



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 19, 2006

SECRETARIAT  
2006 JUL 19 P 3:11

**MEMORANDUM**

**TO:** The Commissioners

**THROUGH:** Patrina M. Clark  
Staff Director *PMC*

Robert J. Costa  
Deputy Staff Director

**FROM:** Joseph F. Stoltz *JFS*  
Assistant Staff Director  
Audit Division

Alex R. Boniewicz *AB*  
Audit Manager

Kendrick Smith *KS*  
Lead Auditor

**SUBJECT:** Final Audit Report – 2004 Democratic National Convention Committee, Inc.  
(DNCC)

**AGENDA ITEM**  
**For Meeting of: 08-03-06**

Attached for your approval is the subject final audit report. Also attached are DNCC's response to the preliminary audit report and the legal analysis prepared by the Office of General Counsel. The Audit Division and the Counsel's office are in agreement with respect to the contents of this report.

**Recommendation**

It is requested that this matter be placed on the next regularly scheduled Open Session agenda. If you have any questions, please contact Kendrick Smith or Alex R. Boniewicz at extension 1200.

Attachments:

Report of the Audit Division on 2004 Democratic National Convention Committee, Inc.  
Response to Preliminary Audit Report  
OGC's Legal Analysis, dated July 14, 2006



# Report of the Audit Division on the 2004 Democratic National Convention Committee, Inc.

September 30, 2002 – December 31, 2004

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## Why the Audit Was Done

Federal law requires the Commission to audit the national committee of a party who receives payments for presidential nominating conventions.<sup>1</sup> The audit examines the receipt and use federal funds and whether the committee otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

## Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

## About the Committee (p. 2)

The 2004 Democratic National Convention Committee, Inc. (DNCC) was responsible for the day to day arrangements and operations of the Democratic Presidential nominating convention. The DNCC is headquartered in Washington, DC. For more information, see chart on the Committee Organization, p. 2.

## Financial Activity (p. 2)

|                                      |                      |
|--------------------------------------|----------------------|
| • <b>Receipts</b>                    |                      |
| ○ Federal Funds                      | \$ 14,924,000        |
| ○ Loans Received                     | 753,214              |
| ○ Offsets to Convention Expenditures | 197,721              |
| ○ <b>Total Receipts</b>              | <b>\$ 15,874,935</b> |
| • <b>Disbursements</b>               |                      |
| ○ Convention Expenditures            | \$ 15,097,469        |
| ○ Loan Repayments                    | 753,214              |
| ○ <b>Total Disbursements</b>         | <b>\$ 15,850,683</b> |

## Findings and Recommendations (p. 3)

- Net Outstanding Convention Expenses - Surplus (Finding 1)
- Receipt of an Impermissible Contribution (Finding 2)
- Inadequate Disclosure – Statement of Organization (Finding 3)

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<sup>1</sup> 26 U.S.C. §9008(g).

# **Report of the Audit Division on the 2004 Democratic National Convention Committee, Inc.**

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September 30, 2002 – December 31, 2004



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# **Part I**

## **Background**

### **Authority for Audit**

This report is based on an audit of the 2004 Democratic National Convention Committee, Inc. (DNCC), undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9008(g) of Title 26 of the United States Code. That section directs the Commission to conduct an examination and audit of the payments for presidential nominating conventions no later than December 31 of the calendar year in which the presidential nomination convention is held.

### **Scope of Audit**

This audit examined:

1. The disclosure of receipts and loans.
2. The disclosure of disbursements, debts and obligations.
3. The recordkeeping process and completeness of records.
4. The consistency between reported figures and bank records.
5. The accuracy of the Statement of Net Outstanding Convention Expenses.
6. The committee's compliance with requirements concerning expenditures for convention expenses.
7. Other committee operations necessary to the review.

### **Inventory of Committee Records**

The Audit staff routinely conducts an inventory of committee records before it begins the audit fieldwork. The DNCC records were materially complete and the fieldwork began immediately.

