



FEDERAL ELECTION COMMISSION
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MEMORANDUM

AGENDA ITEM

To: The Commission

Through: Alec Palmer *AP*
Staff Director

From: Patricia C. Orrock *DC/PO*
Chief Compliance Officer

For Meeting of 2-14-13

Tom Hintermister *TH*
Assistant Staff Director
Audit Division

Kendrick Smith *KS*
Audit Manager

By: Rickida Morcomb *RM*
Lead Auditor

Subject: Proposed Final Audit Report on McCain-Palin 2008 Inc. and McCain-Palin Compliance Fund, Inc.

Attached for your approval is the subject report. The report has been written in accordance with Directive 70. Documents related to this audit report can be viewed in the Voting Ballot Matters folder.

This report is being circulated on a 72 hour no objection basis. Should an objection be received, it is recommended that the report be considered at the next regularly scheduled open session. If you have any questions, please contact Rickida Morcomb or Kendrick Smith at 694-1200.

Attachment:
Proposed Final Audit Report on McCain-Palin 2008 Inc. and McCain-Palin Compliance Fund, Inc.



Proposed Final Audit Report on McCain-Palin 2008 Inc. and McCain- Palin Compliance Fund, Inc.

March 24, 2008 - December 31, 2008

Why the Audit Was Done

Federal law requires the Commission to audit every political committee established by a Presidential candidate who receives general funds for the general campaign.¹ The audit determines whether the candidate was entitled to all of the general funds received, whether the campaign used the general funds in accordance with the law, and whether the campaign otherwise complied with the limitations, prohibitions, and disclosure requirements of the election law.

Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

About the General Committee

McCain-Palin 2008 Inc. (General Committee) is the principal campaign committee for Senator John S. McCain, the Republican Party's nominee for the office of President of the United States. The General Committee is currently headquartered in Washington, DC. For more information, see the chart on Campaign Organization, p. 3.

Financial Activity of the General Committee (p. 4)

- **Receipts**
 - Federal Funds Received \$ 84,103,800
 - Offsets to Operating Expenditures 9,318,570
 - Loans Received 17,076,880
 - Other Receipts 1,154,733
 - **Total Receipts \$ 111,653,983**
- **Disbursements**
 - Operating Expenditures \$ 92,083,836
 - Loan Repayments 17,076,880
 - Other Disbursements 1,491,107
 - **Total Disbursements \$ 110,651,823**

Additional Issue (p. 11)

- Campaign Travel Billing for Press

¹ 26 U.S.C. §9007(a).

About the Compliance Fund

The McCain-Palin Compliance Fund, Inc. (Compliance Fund) was established pursuant to 11 CFR §9003.3(a)(1)(i). The Compliance Fund accepts contributions to be used solely for legal and accounting services to ensure compliance with the Federal Election Campaign Act (the Act). These contributions include the Compliance Fund's share of contributions from affiliated joint fundraising committees. The Compliance Fund is currently headquartered in Washington, DC. An overview of financial activity for the Compliance Fund is presented below.

Financial Activity of the Compliance Fund (p. 4)

- **Receipts**
 - Contributions \$ 9,679,490
 - From Other Authorized Committees 25,046,453
 - Offsets to Operating Expenditures 1,131,139
 - Other Receipts 12,471,782
 - **Total Receipts** \$ **48,328,864**

- **Disbursements**
 - Operating Expenditures \$ 11,675,642
 - All Other Disbursements 13,112,237
 - **Total Disbursements** \$ **24,787,879**

Commission Finding for the Compliance Fund (p. 8)

- Failure to File 48-Hour Notices

About Joint Fundraising Committees

This audit included seven joint fundraising committees. Each of the joint fundraising committees is headquartered in Alexandria, Virginia, and was an authorized committee of the candidates, John McCain and Sarah Palin. The combined financial activity of these joint fundraising committees is presented below and the financial activity of each of these committees is presented on page 4.

Financial Activity of the Joint Fundraising Committees

(p. 5)

• Receipts	
○ Contributions	\$ 207,620,125
○ From Other Authorized Committees	812,325
○ Offsets to Operating Expenditures	159,926
○ Total Receipts	\$ 208,592,376
• Disbursements	
○ Operating Expenditures	\$ 30,374,903
○ All Other Disbursements	167,116,292
○ Total Disbursements	\$ 197,491,195

Commission Finding for the Joint Fundraising Committees (p. 11)

Based on the limited examination of the reports and statements filed and the records presented by the seven joint fundraising committees, the Audit staff did not discover any material non-compliance.

Proposed Final Audit Report on McCain-Palin 2008 Inc. and McCain-Palin Compliance Fund, Inc.

March 24, 2008 – December 31, 2008



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Part I

Background

Authority for Audit

This report is based on audits of McCain-Palin 2008 Inc. (General Committee), McCain-Palin Compliance Fund, Inc. (Compliance Fund), and seven joint fundraising committees affiliated with the Compliance Fund, undertaken by the Audit Division of the Federal Election Commission (the Commission) as mandated by Section 9007(a) of Title 26 of the United States Code. That section states that “after each presidential election, the Commission shall conduct a thorough examination and audit of the qualified campaign expenses of the candidates of each political party for President and Vice President.” This includes joint fundraising committees authorized by the candidates. Also, Section 9009(b) of Title 26 of the United States Code states, in part, that the Commission may conduct other examinations and audits as it deems necessary.

