



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 13, 2008

**MEMORANDUM**

TO: Joseph F. Stoltz  
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SUBJECT: Interim Report of the Audit Division  
on the Washington State Democratic Central Committee (LRA 737)

**I. INTRODUCTION**

The purpose of this memorandum is to address issues raised by the Audit Division pertaining to its Interim Audit Report ("Proposed Report") on the Washington State Democratic Central Committee ("Committee"). In the cover memorandum to the Proposed Report, the auditors presented an issue involving receipts generated from telemarketing fundraising that expressly advocated the election and defeat of federal candidates. In Finding 4 (Reporting of Independent Expenditures) of the Proposed Report, the auditors found that the Committee reported on the wrong schedule independent expenditures for direct mail and automated telephone advertising totaling \$607,290.

We concur with any findings and issues related to the Proposed Report not specifically addressed in this memorandum. In this memorandum, we recommend that

the auditors include a specific finding in the Proposed Report addressing the telemarketing fundraising matter raised in the cover memorandum to the Proposed Report. We conclude that funds raised through the telemarketing are federal funds and that the Committee should have used federal funds to pay costs associated with the fundraising. We also concur that the Committee made independent expenditures absent evidence showing that the Committee's disbursements qualify for the volunteer materials exemption, or that the Committee coordinated the expenditures, but we recommend the auditors request additional information from the Committee. We address these two issues below.

## **II. TELEMARKETING RECEIPTS SHOULD BE CONSIDERED FEDERAL CONTRIBUTIONS AND FEDERAL FUNDS SHOULD HAVE BEEN USED FOR ASSOCIATED DISBURSEMENTS**

In the cover memorandum to the Proposed Report, the auditors seek guidance on one of the Committee's telemarketing fundraising efforts. Gordon & Schwemkmeyer, Inc. ("GSI") conducted telemarketing fundraising on behalf of the Committee. The apparent telemarketing script<sup>1</sup> that GSI used to fundraise expressly advocated the election and defeat of specific federal candidates. The Committee paid a total of \$190,951 in nonfederal funds to GSI for the fundraising. GSI's fundraising generated receipts totaling \$331,772, which the Committee deposited in its nonfederal account. The auditors ask: 1) whether the receipts generated from the telemarketing should be considered federal funds, and 2) whether the Committee should have used federal funds to pay for the cost of the telemarketing fundraising. The auditors are concerned that if the receipts were contributions then, under the Federal Election Campaign Act of 1971, as amended ("Act"), the receipts should have been deposited in a federal account and federal funds should have been disbursed to pay for the telemarketing. We recommend the auditors include the GSI telemarketing fundraising issue as a finding in the Proposed Report and that the auditors also specifically request the Committee to submit the script used for the GSI telemarketing. We begin our analysis of the GSI telemarketing fundraising by examining the telemarketing receipts and finish by addressing what happens if the Commission determines that the receipts from the telemarketing are contributions.

The telemarketing receipts are contributions under the Act. A contribution is defined as a gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for federal office. 2 U.S.C. § 431(8)(A)(i). Our conclusion that the telemarketing receipts are contributions under the Act is supported by *Federal Election Commission v. Survival Education Fund*,

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<sup>1</sup> During the course of the audit, the Committee stated that the script might not have been the script that was used for the telemarketing. The Committee, however, failed to submit an alternate script. Therefore, we do not have a basis to conclude that the script the Committee submitted and addressed herein was not the script used for the telemarketing.

*Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) ("*Survival Education Fund*"). The Commission, however, has not applied *Survival Education Fund* to state party committees. Thus, applying *Survival Education Fund* to a state party committee would be a matter of first impression for the Commission. Nevertheless, the court's holding does not suggest that its analysis and application be limited to the type of entity that made the solicitation and received the contributions in that case.<sup>2</sup>

In *Survival Education Fund*, the court considered whether proceeds received in response to a fundraising solicitation mailed to the general public by two 501(c)(4) organizations during the 1984 Presidential race constituted "contributions" under the Act. In analyzing language associated with the solicitation, the Second Circuit considered whether the solicitation sought "contributions" and was therefore subject to the Act's disclaimer requirements under 2 U.S.C. § 441d(a). Stating that it was unnecessary to consider whether the mailer constituted express advocacy, the court analyzed whether the mailer solicited "contributions" based on *Buckley*'s statement that contributions made to other organizations but earmarked for political purposes were contributions made "for the purpose of influencing elections" and, thus, were properly covered by the Act. *See id.* at 294 (quoting *Buckley v. Valeo*, 424 U.S. 1, 78 (1976)). The court held that the mailer was a solicitation for contributions within the meaning of section 441d, citing the mailer's statement, "your special election-year contribution will help us communicate your views to the hundreds of thousands of members of the voting public, letting them know why Ronald Reagan and his anti-people policies must be stopped." *Id.* According to the court, this statement "leaves no doubt that the funds contributed would be used to advocate Reagan's defeat at the polls, not simply to criticize his policies during the election year." *Id.*<sup>3</sup>

