



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: THE COMMISSION
STAFF DIRECTOR
GENERAL COUNSEL
ACTING CHIEF COMPLIANCE OFFICER
CHIEF COMMUNICATIONS OFFICER

FROM: OFFICE OF THE COMMISSION SECRETARY *MWD*

DATE: July 11, 2007

SUBJECT: *Ex Parte* COMMUNICATION
Report of the Audit Division on Ted Poe for Congress
Agenda Document No. 07-48

Transmitted herewith is an *ex parte* communication sent to Chairman Lenhard from Donald F. McGahn II, Esquire, on behalf of Ted Poe for Congress, regarding the above-captioned matter.

Attachment

CC: Asst. Staff Director, Audit Division
FEC Press Office
FEC Public Disclosure

ATTORNEYS AT LAW
MCGAHN & ASSOCIATES PLLC
509 7TH STREET, NW
WASHINGTON, DC 20004
(202) 654-7036
FAX (202) 654-7033

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July 11, 2007

Chairman Robert D. Lenhard
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: Open Meeting on Audit of Ted Poe for Congress

Dear Chairman Lenhard:

This letter is submitted on behalf of our client, Ted Poe for Congress (the "Campaign"). We understand that discussion of the audit of the Campaign is on the agenda for the Commission's Open Meeting scheduled for July 12.

As an initial matter, we wish to emphasize that the Campaign complied with all the recommendations recommended by the auditors. In particular, with respect to Findings 1, 3 and 4, the Campaign has already filed amendments addressing the concerns of the auditors, and the draft audit report agrees that these amendments materially corrected the reporting issues.

However, we do object to Finding 3, as it amounts to a rewriting of the Commission's regulations. There, the draft audit report claims that the Campaign, as a matter of law, failed to maintain certain documentation, specifically copies of contribution checks.¹ First, some factual perspective is in order: there is no dispute that

¹ Adoption of the draft report would be seen by the general public as the Commission's adoption of this view – after all, according to its own language, "[t]he audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act."

copies of contributor checks are and have been available to the Commission's auditors.² The Campaign's bank maintains electronic copies of the checks, and is able to provide them at no cost to the Commission. In response to the interim report, we explained this to the auditors, and provided a sample of check copies to demonstrate the availability of the documentation. In fact, in our letter dated April 3, 2007, we offered to provide the check copies to the auditors, and followed-up with several phone calls (none of which were returned by the auditors).

What is really at issue is the auditors' attempt to rewrite the Commission's regulation regarding the maintenance of check copies.³ The regulation is clear on its face that either the Campaign treasurer may maintain the documentation, or an agent authorized by the treasurer:

In addition to the account to be kept under paragraph (a)(1) of this section, for contributions in excess of \$50, the treasurer of a political committee **or an agent authorized by the treasurer** shall maintain:

- (i) A full-size photocopy of each check or written instrument; or
- (ii) A digital image of each check or written instrument. The political committee **or other person** shall provide the computer equipment and software needed to retrieve and read the digital image, if necessary, at no cost to the Commission.

11 C.F.R. § 102.9(a)(4) (emphasis added).

The auditors, however, attempt to rewrite the regulation *via* tally vote, claiming that only the committee itself, and not its agent, can maintain the records. From this rewrite of the regulation, the auditors then conclude that the agent authorized by the treasurer, in this case the bank, "routinely maintaining checks does not comply with the regulation."

This is, of course, nonsensical overreaching by the auditors. The Campaign, through its agent, has maintained the requisite documentation – there is no dispute on this point. If the Commission believed that only the treasurer or Campaign itself could house the documentation, it could have easily said so in its regulation. But it did not – it expressly allowed for an agent of the campaign to house the documentation, and even went so far as to differentiate between the political committee and this "other person."

To adopt Finding 3 is nothing short of the Commission rewriting its own rule. But this it cannot do – in addition to the obvious Administrative Procedures Act

² The audit's findings are based on a sample – and even then, the auditors claim that only 19% of the contributions were not properly documented. Thus, even under the auditors' own warped view, the Campaign documentation was sufficient for over 80% of its contributions.

³ It is disappointing to learn that, despite our objection to the auditors' reading of the law, they nonetheless attempted to slip the issue past the Commission on a tally vote. Worse, it appears as though they attempted to do this on the eve of the Fourth of July holiday, perhaps thinking that the Commission would not catch the dispute.

problems, the Commission cannot promulgate a rule that is then relied upon by the regulated community, then change the rule after-the-fact, and then declare a committee in violation of a rule that did not exist at the time the committee acted. Such techniques fail to provide the regulated community with clear notice, and undermine the concept of the rule of law.

In conclusion, we respectfully request that the Commission reject the draft final audit report.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'D. McGahn II', written in a cursive style.

Donald F. McGahn II
Counsel to Ted Poe for Congress

cc: Vice Chairman David M. Mason
Commissioner Ellen L. Weintraub
Commissioner Hans A. von Spakovsky
Commissioner Steven T. Walther