Scope of Audit

The audits of the General Committee and Compliance Fund examined:

1. the receipt of excessive contributions and loans;
2. the receipt of contributions from prohibited sources;
3. the receipt of transfers from other authorized committees;
4. the disclosure of contributions and transfers received;
5. the disclosure of disbursements, debts and obligations;
6. the recordkeeping process and completeness of records;
7. the consistency between reported figures and bank records;
8. the accuracy of the Statement of Net Outstanding Qualified Campaign Expenses;
9. the campaigns’ compliance with spending limitations; and
10. other campaign operations necessary to the review.

The audits of the seven joint fundraising committees affiliated with the Compliance Fund examined:

1. the receipt of excessive contributions and loans;
2. the proper allocation of contributions among joint fundraising participants;
3. the proper allocation of expenses and net amounts transferred to the Compliance Fund; and
4. the consistency between reported figures and bank records.

Inventory of Records

The Audit staff routinely conducts an inventory of campaign records before it begins the audit fieldwork. The records for each of the audited committees were complete and the fieldwork began immediately.

Audit Hearing

On June 7, 2012, the General Committee requested a hearing before the Commission to discuss the findings in the Draft Final Audit Report. The Commission granted the

request and held the hearing on August 23, 2012. At the hearing, the General Committee representatives asserted that the General Committee used a reasonable method to determine campaign press travel billing and the result amounted to an imbalance in collections from Press between the primary and general periods. The representatives stated that if required, the General Committee could correct the \$344,892 imbalance through a transfer to John McCain 2008, Inc. (the Primary Committee). The representatives also said that there was no factual dispute with the Audit staff concerning contributions not included in the 48-hour reports filed by the Compliance Fund. They explained that the oversight in filing some 48-hour reports was caused by an outside vendor that miscoded the contributions. The representatives requested that the Commission take no further action in connection with both the campaign's billing of the Press as well as the filing of 48-hour reports.

Part II

Overview of Campaign

Campaign Organization

	General Committee	Compliance Fund
Important Dates		
• Date of Registration	08/12/08	02/25/08
• Audit Coverage Dates	09/01/08 thru 12/31/08	03/24/08 thru 12/31/08
Headquarters	Washington, DC	Washington, DC
Bank Information		
• Bank Depositories	Three	Four
• Bank Accounts	Eight Bank Accounts	Eight Bank Accounts
Treasurer	Salvatore A. Pupura (08/12/08 – 08/18/08); Joseph Schmuckler (08/19/08 – Present)	Salvatore A. Pupura (02/25/08 – 03/20/08); Joseph Schmuckler (03/21/08 – Present)

Joint Fundraising Committees

Of the seven joint fundraising committees, four registered with the Federal Election Commission in April 2008 and three registered in August 2008. These committees are headquartered in Alexandria, Virginia and Lisa Lisker is the Treasurer for each committee. Each of six joint fundraising committees maintained a single bank account, and the seventh joint fundraising committee maintained two bank accounts.

Overview of Financial Activity

(Audited Amounts)

	General Committee	Compliance Fund
Opening Cash Balance-	\$0	\$0
Receipts		
• Contributions		\$9,679,490
• Federal Funds Received	\$84,103,800	
• From Other Authorized Committees		25,046,453
• Offsets to Operating Expenditures	9,318,570	1,131,139
• Loans Received	17,076,880	
• Other Receipts	1,154,733	12,471,782
Total Receipts	\$111,653,983	\$48,328,864
Disbursements		
• Operating Expenditures	\$92,083,836	\$11,675,642
• Transfers to Other Authorized Committees		222,502
• Loan Repayments	17,076,880	
• Refunds to Contributors		551,599
• Other Disbursements	1,491,107	12,338,136
Total Disbursements	\$110,651,823	\$24,787,879
Closing Cash Balance @12/31/2008	\$1,002,160	\$23,540,985

Overview of Financial Activity

(Audited Amounts)

<u>Joint Fundraising Committees</u>	McCain Victory 2008	McCain-Palin Victory 2008	McCain Victory Ohio	McCain-Palin Victory Ohio	McCain Victory California	McCain-Palin Victory California	McCain Victory Florida
Opening Cash Balance	\$0	\$0	\$0	\$0	\$0	\$0	\$0
Receipts							
• Individual Contributions	\$76,290,438	\$100,038,158	\$4,462,440	\$1,790,913	\$15,194,747	\$5,175,926	\$3,128,210
• Political Committee Contributions	\$603,884	\$529,183	\$82,850	\$42,000	\$200,795	\$49,581	\$31,000
• Transfers from Other Authorized Committees	\$366,165	\$301,310	\$4,300	\$0	\$77,350	\$40,800	\$22,400
• Offsets	\$14,402	\$102,077	\$100	\$0	\$41,983	\$270	\$1,094
Total Receipts	\$77,274,889	\$100,970,729	\$4,549,690	\$1,832,913	\$15,514,875	\$5,266,576	\$3,182,704
Disbursements							
• Operating Expenditures	\$7,400,078	\$18,983,527	\$499,768	\$283,642	\$1,705,448	\$895,640	\$606,800
• Transfers to Other Authorized Committees	\$66,642,154	\$74,097,252	\$3,597,748	\$1,418,627	\$13,154,796	\$3,871,179	\$2,326,750
• Refunds to Contributors	\$403,974	\$611,376	\$91,285	\$21,200	\$350,951	\$379,600	\$120,900
• Other Disbursements	\$28,500	\$0	\$0	\$0	\$0	\$0	\$0
Total Disbursements	\$74,474,706	\$93,692,155	\$4,188,801	\$1,723,469	\$15,211,195	\$5,146,419	\$3,054,450
Closing Cash Balance @ 12/31/2008	\$2,800,183	\$7,278,574	\$360,889	\$109,444	\$303,680	\$120,157	\$128,255

