



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 8, 2017

**MEMORANDUM**

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

Thomas E. Hintermister  
Assistant Staff Director  
Audit Division

**FROM:** Lisa J. Stevenson *LJS*  
Acting General Counsel

Lorenzo Holloway *LH*  
Assistant General Counsel  
Compliance Advice

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Attorney

**SUBJECT:** Proposed Draft Final Audit Report on the Freedom's Defense Fund (LRA 1030)

**I. INTRODUCTION**

The Office of the General Counsel has reviewed the proposed Draft Final Audit Report ("proposed DFAR") on the Freedom's Defense Fund ("FDF"). The proposed DFAR contains four findings: Misstatement of Financial Activity (Finding 1), Disclosure of Occupation and Name of Employer (Finding 2), Reporting of Independent Expenditures (Finding 3) and Recordkeeping for Communications (Finding 4). We concur with the findings, and comment on Finding 3. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

## II. FUNDRAISING COMMUNICATIONS AS INDEPENDENT EXPENDITURES

In Finding 3 of the proposed DFAR, the Audit Division noted that FDF disclosed independent expenditures totaling \$385,619 on Schedule E; however, FDF also made apparent media-related expenditures totaling \$868,015 that were disclosed as operating expenditures on Schedule B, Line 21b. The Audit Division concluded that these media-related expenditures should have been disclosed on Schedule E as Independent Expenditures.

FDF raises two arguments. First, FDF argues that it disclosed the expenditures as operating expenditures because the primary purpose of the communications was for fundraising. FDF states that its purpose was not express advocacy because it was not trying to sway anyone; rather, it already knew how the recipients of the communication would vote.

Contrary to FDF's position, the regulation defining express advocacy does not permit an examination of the speaker's subjective intent or purpose, nor does it permit an examination of the likelihood that the recipient of the communication will be swayed by the communication. *See* 11 C.F.R. § 100.22; *see also* Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35291, 35295 (Jul. 6, 1995) ("[T]he subjective intent of the speaker is not a relevant consideration" under section 100.22). We, therefore, concur with the Audit Division that the costs associated with these communications should have been disclosed on Schedule E as Independent Expenditures. The Commission has arrived at this conclusion in previous audits. *See* Final Audit Report on National Campaign Fund, at 9, 12-13 (approved Oct. 22, 2012); Final Audit Report on Legacy Committee Political Action Committee ("Legacy PAC"), at 8, 10 (approved Jul. 31, 2012). We previously noted in OGC's comments on the audit of the Legacy PAC that the communicator's subjective intent is not a factor the Commission considers when determining whether a communication constitutes express advocacy. *See* Memorandum from Christopher Hughey, OGC to Patricia Carmona, OC, Draft Final Audit Report on The Legacy Committee Political Action Committee (LRA 815) at 3-4 (Jan. 24, 2012). Thus, to the extent that a communication that is the subject of a disbursement constitutes express advocacy, all of the costs associated with producing and disseminating or distributing that communication would be considered independent expenditures.

Second, FDF argues that similar communications were not considered independent expenditures in the 2008 audit of FDF. In response to this argument, the Audit Division notes that the 2008 involved media buys and the current audit involves mailers. However, a media buy and a mailer can each be a communication for the purpose of determining whether a communication is an independent expenditure. 11 C.F.R. § 100.16. We, therefore, recommend that the Audit Division clarify the distinction that it is drawing between the communications in the 2008 audit and the communications in this audit.