



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

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SUBJECT: Interim Audit Report on TeaPartyExpress.Org (LRA 995)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Interim Audit Report ("IAR") on TeaPartyExpress.Org ("the Committee"). The IAR contains four findings: Misstatement of Financial Activity (Finding 1); Disclosure of Occupation/Name of Employer (Finding 2); Failure to File Reports and Properly Disclose Independent Expenditures (Finding 3); and Failure to Itemize Debts and Obligations (Finding 4). We concur with Findings 1, 2, and 4. Our comments address two aspects of the independent expenditures discussed in Finding 3: (i) expenditures not supported by the underlying communications and (ii) the absence of the dissemination date for 24/48 hour reporting of independent expenditures. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. FAILURE TO FILE REPORTS AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES (Finding 3)

The IAR concludes that the Committee disclosed as operating expenditures or as other disbursements approximately \$4.6 million of media-related expenses that, according to the Audit Division, may qualify as independent expenditures and therefore should have been reported as such. Of this total, approximately \$845,000 was spent on expenditures for which copies of the underlying communications were available and the underlying communications could be associated with invoices and other supporting documentation. We have reviewed the underlying communications for these independent expenditures, and we concur that the expenses for these communications appear to be independent expenditures.

Our comments are directed, first, to apparent independent expenditures identified in the IAR that were not supported by underlying communications, and second, to the absence of dissemination date information for some apparent independent expenditure communications, which would be used to determine whether the apparent independent expenditures were timely reported within 24 or 48 hours of their dissemination.¹

A. Independent Expenditures Not Supported By Underlying Communications

With respect to the first subject, the IAR identifies approximately \$3.8 million in apparent independent expenditures that the Audit staff could not completely verify with documentation. The IAR further subdivides these apparent independent expenditures into four subcategories. In the first two of these subcategories, the relevant communications were available for review, but other necessary documentation was not available.² These subcategories are: (i) "Communications Without Invoice" (texts of communications that were not able to be associated with invoices) and (ii) "Details on Invoice" (texts of e-mails³ associated with invoices, but not traceable to

¹ Before proceeding with our principal comments, we also have a brief, ancillary comment relating to the presentation of this finding to the Committee. We recommend that the Audit Division furnish to the Committee lists or charts that show which advertisements are deemed independent expenditures along with a copy of the IAR so that the Committee may provide a fully informed response.

² Some of these apparent independent expenditures were supported by underlying communications, but the communications were either not associated with invoices, or, if associated with invoices, were not traceable to a disbursement database or a bank.

³ The e-mails we examined included hyperlinks to other websites, including, most predominantly, a Tea Party Express donation page and the Committee's homepage, which, presumably, provides access to all of the pages on that website. In our comments on a previous audit, we concluded that an underlying communication accessible by hyperlink and containing additional language expressly advocating the election or defeat of a clearly identified candidate would be a separate communication. See OGC Comments on IAR on the National Campaign Fund (LRA 847), at 3 (Nov. 10, 2011). Here, some of the hyperlinks appear to lead to web pages that are no longer active while others lead to active web pages, but show their current content rather than the content they would have displayed on the date on which viewers received the e-mails containing the links to those pages. Because the contemporaneous, as opposed to the current, web pages, appear to be unavailable for examination at this time, we are confining our analysis at the present time to the texts of the e-mails themselves.

disbursement database or bank). In the second two subcategories, apparent independent expenditures were not supported by underlying communications, and the Audit staff inferred that these were apparent independent expenditures from other information. These subcategories are: (iii) "Use of Common Independent Expenditure Vendor (with invoice)" (no communications available; Audit staff inferred payments made for independent expenditures because same vendor provided other communications that Committee reported as independent expenditures and because content of invoices associated with disbursements suggested payments for communications containing express advocacy); and (iv) "Use of Common Independent Expenditure Vendor (without invoice)" (no communications or invoices available; Audit staff inferred payments made for independent expenditures because same vendor provided other communications that Committee reported as independent expenditures). These comments focus on subcategories (iii) and (iv).

To be an independent expenditure, a communication must expressly advocate the election or defeat of a clearly identified candidate and must not be made in concert or cooperation with or at the request or suggestion of that candidate, the candidate's authorized political committee, their agents, or a political party committee or its agents. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a). A candidate is clearly identified in a communication when the name of the candidate involved appears; a photograph or drawing of the candidate appears; or the identity of the candidate is apparent by unambiguous reference. 52 U.S.C. § 30101(18); 11 C.F.R. § 100.17.

A communication can expressly advocate the election or defeat of a candidate in two ways. First, a communication expressly advocates the election or defeat of a clearly identified candidate when it uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent" or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One", "Carter '76", "Reagan/Bush" or "Mondale!" 11 C.F.R. § 100.22(a).

Second, a communication may contain express advocacy if, when taken as a whole and with limited reference to external events, such as the proximity to the election, it could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s), because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. § 100.22(b).

