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For meeting of January 14, 2021

June 4, 2020

**MEMORANDUM**

To: The Commission

Through: Alec Palmer *AP*  
Staff Director

From: Patricia C. Orrock *PCO*  
Chief Compliance Officer

Dayna C. Brown *DCB*  
Acting Assistant Staff Director  
Audit Division

Zuzana O. Pacious *ZOP*  
Audit Manager

By: Robert Morcomb *RM*  
Lead Auditor

Subject: Audit Division Recommendation Memorandum on the Mississippi Republican Party (A17-15)

Pursuant to Commission Directive No. 70 (FEC Directive on Processing Audit Reports), the Audit staff presented the Draft Final Audit Report (DFAR) to Mississippi Republican Party (MRP) on November 4, 2019 (see DFAR attachment). MRP requested an audit hearing before the Commission. Two Commissioners did not agree to grant the request for an oral hearing. MRP was advised that it may submit a new hearing request once the Commission regains a quorum. MRP was also advised the submission of a new hearing request would not be guaranteed by the newly established Commission.

This memorandum provides the Audit staff's recommendation for each finding outlined in the DFAR.

On November 22, 2019, MRP provided additional information in response to the DFAR. While the submitted information resulted in no change to the amounts in violation highlighted within the DFAR issued on November 4, 2019, MRP presented a new legal argument pertaining to Finding 3, Reporting of Apparent Independent Expenditures. The Office of General Counsel (OGC) reviewed MRP's response to the DFAR and on April 30,

2020, offered its guidance in LRA 1077 (see LRA attachment). In this guidance OGC revised its analysis of two specific mailers discussed below in Finding 3.<sup>1</sup>

With respect to MRP's legal argument that it should be able to allocate the total cost of each mailer between the express advocacy content and other content, OGC planned to submit a joint memorandum with the Office of Compliance to raise the legal argument and recommend a disposition to the Commission pursuant to Commission Directive 69. However, in its LRA 1077 – Supplemental Comments, dated May 27, 2020 (see LRA – Supplemental Comments attachment), OGC provided its legal opinion that MRP should not be allowed to allocate the mailers, along with its reasoning for arriving at this conclusion. The Audit staff raises this issue of allocation for the Commission's consideration, as recommended by OGC.

### **Finding 1. Misstatement of Financial Activity**

In response to the DFAR, MRP reiterated that any incorrect reporting of receipts and disbursements was an inadvertent administrative oversight without any intention to circumvent reporting requirements.

The Audit staff recommends that the Commission find that, in 2015, MRP understated its reported receipts and disbursements by \$10,606 and \$14,808, respectively.

### **Finding 2. Reporting of Debts and Obligations**

In response to the DFAR, MRP reiterated that it hired a compliance professional who worked with Commission staff to properly disclose the debts and obligations to correct the public record.

The Audit staff recommends that the Commission find that MRP failed to disclose debts and obligations to vendors totaling \$152,931.

### **Finding 3. Reporting of Apparent Independent Expenditures**

In response to the DFAR, MRP reiterated its position that the payments represented "routine political party solicitation expenses" and requested an audit hearing before the Commission.

Based on MRP's response to the DFAR, OGC revised its analysis of mailers<sup>2</sup> 1 and 8. Regarding mailer 1, OGC affirmed that mailer 1 still qualifies as an independent expenditure but for different reasons. Regarding mailer 8, OGC recommended that it be removed from the finding because it does not contain express advocacy and is not an independent expenditure. The Audit staff removed mailer 8, totaling \$6,518, from the amount in violation and recalculated the amount in violation accordingly.<sup>3</sup>

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<sup>1</sup> The Audit staff provided OGC's legal comments to MRP on May 4, 2020, and offered it an additional opportunity to respond. MRP declined to submit additional comments.

<sup>2</sup> Copies of mailers 1 and 8, as well as each of the nine mailers referred to in Finding 3, can be found in: \\ntsr\1\Voting Ballot Matters\Audit\Mississippi Republican Party\MRP Mailer Copies Finding 3

<sup>3</sup> The removal of mailer 8 resulted in a \$6,518 decrease of the \$43,967 amount in violation presented in the DFAR. The recalculated amount in violation, \$37,449, will be presented in the upcoming Proposed Final Audit Report.

In LRA 1077 – Supplemental Comments, OGC stated that MRP should not be allowed to allocate the mailers based on the express advocacy content and any other content that does not contain express advocacy. As a result, the Audit staff did not perform any revisions to this finding that would involve the allocation of cost based on content.

The Audit staff recommends that the Commission find that MRP failed to properly disclose apparent independent expenditures totaling \$37,449. In addition, the Audit staff recommends that the Commission find that MRP did not file 24/48-hour reports for apparent independent expenditures totaling \$36,969.<sup>4</sup>

The Office of General Counsel has reviewed this memorandum and concurs with the recommendations.

If this memorandum is approved, the Proposed Final Audit Report will be prepared and circulated within 30 days of the Commission’s approval.

