



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

January 24, 2012

**MEMORANDUM**

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Chief Compliance Officer

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**SUBJECT:** Draft Final Audit Report on The Legacy Committee Political Action Committee  
(LRA # 815)

**I. INTRODUCTION**

The Office of General Counsel ("OGC") has reviewed the Draft Final Audit Report ("Proposed Report") on The Legacy Committee Political Action Committee ("LCP" or "Committee"). We concur with Findings 1 (Misstatement of Financial Activity) and 2 (Failure to File Notices and Properly Disclose Independent Expenditures) in the Proposed Report. In its response to the Interim Audit Report, the Committee primarily addressed Finding 2. This memorandum analyzes the Committee's arguments about this finding. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

## II. BACKGROUND

LCP made expenditures for 60 separate direct mail fundraising appeals, a number of which included express advocacy. LCP originally reported these expenditures as operating expenditures. LCP admitted, after discussions with RAD, that a number of the fundraising letters "included content which contained some words of express advocacy." ETEXT ATTACHMENT, Dec. 18, 2008 (FEC Image #28935204773). LCP then disclosed over \$1 million in independent expenditures on Schedule E of its amended reports, and filed some, but not all, of the 24/48-hour notices where such notices would have been required.

The Audit Division determined that some of the letters disclosed as independent expenditures in the amended reports contained express advocacy and should have been timely disclosed through 24/48-hour notices; in our comments on the Interim Audit Report, we generally concurred.<sup>1</sup> However, the Audit Division and Office of General Counsel determined that many of the letters disclosed as independent expenditures in the amended reports did not, in fact, contain express advocacy. The interim audit report ultimately concluded that \$412,891 of the expenditures were in fact independent expenditures, in that the underlying communications contained express advocacy pursuant to 11 C.F.R. § 100.22. The interim audit report recommended that LCP provide evidence demonstrating that the disbursements were not independent expenditures and therefore did not require 24/48-hour notices, and submit and implement revised procedures for reporting independent expenditures.

LCP responded to the interim audit report by acknowledging that some of the communications contained express advocacy. LCP 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."<sup>2</sup>

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<sup>1</sup> The Office of General Counsel analyzed the communications, providing a detailed chart of whether the 60 types of communications included express advocacy.

<sup>2</sup> LCP states that the fundraising letters were not made in reference to any primary election; however, LCP reported the independent expenditures associated with these underlying communications as being made for the 2008 general election, not the primary.

### III. ANALYSIS

In our analysis of the Draft Interim Audit Report, 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 in the following comments on the Draft Final Audit Report. Contrary to LCP'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. 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).<sup>3</sup>

#### B. Express Advocacy Analysis Does Not Allow for Subjective Intent

In its response to the interim audit report, LCP repeatedly asserts that it never intended the fundraising letters to expressly advocate the election or defeat of a clearly identified

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<sup>3</sup> Some commissioners have expressed concerns, in other pending matters, about the extent to which fundraising letters necessarily constitute express advocacy.

candidate.<sup>4</sup> The Commission's regulations, however, do not provide any consideration for the speaker's subjective intent, ~~whe~~ considering whether the communication expressly advocates the election or defeat of a clearly identified candidate. 11 C.F.R. 100.22. Rather, the regulations provide two possibilities when considering whether a communication contains express advocacy: (1) the communication uses phrases such as "vote for the President," "Smith for Congress," "defeat" accompanied by a picture of one or more candidates, etc.; or (2) when taken as a whole and with limited reference to external events, the communication could only be interpreted by a reasonable person as advocating the election or defeat of a clearly identified candidate because the electoral portion of the communication is unmistakable, unambiguous and suggestive of only one meaning, and reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates. *Id.* Moreover, the Explanation and Justification for the express advocacy regulations, following *FEC v. Furgatch*, 807 F. 2d 857 (9<sup>th</sup> Cir. 1987), specifically states that "the subjective intent of the speaker is not a relevant consideration" under section 100.22. 60 Fed. Reg. 35291, 35295 (July 6, 1995). *See also* MUR 5635 (Sierra Club), General Counsel's Report # 2 at Note 7 (July 3, 2006) (subjective intent of speaker is not relevant consideration under section 100.22(b)). Thus, even if LCP did not intend to expressly advocate the election or defeat of a clearly identified candidate, its subjective intent is not a factor pursuant to 11 C.F.R. § 100.22.

Legacy appears to argue that communications should not be considered independent expenditures if the subjective intent of the speaker is somehow not to urge the reader to vote for or against a candidate -- even those communications that otherwise contain express advocacy as defined in 11 C.F.R. § 100.22(a), such as the ones here that urge the reader to "make sure John McCain is elected in November," to "help stop [Hillary] Clinton," and that "John McCain needs your vote," or that simply state "John McCain for President."

It is our view that a communication that tells the reader that "John McCain needs your vote" does, contrary to the Committee's response, "urge the recipient to vote for any particular candidate." Beyond that, however, the introduction of a subjective intent test into express advocacy analysis would turn the question into a loosely governed inquiry into the speaker's "purpose." But, with respect to independent expenditures, the Supreme Court in *Buckley v. Valeo*, 424 U.S. 1, 79-80 (1976), construed the term "expenditure" as limited to "express advocacy" precisely because the term "for the purpose of influencing" would otherwise have been unconstitutionally vague.

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<sup>4</sup> LCP states that it "never intended to engage in any independent expenditures." Rather, LCP states that it simply "tested various different content appeals in the letters." LCP further states that purpose of the letters that "included content with references to elected officials and Presidential candidates" was "to clue the recipient audience that [LCP] was a conservative Republican PAC worthy of their support, but the purpose of the mailings themselves ... was not to intervene in any election by engaging in a true independent expenditure (i.e., an election communication intended to influence a vote in an election for or against a candidate)."