Part III

Summaries

Commission Finding - Compliance Fund

Failure to File 48-Hour Notices

The Compliance Fund failed to file 48-hour notices for 169 contributions totaling \$240,700 that it received prior to the general election. In response to the Preliminary Audit Report, the Compliance Fund explained that it had experienced a one-time data-management error with an outside vendor relating to the 48-hour notice requirement. The Compliance Fund took measures to ensure that this unintentional oversight was corrected. The Compliance Fund believed that the Commission should have found there was no violation of the 48-hour notice requirement and that the Compliance Fund should be able to terminate immediately.

The Commission approved a finding that McCain-Palin Compliance Fund, Inc. failed to file 48-hour notices for contributions totaling \$240,700 that it received before the general election. (For more detail, see p. 8.)

Commission Finding - Joint Fundraising Committees

Based upon the limited examination of the reports and statements filed, and the records presented by seven joint fundraising committees, the Audit staff discovered no material non-compliance. (For more detail, see p. 11.)

Additional Issue – General Committee

Campaign Travel Billing for Press

The General Committee received reimbursements totaling \$344,892 from the Press for campaign travel, which was above the maximum amount billable to the Press. The Commission's regulations provide that a 10 percent markup on the actual cost of transportation and services may be billed to the Press. The General Committee stated that the excess reimbursement from the Press for travel was a misallocation of billing proceeds, requiring the General Committee to pay John McCain 2008, Inc. (the Primary Committee) for the excess funds collected.

In response to the Preliminary Audit Report, the General Committee maintained that it used a reasonable process for the allocation of Press reimbursements between the two committees that is consistent with Commission precedent as well as Generally Accepted Accounting Principles (GAAP). The General Committee also explained its contention that any apparent excess of Press reimbursements collected during the term of the contract

could be corrected by making a payment to the Primary Committee. The General Committee requested that the Commission permit a transfer from the General Committee to the Primary Committee to resolve the matter. In the event that the Commission did not permit the transfer, the General Committee requested that it be allowed to disgorge the excessive Press reimbursements to the U.S. Treasury. The General Committee believed that the Commission should have found that the Press reimbursements were calculated correctly, resulting in no violation of the Act, and that the General Committee may terminate immediately.

The Commission could not reach a consensus on whether the General Committee's method of billing the Press during the campaign resulted in material harm. The Commission did not approve the Audit staff's recommended finding by the required four votes.

Pursuant to Commission Directive 70², this matter is discussed in the "Additional Issue" section. (For more detail, see p. 11.)

² Available at http://www.fec.gov/directives/directive_70.pdf.

Part IV

Commission Finding for the Compliance Fund

Failure to File 48-Hour Notices

Summary

The Compliance Fund failed to file 48-hour notices for 169 contributions totaling \$240,700 that it received prior to the general election. In response to the Preliminary Audit Report, the Compliance Fund explained that it had experienced a one-time data-management error with an outside vendor relating to the 48-hour notice requirement. The Compliance Fund took measures to ensure that this unintentional oversight was corrected. The Compliance Fund believed that the Commission should have found there was no violation of the 48-hour notice requirement and that the Compliance Fund should be able to terminate immediately.

The Commission approved a finding that McCain-Palin Compliance Fund, Inc. failed to file 48-hour notices for contributions totaling \$240,700 that it received before the general election.

Legal Standard

48-Hour Notification of Contributions. An authorized committee of a candidate must file special notices regarding contributions of \$1,000 or more received less than 20 days but more than 48 hours before any election in which the candidate is running. This rule applies to all types of contributions to any authorized committee of the candidate. 11 CFR §104.5(f).

Facts and Analysis

A. Facts

The general election was held on November 4, 2008. Contributions of \$1,000 or more received by the Compliance Fund between October 16, 2008, and November 1, 2008, required the filing of 48-hour notices (FEC Form 6 – 48-Hour Notice of Contributions/Loans Received). The Audit staff isolated 589 contributions, totaling \$871,260, that required the filing of these 48-hour notices. A review of these records identified 169 contributions, totaling \$240,700, for which the Compliance Fund failed to file 48-hour notices.

B. Preliminary Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with Compliance Fund representatives at the exit conference and provided a schedule of the contributions requiring 48-hour notice filings. In response, Compliance Fund representatives stated that the matter had been addressed previously in a letter to the Reports Analysis Division and reiterated that “48-hour notices were not required for many of the identified contributions, as they were merely redesignations or reattributions that took place during the 48-hour notice reporting period.” Compliance Fund representatives also stated that “the Compliance Fund’s

normal practice of filing a 48-hour notice was not followed for a remaining group of contributions, due to data-management errors made by its outside vendor. To elaborate, the Compliance Fund's outside data-management vendor 'tagged' this group of contributions with an incorrect date in its database and consequently failed to locate the group in a subsequent, computerized search for contributions requiring a 48-Hour Notice. The Compliance Fund has now taken measures with this outside vendor to ensure that this unintentional oversight is corrected, and Compliance Fund staff believes that this was a one-time occurrence."

