



**FEDERAL ELECTION COMMISSION**  
WASHINGTON, D.C. 20463

**Pursuant to Directive 69, the Office of Compliance and the Office of General Counsel submitted a memorandum to the Commission dated July 26, 2010 seeking guidance as to whether certain advertisements broadcast by the audited committee contained express advocacy and were therefore independent expenditures. Because the Commission was unable to resolve the issue within 60 days of the memo, the Office of Compliance, pursuant to Directive 69, proceeded with the matter. The interim audit report is consistent with the analysis in the Directive 69 memo.**



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MEMORANDUM

**SENSITIVE**

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**SUBJECT:** Draft Interim Audit Report on Freedom's Defense Fund (LRA 810)

Pursuant to Directive 69, the Office of Compliance ("OC") and the Office of General Counsel ("OGC") seek the Commission's guidance on issues arising in the audit of Freedom's

Defense Fund, a nonconnected political committee. The Audit Division has submitted a draft Interim Audit Report ("draft IAR") to OGC for comments. The draft IAR has one finding: Disclosure of Independent Expenditures. This finding presents an issue as to whether six advertisements expressly advocate the election or defeat of clearly identified candidates.<sup>1</sup> After OGC reviewed the draft IAR, GGC and OC determined that the text of some of the advertisements, particularly the "Obama's Friends" series of ads, may present close questions. Accordingly, OGC and OC seek the Commission's guidance.

We recommend that the Commission conclude that one of the advertisements contains express advocacy. This will mean that disbursements for the advertisement should have been reported as independent expenditures. However, we recommend that the Commission conclude that the remaining five ads do not constitute express advocacy, and therefore did not have to be reported as independent expenditures.

## **I. STATEMENT OF THE ISSUE: WHETHER ADS CONSTITUTED INDEPENDENT EXPENDITURES**

There are six ads at issue. The Committee reported most disbursements relating to these ads as operating expenditures instead of independent expenditures.<sup>2</sup> To be an independent expenditure, the ad must expressly advocate the election or defeat of a clearly identified candidate. 2 U.S.C. § 431(17). All of the disbursements were made with federal funds, and the auditors have not indicated that there is any evidence that any of the ads were coordinated with any candidate, candidate's committee, or party committee. Accordingly, at issue is whether the Committee reported these expenditures properly and whether it should have filed 24-hour and 48-hour notices, which it did not.

### **A. "Murtha" Ad Contains Express Advocacy and Should Have Been Reported As an Independent Expenditure.**

The "Murtha" ad begins with a narrator's declaration that "Barack Obama and Jack Murtha have little respect for the people of Western Pennsylvania." It then contains audio clips of Obama and U.S. Representative John P. "Jack" Murtha ("Murtha") making negative statements about Western Pennsylvanians. Murtha is heard saying: "There's no question that Western Pennsylvania is a racist area," and Obama is heard saying that Pennsylvanians "get bitter and cling to guns and religion." Next, while the text on the screen says "MURTHA AND OBAMA DON'T REPRESENT OUR VALUES," the narrator says "On election day, tell Jack Murtha and Barack Obama what we think of them." The narrator ends with the statement "Vote

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<sup>1</sup> Video files of the advertisements are in Voting Ballot Matters.

<sup>2</sup> The Committee reported \$229,924 in media disbursements as operating expenditures. The Committee reported \$19,001 in media disbursements for one of the ads -- which did not constitute all reported disbursements related to the ad, *infra* n. 3 -- as independent expenditures, but the Committee did not provide the auditors with documentation for these expenditures. Additionally, the Committee has not provided documentation for \$37,499 in additional media expenditures.

Republican" while a picture of the Republican presidential ticket (John McCain and Sarah Palin) appears, and the text on the screen says "VOTE REPUBLICAN TUESDAY, NOVEMBER 4TH."

An ad satisfies the requirements for express advocacy pursuant to the Commission's regulations at 11 C.F.R. § 100.22(a), if it uses phrases such as "vote for the President," "vote against Old Hickory" or "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent," or contains campaign slogans or individual words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)". 11 C.F.R. § 100.22(a); See *Buckley v. Valeo*, 424 U.S. 1, 44 n. 52 (1976); see also *FEC v. Massachusetts Citizens for Life Inc. ("MCFL")* 479 U.S. 238, 249 (1986). An ad also satisfies the requirements for express advocacy pursuant to section 100.22(a) if it "is marginally less direct than 'Vote for Smith,' [which] does not change its essential nature." *FEC v. MCFL*, 479 U.S. 238, 249 (1986).

