



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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July 9, 2012

MEMORANDUM

AGENDA ITEM

To: The Commission

Through: Alec Palmer *AP*
Staff Director

For Meeting of 8/23/12

From: Patricia Carmona *TH S. P. C.*
Chief Compliance Officer

Tom Hintermister *TH*
Assistant Staff Director
Audit Division

Alex Boniewicz *AB*
Audit Manager

By: Jim Miller *JM*
Lead Auditor

Subject: Audit Division Recommendation Memorandum on the National Campaign Fund (A09-26)

Pursuant to Commission Directive No. 70 (FEC Directive on Processing Audit Reports), the Audit staff's recommendations are presented below and the findings are discussed in the attached Draft Final Audit Report. The Office of General Counsel has reviewed this memorandum and concurs with the recommendations.

Finding 1. Misstatement of Financial Activity

The National Campaign Fund's (NCF) response to the Draft Final Audit Report (DFAR) did not address this finding. The Audit staff recommends that the Commission find that NCF misstated receipts and disbursements for calendar year 2008.

Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures

In response to the DFAR, NCF maintains its position that these were fundraising letters not intended to influence a vote. The response raises three points as to why the communications at issue are not independent expenditures:

- First, NCF's response contends that the communications are not independent expenditures because the timing of the communications was

not related to the timing of the 2008 primary elections. The response references Internal Revenue Service Ruling 2004-6 (IRS 2004-6) which applied a “facts and circumstances” test to determine whether a communication by a tax-exempt organization is subject to penalty for engaging in political campaigns. The factor cited therein is whether “the timing of the communication coincides with an electoral campaign.”

- Second, the response argues that the direct mail letters did not target voters in a particular election. NCF sought lists of proven donors to Republican and conservative causes without regard to whether the listed donors had any propensity to vote, or were even registered voters. Again the response cites IRS 2004-06 and also points out that one of the factors considered was if the communication targeted voters in a particular election.
- Finally, NCF’s response asserts that the occasional inclusion of express advocacy references in the direct mail letters should not mean that the letters meet the definition of independent expenditures.

The Audit staff is not persuaded by NCF’s response. The IRS 2004-06 standards cited are not applicable because the standards for determining when a communication includes express advocacy are set forth in the Commission's regulations at 11 C.F.R. §100.22. The Revenue Ruling and the Commission's regulations serve different purposes. The Revenue Ruling is focused on whether certain organizations can engage in specific kinds of activities and maintain their tax exempt status and the Commission's express advocacy regulations serve as one of the elements for determining whether a communication will be considered an independent expenditure (See 11 C.F.R. § 100.16(a)). In addition, the Commission has not incorporated the standards from the Revenue Ruling by reference. Therefore, the standards of timing of the communication and targeting of voters should not be used in determining whether the communications in this case are independent expenditures.

With respect to NCF's argument about the occasional inclusion of express advocacy references in the letters, the Commission's regulations on express advocacy do not include a limitation or an exception for only occasional inclusion of express advocacy. A communication containing express advocacy of a clearly identified candidate that is not coordinated with a candidate or candidate's committee or its agents, or a political party committee or its agents, and which is not otherwise exempt, is an independent expenditure.

The Audit staff maintains that NCF did not timely file 24/48-hour notices for \$1,153,748; did not file 24-hour notices for \$33,485 and did not properly disclose independent expenditures totaling \$528,662 prior to payment as memo entries.

The Audit staff recommends that the Commission find that NCF failed to file notices and properly disclose independent expenditures.

The Committee did not request an audit hearing.

If this memorandum is approved, a Proposed Final Audit Report will be prepared within 30 days of the Commission's vote.

Should an objection be received, Directive No. 70 states that the Audit Division Recommendation Memorandum will be placed on the next regularly scheduled open session agenda.

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Jim Miller or Alex Boniewicz at 694-1200.