**Given the Commission’s lack of quorum to approve this Audit Division Recommendation Memorandum on a tally vote, the matter would be placed on an open session agenda in accordance with Directive No. 70, once a quorum is reestablished.**

Documents related to this audit report, including the MRP’s November 22, 2019 response to the DFAR, can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Robert Morcomb or Zuzana Pacious at 694-1200.

Attachments:

- Draft Final Audit Report of the Audit Division on the Mississippi Republican Party
- LRA 1077 Mississippi Republican Party ADRM dated April 30, 2020
- LRA 1077 – Supplemental ADRM Comments dated May 27, 2020

cc: Office of General Counsel

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<sup>4</sup> The Audit staff notes that the removal of mailer 8 did not impact the failure to file 24/48-hour reports violation amount.



## Draft Final Audit Report of the Audit Division on the Mississippi Republican Party

(January 1, 2015 - December 31, 2016)

### 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.<sup>1</sup> 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 Mississippi Republican Party is a state party committee headquartered in Jackson, Mississippi. For more information, see the chart on the Committee Organization, p. 2.

### Financial Activity (p. 3)

#### • Receipts

○ Contributions from Individuals	\$ 740,807
○ Contributions from Political Party Committees and Other Political Committees	55,950
○ Transfers from Affiliated/Other Party Committees	1,647,080
○ Offsets to Operating Expenditures	2,686
○ Other Federal Receipts	98,202
○ Transfers from Non-Federal Account	172,635

**Total Receipts** \$ 2,717,360

#### • Disbursements

○ Operating Expenditures	\$ 328,494
○ Allocated Federal/Non-Federal Expenditures	492,538
○ Transfers to Affiliated Committees	1,587,842
○ Federal Election Activity	296,857

**Total Disbursements** \$ 2,705,731

### Findings and Recommendations (p. 4)

- Misstatement of Financial Activity (Finding 1)
- Reporting of Debts and Obligations (Finding 2)
- Reporting of Apparent Independent Expenditures (Finding 3)

<sup>1</sup> 52 U.S.C. §30111(b).



# **Draft Final Audit Report of the Audit Division on the Mississippi Republican Party**

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(January 1, 2015 - December 31, 2016)

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# Part I

## Background

### Authority for Audit

This report is based on an audit of the Mississippi Republican Party (MRP), 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 52 U.S.C. §30111(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 52 U.S.C. §30104. 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. 52 U.S.C. §30111(b).

### Scope of Audit

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

1. the receipt of excessive contributions;
2. the receipt of contributions from prohibited sources;
3. the disclosure of contributions received;
4. the disclosure of individual contributors' occupation and name of employer;
5. the disclosure of disbursements, debts and obligations;
6. the disclosure of expenses allocated between federal and non-federal accounts;
7. the consistency between reported figures and bank records;
8. the completeness of records;
9. the disclosure of independent expenditures; and
10. other committee operations necessary to the review.

## Part II

### Overview of Committee

#### Committee Organization

<b>Important Dates</b>	
• Date of Registration	January 9, 1978
• Audit Coverage	January 1, 2015 - December 31, 2016
<b>Headquarters</b>	
Jackson, Mississippi	
<b>Bank Information</b>	
• Bank Depositories	Two
• Bank Accounts	Three Federal; Three Non-Federal
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Paul V. Breazeale (1/31/2018 - Present) Lucien Smith (1/26/2018 - 1/30/2018)
• Treasurer During Period Covered by Audit	Lucien Smith (7/20/2016 - 12/31/2016) Paul V. Breazeale (8/21/2012 - 7/19/16)
<b>Management Information</b>	
• Attended FEC Campaign Finance Seminar	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

## Overview of Financial Activity (Audited Amounts)

<b>Cash on hand @ January 1, 2015</b>	<b>\$ 42,307</b>
<b>Receipts</b>	
○ Contributions from Individuals	740,807
○ Contributions from Political Party and Other Committees	55,950
○ Transfers from Affiliated and Other Political Committees	1,647,080
○ Offsets to Operating Expenditures	2,686
○ Other Federal Receipts	98,202
○ Transfers from Non-Federal Account	172,635
<b>Total Receipts</b>	<b>\$ 2,717,360</b>
<b>Disbursements</b>	
○ Operating Expenditures	328,494
○ Allocated Federal/Non-Federal Expenditures	492,538
○ Transfers to Affiliated Committees	1,587,842
○ Federal Election Activity	296,857
<b>Total Disbursements</b>	<b>\$ 2,705,731</b>
<b>Cash on hand @ December 31, 2016</b>	<b>\$ 53,936</b>

## **Part III**

### **Summaries**

#### **Findings and Recommendations**

##### **Finding 1. Misstatement of Financial Activity**

During audit fieldwork, a comparison of MRP's reported financial activity with its bank records revealed a misstatement of receipts and disbursements in calendar year 2015. Specifically, MRP understated its receipts and disbursements by \$10,606 and \$14,808, respectively. In response to the Interim Audit Report recommendation, MRP filed a Form 99 (Miscellaneous Electronic Submission) on June 21, 2019, which corrected the misstatements for the 2015 calendar year. MRP also stated that the cash balance is correct as of its 2019 May Monthly disclosure report. (For more detail, see p. 6.)