The "Murtha" ad satisfies the requirements of express advocacy pursuant to section 100.22(a). First, it expressly advocates the election of McCain and Palin. Much like the brochure at issue in *MCFL*, which urged voters to "Vote Pro-Life" and "identifie[d] and provide[d] photographs of specific candidates" who were pro-life, 479 U.S. at 249, the advertisement here urges the viewer to "Vote Republican" at the same time that it displays under that text the pictures of McCain and Palin. "[I]t provides in effect a specific directive: vote for these [pictured] candidates. The fact that this message is marginally less direct than 'Vote for Smith' does not change its essential nature." *Id.* Taken in context, the ad can have no other reasonable meaning than to urge the election of the clearly identified Republican presidential and vice presidential candidates whose images appear behind the superimposed phrase, "Vote Republican." We, therefore, conclude that this ad expressly advocates the election of McCain and Palin. For this reason alone, disbursements made relating to this ad should have been reported by the Committee as independent expenditures.

The "Murtha" ad also expressly advocates the defeat of Murtha (and, for that matter, Obama). After asserting that Murtha and Obama "have little respect for the people of Western Pennsylvania" and playing audio clips in support of that assertion, the narrator says: "On election day, tell Jack Murtha and Barack Obama what we think of them." It then immediately tells the viewer how to do that: the narrator says, "Vote Republican" and the text on the screen says "Vote Republican on Tuesday, November 4." Taken in context, the ad can have no other reasonable meaning than to urge the defeat of Murtha and Obama; the only specified method the viewer is given for telling Obama and Murtha "what we think of them" is to do so "on election day" by voting Republican, which necessarily would include voting against both Murtha and Obama. We, therefore, conclude that this ad expressly advocates the defeat of Murtha and Obama within the meaning of 11 C.F.R. § 100.22(a).

This advertisement also contains express advocacy within the meaning of 11 C.F.R. § 100.22(b). An advertisement satisfies the requirements for express advocacy pursuant to the Commission's regulations at 11 C.F.R. § 100.22(b) 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 of the election or defeat of one or more clearly identified candidates because (1) the electoral portion 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 the clearly identified candidates or encourages some other kind of action. Here, there is a specific reference to what the viewer should do "on election day," so the electoral portion is unmistakable, unambiguous, and suggestive of only one meaning. Moreover, because voters are told to "Vote Republican" while the video shows a picture of McCain and Palin, and because they are told that doing so is the way to "tell Jack Murtha and Barack Obama what we think of them," there is no doubt as to the action the viewer is urged to take.

For these reasons, the costs of the "Murtha" ad should have been reported as independent expenditures and the appropriate 24- and 48-hour notices should have been filed.<sup>3</sup> Further, we conclude that because the advertisement contained express advocacy of the election or defeat of candidates in two separate Federal elections, the Committee should have "allocate[d] the independent expenditures among the different races, based on a time or space analysis" pursuant to 11 C.F.R. § 106.1(a). AO 2010-10 (NRL PAC). The transaction should be reported on FEC Form 3X, Schedule E, with appropriate memo entries naming the federal candidates supported or opposed by the expenditure. *Id.*

**B. The "Friends" Ads Do Not Contain Express Advocacy, and Therefore the Committee Was Not Required to Report Disbursements For Them as Independent Expenditures**

We reach a different conclusion with respect to the five remaining ads. We conclude that these ads do not contain express advocacy.

The committee ran a series of ads in close proximity to the 2008 presidential election that criticized certain alleged associations of Barack Obama. Typical was the following:

(with the superimposed text, "BILL AYERS radical terrorist." followed by "AYERS' TERRORIST BOMBINGS;" a quote from a news article, "OBAMA'S RELATIONSHIP WITH AYERS A VIVID MILEPOST"; and finally, "[Y]ou should know who Barack Obama's friends are.")

Meet Bill Ayers, founder of a radical terrorist organization. Ayers was responsible for bombings in New York City, at the Pentagon, and in the United States Capitol. Ayers is a friend and ally of Barack Obama. He even launched Barack Obama's state senate campaign from his own home. You should know who Barack Obama's friends are. Freedom's Defense Fund is responsible for the content of this advertising.