## Part II

### Overview of Committee

#### Committee Organization

|  |  |
|--|--|
| <b>Important Dates</b>   | DNCC                                   |
| • Date of Registration   | August 16, 2002                        |
| • Audit Coverage   | September 30, 2002 – December 31, 2004 |
| <b>Headquarters</b>  | Washington, DC                         |
| <b>Bank Information</b>  |  |
| • Bank Depositories  | Five                                   |
| • Bank Accounts  | Seven Checking Accounts                |
| <b>Treasurer</b>   |  |
| • Treasurer When Audit Was Conducted                           | Andrew Tobias                          |
| • Treasurer During Period Covered by Audit                     | Andrew Tobias                          |
| <b>Management Information</b>                                  |  |
| • Attended FEC Campaign Finance Seminar                        | No                                     |
| • Used Commonly Available Campaign Management Software Package | Yes                                    |
| • Who Handled Accounting and Recordkeeping Tasks               | Paid Staff                             |

#### Overview of Financial Activity (Audited Amounts)

|  |                      |
|--|----------------------|
| <b>Cash on hand @ September 30, 2002</b> | <b>\$ 0</b>          |
| <b>Receipts</b>                          |                      |
| ○ Federal Funds                          | \$ 14,924,000        |
| ○ Loans Received                         | 753,214              |
| ○ Offsets to Convention Expenditures     | 197,721              |
| <b>Total Receipts</b>                    | <b>\$ 15,874,935</b> |
| <b>Disbursements</b>                     |                      |
| ○ Convention Expenditures                | \$ 15,097,469        |
| ○ Loan Repayments                        | 753,214              |
| <b>Total Disbursements</b>               | <b>\$ 15,850,683</b> |
| <b>Cash on hand @ December 31, 2004</b>  | <b>\$ 24,252</b>     |

## Part III

### Summaries

#### Findings and Recommendations

##### **Finding 1. Net Outstanding Convention Expenses - Surplus**

The DNCC received \$14,924,000 to finance the Democratic National Convention. The preliminary audit report presented a Statement of Net Outstanding Convention Expenses (NOCE), as calculated by the Audit staff, which showed a surplus or unspent funds of \$8,621. In response to the preliminary audit report, the DNCC submitted a NOCE which reflects unspent funds of \$13,453, accompanied by a check in the same amount payable to the U.S. Treasury. Subsequently, the DNCC submitted a revised NOCE as of March 31, 2006, reflecting unspent funds to \$14,002 (an increase of \$549). The Audit staff recommends that the Commission make a determination that \$14,002 is repayable to the United States Treasury. (For more detail, see p. 4)

##### **Finding 2. Receipt of an Impermissible Contribution**

The cost of a biographical film (\$207,000), produced for use at the Democratic National Convention, was split between the DNCC, the Democratic National Committee (DNC) and Kerry-Edwards 2004, Inc. (KE04). The DNCC paid \$86,000 (42%) of the total cost, while the DNC and KE04 each paid \$60,500 (29%). The DNCC has not provided documentation to support this allocation. The Audit staff recommended that the DNCC provide documents, work papers and any comments which support the derivation of the allocation percentages utilized by the DNCC, DNC and KE04. The DNCC's response did not support the derivation of the allocation percentages. The Audit staff recommends that the Commission make a determination that \$121,000 is repayable to the U.S. Treasury. (For more details, see p. 6)

##### **Finding 3. Inadequate Disclosure – Statement of Organization**

The DNCC failed to adequately disclose certain depositories on its original Statement of Organization. During the audit, it filed an amended Statement of Organization that disclosed all the depositories. The Audit staff recommended the DNCC provide any comments it may yet have relative to this matter. In response to the preliminary audit report recommendation, the DNCC acknowledged it did not timely disclose bank depository information and indicated it had taken steps to ensure that such disclosures are made timely. (For more detail, see p. 9)

#### **Summary of Amounts Owed to the U.S. Treasury**

|             |   |                   |
|-------------|---|-------------------|
| • Finding 1 | Net Outstanding Convention Expenses - Surplus | \$ 14,002         |
| • Finding 2 | Receipt of Impermissible Contribution         | 121,000           |
|             | <b>Total Owed</b>                             | <b>\$ 135,002</b> |
|             | Less Payment Received 1/19/06                 | 13,453            |
|             | <b>Net Amount Owed to the U.S. Treasury</b>   | <b>\$ 121,549</b> |

## Part IV

# Findings and Recommendations

### **Finding 1. Net Outstanding Convention Expenses - Surplus**

#### **Summary**

The DNCC received \$14,924,000 to finance the Democratic National Convention. The preliminary audit report presented a Statement of Net Outstanding Convention Expenses (NOCE), as calculated by the Audit staff, which showed a surplus or unspent funds of \$8,621. In response to the preliminary audit report, the DNCC submitted a NOCE which reflects unspent funds of \$13,453, accompanied by a check in the same amount payable to the U.S. Treasury. Subsequently, the DNCC submitted a revised NOCE as of March 31, 2006, reflecting unspent funds to \$14,002 (an increase of \$549). The Audit staff recommends that the Commission make a determination that \$14,002 is repayable to the United States Treasury.