##### **Finding 2. Reporting of Debts and Obligations**

During audit fieldwork, the Audit staff noted that MRP failed to disclose debts and obligations owed to 10 vendors totaling \$152,931. In response to the Interim Audit Report recommendation, MRP filed a Form 99 on both June 21, 2019 and June 22, 2019, properly disclosing the debts and obligations and correcting the public record. (For more detail, see p. 8.)

##### **Finding 3. Reporting of Apparent Independent Expenditures**

During audit fieldwork, the Audit staff reviewed expenditures totaling \$43,967<sup>2</sup>, that MRP disclosed on Schedule B, Line 21(b) (Other Federal Operating Expenditures) and Schedule H4 (Disbursements for Allocated Federal /Non-Federal Activity). These expenditures appear to be independent expenditures that contain express advocacy which should have been disclosed on Schedule E, Line 24 (Itemized Independent Expenditures). Additionally, of the \$43,967, MRP did not provide sufficient documentation, pertaining to dissemination dates, to allow the Audit staff to verify whether 24/48-hour reports were required to be filed for the apparent independent expenditures totaling \$36,969.

In response to the Interim Audit Report recommendation, MRP stated that the expenditures were reported correctly as operating expenses or fundraising expenses. MRP also stated the primary purpose of these mailings was to solicit donors for contributions and to explain the potential uses of the donated funds, and that any mention of federal candidates was "incidental" to the purpose of the mailings. However, MRP

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<sup>2</sup> The amount cited in the Interim Audit Report was \$38,940. An additional \$5,027 has been added following the submission of an invoice and an estimated shipping cost in response to the Interim Audit Report.

stated it will file amendments, based on the Commission vote, with respect to the Audit staff's recommendation on this finding.

Additionally, based on clarification provided in response to the Interim Audit Report which explained the "ship date" noted on some invoices, expenditures totaling \$3,926 required a 24-hour report and expenditures totaling \$12,382 required a 48-hour report. For the remaining expenditures totaling \$20,661 without associated dissemination dates, 24/48-hour reports may still be required. MRP has not complied with the recommendation to correct the disclosure for these nine independent expenditures. (For more detail, see p. 9.)

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## Part IV

# Findings and Recommendations

### Finding 1. Misstatement of Financial Activity

#### Summary

During audit fieldwork, a comparison of MRP's reported financial activity with its bank records revealed a misstatement of receipts and disbursements for calendar year 2015. Specifically, MRP understated its receipts and disbursements by \$10,606 and \$14,808, respectively. In response to the Interim Audit Report recommendation, MRP filed a Form 99 (Miscellaneous Electronic Submission) on June 21, 2019, which corrected the misstatements for the 2015 calendar year. MRP also stated that the cash balance is correct as of its 2019 May Monthly disclosure report.

#### Legal Standard

**Contents of Federal 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). 52 U.S.C. §30104(b)(1), (2), (3), (4), and (5).

#### Facts and Analysis

##### A. Facts

During audit fieldwork, the Audit staff reconciled MRP's reported financial activity with its bank records for calendar years 2015 and 2016. The reconciliation identified that MRP misstated receipts and disbursements for 2015. The following chart details the discrepancies between MRP's disclosure reports and bank activity. The succeeding paragraphs explain why the discrepancies occurred.

<b>2015 Committee Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Beginning Cash on hand @ January 1, 2015	\$50,087	\$42,307	\$7,780 Overstated
Receipts	\$394,175	\$404,781	\$10,606 Understated
Disbursements	\$403,626	\$418,434	\$14,808 Understated
Ending Cash on hand @ December 31, 2015	\$28,624 <sup>3</sup>	\$28,654	\$30 Understated

The reported 2015 beginning cash on hand was over reported by \$7,780 likely resulting from prior period discrepancies.

The understatement of receipts resulted from the following:

• Transfer from a Non-federal account not reported	\$7,830
• In-kind contribution not reported as a receipt	2,868
• Unexplained differences	(92)
<b>Net Understatement of Receipts</b>	<b><u>\$10,606</u></b>

The understatement of disbursements resulted from the following:

• Disbursements not reported	\$11,932
• In-kind contribution not reported as a disbursement	2,868
• Unexplained differences	8
<b>Understatement of Disbursements</b>	<b><u>\$14,808</u></b>

### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter with MRP representatives during the exit conference and provided schedules detailing the misstatements. MRP representatives did not provide any comments.

