



FEDERAL ELECTION COMMISSION

WASHINGTON, D. C. 20463

**STATEMENT OF CHAIRMAN ROBERT D. LENHARD AND
COMMISSIONERS STEVEN T. WALTHER AND ELLEN L. WEINTRAUB**

AUDIT OF BUSH-CHENEY '04, INC.

The Bush-Cheney '04 campaign voluntarily agreed to participate in the public financing system for the 2004 general election. As a result, it received \$74,620,000 in taxpayer funds to pay all of the costs of its campaign activities. As a condition of receiving these funds, the Bush-Cheney campaign agreed to limit its spending to the \$74,620,000 it received.¹ See 26 U.S.C. § 9003(b)(2); 2 U.S.C. § 441a(b)(1)(B). If the campaign accepted or used funds in addition to those provided by the taxpayers, the law requires the campaign to repay the excess funds to the U.S. Treasury. 26 U.S.C. §§ 9007(b)(2), 9007(b)(3).

As a further condition of receiving public funds, a presidential campaign must agree to be audited by the FEC to ensure that it has complied with the restrictions on how public funds may be spent. In the audit, the campaign has the burden of proving to this agency that public funds were used properly and that it adhered to the spending limit. See 11 CFR §§ 9003.1(b)(1), 9003.5(a).

The audit of Bush-Cheney showed that the Republican National Committee and Bush-Cheney equally split the cost of \$81,418,812 in television advertisements that featured President Bush and/or John Kerry.² Although the advertisements focused on supporting Bush or attacking Kerry, they also made vague references to other political figures in Congress (e.g., "President Bush and our leaders in Congress," "John Kerry and liberals in Congress," "John Kerry and his liberal allies").³ The audit raised the question

¹ Some limited exceptions to this rule exist, such as for legal and accounting services provided to ensure compliance with federal campaign finance law, 11 CFR § 9002.11(b)(5). None of those exceptions apply to the type of spending at issue here.

² In addition to paying for half the cost of the advertisements, the RNC also paid approximately \$1.7 million in commissions for these ads.

³ The following is a typical example of the advertisements at issue:

President Bush and our leaders in Congress have a plan. Strengthen our economy, lifelong learning, investment in education, new skills for better jobs, simplify the tax code, reduce dependence on foreign energy, freer, fairer trade, create jobs, comp and flex time for working families, strengthen social security, legal reform, tax relief, an agenda for America.

of whether the RNC's payment for half of these so-called "hybrid advertisements" was a violation of the Bush-Cheney campaign's obligation not to spend more than the \$74,620,000 on its general election campaign.

Bush-Cheney argued that it was permitted to split the cost of the hybrid ads by analogizing to an FEC regulation covering telephone banks. Under that regulation, a party may split the cost of a phone bank with a federal candidate, with the party paying up to one-half the cost, if the phone calls refer to a clearly identified candidate and also make a generic reference to other candidates of the same party (e.g., "Vote for Smith and the rest of the Democratic team"). See 11 CFR § 106.8. Bush-Cheney argued that because the FEC's regulations provide that a party that pays for a portion of a phone bank with the appropriate message has not made a contribution to that candidate, similarly, the RNC did not make a contribution to Bush-Cheney (and Bush-Cheney did not accept a contribution) when the RNC paid one-half the cost of the hybrid ads.

Another argument raised during the audit process reasons that an advisory opinion the FEC issued in 2006 applies equally to Bush-Cheney's decision to split the cost of these ads with the RNC during the 2004 election. In Advisory Opinion 2006-11 (Washington Democratic State Central Committee), the Commission decided that a state party committee did not make a contribution to a federal candidate if it paid for part of the cost of a mass mailing that advocated the election of one clearly identified federal candidate as well as the election of other party candidates who are referred to only generically. See AO 2006-11, at n.1 (providing as an example "Vote for John Doe and our great Democratic team"). The Commission concluded that a state party could pay for a portion of the mailing costs that were equal to the percentage of the mailer space devoted to the generically referenced party candidates, but under no circumstances could the party pay for more than 50% of the overall costs of the mailing.

The Commission considered the arguments of Bush-Cheney and split 3-3 on whether the RNC's payment for half of these advertisements was a violation of the requirement that the Bush Cheney campaign spend no more than the \$74,620,000 on its general election campaign.⁴ We voted to find that this was not a permissible way to pay for these ads.⁵ Our reasons for doing so follow.