#### **Legal Standard**

**Entitlement to Payments From the Fund.** The national committee of a major party shall be entitled to payments with respect to any presidential nominating convention, in amounts that, in the aggregate shall not exceed \$4,000,000, as adjusted by the Consumer Price Index. The major party entitlement for the 2004 nominating convention was \$14,924,000. 26 U.S.C §9008(b)(1).

**Unspent Funds** - Any portion of the entitlement that remains unspent after all convention expenses have been paid shall be returned to the Secretary of the Treasury. The national committee or convention committee shall make an interim repayment of unspent funds based on the financial position of the committee as of the end of the ninth month following the last day of the convention, allowing for a reasonable amount as determined by the Commission to be withheld for unanticipated contingencies. The interim repayment shall be made no later than 30 calendar days after the end of the ninth month following the last day of the convention. 11 CFR §9008.12(b)(5).

**Repayment Determination Procedures.** The Commission will follow the same repayment determination procedures, and the committee has the same rights and obligations as are provided for repayment determinations involving publicly funded candidates under 11 CFR 9007.2(c) through (h). 11 CFR §9008.12(c).

**Net Outstanding Convention Expenses (NOCE).** A convention committee shall file, no later than sixty days after the last day of the convention, a statement of that committee's "net outstanding convention expenses". This statement must contain, among other things:

- The total of all committee assets, including cash on hand, amounts owed to the committee and capital assets listed at their fair market value;
- The total of all outstanding obligations for qualified convention expenses; and
- An estimate of necessary winding-down costs. 11 CFR §9008.10.



### **Facts and Analysis**

The 2004 Democratic National Convention ended July 29, 2004. The DNCC filed a Statement of Net Outstanding Convention Expenses as of September 12, 2004. In the preliminary audit report, the Audit staff's NOCE reflected a surplus of \$8,621. The figures below reflect the DNCC's NOCE prepared using actual transactions through March 31, 2006 and submitted in response to the preliminary audit report.

### **Statement of Net Outstanding Convention Expenses**

**As of September 12, 2004**

**Prepared on March 31, 2006**

#### **Assets**

|                     |                |           |
|---------------------|----------------|-----------|
| Cash on Hand        | \$645,044      |           |
| Accounts Receivable | <u>154,447</u> |           |
| Total Assets        |                | \$799,491 |

#### **Obligations**

|  |               |                  |
|--|---------------|------------------|
| Accounts Payable for Qualified Convention Expenses | \$ 211,978    |                  |
| Actual Wind Down Expenses                          | 559,511       |                  |
| Estimated Wind Down Expenses                       | <u>14,000</u> |                  |
| Total Obligations                                  |               | <u>\$785,489</u> |

**Net Outstanding Convention Expenses (Surplus) \$ 14,002<sup>2</sup>**

The NOCE as calculated by the DNCC shows a surplus or an amount of unspent funds of \$14,002. Pursuant to 11 CFR §9008.12, the Committee shall make an interim repayment of unspent funds no later than 30 calendar days after the end of the ninth month following the last day of the convention. For the DNCC, this interim repayment was due May 30, 2005; however, no payment was made.

### **Preliminary Audit Report Recommendation and Committee Response**

The Audit staff recommended that the DNCC provide documentation demonstrating that either: (a) no repayment of unspent funds is due, or (b) a lesser amount is due. The DNCC submitted two NOCE statements in response to the preliminary audit report. The first calculated an unspent funds balance of \$13,453 and included a check made payable to the U.S. Treasury in the same amount. The second increased the unspent funds amount to \$14,002.

### **Audit Staff Analysis of the Committee's Response**

After reviewing the DNCC's response to the preliminary audit report, the Audit staff updated its NOCE statement. The majority of the difference between DNCC's calculation and the calculation in the preliminary audit report calculation is due to voided checks totaling \$4,531 that had been classified as outstanding. A review of the checks

<sup>2</sup> There is a minor difference between the Audit staff's updated NOCE surplus (\$13,183) and the DNCC's NOCE surplus (\$14,002) of \$819. The Audit staff considers this difference immaterial.

indicates that they were properly voided. In addition, an unanticipated vendor refund of \$549 was received. The remaining difference of \$819 is not explained, but not material.

### **Recommendation**

The Audit staff recommends that the Commission make a determination that \$14,002 is repayable to the U.S. Treasury.