The Committee's telemarketing script contains language similar to the language the Second Circuit relied upon to conclude that funds raised pursuant to the solicitation

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<sup>2</sup> Although the Commission has not explicitly extended *Survival Education Fund* to state party committees, the Commission relied on *Survival Education Fund* to support its conclusion in MURs 5403 and 5466 that America Coming Together, a non-connected political action committee ("PAC"), used funds raised outside federal limits and source prohibitions to pay for expenses that should have been paid with funds raised within the federal contribution limits and prohibitions. Therefore, we believe *Survival Education Fund* should be applied to the Committee since the content of its telemarketing script mirrors the solicitation language the Commission relied on in MURs 5403 and 5466 to determine that funds raised pursuant to the solicitations were federal contributions despite the fact that the Committee is a state party committee.

<sup>3</sup> The current regulation at 11 C.F.R. § 100.57 provides that a gift, subscription, loan, advance, deposit of money or anything of value given in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. 11 C.F.R. § 100.57(a). If the solicitation does not refer to any clearly identified non-Federal candidates, but does refer to a political party, in addition to the clearly identified Federal candidate, one hundred percent of the total funds received are contributions. 11 C.F.R. § 100.57(b)(2). This regulation, however, was not effective during the 2004 election cycle.

would be used in connection with a federal election. Specifically, the Committee's telemarketing script states that, "if we can raise the resources we need to implement our campaign, we will defeat George W. Bush and take back control of our country once and for all." Given the similarities between the language in the solicitations and the Committee's telemarketing script, we conclude that funds the Committee raised using the script should be considered contributions under the Act.

If the Commission concludes that the receipts are contributions, then there are two immediate implications for the Committee. First, the Committee had to use Federal funds to finance the telemarketing activity. 11 C.F.R. § 300.32(a)(3). Second, the Committee should have deposited the receipts in a Federal account. The regulations clearly allow a committee to deposit contributions in its Federal account. See 11 C.F.R. § 300.30(b)(3)(ii)(B). The regulations require that if a state party committee chooses to establish Federal and non-Federal accounts, the Federal account "shall be treated as a separate Federal political committee that must comply with the requirements of the Act." 11 C.F.R. § 102.5(a)(i). The regulations, promulgated under the Act, require each political committee to designate a campaign depository, 11 C.F.R. § 103.2, and all receipts of the political committee shall be deposited in that depository within 10 days of receipt. 11 C.F.R. § 103.3(a). Thus, we conclude that the Committee's receipts raised through the telemarketing are receipts which must be deposited into the Committee's Federal account.

### **III. COMMITTEE FAILED TO ESTABLISH VOLUNTEER MATERIALS EXEMPTION**

The auditors identified 10 disbursements totaling \$607,290 for direct mail and automated telephone advertisements. The Office of General Counsel's analysis of these disbursements focuses on exempt party activity, coordination, and independent expenditures, but we begin with a discussion of the Committee's initial reporting of these disbursements. The Committee reported a portion, \$183,716, as Federal election activity that was paid entirely with Federal funds. The Committee reported the remaining \$423,574 as disbursements of Federal and Levin funds for allocated Federal election activity. The Committee, however, could not claim these disbursements as Levin fund activity because the advertisements included references to clearly identified Federal candidates. Assuming there were more than 500 of each communication, making each advertisement a "public communication" within the meaning of 2 U.S.C. § 431(22), the communications would be so-called "Type III" federal election activity. 2 U.S.C. § 431(20)(A)(iii). Such activity must be paid for only with federal funds. 2 U.S.C. § 441i(b).

The auditors questioned the Committee's reporting of these disbursements. The auditors believe that the disbursements were independent expenditures, and they conclude that the Committee failed to properly report the expenditures and file associated

24 and 48-hour notices. The Committee now claims that the disbursements qualify for the "volunteer materials exemption" from the definition of "expenditures," 2 U.S.C. § 431a(B)(viii).

The starting point for our analysis is to determine whether the disbursements for activity for any volunteers' use and distribution of campaign materials qualifies as exempt from the definition of expenditure. If the disbursements are not considered expenditures because they are exempt, then we do not need to examine whether the disbursements are independent expenditures. If the disbursements are exempt, the Committee may coordinate the activity with the authorized committees and the disbursements will not be considered contributions or be subject to the coordinated party expenditure limitation. See 11 C.F.R. § 109.20(b).