The Interim Audit Report recommended that MRP amend its disclosure reports or file a Form 99<sup>4</sup> to correct the misstatements noted above. It was further recommended that MRP reconcile the cash on hand in its most recently filed report to include these adjustments and correct any subsequent discrepancies.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MRP explained that it believed that the “minor apparent misstatements” were “inadvertent administrative oversights.” MRP filed a Form 99, on June 21, 2019, which corrected the misstatements for the 2015 calendar year. MRP also stated that the cash balance reflected on its 2019 May Monthly disclosure report is correct.

<sup>3</sup> The reported ending cash on hand does not equal reported beginning cash on hand plus reported receipts minus reported disbursements likely due to the mathematical discrepancy.

<sup>4</sup> MRP was advised by the Audit staff that if it chose to file a Form 99, instead of amending its disclosure reports, the form must contain all pertinent information that is required on each schedule.

## **Finding 2. Reporting of Debts and Obligations**

### **Summary**

During audit fieldwork, the Audit staff noted that MRP failed to disclose debts and obligations owed to 10 vendors totaling \$152,931. In response to the Interim Audit Report recommendation, MRP filed a Form 99 on both June 21, 2019 and June 22, 2019, properly disclosing the debts and obligations and correcting the public record.

### **Legal Standard**

- A. Continuous Reporting Required.** A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 52 U.S.C §30104(b)(8) and 11 CFR §§104.3(d) and 104.11(a).
- B. Separate Schedules.** A political committee must file separate schedules for debts owed by the committee and debts owed to the committee, together with a statement explaining the circumstances and conditions under which each debt and obligation was incurred or extinguished. 11 CFR §104.11(a).
- C. Itemizing Debts and Obligations.**
- A debt of \$500 or less must be reported once it has been outstanding 60 days from the date incurred (the date of the transaction); the committee reports it on the next regularly scheduled report.
  - A debt exceeding \$500 must be disclosed in the report that covers the date on which the debt was incurred. 11 CFR §104.11(b).

### **Facts and Analysis**

#### **A. Facts**

During audit fieldwork, the Audit staff reviewed MRP's disbursements records and disclosure reports for proper reporting of debts and obligations. This review identified debts owed to 10 vendors totaling \$152,931<sup>5</sup> that MRP failed to report on Schedule D (Debts and Obligations) during the audit period. Based on a review of the records, these vendors provided MRP with signs, stickers, printed membership/fundraising letters and cards, audio and video equipment, food and venue for events, financial services, national convention materials, transportation, compliance services, postage, and flower arrangements. MRP reported debt totaling \$134,142 on Schedule D during the audit cycle. The Audit staff calculated the debts owed to the vendors based on the invoice date and the subsequent payment date. Debts were outstanding for periods ranging from 13 to 1,047 days.

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<sup>5</sup> Each debt in this amount was counted once, even if it required disclosure over multiple periods.

### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter at the exit conference and provided MRP representatives schedules detailing the transactions requiring disclosure on Schedule D. MRP representatives inquired about the definition of debts and whether monthly recurring expenses would be considered debt if not paid within a specific timeframe or crossing reporting periods. The Audit staff noted that none of the errors were recurring expenses. In response to the exit conference, MRP provided no further comments.

The Interim Audit Report recommended that MRP provide additional documents such as, invoices, billings statements, cancelled checks, etc., demonstrating that these transactions were not obligations which required reporting on Schedule D. Absent such documentation, the Interim Audit Report further recommended that MRP amend its reports or file a Form 99 to disclose these debts and obligations on Schedule D.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MRP filed a Form 99 on both June 21, 2019 and June 22, 2019, properly disclosing the debts and obligations and correcting the public record.

## **Finding 3. Reporting of Apparent Independent Expenditures**

### **Summary**

During audit fieldwork, the Audit staff reviewed expenditures totaling \$43,967<sup>6</sup>, that MRP disclosed on Schedule B, Line 21(b) (Other Federal Operating Expenditures) and Schedule H4 (Disbursements for Allocated Federal /Non-Federal Activity). These expenditures appear to be independent expenditures that contain express advocacy which should have been disclosed on Schedule E, Line 24 (Itemized Independent Expenditures). Additionally, of the \$43,967, MRP did not provide sufficient documentation, pertaining to dissemination dates, to allow the Audit staff to verify whether 24/48-hour reports were required to be filed for the apparent independent expenditures totaling \$36,969.

In response to the Interim Audit Report recommendation, MRP stated that the expenditures were reported correctly as operating expenses or fundraising expenses. MRP also stated the primary purpose of these mailings was to solicit donors for contributions and to explain the potential uses of the donated funds, and that any mention of federal candidates was “incidental” to the purpose of the mailings. However, MRP stated it will file amendments, based on the Commission vote, with respect to the Audit staff’s recommendation on this finding.

<sup>6</sup> The amount cited in the Interim Audit Report was \$38,940. An additional \$5,027 has been added following the submission of an invoice and an estimated shipping cost in response to the Interim Audit Report.