First, Bush-Cheney's argument that the hybrid ads were permissible in light of the phone bank regulation is unpersuasive. In part this is because at the time the Commission adopted the phone bank regulation, it considered and rejected a proposal to expand this exemption to include advertisements. See *Party and Committee Telephone Banks*, 68 Fed.

⁴ Commissioners Lenhard, Walther and Weintraub believed there was a violation, while Commissioners Mason, Toner and von Spakovsky did not.

⁵ Press reports at the time reflect that the Kerry-Edwards campaign and the Democratic National Committee made similar expenditures for hybrid ads, though the Kerry-Edwards effort began later, spent substantially less and the ads did make generic reference to other party candidates. See Michael J. Malbin (ed.), *The Election After Reform: Money, Politics, and the Bipartisan Campaign Reform Act* 32-33 (2006); Liz Sidoti, *Kerry Campaign, DNC to Run Joint Ads*, Associated Press State and Local Wire (Sep. 24, 2004).

Reg. 64,517-18 (Nov. 14, 2003) (explaining that the Commission “decided to limit the scope of the new section 106.8 to phone banks at this time because each type of communication presents different issues that need to be considered in further detail before establishing new rules”).

Second, even if the phone bank regulation were to be broadly interpreted to apply to broadcast advertisements, the regulation requires that the communication “generically refer[] to other candidates of the Federal candidate’s party without clearly identifying them.”⁶ 11 CFR § 106.8(a)(3). The Commission’s Explanation and Justification for the rule is clear that a political party must be mentioned to satisfy the generic reference requirement. *See* 68 Fed. Reg. 64,518 (giving as examples of generic references “our great Republican team” and “our great Democratic ticket”). Otherwise, the phone bank is influencing only the clearly identified candidate’s election. Here, only one of the 27 hybrid advertisements used the party names “Democrats” or “Republican,” with the rest making vague references to “our leaders in Congress,” “liberals in Congress” or “liberal allies.” As recognized by the phone bank regulation requirements, a reference to “liberals” and “leaders” in Congress is not the same as advocating for specific candidates or a specific party.

The argument that Bush-Cheney is covered by the Commission’s Advisory Opinion 2006-11 is also unpersuasive. First, the opinion requires a generic party reference. *See* AO 2006-11, at n.1 (providing as an example “Vote for John Doe and our great Democratic team”). As discussed above, only one of the twenty-seven Bush-Cheney ads contained a reference to either the Republican or Democratic party. Second, the advisory opinion does not sanction a blanket 50% split, but rather states that the costs must be allocated based on the “space or time” devoted to the generic party candidates, with a limit that under no circumstances may more than 50% of the cost be allocated to the generic party candidates. Bush-Cheney presented no evidence at all that 50% of the space or time of the advertisements was devoted to the generic party candidates and a review of those ads indicates that this standard would not have been met.

Because Bush-Cheney’s activity falls under no exemption to the general prohibition on publicly funded committees taking contributions, we believe the campaign impermissibly accepted \$42,409,406 in in-kind contributions from the RNC. Consequently, the committee should be required to repay this amount to the U.S. Treasury. However, without the requisite four affirmative votes, this is not the conclusion reached in the Commission’s Final Audit Report.

Despite our inability to reach agreement in the audit, the Commission is committed to addressing whatever ambiguity there is in the law concerning hybrid advertisements through rulemaking this year. This will ensure that future campaigns

⁶ If the advertisement clearly identifies other candidates, the expenditure is covered under a different section of the agency’s regulations. 11 CFR § 106.1. When there are multiple candidates specifically mentioned, the cost can be apportioned based upon the benefit reasonably expected to be derived by each candidate. That is determined by examining the proportion of space and time devoted to each candidate as compared to the total time and space devoted to all candidates.

properly allocate the costs of communications that specifically reference a candidate while generically referencing other party candidates.

Robert D. Lenhard
Robert D. Lenhard, Chairman

3/21/07
Date

Steven T. Walther
Steven T. Walther, Commissioner

3/21/07
Date

Ellen L. Weintraub
Ellen L. Weintraub, Commissioner

3/21/07
Date