



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**MEMORANDUM**

**TO:** Patricia Carmona  
Chief Compliance Officer

Joseph F. Stoltz  
Assistant Staff Director

**FROM:** Christopher Hughey *pch*  
Acting General Counsel

Lawrence L. Calvert, Jr. *L.C.*  
Associate General Counsel

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

Delanie DeWitt Painter *DDP per LCP*  
Attorney

**SUBJECT:** Draft Final Audit Report of the Audit Division on the United Association Political Education Committee (LRA 818)

The Office of General Counsel has reviewed the Draft Final Audit Report of the Audit Division ("Draft Report") and the Audit Division's Recommendation Memorandum ("ADRM") on the United Association Political Education Committee ("UAPEC" or the "Committee") and has the following comments. The Draft Report sets forth the Audit Division's basis for three findings: Finding 1. Excessive Contributions to Candidates and Other Political Committees; Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures; and Finding 3. Failure to Properly Disclose Transfers from Affiliated Committees. The Committee responded to the Draft Report on December 7, 2010 ("DFAR Response") but did not request an audit hearing. The Committee, however, raises the legal issue of how to determine for reporting purposes when independent expenditures are disseminated to the public if the nature of the materials (yard signs, mini billboards, shirts, hats, etc.) that are sent from the national union to local chapters and members makes it difficult to know when the materials are disseminated to the public.<sup>1</sup> Our comment focus on this legal issue (Finding 2). If you

<sup>1</sup> We note that we have not commented at any prior stage of this audit.

have any questions, please contact Delanie DeWitt Painter, the attorney assigned to this audit.

**I. BACKGROUND – FAILURE TO FILE NOTICES AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES (FINDING 2)**

The auditors conclude that UAPEC did not properly disclose independent expenditures on its reports and did not timely file 24 and 48 hour notices for its independent expenditures.<sup>2</sup> UAPEC made 8 disbursements totaling \$510,314 to purchase materials such as mini billboards, yard signs, posters, shirts, hats, etc. UAPEC itemized these disbursements as independent expenditures supporting Barack Obama on Schedule E as of the date of payment.<sup>3</sup> Most of these independent expenditures relate to one payment of \$324,209 made on December 3, 2008, after the 2008 general election, and disclosed on line 24 Schedule E with a date of December 10, 2010. The auditors state that UAPEC should have disclosed these independent expenditures as memo entries on Schedule E for the reports covering the dates when the materials were publicly disseminated, and included a corresponding debt on Schedule D. In addition, UAPEC did not timely file any 24 or 48-hour notices of independent expenditures. Because UAPEC did not maintain documentation of the public dissemination date for any of the materials, the auditors do not know the exact amount that required such notices. The auditors conclude that some of the materials were likely disseminated within the notice period because of the dates of some invoices close to the election and the \$324,209 payment after the election and because UAPEC acknowledges that the materials were disseminated prior to the election.

The Draft Report states that UAPEC representatives told the auditors they were unsure how to determine the dissemination date because UAPEC generally distributes these materials directly to local union members or ships the materials to local unions for distribution. UAPEC suggested that in the future it would change its method of filing the required notices and use the date that materials are first received at UAPEC headquarters as the dissemination date for filing 24 and 48-hour notices.

In the Interim Audit Report (“IAR”), the auditors recommended that UAPEC implement revised procedures to properly disclose independent expenditures on

---

<sup>2</sup> The auditors provided us with additional information to clarify the facts in the Draft Report. We suggest that this information be included in the revised finding. Specifically, the auditors have informed us that the revised finding will clarify that UAPEC eventually filed notices, but did not file them timely, and that a \$324,209 payment on December 3, 2008 was related to numerous invoices.

<sup>3</sup> According to the Audit staff, one payment check dated December 3, 2008 related to \$324,209 of the independent expenditures and was payment for a number of invoices dated between March 31, 2008 and November 18, 2008, but the invoices could not be traced directly to the payment. The remaining seven invoices for independent expenditures totaling \$186,105 were dated between August 20, 2008 and November 7, 2008 and paid between August 27, 2008 and November 12, 2008.

Schedules E and D and to track aggregation and dissemination for the 24 and 48 hour notice requirements. The Draft Report states that in response to the IAR, UAPEC agreed with the Audit staff's conclusion, and provided the recommended written copy of its new independent expenditure tracking procedures.