Attachments:

- Draft Final Audit Report of the Audit Division on the National Campaign Fund
- Draft Final Audit Report on National Campaign Fund (LRA 847)
- Audit Division Recommendation Memorandum on National Campaign Fund (LRA 847)

cc: Office of General Counsel



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 2, 2012

MEMORANDUM

TO: Patricia Carmona
Chief Compliance Officer

Tom Hintermister
Assistant Staff Director
Audit Division

FROM: Christopher Hughey *pch*
Deputy General Counsel

Lawrence L. Calvert, Jr. *LJC*
Associate General Counsel
General Law and Advice

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

Margaret J. Forman *mjf*
Attorney

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 these 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 conciliation 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).¹

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 only

¹ 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.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 26, 2012

MEMORANDUM

TO: Patricia Carmona
Chief Compliance Officer

Tom Hintermister
Assistant Staff Director
Audit Division

FROM: Lisa J. Stevenson
Special Counsel to
the General Counsel

Lawrence L. Calvert, Jr.
Associate General Counsel
General Law and Advice

Lorenzo Holloway
Assistant General Counsel
Public Finance and Audit Advice

Margaret J. Forman
Attorney

SUBJECT: Audit Division Recommendation Memorandum on National
Campaign Fund (LRA 847)

I. INTRODUCTION

The Office of General Counsel ("OGC") has reviewed the Audit Division Recommendation Memorandum ("ADRM") on the National Campaign Fund ("NCF") and NCF's response to the Draft Final Audit Report.¹ We generally concur with the ADRM, but we have specific comments about three points that NCF raises in its response to the DFAR as to why the communications at issue are not independent expenditures.

¹ While this memorandum provides comments on the ADRM and NCF's response to the DFAR, we recommend that you attach this memorandum and our memorandum commenting on the DFAR to the ADRM. This will assist the Commission in understanding the legal issues raised in the ADRM and NCF's response to the DFAR.

First, NCF contends that the communications are not independent expenditures because the timing of the communications – direct mail letters in this case – were not related to the timing of the 2008 primary elections. Second, NCF argues that the direct mail letters did not target voters in a particular election. NCF pulls the standards of timing of the communication and targeting of voters from an Internal Revenue Service Ruling that addresses whether certain organizations may maintain their exemption from Federal taxes when they advocate on public policy issues for which public officials, who are also candidates, have taken a stance. Rev. Rul. 2004-6. Finally, NCF asserts that the occasional inclusion of express advocacy references in the direct mail letters should not mean that the letters meet the definition of independent expenditures.

The Revenue Ruling's standards are inapposite because the standards for determining when a communication includes express advocacy are set forth in the Commission's regulations at 11 C.F.R. §§ 100.22(a) and (b). The Revenue Ruling and the Commission's regulations serve different purposes. The Revenue Ruling is focused on whether certain organizations can engage in specific kinds of activities and maintain their tax exempt status, Rev. Rul. 2004-6, and the Commission's express advocacy regulations serve as one of the elements for determining whether a communication will be considered an independent expenditure. 11 C.F.R. § 100.16(a). In addition, the Commission has not incorporated the standards from the Revenue Ruling by reference. We believe, therefore, that the standards of timing of the communication and targeting of voters should not be used in determining whether the communications in this case are independent expenditures.

With respect to NCF's argument about the occasional inclusion of express advocacy references in the letters, the Commission's regulations on express advocacy do not include a limitation or an exception for only occasional inclusion of express advocacy. *See* 11 C.F.R. §§ 100.22(a) and (b). A communication containing express advocacy of a clearly identified candidate that is not coordinated with a candidate or candidate's committee or its agents, or a political party committee or its agents, and which is not otherwise exempt, is an independent expenditure. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.



Draft Final Audit Report of the Audit Division on the National Campaign Fund

February 4, 2008 – December 31, 2008

Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.¹ The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

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 National Campaign Fund is a non-connected committee, headquartered in Laguna Niguel, California. For more information, see the chart on Committee Organization, p. 2.