Additionally, Compliance Fund representatives emphasized that "48-Hour Notices are intended to bring to light any last-minute contributions that a candidate might deploy for campaign-related activities, such as advertising and get-out-the-vote efforts, during an election's final days. Donations to the Compliance Fund, however, may not be used for any candidate's election and may only support legal and accounting services to ensure compliance with Federal law. It should also be noted that the Compliance Fund today maintains a balance of over \$20 million, meaning that these funds received shortly before the 2008 general election still have not been spent for any purpose. The Compliance Fund was therefore not in material violation of the 48-hour notice requirement when its reliance on an outside vendor caused it to delay disclosure of donations that would only fund lawyers' and accountants' legal compliance activities. For these same reasons, the Compliance Fund should not be fined for this vendor failure even if the Commission somehow finds that a technical infringement of the 48-hour notice requirement occurred."

The Preliminary Audit Report recommended that the Compliance Fund provide:

- documentation to demonstrate that the contributions in question were included properly in 48-hour notices; or
- documentation establishing that the contributions were not subject to 48-hour notification; and/or
- any further written comments it considered relevant.

C. Committee Response to the Preliminary Audit Report

In response to the Preliminary Audit Report, the Compliance Fund reiterated the arguments mentioned above concerning the filing of 48-hour notices. Specifically, the Compliance Fund maintained that the Commission incorrectly identified contributions that were redesignated during the 48-hour notice reporting period or refunded immediately following receipt. For other contributions, the Compliance Fund stated that it did not follow the normal practice of filing 48-hour notices due to data-management errors by its outside vendor. Furthermore, the Compliance Fund again stated that the funds received shortly before the 2008 general election still have not been spent for any purpose, and it reiterated its belief that 48-hour notices are intended to disclose any last-minute contributions that can be used for campaign-related activities and not for donations to the legal and accounting activities of the Compliance Fund.

The Audit staff acknowledged that the majority of 48-hour notices not filed resulted from a data management error as indicated by the Compliance Fund. The Audit staff also noted, however, that none of the contributions it had identified were redesignated contributions.³ Also, the contributions that the Compliance Fund identified in its response to the Preliminary Audit Report, at footnote 56, actually were received during the 48-hour notice period but refunded after the notice period (after November 1, 2008). As such, these contributions required a 48-hour notice.

D. Draft Final Audit Report

In the Draft Final Audit Report, the Audit staff stated that the Compliance Fund failed to file 48-hour notices for 169 contributions, totaling \$240,700, that it received prior to the general election. The Compliance Fund explained that it had experienced a one-time data-management error with an outside vendor relating to the 48-hour notice requirement and that it had taken measures to ensure that this unintentional oversight was corrected.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, the Compliance Fund stated that it had discussed thoroughly the 48-hour notice issue in its response to the Preliminary Audit Report. The Compliance Fund said the Commission should find that no legal violations had occurred and that it may terminate its registration with the Commission immediately.

F. Audit Hearing

During the audit hearing, the General Committee stated that there was no factual dispute with the Audit staff and that the outside vendor had miscoded the contributions. Therefore, its representatives maintained, the 48-hour reports filed by the Compliance Fund did not include the contributions. Also, the funds were not used in the election so the vendor error had no effect on the election itself, the General Committee contended. The General Committee requested that the Commission take no further action on this matter.

Commission Conclusion

On December 6, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that the Compliance Fund failed to file 48-hour notices for contributions it received prior to the general election.

The Commission approved the Audit staff's recommendation.

³ The Compliance Fund's response to the Preliminary Audit Report mistakenly included the example, at footnote 55, of a redesignated contribution from Eileen Kamerick on 10/23/08. This contribution, totaling \$1,500, was reported as a memo entry redesignation from the primary on the Compliance Fund's Post-General 2008 disclosure report and was not included in the Audit staff's review of 48-hour notices. A subsequent credit card contribution made on the committee's website from Eileen Kamerick totaling \$1,000 on 10/29/08 was also reported on the Compliance Fund's Post-General 2008 disclosure report and was included in this review.

Part V

Commission Finding for the Joint Fundraising Committees

Based upon the limited examination of the reports and statements filed and the records presented by the seven joint fundraising committees, the Audit staff discovered no material non-compliance.

Part VI

Additional Issue

Campaign Travel Billing for Press

Summary

The General Committee received reimbursements totaling \$344,892 from the Press for campaign travel, which was above the maximum amount billable to the Press. The Commission's regulations provide that a 10 percent markup on the actual cost of transportation and services may be billed to the Press. The General Committee stated that the excess reimbursement from the Press for travel was a misallocation of billing proceeds, requiring the General Committee to pay John McCain 2008, Inc. (the Primary Committee) for the excess funds collected.

In response to the Preliminary Audit Report, the General Committee maintained that it used a reasonable process for the allocation of Press reimbursements between the two committees that is consistent with Commission precedent as well as Generally Accepted Accounting Principles (GAAP). The General Committee also explained its contention that any apparent excess of Press reimbursements collected during the term of the contract could be corrected by making a payment to the Primary Committee. The General Committee requested that the Commission permit a transfer from the General Committee to the Primary Committee to resolve the matter. In the event that the Commission did not permit the transfer, the General Committee requested that it be allowed to disgorge the excessive Press reimbursements to the U.S. Treasury. The General Committee believed that the Commission should have found that the Press reimbursements were calculated correctly, resulting in no violation of the Act, and that the General Committee may terminate immediately.