## **Finding 2. Receipt of an Impermissible Contribution**

### **Summary**

The cost of a biographical film (\$207,000), produced for use at the Democratic National Convention, was split between the DNCC, the Democratic National Committee (DNC) and Kerry-Edwards 2004, Inc. (KE04). The DNCC paid \$86,000 (42%) of the total cost, while the DNC and KE04 each paid \$60,500 (29%). The DNCC has not provided documentation to support this allocation. The Audit staff recommended that the DNCC provide documents, work papers and any comments which support the derivation of the allocation percentages utilized by the DNCC, DNC and KE04. The DNCC's response did not support the derivation of the allocation percentages. The Audit staff recommends that the Commission make a determination that \$121,000 is repayable to the U.S. Treasury.

### **Legal Standard**

**Cost of Biographical Films.** The convention committee is permitted to produce biographical films, or similar materials, of the candidate for nomination for use during the convention. However, if any other committee uses part or all of the films or similar materials, it shall pay the convention committee for the reasonably allocated cost of the films. 11 CFR §9008.7(a)(4)(xiii).

**Payment of Convention Expenses.** The convention committee shall receive all public funds for the purpose of defraying convention expenses. All expenditures on behalf of the national committee for convention expenses shall be made by the convention committee. 11 CFR §9008.3(a)(2).

**Repayments.** If the national committee accepted contributions to defray convention expenses which, when added to the amount of payments received, exceeds the expenditure limitation of such party, the national committee shall make a payment to the U.S. Treasury of the amount of such contributions. 11 CFR §9008.12(b)(3).

### **Facts and Analysis**

At a cost of \$207,000, the DNCC had DMP Boston 04, Inc. produce a biographical film, "A Remarkable Promise", about Senator John Kerry. The film was shown during the 2004 Democratic National Convention.

After reviewing payments to media vendors, the Audit staff discovered documentation indicating that the cost of this film was allocated between the DNCC, the DNC and KE04. The DNCC paid \$86,000 and the DNC and KE04 each paid \$60,500. The

percentage paid by each entity was: DNCC (42%), DNC (29%) and KE04 (29%). There has been no documentation provided that explains this allocation.

After reviewing media ads paid for by the DNC and KE04, it appears that the biographical film and the DNC and KE04 ads share some film excerpts.

This matter was not discussed at the Exit Conference; however, the Audit staff later informed DNCC representatives that the allocation of the cost of the film was in question and that it would be addressed in the preliminary audit report.

### **Preliminary Audit Report Recommendation and Committee Response**

The Audit staff recommended the DNCC provide documents, work papers and any comments it may have which support the derivation of the allocation percentages utilized by DNCC, DNC and KE04. The preliminary audit report also stated that, absent such a demonstration, the Audit staff would recommend the Commission make a determination that the amount paid by the DNC and KE04 (\$121,000) represented an impermissible contribution and was repayable to the U.S. Treasury.

The DNCC's response begins by noting that the preliminary audit report accurately stated that the \$207,000 cost of the film was split between the DNCC, the DNC and KE04. It then restated that report's recommendation and opines that "...the Audit staff is insisting that *more* taxpayer, public funds should have been used to cover the costs of the film."

The response revisits the circumstances surrounding a similar issue that arose during the audit of the 1992 Democratic National Convention Committee (1992 DNCC) when a film was produced by Clinton for President was shown at that convention. To avoid an impermissible contribution, the 1992 DNCC paid 1/6 the cost of the film which was questioned as a permissible convention expense. The response goes on to say the Commission acknowledged that, in part, the convention legitimately serves as a vehicle to promote its nominee and determined that the 1992 DNCC could make the film payment. The response noted that later the Commission revised its regulations to include 11 CFR 9008.7(a)(4)(xiii). The response notes that both the regulation and its Explanation and Justification provide that the campaign committee or party committee must pay the convention committee for the reasonably allocated costs of the films or materials used. Finally, the response concludes that the Audit staff's current position "...that the candidates and party *cannot* pay and that the Convention *must* pay – is the exact opposite of the position the Audit Division took in 1992."

The response states that the regulation requires only a "*reasonable*" allocation and does not require that contributing committees document or establish an exact allocation based on actual use or any particular factors. "It has been an understanding of the party committees since the time of the issuance of this regulation that if a party committee and presidential campaign make any use of the Convention film, they should pay roughly equal shares of the costs."

The response represents that both DNC and KE04 made significant use of the biographical film and supported this statement by stating that the PAR conceded that both DNC and KE04 ads shared some film excerpts. Further, it stated that DNC distributed

portions of the film to political candidates and organizations as part of the tapes of the Convention proceedings. It then noted that the use was not as extensive as the use made by Clinton for President in 1992. Based upon the expected uses made by each entity, it was determined, by mutual agreement of the three committees, that an allocation of 29% to the DNC, of 29% to the KE'04 and 42% to the DNCC was reasonable and appropriate. The response concluded that a good faith allocation was made and that DNCC certainly did not receive any impermissible contribution.