Financial Activity (p. 2)

• Receipts	
○ Contributions from Individuals	\$ 1,927,095
○ Loans Received	5,000
○ Other Receipts	3,489
Total Receipts	\$ 1,935,584
• Disbursements	
○ Independent Expenditures	\$ 1,186,972
○ Operating Expenditures	679,546
○ Refunds of Contributions	26,143
○ Loan Repayments	5,000
Total Disbursements	\$ 1,897,661

Findings and Recommendations (p. 3)

- Misstatement of Financial Activity (Finding 1)
- Failure to File Notices and Properly Disclose Independent Expenditures (Finding 2)

¹ 2 U.S.C. §438(b).

Draft Final Audit Report of the Audit Division on the National Campaign Fund

February 4, 2008 - December 31, 2008

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Part I

Background

Authority for Audit

This report is based on an audit of the National Campaign Fund (NCF) undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 2 U.S.C. §438(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 2 U.S.C. §434. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. 2 U.S.C. §438(b).

Scope of Audit

Following Commission-approved procedures, the Audit staff evaluated various risk factors and, as a result, this audit examined:

1. the consistency between reported figures and bank records;
2. the disclosure of individual contributors' occupation/name of employer;
3. the disclosure of independent expenditures; and
4. other committee operations necessary to the review.

Part II Overview of Committee

Committee Organization

Important Dates	
• Date of Registration	August 20, 2007
• Audit Coverage	February 4, 2008 ² – December 31, 2008
Headquarters	
	Laguna Niguel, California
Bank Information	
• Bank Depositories	Three
• Bank Accounts	Three Checking Accounts
Treasurer	
• Treasurer When Audit Was Conducted	James V. Lacy
• Treasurer During Period Covered by Audit	James V. Lacy
Management Information	
• Attended Commission Campaign Finance Seminar	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

Overview of Financial Activity (Audited Amounts)

Cash-on-hand @ February 4, 2008	\$ 0
Receipts	
○ Contributions from Individuals	1,927,095
○ Loans Received	5,000
○ Other Receipts	3,489
Total Receipts	\$ 1,935,584
Disbursements	
○ Independent Expenditures	1,186,972
○ Operating Expenditures	679,546
○ Refunds of Contributions	26,143
○ Loan Repayments	5,000
Total Disbursements	\$ 1,897,661
Cash-on-hand @ December 31, 2008	\$ 37,923

² Although NCF registered with the Commission on August 20, 2007, the initial bank activity occurred on February 4, 2008.

Part III Summaries

Findings and Recommendations

Finding 1. Misstatement of Financial Activity

During audit fieldwork, a comparison of NCF's reported financial activity with its bank records revealed that, for 2008, NCF understated reported receipts and disbursements by \$69,339 and \$100,887, respectively, and overstated ending cash on-hand by \$31,448. In response to the Interim Audit Report recommendation, NCF amended its reports to materially correct the misstatements. (For more detail, see p. 4)

Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures

During audit fieldwork, the Audit staff ascertained that NCF disclosed independent expenditures, totaling \$1,548,622, on Schedule E (Itemized Independent Expenditures). The Audit staff noted that only \$1,261,206 of these expenditures appeared to meet the definition of independent expenditure and contained language expressly advocating the election or defeat of a clearly identified candidate. Of these independent expenditures NCF:

- did not file 24/48-hour notices for \$1,163,748 in a timely manner and did not file any 48-hour notices for \$33,485; and
- did not properly disclose independent expenditures totaling \$528,662 made (i.e., publicly disseminated) prior to payment as "memo" entries on Schedule E and as a debt on Schedule D (Debts and Obligations).