The Commission could not reach a consensus on whether the General Committee's method of billing the Press during the campaign resulted in material harm. The Commission did not approve the Audit staff's recommended finding by the required four votes.

Pursuant to Commission Directive 70, this matter is discussed in the "Additional Issue" section.

Legal Standard

A. Expenditures for Transportation and Services Made Available to Media Personnel and Secret Service. Expenditures by an authorized committee for transportation, ground services or facilities (including air travel, ground transportation, housing, meals, telephone service and computers) provided to media personnel, Secret Service personnel or national security staff will be considered qualified campaign expenses, and, except for costs relating to Secret Service personnel or national security staff, will be subject to the overall expenditure limitations of 11 CFR 9003.2(a)(1) and (b)(1). 11 CFR §9004.6.

B. Billing Media Personnel for Transportation and Services. The committee shall provide each media representative, no later than 60 days from the campaign travel or event, with an itemized bill that specifies the amounts charged for air and ground transportation for each segment of the trip, meals and other billable items specified in the White House Press Corps Travel Policies and Procedures issued by the White House Travel Office. 11 CFR §9004.6(b)(3).

C. Reimbursement Limits for Transportation and Services of Media Personnel. The amount of reimbursement sought from media personnel shall not exceed 110 percent of the media representative pro rata share (or a reasonable estimate of the media representative's pro rata share) of the actual cost of transportation and services made available. Any reimbursement received in excess of this amount shall be returned to the media representative. 11 CFR §9004.6(b) and (d)(1).

D. Pro Rata Share Definition. A media representative's pro rata share shall be calculated by dividing the total actual cost of the transportation and services provided by the total number of individuals to whom transportation and services were made available (to include committee staff, media personnel, Secret Service staff). 11 CFR §9004.6(b)(2).

E. Administrative Costs for Transportation and Services of Media Personnel. The committee may deduct from the amount of expenditures subject to the overall limitation the reimbursements paid by media representatives for transportation and services, up to the actual cost of the transportation and services provided to the media representatives. The committee may deduct an additional amount of the reimbursements received from media representatives, representing the incurred administrative costs of 3 percent. The committee may deduct an amount in excess of 3 percent representing the administrative costs actually incurred by the committee in providing services to the media, provided that the committee is able to document the total amount of administrative costs actually incurred.

For the purposes of the above paragraph, administrative costs include all costs incurred by the committee in making travel arrangements and seeking reimbursement, whether these services are performed by committee staff or independent contractors. 11 CFR §9004.6(c).

F. Attribution of Travel Costs. Expenditures for campaign-related transportation, food and lodging by any individual, including a candidate, shall be attributed according to when the travel occurs. If the travel occurs on or before the date of the candidate's

nomination, the cost is a primary election expense. Travel to and from the conventions shall be attributed to the primary election. Travel by a person who is working exclusively on general election campaign preparations shall be considered a general election expense, even if the travel occurs before the candidate's nomination. 11 CFR §9034.4(e)(7).

G. Travel Support Documentation. For each trip, an itinerary shall be prepared and made available by the committee for Commission inspection. The itinerary shall show the time of arrival and departure and the type of events held.

For trips by government conveyance or by charter, a list of all passengers, along with a designation of which passengers are and which are not campaign-related, shall be made available for Commission inspection. When required to be created, a copy of the government's or charter company's official manifest shall also be maintained and made available by the committee. 11 CFR §9004.7(b)(3) and (4).

H. Assets Purchased from the Primary Election Committee. If capital assets are obtained from the candidate's primary election committee, the purchase price shall be considered to be 60 percent of the original cost of such assets to the candidate's primary election committee. 11 CFR §9004.9(d)(1)(ii).

Facts and Analysis

A. Facts

In 2008, the Press covering the campaign of the Presidential candidate (McCain) and the Vice Presidential candidate (Palin) travelled predominately on two aircraft chartered by the campaign. The aircraft for the Presidential candidate was the same aircraft used by John McCain 2008, Inc. (the Primary Committee) and was chartered through Swift Air, LLC (Swift Air). The aircraft for the Vice Presidential candidate was chartered through JetBlue Airways Corporation shortly before the Republican National Convention. The Press also occasionally travelled on aircraft chartered by the General Committee through CSI Aviation Services (CSI) and via ground transportation throughout the campaign.

As cited above, the amount of reimbursement sought from media personnel shall not exceed 110 percent of the media representative's pro rata share (or a reasonable estimate of the media representative's pro rata share) of the actual cost of transportation and services made available. Any reimbursement received in excess of this amount shall be returned to the media representative. 11 CFR §9004.6(b) and (d)(1).

The General Committee contended that it did not receive Press travel reimbursement above the 110 percent allowed by the regulations. The General Committee calculated total transportation costs for the Press to be \$4,503,658, equaling 106 percent of the cost calculated by the General Committee. The General Committee actually received \$4,476,728 from the Press as reimbursement for travel.

During fieldwork, the Audit staff calculated that the General Committee received Press travel reimbursement in excess of the 110 percent allowed by the regulations. The Audit staff calculated the total pro rata transportation cost for the Press to be \$3,756,215 and a

maximum amount billable to the Press (110 percent of cost) of \$4,131,836.⁴ Based on the Audit staff's calculation of transportation costs, the General Committee is required to refund to the Press \$344,892 (\$4,476,728 - \$4,131,836).