Additionally, based on clarification provided in response to the Interim Audit Report which explained the “ship date” noted on some invoices, expenditures totaling \$3,926 required a 24-hour report and expenditures totaling \$12,382 required a 48-hour report. For the remaining expenditures totaling \$20,661 without associated dissemination dates, 24/48-hour reports may still be required. MRP has not complied with the recommendation to correct the disclosure for these nine independent expenditures.

## **Legal Standard**

**A. Definition of Independent Expenditures.** An independent expenditure is an expenditure made for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate’s authorized committee, or their agents, or a political party or its agents.

A clearly identified candidate is one whose name, nickname, photograph or drawing appears, or whose identity is apparent through unambiguous reference, such as “your Congressman,” or through an unambiguous reference to his or her status as a candidate, such as “the Democratic presidential nominee” or “Republican candidate for Senate in this state.”

Expressly advocating means any communication that:

- Uses phrases such as “vote for the President” or “re-elect your Congressman” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge election or defeat of one or more clearly identified candidates; or
- When taken as a whole and with limited references to external events, such as proximity to the election, could be interpreted by a reasonable person only as advocating the election or defeat of one or more clearly identified candidates. 11 CFR §§100.16(a), 100.17 and 100.22.

**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 need not be itemized, though the committee must report the total of those expenditures on line (b) on Schedule E. 11 CFR §§104.3(b)(3)(vii), 104.4(a) and 104.11.

**C. Last-Minute Independent Expenditure Reports (24-Hour Reports).** Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20<sup>th</sup> 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 report is required each time additional independent expenditures aggregate \$1,000 or more. The 24-hour report must be filed on a Schedule E. 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 Reports).** 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 48-hour report must be filed on a Schedule E. 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 \$10,000. The reports must be filed with the Commission within 48 hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

**E. Formal Requirements Regarding Reports and Statements.** Each political committee shall maintain records with respect to the matters required to be reported which shall provide in sufficient detail the necessary information and data from which the filed reports may be verified, explained, clarified, and checked for accuracy and completeness. 11 CFR §104.14(b)(1).

## **Facts and Analysis**

### **A. Reporting of Apparent Independent Expenditures**

#### **1. Facts**

During audit fieldwork, the Audit staff reviewed disbursements to ensure proper reporting. The Audit staff noted that MRP did not disclose any independent expenditures on Schedule E, however, it made expenditures totaling \$43,967 disclosed on Schedule B, Line 21(b), and Schedule H4. These expenditures were for nine fundraising mailers, which contained express advocacy. A breakdown analysis for these expenditures is as follows:

#### **a. Apparent Independent Expenditures Reported as Disbursements for Allocated Federal /Non-federal Activity (Associated Mailer and Invoice Provided under 11 CFR §100.22(a))**

MRP made 12 disbursements for five<sup>7</sup> apparent independent expenditures totaling \$26,638 for which it provided copies of the mailers with associated invoices and cancelled checks. These communications contained language expressly advocating the election or defeat of a clearly identified candidate, as defined under 11 CFR §100.22(a):

<sup>7</sup> Two mailers previously considered under §100.22(b) (Interim Audit Report of the Audit Division, p. 10), have been reclassified under §100.22(a), per the Office of General Counsel's legal analysis, LRA 1077.

*LRA 1077, p. 4, Mailer #1*

“We must elect a Republican as the 45<sup>th</sup> President of the United States”

*LRA 1077, p. 4, Mailer #2*

“If we unite to support Donald Trump, we still have a chance to save our country for the future”

*LRA 1077, p. 4, Mailer #3*

“Stop Hillary!”; “STOP HILLARY from becoming President of the United States” and “support Donald Trump”

*LRA 1077, p. 4, Mailer #4*

“... you can make a difference to support Donald Trump and stop Hillary Clinton from moving back into the White House”

*LRA 1077, p. 6, Mailer #8*

“We must elect a Republican President in 2016”

**b. Apparent Independent Expenditures Reported as Operating Expenditures and Disbursements for Allocated Federal /Non-federal Activity (Associated Mailer and Invoice Provided under 11 CFR §100.22(b))**

MRP made 9 disbursements for four apparent independent expenditures totaling \$17,329<sup>8</sup>, for which it provided copies of the mailers with associated invoices and cancelled checks.

Based on the definition of express advocacy under 11 CFR §100.22(b), the Audit staff believes the following mailers could only be interpreted by a reasonable person as advocating the election or defeat of a clearly identified candidate:

*LRA 1077, p. 5, Mailer #5*

“Donald Trump ...will nominate Supreme Court Justices who will protect the Constitution.... I’m asking you to please stand up in defense of our Constitution by making a contribution today...”; “The Mississippi Republican Party has been hard at work not only to ensure that Donald Trump wins Mississippi by a wide margin, but also that he wins swing states such as Florida and Ohio”; and “Your generous contribution today will help keep Trump from losing the presidency...”

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<sup>8</sup> In addition to the amounts reclassified in this category (footnote 7), an additional \$5,027 has been added to the amount based on an invoice and an estimated shipping cost submitted in response to the Interim Audit Report.