In response to the Interim Audit Report recommendation, NCF provided information supporting its position that the purpose of its direct-mail letters was fundraising and did not require reporting as independent expenditures. Regarding the Audit staff's recommendation that they submit and implement revised procedures for reporting independent expenditures, NCF indicated that they plan to terminate after the audit is completed. (For more detail, see p. 5)

Part IV

Findings and Recommendations

Finding 1. Misstatement of Financial Activity

Summary

During audit fieldwork, a comparison of NCF's reported financial activity with its bank records revealed that, for 2008, NCF understated reported receipts and disbursements by \$69,339 and \$100,887, respectively, and overstated ending cash-on-hand by \$31,448. In response to the Interim Audit Report recommendation, NCF amended its reports to materially correct the misstatements.

Legal Standard

Contents of Reports. Each report must disclose:

- the amount of cash-on-hand at the beginning and end of the reporting period;
- the total amount of receipts for the reporting period and for the calendar year;
- the total amount of disbursements for the reporting period and for the calendar year; and
- certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements), 2 U.S.C. §434(b)(1), (2), (3), (4) and (5).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reconciled reported financial activity with bank records for calendar year 2008. The following chart outlines the discrepancies for the receipts, disbursements, and the ending cash balance. The succeeding paragraphs explain why the differences occurred, if known.

2008 Activity			
	Reported	Bank Records	Discrepancy
Opening Cash Balance @ February 4, 2008	\$0	\$0	\$0
Receipts	\$1,866,245	\$1,935,584	\$69,339 Understated
Disbursements	\$1,796,773	\$1,897,661	\$100,887 Understated
Ending Cash Balance @ December 31, 2008	\$69,372 ³	\$37,923	\$31,448 Overstated

³ This column and the discrepancy column do not total correctly. The reported ending cash balance at December 31, 2008 is \$100 less than the reported receipts minus the reported disbursements for the period due to a \$100 discrepancy between the reported ending cash on one report and beginning cash on the succeeding report.

The understatement of receipts resulted from unidentified differences that occurred primarily during the 2008 year-end report period. Based on a limited review of available records, it appeared that all contributor information received by the vendor that processed deposits of contributions may not have been forwarded to the vendor responsible for the data entry.

The understatement of disbursements resulted from the following:

• Disbursements not reported	\$ 96,398
• Reported disbursements not supported by a check or debit	(2,596)
• Contribution refunds not reported	7,433
• Amounts incorrectly reported	(696)
• American Express charges not reported	522
• Unexplained difference	<u>(174)</u>
Net Understatement of Disbursements	<u>\$ 100,887</u>

The \$31,448 overstatement of the ending cash-on-hand resulted from the misstatements described above.

B. Interim Audit Report & Audit Division Recommendation

At the exit conference, the Audit staff explained the misstatements and provided schedules to NCF's Treasurer and Assistant Treasurer. They agreed to amend their reports as necessary.

The Interim Audit Report recommended that NCF:

- Amend its reports to correct the misstatements noted above; and
 - Amend its most recently filed report to correct the cash-on-hand balance with an explanation that the change resulted from a prior period audit adjustment.
- Further, NCF should have reconciled the cash balance of its most recent report to identify any subsequent discrepancies that may affect the adjustment recommended by the Audit staff.

C. Committee Response to Interim Audit Report

In response to the interim Audit Report recommendation, NCF filed amended reports for 2008 that materially corrected the misstatements.

Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures

Summary

During audit fieldwork, the Audit staff ascertained that NCF disclosed independent expenditures, totaling \$1,548,622, on Schedule E (Itemized Independent Expenditures). The Audit staff noted that only \$1,261,206 of these expenditures appeared to meet the

definition of independent expenditure and contained language expressly advocating the election or defeat of a clearly identified candidate. Of these independent expenditures NCF:

- did not file 24/48-hour notices for \$1,153,748 in a timely manner and did not file any 48-hour notices for \$33,485; and
- did not properly disclose independent expenditures totaling \$528,662 made (i.e., publicly disseminated) prior to payment as “memo” entries on Schedule E and as a debt on Schedule D (Debts and Obligations).