### **Audit Staff Analysis of the Committee's Response**

The DNCC's response is misleading in its assertions that the Audit staff "...is insisting that *more* taxpayer, public funds should have been used to cover the costs of the film." And that the Audit Division's position is "...that the candidates and party committees *cannot* pay..." and that the DNCC must pay. Our recommendation rather clearly instructed that in the **absence** (emphasis added) of documentation supporting the allocation of the film's cost, a repayment would be warranted.

The Audit staff does not disagree that the costs associated with the biographical film could be allocated. The DNCC failed to provide documentation supporting the derivation of its percentages. Simply to say an allocation is reasonable and agreed to by the parties involved is not sufficient.

Further, it is interesting to note, the invoice received by the DNCC was dated July 6, 2004, and contained the following language, "Payment 1 to fund production budget for the John Kerry Biographical film being produced for the 2004 Democratic National Convention in Boston, MA. Note: This is for HALF of the production budget. The other half to be paid by Kerry for President."

The invoice received by KE04 was dated July 28, 2004. This invoice indicated the total video cost of \$207,000, less 50% to be paid by the DNCC. The remaining 50% or \$103,500 was due from Kerry for President.

It's apparent from various e-mail communications between officials of the KE04 that it was unclear how much should have been paid by either the DNC or KE04. One e-mail questioned why the cost was being split three ways. Based on the DNCC invoice, the cost was to be split between the DNCC and KE04. The DNCC paid \$86,000. It appears that it was then decided that the remaining cost would be split equally between the KE04 and DNC. KE04 has offered no information as to how DNC utilized the film, but indicated it used excerpts in its paid advertising and posted the film on its website.

In the absence of documentation supporting the percentages used to allocate the costs of the film, the Audit staff's position remains unchanged.

### **Recommendation**

The Audit staff recommends that the Commission make a determination that \$121,000 is repayable to the U.S. Treasury.

### **Finding 3. Inadequate Disclosure – Statement of Organization**

#### **Summary**

The DNCC failed to adequately disclose certain depositories on its original Statement of Organization. During the audit, it filed an amended Statement of Organization that disclosed all the depositories. The Audit staff recommended the DNCC provide any comments it may yet have relative to this matter. In response to the preliminary audit report recommendation, the DNCC acknowledged it did not timely disclose bank depository information and indicated it had taken steps to ensure that such disclosures are made timely.

#### **Legal Standard**

**Registration.** Each convention committee established by a national committee shall register with the Commission on FEC Form 1 as a political committee. FEC Form 1 is the Statement of Organization. 11 CFR §§102.2(a) and 9008.3(b).

**Contents.** The Statement of Organization shall be signed by the treasurer and include a listing of all banks, safe deposit boxes, or other depositories used by the committee. 11 CFR §102.2(a)

#### **Facts and Analysis**

On August 12, 2002, the DNCC filed a Statement of Organization (the Statement) with the Commission. In the Statement, the DNCC listed one depository (NationsBank), which was the operating account. In 1998, NationsBank merged with Bank of America and assumed its name. The Statement did not reflect this name change, nor was an amendment filed to correct this matter. In addition, the Audit staff identified five additional depositories utilized by the DNCC for convention purposes that had not been disclosed on the Statement; one of which (Fleet Bank) also merged with Bank of America during the audit period.

At the Entrance Conference, the Audit staff discussed this matter with DNCC representatives. Shortly thereafter, the DNCC amended its Statement of Organization to disclose all the depositories; however, the name change had not been properly addressed.

#### **Preliminary Audit Report Recommendation and Committee Response**

The Audit staff recommended the DNCC provide any comments it may yet have relative to this matter. In its response to the preliminary audit report, the DNCC acknowledged it did not timely file an amended statement of organization to disclose the additional depositories. The DNCC states that although such an amendment had been prepared on its electronic filing software, for reasons unknown, this information was inadvertently not “uploaded” to the Commission. The response further notes that the DNCC has filed a miscellaneous report with the Commission to clarify the name changes with respect to Fleet Bank and Bank of America.

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January 17, 2006

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2006 JAN 17 P 4:16

Re: 2004 Democratic National Convention Committee, Inc.  
Response to Preliminary Audit Report

Dear Mr. Stoltz:

This response is submitted on behalf of our client, 2004 Democratic National Convention Committee, Inc. ("2004 DNCC"), in response to the Preliminary Report of the Audit Division ("PAR") sent to 2004 DNCC under cover of your letter of November 15, 2005.