Nevertheless, the Committee addresses the issue in its response. It states that it understood the independent expenditure notice requirements but was not able to identify an earlier dissemination date because the nature of the material made it unable to know precisely when the material was disseminated to the public. The Committee explained that the material "is not typically disseminated on the date the material is received at UAPEC headquarters, the date the material is sent to the affiliates or the date the material is sent to members of the restricted class." DFAR Response at 2. Instead, the material would only be disseminated to the public on "multiple unknown dates" when "a shirt is worn in public or a yard sign is posted in a yard." *Id.* The Committee contends that the statute and regulations do not provide guidance on when such materials should be considered disseminated. The Committee stated, however, that "given the impossibility of identifying the dates of dissemination" it will in the future consider the material to be disseminated for reporting purposes on the date the material is received. *Id.* at 2-3. We understand that the auditors concur that this approach would be acceptable.

## **II. UAPEC MAY REPORT INDEPENDENT EXPENDITURES AS OF DATE WHEN IT RECEIVES MATERIALS FROM VENDORS BECAUSE OF PRACTICAL IMPOSSIBILITY OF DETERMINING ACTUAL DATES OF PUBLIC DISSEMINATION**

The issue here is how to determine when materials are publicly disseminated for reporting purposes when the nature of the materials, such as yard signs, mini billboards, shirts, hats, etc. that are sent from a union to local union chapters and members makes it difficult to know when the materials are actually disseminated to the public by union members. We concur with the Audit staff that UAPEC may use the date when UAPEC receives the independent expenditure materials from vendors as the date of public dissemination for reporting and aggregation purposes. UAPEC could also use a later date, such as the date it ships the materials to local unions or union members, if it maintains records to support that date.

An independent expenditure is a communication expressly advocating the election or defeat of a clearly identified candidate that is not coordinated with any candidate or authorized committee. 11 C.F.R. § 100.16(a). A committee must report independent expenditures as of the date when they are publicly distributed or publicly disseminated. *See* 11 C.F.R. §§ 104.4, 104.5(g), *see also* 11 C.F.R. § 109.10.

A committee must file notices within 48 hours of the date an independent expenditure is publicly distributed or otherwise publicly disseminated for independent expenditures aggregating \$10,000 or more with respect to a given election made at any

time during the calendar year up to and including the 20th day before an election. 11 C.F.R. §§ 104.4(b)(2) and 104.5(g). In addition, a committee must file a notice within 24 hours of when each independent expenditure aggregating \$1,000 or more with respect to any given election is publicly distributed or otherwise publicly disseminated if that occurs after the 20th day but more than 24-hours before the election. 11 C.F.R. §§ 104.4(c) and 104.5(g). To determine when a committee must file 24 and 48-hour notices, independent expenditures are aggregated as of the first date that an independent expenditure is publicly distributed or otherwise publicly disseminated. 11 C.F.R. § 104.4(f), 104.5(g).

The Commission explained in the rulemaking that the term “publicly distributed” for independent expenditures has the same meaning as the term does for electioneering communications in 11 C.F.R. § 100.29(b)(3).<sup>4</sup> Explanation and Justification, “Bipartisan Campaign Reform Act of 2002 Reporting,” 68 *Fed. Reg.* 404, 407 (Jan. 3, 2003). The Commission further explained that “publicly disseminated” “refers to communications that are made public via other media, e.g., newspaper, magazines, handbills.” *Id.* at 407 and 409. The Commission noted that when a communication is publicly distributed or disseminated, the person paying for the communication would be able to determine whether the communication meets the independent expenditure requirements including express advocacy. *Id.* at 407

The materials at issue here would be “publicly disseminated” rather than “publicly distributed” because they are not broadcast communications. *See* 68 *Fed. Reg.* 404, 407 and 409 (Jan. 3, 2003). The regulations and regulatory history are silent on how to determine the date when independent expenditures such as shirts, hats, yard signs, or mini billboards provided by a union to local unions and members are “publicly disseminated.” The term “publicly disseminated,” however, can be generally understood to mean the first date when a communication could be seen or heard by a member of the public, equivalent to the publication date for printed media such as a newspaper.<sup>5</sup> Thus, we believe that the date these materials are publicly disseminated is the first date when the materials can be viewed or heard by members of the public, rather than only members of the union’s restricted class under section 114.1(j). The types of materials at issue here

<sup>4</sup> Section 100.29 (b)(3)(i) defines “publicly distributed” for electioneering communications as aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system. Electioneering communications do not include any communication publicly disseminated through a means other than broadcast, such as print media. 11 C.F.R. § 100.29(b)(3).