*LRA 1077, p. 5, Mailer #6*

“I am asking you to please contribute \$100 to make sure that Donald Trump’s message of Making America Great Again can be delivered untainted by the media to undecided voters here in Mississippi and in key battleground states”

*LRA 1077, p. 5, Mailer #7*

“The Mississippi Republican Party is working hard to make sure Republicans in Mississippi turn out to vote and send Donald Trump to a landslide victory here. And the Party is doing the same thing in the critical battleground state of Florida... Will you please contribute \$50, \$75, \$100 or more to enable our Party to do everything it can in these last days to turn out Republican voters in Mississippi and Florida?”

*LRA 1077, p. 6, Mailer #9*

“Recent polls suggest the presidential election is dead even and that’s good news for Donald Trump and Mike Pence as they build momentum to win the White House... NOW is the time for a final surge in the momentum. Will you help make sure that happens?”

## **2. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff presented MRP with a schedule detailing these expenditures. MRP representatives did not have any comments.

The Interim Audit Report recommended that MRP provide documentation showing that the apparent independent expenditures, totaling \$38,940<sup>9</sup>, did not require reporting as independent expenditures. Absent such documentation, the Interim Audit Report recommended that MRP amend its reports to disclose these disbursements as independent expenditures on Schedule E and submit procedures for reporting independent expenditures.

## **3. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MRP disagreed that any of its mailers constituted independent expenditures. MRP stated that expenditures totaling \$38,940<sup>10</sup> were reported on the appropriate schedule as “operating expenses or fundraising expenses”<sup>11</sup> and that these mailings “constitute solicitations for MRP.” MRP further stated that the Commission should reject the assertion that these mailings contain express advocacy because the “call to action” was not “electoral” or an “explicit directive to vote for or against any clearly identified Federal candidate,” but rather, “a solicitation of a contribution.” Lastly, MRP stated that it and other “similarly situated parties lack notice that the Commission has taken the view that incidental issue or political advocacy

<sup>9</sup> See footnote #5.

<sup>10</sup> See footnote #5.

<sup>11</sup> Expenditures totaling \$36,969 referenced a Federal candidate and were therefore incorrectly reported on Schedule H4. 11 CFR §300.32(a).

language can transform typical party expenses such as these into independent expenditures.”

The Audit staff does not dispute MRP’s assertion that the mailers were used to solicit contributions, however, the Commission has concluded that if mailers contain express advocacy as defined in 11 CFR §100.22, they are considered independent expenditures, irrespective of the solicitations’ intended purpose to raise funds.<sup>12</sup>

## **B. Failure to File 24/48-Hour Reports for Apparent Independent Expenditures**

### **1. Facts**

In addition to not reporting any independent expenditures during the audit period, MRP did not file any 24 or 48-hour reports. Therefore, the apparent independent expenditures identified above, may also have required such filings.

### **2. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff discussed with the MRP representatives the requirements for filing 24/48-hour reports. MRP representatives did not provide any comments.

The Interim Audit Report recommended that absent documentation that the apparent independent expenditures, totaling \$38,940<sup>13</sup>, did not require reporting as independent expenditures, MRP provide documentation to support the date of public dissemination for each mailer to determine whether a 24/48-hour report was required.

### **3. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, MRP provided documentation and stated that the term “ship date,” as detailed on four of the nine invoices, reflects “the day that they took the mailers to the post office.” Accordingly, the Audit staff used the ship date as the date of dissemination for these invoices and determined that MRP failed to file one 48-hour report for expenditures totaling \$12,382 and one 24-hour report for expenditures totaling \$3,926.

Thus, four of the remaining five mailers<sup>14</sup> with no dissemination date may still require the filing of 24/48-hour reports. Absent evidence that the expenditures totaling \$36,969 did not require reporting as independent expenditures, the Audit staff considers these independent expenditures which may have required filing of

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<sup>12</sup> Final Audit Report on National Campaign Fund; Final Audit Report on Legacy Committee Political Action Committee; Final Audit Report on Freedom’s Defense Fund; and Final Audit Report on Conservative Majority Fund.

<sup>13</sup> See footnote #5.

<sup>14</sup> The ninth mailer, for the 2015 activity totaling \$6,998, did not require any 24/48-hour reports.

24/48-hour reports. The Audit staff recommends that MRP provide the dates of dissemination for the mailers discussed above.