The main difference between the General Committee's figure and the Audit staff's figure was the calculation for total transportation costs. The General Committee disagreed with the Audit staff's cost calculation methods with respect to charter flights associated with the aircraft used by the Presidential candidate. The General Committee also did not agree with the Audit staff's initial application of aircraft reconfiguration costs.

The Audit staff calculated transportation costs based on actual hours used only by the General Committee during the general campaign. The General Committee, in contrast, calculated transportation costs based on the life of the charter contract, which covered both the primary and general campaign periods.

Applying Cost on Aircraft for Presidential Candidate

The Primary Committee and the General Committee chartered a Boeing 737-400 from Swift Air for use by the Presidential candidate. The Swift Air contract covered the period from June 30, 2008 through November 15, 2008. The contract stipulated payments totaling \$6,384,000, to be paid in 19 weekly installments of \$336,000. The contract covered nine weeks for the Primary Committee and 10 weeks for the General Committee. The contract also required the General Committee and Primary Committee to pay costs for fuel, catering, passenger taxes, and ground handling fees. There was also an aircraft reconfiguration cost of \$650,000 that was paid initially by the Primary Committee. The General Committee correctly reimbursed the Primary Committee \$390,000 (\$650,000 less 40 percent depreciation) for these aircraft reconfiguration costs.

The contract allowed 22.4 flight hours per week, or a total of 425.6 flight hours for the life of the contract. If the full flight hours per week were not flown, the hours rolled over to subsequent week(s). If the contracted 22.4 flight hours per week were exceeded and no accumulated unused hours were available, there was a charge of \$15,000 per additional hour. Neither the Primary nor General Committee ever exceeded the 22.4 flight hours in a week. The General Committee used 140.3 flight hours and the Primary Committee used 111.8 flight hours during the contract.

The General Committee made its first weekly installment payment of \$336,000 on August 29, 2008, and made total payments of \$4,047,402 to Swift Air. This amount included charges for fuel, catering, passenger taxes, and ground handling fees.

For the first week of the campaign, the General Committee used the total cost of the contract (primary and general) and divided it by the remaining number of hours available under the contract, including unused hours paid for by the Primary Committee. Later weeks were calculated using the amount yet to be paid on the contract and dividing it by

⁴ The General Committee billed at 106 percent, but was able to document administrative costs to allow billing up to 110 percent for all modes of transportation. In determining the amount billable to the Press, the Audit staff credited the General Committee for any under-billing of the Press associated with any one aircraft or mode of transportation. In other words, any under-billing of the Press for travel on the aircraft for the Vice Presidential candidate, CSI chartered aircraft, and ground transportation was applied to any overbilling of the Press that may have occurred for travel on the Presidential aircraft.

the estimated flight hours that would be used in the future, based on weekly averages. The calculation included reconfiguration costs. This method caused a fluctuation of the hourly charter rate calculated from as low as \$11,569 to as high as \$39,715. Using this rate, the segment cost was calculated and divided by the number of passengers.

The Audit staff calculated the charter rate per flight hour for Swift Air by taking the contract weekly installment (\$336,000) and dividing that by the *actual* weekly hours flown. The Audit staff then added the costs of fuel, catering, passenger taxes, ground handling, and certain reconfiguration costs to determine the total segment cost. The Audit staff then calculated the cost per passenger by dividing the total segment cost by the total number of passengers on the segment.

Applying Reconfiguration Costs

The Audit staff and the General Committee did not initially agree on the amount of aircraft reconfiguration costs billable to the Press. Historically, the Commission allowed the Press to be billed only for the aircraft reconfiguration costs that could reasonably be considered as having benefited the Press. The General Committee believed all costs for reconfiguring an aircraft at the beginning and at the end of the campaign should be considered when calculating the billable amount for the Press. The General Committee also stated that part of the aircraft reconfiguration cost was to bring the aircraft into compliance with Federal Aviation Administration safety standards that ultimately benefited the safety of all passengers including the Press.

B. Preliminary Audit Report & Audit Division Recommendation

The issue of press travel reimbursement was presented at the exit conference. In response, the General Committee submitted the following points for the Commission's consideration.

Cost Calculation

The General Committee compared the Swift Air contract, which spanned both the primary and general election periods, and similar aircraft contracts that were analyzed during previous presidential audits: Dole-Kemp in 1996, Bush-Cheney in 2000, and Kerry-Edwards in 2004. The General Committee specifically referenced the Audit staff's calculation of the hourly rate for each aircraft from the 1996 Dole-Kemp audit, which accumulated all operating costs and divided that total by the actual number of hours flown by each aircraft. By applying the same calculation to the entire amount of the Swift Air contract (\$6,384,000 divided by 252.1 hours flown), the General Committee stated that its cost calculations used for billing the Press were accurate.

The Audit staff agreed that if the General Committee was using the *total* Swift Air contract amount for both the primary and general election periods, as well as the full aircraft reconfiguration costs, it did not receive travel reimbursement from the Press that exceeded the maximum allowed by the regulations. However, as in Dole-Kemp, only those costs attributable to the General Committee should be used in determining the travel cost that the General Committee may bill to the Press. This conclusion was consistent with travel cost calculations in past presidential audits and supported by 11 CFR §9034.4(e)(7), which states, in part, that expenditures for campaign-related transportation shall be attributed according to when the travel occurs. As in Dole-Kemp, the Audit staff used only the general election operating cost (\$4,047,402) and the actual weekly hours

flown by the General Committee when calculating the billable cost to the Press. This was a more appropriate method when calculating costs and billing for campaign travel during the general election period.