With these standards in mind, and with respect to categories (iii) and (iv), we do not believe that the Audit staff may infer that disbursements were for independent expenditures solely on the basis of invoice descriptions or the use of common vendors. Since the communications are not available, it is difficult to determine whether they contain express advocacy. The information in invoices, generally, may not be adequate because invoices are not typically created for the purpose

of conveying the content of communications. Rather, invoices usually contain brief descriptions that are sufficient for both a vendor to identify the service provided and a committee to confirm that it is receiving the service for which it contracted prior to making payment. Similarly, although the auditors found that disbursements were made to some of the same vendors who had previously been paid by the Committee for communications containing express advocacy, its conclusion that these additional communications from the same vendor therefore contain express advocacy cannot be supported since it is possible that the same vendor provided services for communications that did not, in fact, contain express advocacy and thus were not independent expenditures. Given the difficulty of analyzing whether a communication contains express advocacy when the communication is available, we conclude descriptive information contained in an invoice, database, or bank statement or the use of a common vendor is too tangential to support a finding that express advocacy exists absent a copy of the underlying communication or other more descriptive documentation than that relied upon by Audit staff here.⁴

We acknowledge, however, that there are instances where drawing inferences is appropriate. For example, in the allocation context, we believe that Audit staff may infer that certain types of ordinary overhead expenses such as postage, consulting, travel reimbursements, printing, and accounting fees are allocable absent information demonstrating that the expenses are solely non-federal. *See* Legal Analysis Memorandum to the Audit Division, “Interim Audit Report on the Maine Republican Party” (LRA 817) (Dec. 17, 2010). This type of adverse inference can be supported because the Commission, through the regulatory process, has already determined that administrative expenses of this type are, in fact, allocable absent a demonstration otherwise. There has been no such regulatory guidance by the Commission here. Audit staff also may use adverse inferences where a committee’s internal records specifically identify the type of expenditure though its reports disclose the expenditure differently. *See id.* (Audit staff may conclude that printed materials costs that the committee coded in its internal records as federal election activity (“FEA”) but reported as operating expenses represents potential FEA while giving the committee an opportunity to clarify the discrepancy). Such discrepancies, however, do not exist here.

To address the lack of information at this stage of the audit, we recommend that the media-related disbursements in categories (iii) and (iv) should not be categorized as independent expenditures. Instead, the disbursements should be treated as a separate category of expenditures for which the Committee has not provided sufficient documentation to verify its disclosure reports. When a committee reports financial activity, the Commission requires the committee to maintain records with respect to that financial activity. 11 C.F.R. § 104.14(b)(1). These records must

⁴ As support for its approach, the Audit Division has directed our attention to advice we provided to it informally in the audit of ██████████, and states that it followed the guidance in this matter in fashioning its undocumented expenditure analysis in the current IAR. In the ██████ matter, we recommended that the Audit Division treat certain disbursements as independent expenditures in the interim audit report and invite the ██████ to respond to the report. *See* ██████████. However, in ██████, the texts of the underlying communications were available for us to review. Our recommendation was based on the absence of an explanation from ██████ for dividing its communications into independent and operating expenditures in the manner that it did. *Id.* In categories (iii) and (iv), however, we do not have the texts of the underlying communications.

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. *Id.* In the absence of this information, the auditors are unable to verify whether the Committee correctly reported its disbursements as operating expenditures or whether they should have been disclosed as independent expenditures. Thus, the Committee should be given the opportunity to provide copies of the communications, additional documentation, or other information and/or to explain any discrepancies in its reporting. In the alternative, the Audit staff may request the Commission to issue a subpoena for copies of the communications at issue or other documents the auditors believe may enable it to verify the Committee's reporting of these disbursements as operating expenditures.⁵

B. The Absence of Dissemination Date Information for 24/48 Hour Reporting of Independent Expenditures

With respect to the second subject, we comment briefly on the portion of Finding 3 that discusses the Committee's apparent failure to file certain 24-hour and 48-hour reports of independent expenditures in a timely fashion. The IAR notes that for certain of the communications the actual dates of dissemination⁶ were not known and that in such cases, the Audit Division used either the date of the invoice or the date of the incurrence of the expense for the independent expenditure as the date of public dissemination for the purpose of conducting its analysis. IAR, at 12, n.6. In subsequent discussion with the Audit staff, the Audit staff clarified that it did not actually use the date of the invoice or the incurrence of the expense itself as the dissemination date, but rather relied upon a "date range" listed on the invoice that the Audit staff assumes, in the absence of information from the Committee, represents the range of dates within which the underlying communications were publicly disseminated.

We recommend that the Audit Division revise footnote 6 of the IAR to include this clarification, both for the Commission's benefit and so that the Committee may respond and indicate whether the Audit Division's assumption is correct.

⁵ To the extent that any of the expenditures identified in Finding 4, Failure to Itemize Debt and Obligations, are apparent independent expenditures also identified in Finding 3, the Audit staff's further analysis of any additional information the Committee provides with respect to Finding 3 may require modification of Finding 4.

⁶ The Commission's regulations require committees to use the date of public distribution or dissemination of the underlying communication as the relevant date for determining compliance with the 24 and 48 hour reporting obligations. See 11 C.F.R. § 104.4(b)(2), (c). See also, e.g., *Final Audit Report of the Commission on the United Association Political Education Committee*, at 9-10 (approved Sept. 15, 2011) (Commission approved finding that committee required to file 24 or 48 hour reports based on dissemination date rather than payment date).