DRAFT



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

April 30, 2020

**MEMORANDUM**

**TO:** Patricia C. Orrock  
Chief Compliance Officer

Dayna Brown  
Assistant Staff Director  
Audit Division

**FROM:** Neven F. Stipanovic *NFS*  
Associate General Counsel  
Policy Division

Lorenzo Holloway *LH*  
Assistant General Counsel  
Compliance Advice

Joshua Blume *JB*  
Attorney

**SUBJECT:** Audit Division Recommendation Memorandum on the Mississippi Republican Party (LRA 1077)

**I. INTRODUCTION**

The Office of General Counsel has reviewed the Audit Division Recommendation Memorandum (“ADRM”) on the Mississippi Republican Party (“the Committee”) and the Committee’s response to the Draft Final Audit Report. We concur with Findings 1 and 2 of the Draft Final Audit Report (“DFAR”). We have reviewed arguments submitted by the Committee in response to the DFAR, and we plan to address one particular argument in a forthcoming memorandum jointly submitted by this office and the Office of Compliance pursuant to Commission Directive 69, Par. 3.a and d, in the near future.<sup>1</sup> In this memorandum, we revisit

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<sup>1</sup> The Committee argues that even if some of the mailers at issue in the DFAR are independent expenditures, the Committee should be permitted to allocate the total cost of each mailer between the express advocacy content and other content that does not contain express advocacy, thereby allowing it to report part of the mailers’ costs as

our independent expenditure analysis of two of the nine mailers discussed in our previous comments on the DFAR — specifically, mailers one and eight. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock on Draft Final Audit Report on Mississippi Republican Party (LRA 1077), at 4, 6 (Oct. 2, 2019) (“DFAR Comments”).<sup>2</sup> We believe that mailer one still qualifies as an independent expenditure, but for different reasons. Because we are revising our basis for concluding that mailer one is an independent expenditure, we recommend that the Audit Division notify the Committee of this changed basis so that it may have a further opportunity to comment if it wishes to do so. We recommend that mailer eight be removed from Finding 3 because we no longer believe it qualifies as an independent expenditure.

## II. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 3)

Although mailers one and eight used “magic words” such as “[w]e must elect a Republican as the 45<sup>th</sup> President of the United States” (mailer one) and “[w]e must elect a Republican President in 2016” (mailer eight), neither mailer clearly identified that candidate by name, photograph, drawing, or other unambiguous reference. *See* 11 C.F.R. § 100.17. In our earlier comments we had relied on the Commission’s reasoning in Advisory Opinion 2003-23 (WE LEAD) to conclude that even though the eventual nominee was not known, the candidate was nonetheless identifiable as to the specific office, party affiliation, and election cycle. However, in that advisory opinion the Commission was interpreting a different regulation — 11 C.F.R. § 110.6(b)(1) — to allow contributions to be earmarked for an undetermined federal candidate “in certain circumstances.” Advisory Opinion 2003-23 (WE LEAD) at 3. The Commission did not address whether a candidate may be sufficiently identified for express advocacy purposes using only office, party affiliation and election cycle. Thus, we believe that the facts in that advisory opinion are materially different than those presented in this audit.

Although mailer one does not clearly identify the candidate that must be elected as the “45<sup>th</sup> President of the United States,” the mailer does clearly identify two other federal candidates: Bernie Sanders and Hillary Clinton, both of whom were candidates for the Democratic Party nomination. We believe that mailer one expressly advocates their defeat under 11 C.F.R. § 100.22(b) because the mailer criticizes their character that, when taken as a whole and with limited reference to external events, cannot be understood as suggesting any other action than to defeat either candidate should either candidate become the Democratic party nominee. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35295 (July 6, 1995) (communications discussing or commenting on candidate’s character, qualifications, or accomplishments are express advocacy

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independent expenditures and part as operating expenditures. In our view, this is a complex, relatively close, and unsettled question of law, with possible arguments pro and con that we intend to address.

<sup>2</sup> On November 22, 2019, the Committee submitted its response to the DFAR and included a request for an audit hearing to discuss Finding 3. Two or more Commissioners did not agree to grant the request for a hearing. *See* Procedural Rules for Audit Hearings, 74 Fed. Reg. 33140, 33142 (July 10, 2009). The Commission advised the Committee of the denial of its request for a hearing on December 23, 2019, but also offered the Committee an opportunity to submit a new request for a hearing when a quorum is restored. Our comments may be revised if a hearing is held.

under section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat candidates in question). The mailer disparages Bernie Sanders by characterizing him as an avowed socialist and condemns Hillary Clinton as dogged by political scandals and untrustworthy. It states that neither candidate seeking the Presidency is good for America. The mailer also contains an electoral portion that is “unmistakable, unambiguous, and suggestive of only one meaning,” *see* 11 C.F.R. § 100.22(b)(1), stating that “we are just months away from the most consequential presidential election in our lives.” The mailer’s assertion that it is imperative to electing their opponent and asking the reader to donate “[i]f you want Election Night, 2016 to be an evening of great celebration” can only be reasonably interpreted as a call to defeat Clinton or Sanders. 11 C.F.R. § 100.22(b)(2).