The Findings and Recommendations of the Audit Division are set forth on page 3 of the PAR. 2004 DNCC responds to each as follows:

**Finding 1: Net Outstanding Convention Expenses—Surplus**

The DNCC has reviewed the Audit Division's statement of Net Outstanding Convention Expenses (NOCE). Based upon the DNCC's own review of NOCE, the amount repayable to the U.S Treasury, as of December 31, 2005, is, in fact, \$13,452.97. A statement of NOCE, as of December 31, 2005, prepared by the DNCC, is attached to this letter. Please note that the DNCC did not send a payment pursuant to 11 CFR § 9008.12(b)(5) because, at that time, the DNCC believed that little or no surplus funds were available. Due to revisions in estimated and actual wind down costs, the DNCC is remitting its current estimate of unspent funds as stated above.

**Finding 2: Receipt of an Impermissible Contribution**

The PAR accurately states that the \$207,000 cost of a biographical film of Senator Kerry produced for use at the Democratic National Convention was split between the 2004 DNCC, the Democratic National Committee ("DNC") and Kerry-Edwards 2004, Inc. ("KE04"). The PAR recommends that, absent documentation to support the allocation percentages utilized by these three entities, "the Audit staff will recommend the Commission make a determination that the amount paid by the DNC and KE04 (\$121,000) represents an impermissible contribution" to DNCC, by the DNC and KE04.

In other words, the Audit Division is insisting that *more* taxpayer, public funds should have been used to cover the costs of a film which was indisputably used for electoral purposes by both the DNC and KE04 as well as being shown at the Convention. That position turns the purpose of the applicable regulation on its head.

The Commission's regulation governing the costs of candidate biographical films shown at national nominating conventions was proposed after an issue arose in the audit of the 1992 Democratic National Convention about the proper treatment of such costs. A biographical film of then-Governor Clinton, "Man from Hope," was originally produced to be shown at the Convention, and was in fact shown at the Convention, but the Clinton primary committee (Clinton for President) determined that it wanted to use the film for campaign purposes after the Convention, and did make repeated use of the film for such purposes.

To avoid having Clinton for President make an impermissible in-kind contribution to the 1992 Democratic National Convention Committee ("1992 DNCC"), the 1992 DNCC paid 1/6 of the cost of the film. The Audit Division, in the Interim Audit Report, took the position that even this 1/6 was an impermissible Convention expense by 1992 DNCC—even though the film had been shown and used at the Convention. Before the Commission, the Audit Division took the position that *no* part of the costs of the film should be considered a permissible Convention expense, and that no payment by the Convention Committee (1992 DNCC) was necessary in order to avoid having Clinton for President make an impermissible contribution to the Convention Committee. *Final Report of the Audit Division on 1992 Democratic National Convention Committee, Inc.* at 14-115 (March 10, 1994). The Audit Division explained that:

[I]f after the convention has made its nomination, and prior to the candidate's acceptance speech, the Committee agrees to show convention attendees a biographical film produced by its nominee at a time when it would be available for broadcast by a number of television networks, doing so is an accommodation to the party's candidate rather than a contribution from the candidate. The Audit Division believes that under any other circumstances a candidate would expect to purchase air time to broadcast a film to a large audience rather than expect to be paid for use of the film.

The Commission rejected the position of the Audit Division, however, and determined that payment of a portion of the costs of the film “would be viewed as a permissible Convention expense.” *Id.* “The Commission acknowledged that, in part, the convention legitimately serves as the vehicle to promote its nominee. Therefore, the Commission determined that the convention could make the film payment.” *Id.*

Subsequent to its adoption of the 1992 Audit Report, the Commission issued new regulations governing public financing of the conventions. *Presidential Election Campaign Fund and Federal Financing of Presidential Nominating Conventions: Final Rules*, 59 *Fed. Reg.* 33606 (June 29, 1994). Those new rules included a new regulation addressing the costs of biographical films, 11 C.F.R. §9008.7(a)(4)(xiii), which has remained in effect since that time without amendment and provides that permissible “Convention expenses,” that can be paid for using the public grant, include:

Expenses for producing biographical films, or similar materials, for use at the convention, about candidates for nomination or election to the office of President of Vice-President, but any other political committee(s) that use part or all of the biographical films or materials shall pay the convention committee for the reasonably allocated cost of the biographical films or materials used.