The General Committee provided a spreadsheet that spanned the primary and general election periods and relied on adjusting the per-hour billing rates on a segment-by-segment basis due to using fewer flight hours than available in the Swift Air contract. The General Committee made the spreadsheet available to demonstrate that the Primary and General Committees' billing allocation was based on total costs (\$6,354,859) that were lower than the contract amount (\$6,384,000). The General Committee stated that no overbilling of the Press could have occurred since the difference (\$29,141) was never billed to the Press by the Primary committee during week eight. However, it appeared that the General Committee did bill this difference to the Press⁵. Therefore, the General Committee included the total contract amount in calculating the billing allocation.

The Audit staff used the weekly \$336,000 installment divided by the actual hours flown weekly during the general election period for billing calculations (plus the fuel, catering, taxes, and ground handling fees). The General Committee explained that the Audit staff's calculations had the benefit of hindsight because, due to the fast pace of the election campaign, the actual flying hours were unknown at the time of billing. Therefore, estimates of pro rata share had to be used in order to be in compliance with the regulations to bill media representatives within 60 days of travel. The General Committee believed that the Audit staff's methodology would be in conflict with 11 CFR §9004.6(b)(3), which says, in part, that media representatives should be given a bill that specifies amounts charged for air and ground for each segment.

The Audit staff's methodology did not conflict with 11 CFR §9004.6(b)(3), given that the actual flight hours are known soon after flights occur and thereby fall within the required 60 days to provide the Press with an itemized bill that specifies the amounts charged for air transportation for each segment of the trip. It appeared that the General Committee invoiced the Press on average 12 days after completion of each travel week, allowing time to use the actual flight hours for the week. Other billable travel costs known at the time of billing also could have been added to determine the cost per passenger. This method would incorporate adjusting for weekly flight hours.

The General Committee also referenced the 2000 Bush-Cheney audit and explained that it used the same billing methodology and personnel in that audit, which did not include an adverse audit finding or any informal advice from the Audit staff suggesting that a correction to the accounting methods was necessary. The Audit staff acknowledged that the same billing methodology was used in 2000 Bush-Cheney; however, the amount of the overbilling of the Press was not material. Furthermore, there was no indication that the 2000 Bush-Cheney General Committee included costs associated with the Bush Primary Committee in the calculation of travel costs.

⁵ During the second week of the general campaign, the General Committee calculated Press billing by using the total cost of the contract (\$6,384,000) and subtracting the amount of the contract already billed (\$2,140,752) to arrive at the remaining balance of the contract. The helicopter cost (\$29,141) was included in the \$2,140,752 already billed. The remaining balance of the contract was then divided by the average estimated flight hours remaining on the contract to determine the adjusted charter rate for the week.

Generally Accepted Accounting Principles (GAAP)

The General Committee explained several accounting principles and standards under GAAP to support its methodology for billing the Press. The General Committee believed that the Audit staff did not apply the appropriate accounting basis in its analysis. Specifically, the General Committee believed that the Audit staff incorrectly applied a cash-basis of accounting instead of an accrual-basis in its analysis of Press billing. Under cash-basis accounting, revenue is recorded when cash is received and an expense is recorded when cash is paid. In accrual-basis accounting, revenue is recognized when it is earned (or when services are performed) and expenses are recognized when they are incurred.⁶ The General Committee contended that under accrual-basis accounting, the objective is to ensure that events that change an entity's financial statements are recorded in the periods in which the events occur, rather than only in the periods during which the entity receives or pays cash. The General Committee also stated that the matching principle under GAAP dictates that expenses are recognized when the revenue is recognized, and therefore that the entire cost of the contract should be used when calculating billing for travel.

The Audit staff agreed that the matching principle dictates that expenses be recognized when the revenue is recognized. In turn, the revenue recognition principle recognizes revenue in the *period* in which it is earned. Since the period and activity audited was the general election period, the Audit staff correctly applied the \$4,047,402 cost for the general election portion of the Swift Air contract and related expenses.

The issue was not whether the cash- or accrual-basis of accounting is applied to the transportation costs and revenue generated from billing the Press for travel; nor was there a question of the matching principle under GAAP. At issue was whether the activity of a separate reporting and corporate entity (the Primary Committee) should be recognized by the General Committee and by this audit. An underlying assumption in GAAP is that every entity is separate and, therefore, the revenues and expenses of each entity should be recognized as such. As previously noted, recognizing the activity of the two entities separately is further supported by 11 CFR §9034.4(e)(7), which states in part that expenditures for campaign-related transportation shall be attributed according to when the travel occurs. Therefore, the General Committee should have recognized only those transportation costs from September 1, 2008, through November 4, 2008, in the calculation for billing the Press.

Reconfiguration

The General Committee believed that aircraft reconfiguration costs are a part of placing the asset in service and that the reconfiguration costs were included in the value of the asset when it was purchased from the Primary Committee. Therefore, the General Committee stated that all reconfiguration costs could be billed to the Press pro rata since the Press used the asset.

In response to the Exit Conference and after discussions with the Audit staff, the General Committee stated that all reconfiguration costs incurred, with the exception of decals and any item that benefited only campaign staff, such as divider-curtain expenses, should be included in the billable amount. After considering the General Committee's response, the

⁶ "Accounting Principles 7th Edition", Jerry J. Weygandt PhD, CPA, Donald E. Kieso PhD, CPA, Paul D. Kimmel PhD, CPA, page 90.