Mailer eight, apart from using the phrase “[w]e must elect a Republican President in 2016,” also contains references to 18 candidates that are clearly identified by name. Nevertheless, those candidates are simply listed in an apparent survey of potential nominees and the mailer does not urge the election of any specific candidate. Indeed, the mailer closely resembles the preference poll mailers that we concluded did not contain express advocacy in the audit of The Legacy Political Action Committee. *See* Memorandum from Christopher Hughey to Patricia Carmona on Interim Audit Report on The Legacy Political Action Committee (LRA # 815), at 7-8 (May 4, 2011) (comments on Letters 25 and 54); Commission Certification In the Matter of The Legacy Committee Political Action Committee, A09-22, Agenda Document No. 12-30 (June 11, 2012) (containing list of communications containing express advocacy that excludes communications 25 and 54). Mailer eight thus should be removed from the finding because it does not contain express advocacy and is not an independent expenditure.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 27, 2020

**MEMORANDUM**

**TO:** Patricia C. Orrock  
Chief Compliance Officer

Dayna C. Brown  
Acting Assistant Staff Director  
Audit Division

**FROM:** Neven F. Stipanovic *NFS*  
Associate General Counsel  
Policy Division

Lorenzo Holloway *LH*  
Assistant General Counsel  
Compliance Advice

Joshua Blume *JB*  
Attorney

**SUBJECT:** Audit Division Recommendation Memorandum on the Mississippi Republican Party (LRA 1077) – Supplemental Comments

**I. INTRODUCTION**

On April 30, 2020, this office transmitted comments on the Audit Division Recommendation Memorandum on the Mississippi Republican Party (“the Committee”), prepared by the Audit Division. In those comments, we deferred commenting on one argument raised by the Committee; namely, that the Committee should be allowed to allocate the cost of mailers containing express advocacy and other, non-express advocacy content, for reporting purposes. We stated that because the issue of allocation appeared to be a complex, relatively novel and unsettled question, for which arguments pro and con might be adduced on both sides, we would draft a memorandum in concert with the Office of Compliance raising the issue and recommending a disposition of it to the Commission pursuant to Commission Directive 69.

Following additional consideration of the issue, and for the reasons discussed below, we have determined that the issue is not as unsettled as we had previously thought, and that it would

be more expedient and appropriate to issue these supplemental comments in lieu of submitting a memorandum under Directive 69. We recommend that the Audit Division raise the issue for the Commission's consideration in its cover memorandum to the Commission that will accompany the transmission of the Draft Final Audit Report ("DFAR").

## II. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 3)

In response to the DFAR, the Committee argues that even if the mailers were independent expenditures, the Committee should be permitted to allocate the total cost of each mailer between the express advocacy content and other content that does not contain express advocacy, for example portions of the mailer that discuss fundraising or issues, or that contain only generic references to candidates of a political party. The effect of such an allocation would be to allow the Committee to report only the portion of each mailer containing express advocacy as an independent expenditure and to report the remainder of each mailer as an operating expenditure.

We believe that the Committee should not be allowed to allocate the mailers in this manner. As the Commission previously explained, "communications that include express electoral advocacy [are treated] as express advocacy, despite the fact that the communications happen to include issue advocacy as well" — a conclusion that we believe applies equally, in principle, to communications that include express advocacy and content serving other kinds of purposes, such as fundraising, as well. *See* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35291, 35295 (Jul. 6, 1995) (noting that the Supreme Court in *FEC v. Mass. Citizens for Life, Inc.*, 479 U.S. 238 (1986) made clear that "isolated portions of a communication are not to be read separately in determining whether a communication constituted express advocacy"). The "subjective intent of the speaker," the Commission further explained, is not a relevant consideration when deciding whether a communication contains express advocacy. *Id.* Consistent with this rationale, the Commission previously approved several audits where the committees' fundraising communications were treated entirely as independent expenditures because they contained express advocacy, even though the intent of the communications may have been to raise funds.<sup>1</sup> In one of those audits, the Commission approved the audit even though the committee, like the Committee at issue here, explicitly argued that it should be allowed to allocate its fundraising communications.<sup>2</sup> Therefore, the fact that the Committee's mailers may have been intended for different purposes, for example to raise funds, is not a relevant consideration here. Because the mailers contain express advocacy, the entire cost of the mailers should be reported as independent expenditures.

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<sup>1</sup> *See* Final Audit Report on Conservative Majority Fund, at 16-17 (approved Dec. 6, 2017); Final Audit Report on the Freedom's Defense Fund, at 12-13 (approved Dec. 6, 2017); Final Audit Report on the National Campaign Fund, at 9-15 (approved Oct. 22, 2012); Final Audit Report on the Legacy Fund Political Action Committee, at 7-13 (approved July 31, 2012).

<sup>2</sup> *See* Final Audit Report on Conservative Majority Fund, at 16-17 (approved Dec. 6, 2017); *see also* Memorandum from Lisa J. Stevenson to Patricia C. Orrock on Draft Final Audit Report on the Conservative Majority Fund (LRA 986), at 2 (May 12, 2017).

Because of the importance of this issue, we recommend that the Audit Division raise the issue for the Commission's consideration in the cover memorandum that will accompany the transmission of the DFAR to the Commission.