The Preamble to the new rules explained that this new provision “clarifies that the production costs of a biographical film or similar materials about a Presidential or Vice Presidential candidate may be paid for by the convention committee. However, if part or all of the film or similar materials, is previously or subsequently aired or otherwise distributed by the candidate’s primary or general election campaign committee or by a party committee, .. the campaign committee or party committee must pay the convention committee for the reasonably allocated costs of the films or materials used.” 59 *Fed. Reg.* at 33609. In other words, the entire purpose of this regulation was to establish the permissibility of the convention committee paying *anything* for such a biographical film—not to require the convention committee to pay the maximum possible amount for such a film.

Indeed, the position the Audit Division is now taking—that the candidates and party *cannot* pay and that the Convention *must* pay—is exactly the opposite of the position the Audit Division took in 1992, which that the *Convention Committee could not pay* and that the candidate should pay 100%.

Further, the regulation requires only a “reasonable” allocation. It does not require that the contributing committees document or establish an exact allocation based on actual use or any other particular factors. It has been the understanding of the party committees since the time of issuance of this regulation that if a party committee and presidential campaign make any use of the Convention film, they should pay roughly equal shares of the costs.



With respect to the 2004 Convention, it is undisputed that both the DNC and KE04 made significant use of the biographical film. The PAR itself concedes that, "After reviewing media ads paid for by the DNC and KE04, it appears that the biographical film and the DNC and KE04 ads share some film excerpts." PAR at 7. Further, the DNC distributed portions of the film to political candidates and organizations as part of the tapes of the Convention proceedings. At the same time, the use by the DNC and KE04 of this film was not nearly as extensive as the use made by the Clinton for President Committee of the 1992 biographical film, after the Convention. Based upon the expected uses made by each entity, it was determined, by mutual agreement of the three committees, that an allocation of 29% to the DNC, of 29% to the DNC and of 42% to the Convention Committee was reasonable and appropriate.

In this case, KE04 and the DNC have made a good faith allocation for the purpose of ensuring that public funds were *not* used for non-Convention related, campaign purposes. That allocation is entirely consistent with and in compliance with section 9008.7(a)(4)(xiii). The 2004 DNCC has certainly not received any impermissible contribution from the DNC or KE04. The Audit Division should drop this recommendation.

**Finding 3: Inadequate Disclosure --- Statement of Organization**

The DNCC acknowledges it did not timely file an amended statement of organization to disclose additional depositories. Although an amendment to disclose this information was prepared by our office using Commission supplied electronic filing software, the amendment, for reasons unknown, was inadvertently not uploaded to the Commission. It is our recollection that this issue was first discussed at the exit conference, and at that time, we were surprised to learn that the amendment wasn't filed. In the presence of the auditors, we located a file containing the amendment (which was completed and prepared for upload with the Commission) during the Exit Conference, but discovered that the file was in fact, not uploaded. The file was uploaded to the Commission soon thereafter. The issue regarding the names of the Bank of America and Fleet Bank depositories was not discussed at the Exit Conference and was not known to be an issue with the Commission until receipt the Preliminary Audit Report. The DNCC has filed a miscellaneous document with the Commission that clarifies the name changes with respect to Fleet Bank and Bank of America. In the future, our office will take all necessary steps to ensure that necessary amendments are both prepared and uploaded to the Commission in a timely manner. We regret any inconvenience this inadvertent error may have caused.

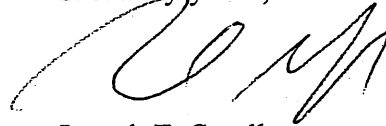
Joseph F. Stoltz  
January 17, 2006  
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**CONCLUSION**

The 2004 DNCC has already complied with the Audit Division's recommendations with respect to Findings 1 and 3. No further demonstration or documentation is required with respect to Finding 2.

If the Audit Division has any questions or needs further information concerning the above, please contact us.

Sincerely yours,



Joseph E. Sandler  
Neil P. Reiff

Attorneys for 2004 Democratic  
National Convention Committee,  
Inc.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 14, 2006

MEMORANDUM

TO: Joseph F. Stoltz  
Assistant Staff Director  
Audit Division

THROUGH: Patrina M. Clark *PMC*  
Staff Director

FROM: James A. Kahl *JAK*  
Deputy General Counsel

Thomasenia P. Duncan *TPD*  
Associate General Counsel

Lorenzo Holloway *LH*  
Assistant General Counsel  
for Public Finance and Audit Advice

Michelle E. Abellera *ME* *for MEd*  
Attorney

SUBJECT: Final Audit Report on the 2004 Democratic National Convention  
Committee, Inc. (LRA # 675)

The Office of General Counsel reviewed the proposed Final Audit Report ("proposed Report") on the 2004 Democratic National Convention Committee, Inc. ("DNCC") that you submitted to this Office on May 5, 2006. This memorandum summarizes our comments on the Proposed Report.<sup>1</sup> We concur with any findings not specifically discussed in this memorandum. If you have any questions, please contact Michelle E. Abellera, the attorney assigned to this audit.

