



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 2, 2012

**MEMORANDUM**

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**SUBJECT:** Draft Final Audit Report on National Campaign Fund (LRA 847)

**I. INTRODUCTION**

The Office of General Counsel ("OGC") has reviewed the Draft Final Audit Report ("Proposed Report") on The National Campaign Fund ("NCF"), and we concur with Finding 1 (Misstatement of Financial Activity) and Finding 2 (Failure to File Notices and Properly Disclose Independent Expenditures). We discuss Finding 2 below. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

**II. FINDING 2 (FAILURE TO FILE NOTICES AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES)**

In our analysis of the Draft Interim Audit Report ("IAR"), we concluded that fundraising letters can be independent expenditures as a matter of law, so long as the underlying communication meets the definition of express advocacy.

We reach the same conclusion here. Contrary to NCF's position, the regulation defining express advocacy does not permit an examination of the speaker's intent when making the communication. We believe a test that incorporates the speaker's subjective intent would not be workable.

#### **A. BACKGROUND**

NCF made expenditures for direct mail and electronic mail communications that included fundraising requests. Many of these communications included express advocacy. On its April 2008 Quarterly Report, NCF originally reported these types of expenditures as operating expenditures. NCF, however, amended that report to disclose such communications as independent expenditures, and NCF's subsequent reports also disclosed such communications as independent expenditures. NCF ultimately disclosed, in aggregate, approximately \$1.55 million in communications as independent expenditures on Schedule E of its reports, and it filed 24/48-hour notices.

The Audit Division's review determined that many of the communications disclosed as independent expenditures in these reports contained express advocacy, and indeed should have been disclosed as independent expenditures on Schedule E of NCF's reports. It also determined that many of these independent expenditures required 24/48 hour notices. The Audit Division also determined, however, that communications on which NCF spent approximately \$290,000 did not, in fact, contain express advocacy, and thus were not independent expenditures. The Audit Division's review also revealed that for the communications that were independent expenditures, NCF reported them and determined whether 24 or 48 hour notices were required based on when the invoices were paid, rather than when the communications were disseminated.

The IAR recommended that NCF provide evidence demonstrating that the disbursements identified by the Audit Division were not independent expenditures and therefore would not require 24/48-hour notices. It also recommended that NCF submit and implement revised procedures for reporting independent expenditures and tracking dissemination dates for independent expenditures to ensure timely filing of 24/48-hour notices.

NCF responded to the IAR by acknowledging that some of the communications contained express advocacy. NCF asserts, however, that it "never intended to engage in any independent expenditures," that these "communications were all just fundraising letters sent to proven donors with no consideration at all to whether the recipient was even a voter," that the timing of the letters "had absolutely no reference to the timing of primary elections during 2008," and the content of the letters "did not urge the recipient audience to vote for any particular candidate." NCF Response, February 27, 2012.

The DFAR states that because a number of the communications meet the definition of independent expenditure and the regulation does not exclude direct mail

fundraising letters from the definition, the Audit Division believes that NCF's assertion that those are not independent expenditures is not supported by the evidence.

**B. FUNDRAISING COMMUNICATIONS AS INDEPENDENT EXPENDITURES**

The Commission has found that fundraising solicitations containing express advocacy should be reported as independent expenditures. In MUR 5809, the Christian Voter Project ("CVP") failed to file independent expenditure notices for the costs of fundraising letters that expressly advocated the election/defeat of candidates. The Commission found reason to believe that CVP's failure to file independent expenditure notices violated the Act, and accepted a nonconciliation agreement with the committee based on that violation. In MUR 5518 (Hawaii Democratic Party), a party communication contained at least three messages: an invitation to precinct meetings, express advocacy of the defeat of a clearly identified Federal candidate, and a fundraising appeal. The Office of General Counsel concluded the communication should have been reported either as an independent expenditure or as federal election activity, and recommended that the Commission find reason to believe. The Commission rejected our recommendation, *not* on grounds that solicitations could not be independent expenditures but on grounds that invitations to precinct meetings permitted treatment as a federal/non-federal allocated administrative expense under the exception to the definition of federal election activity for costs of local political conventions, 2 U.S.C. § 431(20)(B)(iii). In particular, Commissioners von Spakovsky and Weintraub stated in their Statement of Reasons that "had this invitation been mailed more broadly than it was, and in sufficient numbers to raise questions about whether it was a bona fide invitation, or if it was really just a fundraising or advocacy piece masquerading as an invitation, this would be a different case." MUR 5518 (Hawaii Democratic Party), Statement of Reasons of Commissioners Hans A. von Spakovsky and Ellen L. Weintraub, at 3 (Feb. 23, 2007); *cf.* MURs 5511 and 5525 (Swift Boat Veterans for Truth) (fundraising solicitations containing express advocacy were expenditures that counted towards organization's threshold for political committee status).<sup>1</sup>

**C. AUDIT DIVISION SHOULD FOLLOW COMMISSION APPROACH IN PENDING AUDIT**

We previously have analyzed Finding 2 (Failure to File Notices and Properly Disclose Independent Expenditures) in legal comments on the IAR dated June 17, 2011, and supplemental legal comments on the IAR, dated November 10, 2011. The same issue is pending in another audit, which is currently before the Commission. NCF here has made essentially the same argument as another committee made in response to the IAR in that other audit, even using in a number of instances the same phrases. The ugly

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<sup>1</sup> Some Commissioners have expressed concerns, in other pending matters, about the extent to which fundraising letters necessarily constitute express advocacy.

substantive difference is that NCF adds that the communications were not independent expenditures because the communications "in no way [advocated] the election or defeat of a clearly identified candidate." Notwithstanding that argument, we note that a number of the communications contained phrases, either in their principal text or on their envelopes, that contained phrases such as "Now is the time to elect John McCain President of the United States."

Essentially, NCF's argument as we understand it is this: fundraising communications should never be considered independent expenditures, even if the communications contain express advocacy under 11 C.F.R. § 100.22(a) (for example, "Vote for Jones"), so long as the communicator's subjective intent was not to make an independent expenditure. We addressed that argument at greater length in our comments to the draft DFAR in the other audit, and we refer you to those comments. The principal points we made there were that fundraising communications can be independent expenditures if they contain express advocacy, and that express advocacy analysis, for a number of reasons, does not provide for consideration of the speaker's subjective intent.

However, we note that the Audit Division Recommendation Memorandum in that other audit is anticipated to be considered by the Commission in the very near future. Assuming that the Commission completes action on that audit as soon as we anticipate, and assuming that the Commission is able to resolve this issue in that other audit by a four-vote majority, we would recommend that the Audit Division then make any revisions to the DFAR in this audit that might be necessary to be consistent with the approach taken by the Commission in that other audit.