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<sup>3</sup> The Committee reported \$60,397 of expenditures related to this ad as operating expenditures, and an additional \$19,001 of expenditures as independent expenditures. When the auditors asked the Committee treasurer why some of these expenditures were reported as operating expenditures and some as independent expenditures, the treasurer indicated that he had been told that the ads did not expressly advocate the election or defeat of a candidate, and that he did not know why the \$19,001 was reported as independent expenditures.

Other advertisements with virtually the same format linked Obama to Raila Odinga, identified as "the Communist leader of Kenya;" Tony Rezko, identified as "convicted of bribery, money laundering, and 12 counts of mail and wire fraud;" and the Rev. Jeremiah Wright, quoted as saying "not God bless America, but God damn America." An additional advertisement with a somewhat different format showed a clip of Obama speaking in which Obama praises Detroit Mayor Kwame Kilpatrick, while scrolling superimposed on the image is a list of crimes and misdeeds supposedly attributable to Kilpatrick. Each advertisement contains either the written or spoken exhortation (or both), "You should know who Barack Obama's friends are." None contain any other exhortation of any sort.

Nothing in these ads would constitute express advocacy under 11 C.F.R. § 100.22(a). We, therefore, turn to section § 100.22(b).

The ads contain some elements of express advocacy under Section 100.22(b). In particular, they attempt to attack Obama's character by alluding to negative acts or statements by persons identified as Obama's "friends." See *Explanation and Justification, Expressly Advocating*, 60 Fed. Reg. 35295 (July 6, 1995) (Communications discussing or commenting on a candidate's character, qualifications, or accomplishments can be considered express advocacy, under certain circumstances). The ads make an unambiguous reference to Obama's judgment by negatively describing people with whom he allegedly had a significant connection or relationship. According to one of the ads, Obama looked to "Bill Ayers, Radical Terrorist," for support in a campaign for state Senate. Another ad asserted that Obama received significant campaign contributions that were raised by Tony Rezko, who, according to the ad, was convicted of bribery, money laundering, and twelve counts of mail and wire fraud, and who faced a life sentence. Similarly, in another ad, Obama makes a speech praising Mayor Kilpatrick, who is shown in a photograph while various criminal charges roll down the screen. In another ad, Obama is alleged to have campaigned for Raila Odinga, described in the ad as a Communist leader. And finally, another ad depicts Reverend Jeremiah Wright, who, according to the ad, says the following about America: "God Damn America...." Further, according to that ad, Reverend Wright was Obama's pastor for 20 years, performed Obama's marriage ceremony and baptized Obama's children. The ads then state that "You should know who Obama's friends are." Thus, Obama is linked, negatively, to those with whom he associated.

Because these ads are intended to link Obama negatively with the persons depicted in the ads, they attempt to attack Obama's own character by depicting the assertedly bad actors that he has chosen as his "friends."

However, these advertisements are not express advocacy because they do not contain an electoral portion that is "unmistakable, unambiguous, and suggestive of only one meaning," and with one possible exception they do not contain any electoral portion at all. There is not an allusive reference to the office Obama seeks or to character traits or duties associated with it. Compare MURs 5511 and 5525 (Swift Boat Veterans and POW's for Truth), Conciliation Agreement para. 15 (ads expressly advocated defeat of Democratic presidential nominee John Kerry when they stated Kerry "lacks the ability to lead," "cannot be trusted," and "gave [aid] and comfort to the enemy.") The closest any of the advertisements come to containing an electoral portion is the Rezko advertisement. That ad refers to Rezko as a campaign donor and fundraiser.

including the text "life in prison for Obama's fundraiser." without explaining that Rezko's activity was in connection with elections earlier in Obama's career rather than the presidential election. But even that advertisement, like all of the others in this group, urges the viewer to do no more than "know who Barack Obama's friends are." There is no explanation as to why this information is important or what the viewer is supposed to do with it. The ads do not reference the fact that Obama is a candidate. Because the ads neither contain an electoral portion nor urge the viewer to do more than "know who Barack Obama's friends are," they do not contain express advocacy as defined in section 100.22(b). We, therefore, conclude that disbursements for these ads were not required to be reported as independent expenditures. 2 U.S.C. § 431(17).

## II. RECOMMENDATION

We recommend that the Commission conclude that the "Murtha" advertisement contains express advocacy, and thus disbursements for the advertisement should have been reported as independent expenditures. However, we recommend that the Commission conclude that the remaining five Obama "friends" advertisements do not constitute express advocacy, and therefore would not support a finding that committee should have reported them as independent expenditures.