Our only comment is directed to Finding 2, Receipt of an Impermissible Contribution, which relates to \$207,000 in production costs for a biographical film aired at the convention. The film's production costs were allocated among the DNCC, the

<sup>1</sup> The Office of General Counsel recommends that the Commission consider this document in open session since the Report does not include matters exempt from public disclosure. See 11 C.F.R. § 2.4.

Democratic National Committee (“DNC”), and Kerry-Edwards 04 (“KE04”). The percentage of production costs paid by each entity was: 42% DNCC (\$86,000), 29% DNC (\$60,500), and 29% KE04 (\$60,500). The DNCC, however, did not provide documentation to support the allocation. We conclude that the DNCC must document its allocation.

In support of the 42/29/29 allocation, the DNCC stated that “both the DNC and KE04 made significant use of the biographical film.” *See* DNCC Preliminary Audit Report (PAR) Response, at 4. Not only did the DNC and KE04 media ads share some film excerpts from the biographical film, but the DNC distributed portions of the film to political candidates and organizations as part of the tapes of the Convention proceedings. *Id.* Furthermore, the DNCC asserted that it did not need to submit documentation or work papers because the Commission’s regulation “does not require that the contributing committees document or establish an exact allocation based on actual use or any other particular factors.” DNCC PAR Response, at 3.

The law is clear that the DNCC may use public funds to pay for a candidate’s biographical film and the DNCC may share the cost of the film with another political committee. The DNCC’s costs for the biographical film are permissible convention expenses and, therefore, the DNCC may use public funds to pay the expenses. 11 C.F.R. § 9008.7(a)(4). If another committee uses part or all of the biographical film from the convention, however, the other committee must pay the DNCC for the “reasonably allocated” cost of the biographical film used.<sup>2</sup> 11 C.F.R. § 9008.7(a)(4)(xiii).

The question is whether the DNCC must document that its 42/29/29 allocation reflects a reasonable allocation among the DNC, KE04, and itself. We conclude that the DNCC must document its reasonable allocation. Generally, the DNCC must document its disbursements to show that it used its public funds for permissible convention expenses. 11 C.F.R. § 9008.10(a)-(b). When a convention committee shares expenses with another entity, the Commission must ensure that the convention committee does not underpay its share because this would result in the convention committee accepting a contribution to defray convention expenses. 11 C.F.R. §§ 9008.6(a)(3), 9008.12(b)(3). The Commission also must ensure that the convention committee does not overpay because this would result in the convention committee using public funds to pay expenses that are not related to the convention. 11 C.F.R. §§ 9008.7(a), 9008.12(b)(4). To determine if the expenses here have been properly allocated, the Commission can request information from the convention committee that connects the convention committee’s share of expenses to convention related activities. 11 C.F.R. § 9008.3(a)(4)(v); 11 C.F.R. § 9008.10(e).

The evidence in the record suggests the parties contemplated an allocation that included only two entities. As noted in the proposed Report, the original arrangement called for the production budget for the convention’s biographical film to be split in half

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<sup>2</sup> The Commission’s regulations do not define “reasonably allocated.” 11 C.F.R. § 9008.7(a)(4)(xiii).

between the DNCC and KE04 (\$86,000 each = \$172,000/2). See July 6, 2004 invoice. The parties made no mention of the DNC sharing in the cost of the biographical film until after the issuance of the second invoice, dated July 28, 2004. According to the second invoice, the total cost of the biographical film was \$207,000 (a \$35,000 increase from the original amount of \$172,000). The three parties exchanged multiple e-mail messages in which the DNC questioned why it should pay for any part of the film.

We acknowledge that the DNCC's analysis of the appropriate allocation could have evolved to include the DNC. Given that the biographical film had three initial users and served at least three purposes, we believe that an allocation among the DNCC, the DNC and KE04 is warranted. The DNCC must, however, submit documentation so that the Commission can verify that the DNCC allocated the expenses among the three entities on a reasonable basis. See *LaRouche's Committee for a New Bretton Woods v. FEC*, 439 F.3d 733 (D.C.Cir. 2006) (because committee did not provide Commission with any verifiable basis for the "reasonable" mark-up charged by vendors, the court upheld the repayment determination). We, therefore, concur with the Audit Division's finding.