To qualify for the exemption, however, a state or local committee must pay for campaign materials under certain conditions, which include: (a) the committee's payment of campaign materials is not for costs of "general public communication or political advertising," which includes "direct mail;" (b) the portion of the payment allocable to a federal candidate must be paid with federal funds; (c) the committee's payment must not be paid for from funds designated for a particular federal candidate by the donor; (d) campaign materials must be "distributed by volunteers and not by commercial or for-profit operations;" (e) the committee's payment must be reported as disbursements; (f) state candidates and their campaign committees must not make payments that exceed their proportionate share of the expenses; and (g) campaign materials must not be purchased either directly by a national committee or with funds donated by the national committee to the state committee. 11 C.F.R. §§ 100.87(a)-(g) and 100.147(a)-(g). For purposes of sections 100.87(a) and 100.147(a), "direct mail" is defined as "any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists." *Id.*

The Committee did not provide documentation supporting its claim that the disbursements qualify as exempt activity. Because there is a lack of documentation, there is a question about the degree to which volunteers were involved in this activity. However, since the Committee raised the point about the exempt activity, we suggest that the Audit Division revise the recommendation in the Interim Audit Report to specifically request that the Committee submit documentation supporting its claim for the exemption. If the Committee provides documentation supporting its claim that the disbursements financed exempt activity, we will not need to analyze these disbursements any further. If, however, the Committee does not respond or the documentation does not support the qualification of these disbursements as exempt activity, the conclusion is that these disbursements are expenditures and we will need to examine the conditions under which the Committee made expenditures to determine if they were either coordinated or independent expenditures.

An expenditure is coordinated when it is made in cooperation, consultation or concert with or at the request or suggestion of the candidate or the candidate's authorized

committee. 11 C.F.R. § 109.20(a). Some of the advertisements included the Kerry-Edwards logo, and this may suggest that the Committee coordinated its efforts. Beyond this, however, we do not have any other information at this stage of the audit to suggest that the Committee engaged in coordination when it financed the activity. We suggest that the auditors revise the Interim Audit Report to request information about coordination.

Evidence of coordination is relevant because the ability to coordinate without limit is one of the principal advantages of "exempt activity" as the Committee claims was the nature of its activity. Additionally, whether the activity is coordinated (and thus, potentially an excessive contribution by the Committee) or independent (and therefore, potentially misreported), the presence of express advocacy is relevant. Express advocacy is one way to meet the content prong of the coordination test at 11 C.F.R. § 109.21, and it is necessary for a communication to be an "independent expenditure" under 2 U.S.C. § 431(17).

An independent expenditure is an expenditure by a person<sup>4</sup> 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 committee or its agents. 11 C.F.R. § 100.16(a). The term 'clearly identified' means the candidate's name, nickname, photograph, or drawing appears, or the identity of the candidate is otherwise apparent through an unambiguous reference such as "President," "your Congressman," or "the incumbent," or through an unambiguous reference to his or her status as candidate such as his or status as a candidate. 11 C.F.R. § 100.17. A communication contains express advocacy when it uses phrases, campaign slogans or words, "which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s)...." 11 C.F.R. § 100.22(a); *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); see also *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) ("*MCFL*"). A communication also contains express advocacy "when taken as a whole and with limited reference to external events, such as the proximity to the election," the communication has an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidates, or encourages some other kind of action." 11 C.F.R. § 100.22(b).

The communications clearly identify at least one federal candidate by either name or by name and photograph. Each of the communications contain express advocacy under 11 C.F.R. § 100.22(a) with two exceptions. The communications that come under 11 C.F.R. § 100.22(a), include phrases, slogans or words that explicitly urge the election

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<sup>4</sup> A "person" means an individual, partnership, committee, association, corporation, labor organization, and any other organization, or group of persons. 11 C.F.R. § 100.10.

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of federal candidates John Kerry, John Edwards and Patty Murray. Regarding the exceptions, one flyer focusing on Senate candidate Patty Murray is express advocacy but it qualifies under 100.22(b). The Murray advertisement addresses her "character/qualifications for office" by referring to her as "the only teacher in the U.S. Senate" and, when taken as a whole and with limited reference to external events, the advertisement can only be reasonably interpreted as advocating her election. See 100.22(b). See Explanation and Justification, *Expressly Advocating*, 60 Fed. Reg. 35295 (July 6, 1995) ("Communications discussing or commenting on a candidate's character, qualifications, or accomplishments are considered express advocacy"). The second exception is the voter identification telephone script which contains no express advocacy.



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WASHINGTON, D.C. 20463

February 24, 2009

**MEMORANDUM**

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SUBJECT: Supplemental Legal Analysis – Interim Report of the Audit Division  
on the Washington State Democratic Central Committee (LRA 737)

The Office of General Counsel has received a complete copy of the mailer on Senate candidate Patty Murray that was presented in Finding 4 (Reporting of Independent Expenditures) of the Interim Audit Report on the Washington State Democratic Central Committee. The phrases "vote for Kerry-Edwards" and "vote for Patty Murray" did not reproduce on the first copy we received. Upon review of the complete copy, we concur with the Audit Division that the mailer contains express advocacy under 11 C.F.R. § 100.22(a).