In response to the Interim Audit Report recommendation, NCF provided information supporting its position that the purpose of its direct-mail letters was fundraising and did not require reporting as independent expenditures. Regarding the Audit staff’s recommendation that they submit and implement revised procedures for reporting independent expenditures, NCF indicated that they plan to terminate after the audit is completed.

Legal Standard

- A. Definition of Independent Expenditures.** The term “independent expenditure” means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. 11 CFR §100.16.
- B. Disclosure Requirements – General Guidelines.** An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same payee during the same calendar year, it exceeds \$200. Independent expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as “memo” entries on Schedule E and as a debt on Schedule D. Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) on Schedule E. 11 CFR §§104.4(b)(3)(vii), 104.4(a) and 104.11.
- C. Last-Minute Independent Expenditure Reports (24-Hour Notices).** Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20th day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour notice is required each time additional independent expenditures aggregate \$1,000 or more. The date that a communication is publicly disseminated serves as the date that the committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).
- D. Independent Expenditure Reports (48-Hour Notices).** Any independent expenditures aggregating \$10,000 or more with respect to any given election, at any

time during a calendar year, up to and including the 20th day before an election, must be disclosed within 48 hours each time the expenditures aggregate \$10,000 or more. The notices must be filed with the Commission within 48 hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

Facts and Analysis

A. Facts

During audit fieldwork, it was noted that NCF's initial filing for 2008 (the April 15th Quarterly Report) disclosed all expenditures as operating expenditures on Schedule B, Line 21(b). On July 11, 2008, NCF amended that report and disclosed most of the former operating expenditures as independent expenditures on Schedule E and Line 24 of the report. During the remainder of 2008, NCF filed reports which disclosed the majority of its disbursements as independent expenditures.

NCF disclosed independent expenditures, totaling \$1,548,622, on Schedule E. Most of these disbursements were for the printing and postage costs for direct mail solicitation letters that were disclosed as either in support of Rudy Giuliani or John McCain for President or in opposition to Hillary Clinton or Barack Obama for President. The Audit staff reviewed these expenditures to assess whether NCF properly reported them on Schedule E and if 24/48-hour notices were required to be filed. The review indicated that only \$1,261,206 of these expenditures appeared to meet the definition of an independent expenditure and contained language expressly advocating the election or defeat of a clearly identified candidate. A review of the direct mail pieces and invoices for those expenditures (\$1,261,206) revealed the following:

- NCF did not file in a timely manner 24/48-hour notices of its independent expenditures for \$1,153,748. In addition, NCF did not file any 48-hour notices for \$33,486.
- NCF reported the independent expenditures when the invoices were paid; some payments were weeks or months after the dissemination date of the printed material. For expenditures totaling \$528,662, NCF should have disclosed independent expenditures as memo entries on Schedule E, filed with reports covering the dates when the materials were disseminated, and included a corresponding debt on Schedule D.

B. Interim Audit Report & Audit Division Recommendation

At the exit conference, the Audit staff addressed these matters and provided schedules detailing these expenditures to NCF representatives. NCF representatives stated that they would comply with the recommendation.

The Treasurer later emailed the Audit staff NCF's position regarding independent expenditures. The email stated:

"Political fundraising letters that are not intended to influence a vote, not timed to a particular election, but which are intended solely to motivate a donation for

the group (and which have words of express advocacy in them) should be excluded from the definition of independent expenditure for your extraordinary reporting purposes, as I stated to you. I have previously written to the FEC on these views and spoken to reporters about them as well. When the FEC pushes administrative overhead activities like general fundraising into IE status, it creates a costly regulatory burden for small donor committees like ours that do not have the financial backing, permanent staff, and infrastructure to keep up with the filings. Hardly any public purpose is served by the extraordinary reporting requirements imposed on just a fundraising letter; and the public is indeed misled (sic) by the artificial inflation in dollars spent on IEs the current requirements cause. In the last election, I fielded questions about the National Campaign Fund from reporters of the *Huffington Post* and the *New York Times* who relied on the IE expense compilations as indications of actual IE activity in direct mail. I told both that the FEC requirements mislead the public in the true nature of the expenditures, and both the reporters agreed with me.”

