank statement or the use of a common vendor is too tangential to support a finding that express advocacy exists absent a copy of the underlying communication or other more descriptive documentation than that relied upon by Audit staff here.

We acknowledge, however, that there are instances where drawing inferences is appropriate. For example, in the allocation context, we believe that Audit staff may infer that certain types of ordinary overhead expenses such as postage, consulting, travel reimbursements, printing, and accounting fees are allocable absent information demonstrating that the expenses are solely non-federal. *See* Legal Analysis Memorandum to the Audit Division, "Interim Audit Report on the Maine Republican Party" (LRA 817) (Dec. 17, 2010). This type of adverse inference can be supported because the Commission, through the regulatory process, has already determined that administrative expenses of this type are, in fact, allocable absent a demonstration otherwise. There has been no such regulatory guidance by the Commission here. Audit staff also may use adverse inferences where a committee's internal records specifically identify the type of expenditure though its reports disclose the expenditure differently. *See id.* (Audit staff may conclude that printed material costs that the committee coded in its internal records as Federal election activity ["FEA"] but reported as operating expenses represents potential FEA while giving the committee an opportunity to clarify the discrepancy). Such discrepancies, however, do not exist here.

² We understand that Audit staff is relying on informal guidance that we provided in the audit of the [REDACTED], as the basis for its undocumented expenditure analysis in the current IAR and its conclusion that these disbursements may be independent expenditures. In the [REDACTED] matter, we recommended that the Audit Division treat certain disbursements as independent expenditures in the interim audit report and invite the [REDACTED] to respond to the report. *See* [REDACTED]. However, we made this recommendation with respect to actual communications that appeared to contain express advocacy, but about which we were hesitant to reach a definitive conclusion because the [REDACTED] had not yet explained its legal and factual bases for dividing its communications into independent and operating expenditures in the manner that it did. *Id.* Thus, this guidance would not apply to disbursements where no communications are available to assess.

To address the lack of information at this stage of the audit, we recommend that the 134 media-related disbursements totaling \$357,998 for which no underlying communication was provided should not be categorized as independent expenditures. Instead, the disbursements should be treated as a separate category of expenditures for which the Committee has not provided sufficient documentation to verify its disclosure reports. When a committee reports financial activity, the Commission requires the committee to maintain records with respect to that activity. 11 C.F.R. § 104.14(b)(1). These records must provide, in sufficient detail, the necessary information and data from which the filed reports may be verified, explained, clarified, and checked for accuracy and completeness. *Id.* In the absence of this information, the auditors are unable to verify whether the Committee correctly reported its disbursements as operating expenditures or whether they should have been disclosed as independent expenditures. Thus, the Committee should be given the opportunity to provide copies of the communications, additional documentation, or other information and/or to explain any discrepancies in its reporting. In the alternative, the Audit staff may request the Commission to issue a subpoena for copies of the communications at issue or other documents the auditors believe may enable it to verify the Committee's reporting of these disbursements as operating expenditures.

**B. Failure to File 24/48 Hour Reports for Independent Expenditures Section -
Absence of Dissemination Date Information**

Finally, we comment briefly on the portion of the finding that discusses the Committee's apparent failure to file certain 24-hour and 48-hour reports of independent expenditures in a timely fashion. The IAR notes that for certain communications the actual dates of dissemination were not known and that in such cases, the Audit staff used either the date of the invoice or the date of the incurrence of the expense for the independent expenditure as the date of public dissemination for the purpose of conducting its analysis. IAR, at 8, n.6. In subsequent discussion with the Audit staff, the auditors indicated that they selected alternate dates [REDACTED]. In the absence of the dissemination date, we believe that the auditors may permissibly use an alternate date, [REDACTED]. Use of an alternate date enables Audit staff to complete the audit based on the available information. We recommend, however, that the Audit Division revise this aspect of the finding and specify the instances where an alternate date is used and give the Committee the opportunity to provide information on the actual dissemination date.