<sup>5</sup> In a pre-BCRA rulemaking in 2001 and early 2002 for then-section 109.1, the Commission considered a multi-prong test to determine when an independent expenditure was made for reporting purposes but decided on a rule that an independent expenditure is made on the first date on which the communication is published, broadcast or otherwise publicly disseminated. *See* Explanation and Justification for 11 C.F.R. § 109.1, 67 *Fed. Reg.* 12837 (Mar. 20, 2002). One commenter on the rulemaking objected to the other possible prongs and to using the word “printed” (which the Commission changed to “published” based on the comment) because an independent expenditure is not made until the communication is disseminated to the public. *Id.*

are likely to be eventually seen by members of the public at some time. See Memorandum to Joseph F. Stoltz, "Proposed Interim Audit Report, Democrat, Republican, Independent Voter Education Political Campaign Committee ("DRIVE") LRA 729" at 3-4 (Dec. 27, 2007). The committee here implicitly acknowledged that was its intent for these materials by reporting disbursements for them as independent expenditures. The materials were paid for and obtained by the national office of UAPEC, distributed by the national office to local unions, and then either publicly disseminated by the local unions or, and particularly in the case of items such as t-shirts, and yard signs, distributed by local unions to the individual members of the restricted class who then "publicly disseminated" the materials when they decided to wear the t-shirt, put up a sign in their yard, etc.

We concur with the auditors that UAPEC failed to timely file 24 and 48 hour notices or to properly report these independent expenditures. While we acknowledge the inherent difficulty of determining the precise date of public dissemination of these materials, there is no indication that UAPEC made any attempt to disclose these independent expenditures in a way that would make the information available to the public prior to the date of the election. Nor did it maintain records that would assist it or the auditors in determining a date that would be as close as possible to the date of public dissemination.

The problem for future disclosure is that in the case of the materials that are distributed by UAPEC through the local unions to union members for display at a time of the individual members' choosing, it is practically impossible for UAPEC to know precisely when these kinds of campaign materials are first viewed by members of the public rather than only by members of its restricted class. A union member could wear a shirt, for example, to a union meeting or in the member's home and the shirt would only be seen by members of the restricted class, but once the individual ventures out in public, assuming the shirt is visible, the message would be disseminated to the public. Similarly, a local union could give a yard sign to a member, who could put it into his garage for several days before putting it on his lawn where it could be viewed by the public passing by. So one box of materials sent to one local union chapter could result in public dissemination of the materials over a number of different dates, because each of many union members would make individual decisions about when to publicly disseminate the materials by wearing or displaying them. Those individual decisions are the actual dates when the independent expenditures are "publicly disseminated." It would be burdensome and impractical to require a union to track the use of these types of materials to determine when they are first viewed by members of the public.

Because it is impractical to determine the actual dates when these materials are publicly disseminated, UAPEC could use the next earliest date in the distribution chain: the first date when the local union makes these materials available to members of its restricted class (or when the local union itself publicly displays materials such as "mini-billboards," which we understand are four-foot by eight-foot signs.) These dates could be

determined for future independent expenditures, but might create an additional recordkeeping responsibility for UAPEC and its local union chapters. These would be the latest dates that UAPEC could pragmatically use to determine the dates of public dissemination of these independent expenditures. The Committee, however, has evidently decided that using those dates -- or an earlier date, when it sends the materials from its national headquarters to its local unions or members -- would impose too much of a recordkeeping burden, and instead proposes an even earlier date, when it receives the materials from its vendors. The Audit Division appears to concur with this approach.

The date a national union receives materials from vendors is not the actual date of public dissemination; however, this date is earlier than would otherwise be required and would disclose the relevant information to the public for a longer period before the election. Therefore, we concur that this approach is acceptable, as long as UAPEC ensures that the materials are eventually publicly disseminated by the local unions and union members so that their reporting of them as independent expenditures is accurate.