Subsequent to the exit conference, the Audit staff made additional requests to NCF for documentation and explanations to clarify whether some of the communications resulted in independent expenditures. NCF was asked to clarify how some of the communications were distributed and to provide the content of hyperlinks that were contained in those communications. In addition, NCF was requested to explain why some of the communications did not appear to correlate with the mailing dates. NCF responded by stating that the communications in question were “e-mailings” and provided the content for one of the e-mailings. NCF also explained that it revised the communication multiple times for each mailing but did not keep previous versions of the communication, and therefore was unable to provide the previous versions. NCF’s responses have been considered in the analysis of independent expenditures presented above.

The Interim Audit Report recommended that NCF take the following action:

- Provide any documentary evidence that would demonstrate that these disbursements were not independent expenditures and therefore did not require 24/48-hour notices; and
- Submit and implement revised procedures for reporting independent expenditures, as well as for tracking dissemination dates for such expenditures to allow for timely filing of 24/48-hour reporting notices.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, NCF offered background information for why it was created and the purpose of its direct-mail fundraising letters. NCF explained that it was formed in 2008 as a non-connected, political action committee (PAC) that was not supported by any sponsoring organization such as a labor union or corporation. There was no permanent staff, office or office equipment. It was formed with the intention of raising funds to allow it to participate in the 2008 General Election by making direct contributions to candidates for Federal office. NCF indicated that the committee was the epitome of a “grass roots” attempt to participate in the 2008 Federal elections.

NCF explained that its direct-mail advisors obtained lists of proven donors to Republican and conservative causes and tested various content appeals in the letters to these donors. The various tests included content with references to elected officials and Presidential candidates to clue the recipient audience that NCF was a conservative Republican PAC worthy of their support. NCF stated that the purpose of these mailings was not to intervene in any election. NCF indicated that the facts demonstrated that: the timing of all of its mailings had no reference to the timing of primary elections during 2008; the content of the letters, other than sometimes including some words considered "express advocacy" by the Commission, did not urge the recipient audience to vote for any particular candidate; and the audience was selected for its fundraising value, with no consideration for its electoral value. Thus the expenditures' content, timing and distribution, and audience served a fundraising purpose but not an electoral purpose.

NCF disagreed that any of its direct-mail fundraising letters constituted independent expenditures. NCF noted that the Commission defines an independent expenditure at 11 CFR §100.16 as a communication expressly advocating the election or defeat of a clearly identified candidate. NCF acknowledged that some of its mailings did include words of express advocacy. However, NCF thought that if the Commission considered all of the facts, it should agree that NCF's fundraising letters were not independent expenditures and that the special reporting rules applicable to independent expenditures (such as the 24/48-hour notices or memo entries) should not apply. NCF stated that they believe that direct-mail fundraising letters should be excluded from the definition of independent expenditures, and that the intent of the regulation was not to include direct mail fundraising expenditures as independent expenditures. NCF urged the Commission to reform its reporting requirements for grass-roots organizations that engage in direct-mail fundraising since they believe that these letters are not independent expenditures. NCF indicated that a decision has been made that the time requirements, coordination and record keeping are not worth the effort of continuing to participate and as such, plan to terminate the committee after the audit is completed.

The Audit staff does not dispute that NCF's intention was to raise funds. However, NCF acknowledges, and the Audit staff agrees, that some of these letters included express advocacy language such as "Vote for John McCain". Since these expenditures meet the definition of an independent expenditure and the regulation does not exclude direct-mail fundraising letters from the definition, the Audit staff believes that the documentary evidence provided does not support NCF's assertion that none of these expenditures are independent expenditures.