Audit staff revised its calculation of aircraft reconfiguration costs billable to the Press. The Audit staff did not include costs for painting and applying logos, totaling \$161,386, or the cost for a divider-curtain totaling \$1,167 in the calculation for billable reconfiguration costs since the General Committee indicated that these items benefited only the campaign. As a result, the Audit staff calculated \$487,447 (\$650,000 – \$161,386 – \$1,167) in reconfiguration costs billable to all travelers for both the primary and general periods. After subtracting 60 percent of the accepted reconfiguration cost because the asset was purchased from the Primary Committee, the Audit staff calculated \$292,468 (\$487,447 x 60%) of aircraft reconfiguration costs as billable during the general period. The Audit staff divided this amount by the total 140.3 flight hours flown by the General Committee to determine the amount of aircraft reconfiguration costs attributed to each segment.

Other Considerations

The General Committee stated that the Audit staff and the Commission have allowed for transfers and repayments between primary and general election presidential committees with respect to other types of vendors. The General Committee believed that any excess funds from the Press for travel were no different than deposits related to other vendors such as those for telephone contracts, media placement refunds, or lease agreements, for which repayments sometimes are necessary to ensure that a primary committee does not subsidize a general committee.

The General Committee also stated that it would not be reasonable to force campaigns to renegotiate and redraft every legal contract that exists to separate primary and general activity. To refund the Press would involve more than 700 separate billing transactions and would “go against many of the internal ethics policies of the various news organizations...who are not allowed to receive passage at discounted rates on campaign transportation so as to not unduly influence their coverage of the candidates.”

The Audit staff acknowledged the administrative burden that may be involved with refunding the Press. Historically, the Commission allowed refunds to the Press to be made on a pro rata basis, such as in the 1996 Dole-Kemp audit, rather than recalculating each billing to the Press. The General Committee’s alternative suggestion, refunding the Primary Committee, would be considered a non-qualified campaign expense subject to repayment. The regulations state that a general election committee cannot incur primary-related expenses because these expenses are not in furtherance of the general election. 11 CFR §9002.11(a).

The General Committee received reimbursements from the Press for campaign travel that were above the maximum amount billable to the Press. The Primary Committee appeared to have billed an amount that was less than its cost. The Primary and General Committee each paid its share of the contract and billed the Press and Secret Service accordingly. Although the regulation limits how much can be billed, there is no requirement that any billing be made. Thus, the travel could be provided at no cost.

The General Committee was correct that there are transactions between the Primary and General Committees in many Presidential campaigns in which either the primary or general election is publicly funded. Assets, ranging from office equipment to service deposits to, as in this case, aircraft configuration, often are purchased. In each case, value

is transferred between the two committees. For example, if the General Committee purchases security deposits, it gives cash for the right to continue the service and recover the deposit after the campaign. No such exchange was involved in the proposed transfer to the Primary Committee in this case.

The General Committee did not dispute that it received more reimbursements from the Press during the general election period, but the General Committee believed a more appropriate description would be misallocation of Press travel reimbursement received between the General Committee and the Primary Committee. The General Committee's methodology may have accurately reflected the comparative actual use of the aircraft between the Primary (111.8 flight hours) and General Committees (140.3 flight hours), but it did not reflect the comparative actual costs paid by each committee. The General Committee did not exceed the overall expenditure limitation, even with the excessive Press reimbursements. However, the purpose was to match the cost of the campaign to the proper election and spending limit. For these reasons and those noted above, the reimbursements totaling \$344,892 that the General Committee received from the press were above the maximum amount billable under the regulations.

The Preliminary Audit Report recommended that the General Committee demonstrate it did not receive reimbursements from the Press for campaign travel that were above the maximum amount billable. Absent such evidence, the General Committee was to return, on a pro rata basis, \$344,892 to Press representatives and provide documentation to support the refunds.

C. Committee Response to Preliminary Audit Report

The General Committee submitted a response to the Preliminary Audit Report on December 20, 2011, which addressed the finding concerning Press reimbursement for travel. The General Committee argued that there was no "overbilling" because "the Primary Committee and the General Committee used a reasonable process to predict the allocation of Press reimbursements between the committees" that was "consistent with the Commission precedent as well as Generally Accepted Accounting Principles". The General Committee also argued that if there was a misallocation of Press reimbursement between the two committees, a payment to the Primary Committee could correct it.

The General Committee discussed the validity of its approach to press billing. The General Committee maintained that because the contract with Swift Air for air travel spanned nine weeks of the Primary and 10 weeks of the General campaigns, it was necessary to bill based on the entire cost of the contract. The General Committee also asserted that the Primary Committee and the General Committee "used a reasonable process to predict the eventual, proper allocation of press reimbursements between the General Committee and the Primary Committee." The General Committee described in some detail the difficulty encountered in the billing process due to the fact that while they knew what the total costs were for the combined period, they would not know how to apply the fixed costs until the contract was completed and the actual number of hours flown was known. Accordingly, the Primary Committee began billing at the rate of \$15,000 per flight hour, which would have been the actual contract price per hour had it flown all the hours provided for in the contract. By the time the billing began in the general election period, the General Committee had to face the fact that the total price of the contract less the total for flight hours billed to date required that the remaining hours

to be flown would have to be valued at a higher rate in order to account for the remaining outstanding balance of the contract.

The General Committee stated the following:

“The Audit Division acknowledges that the Committees’ method for predicting the proper allocation of Press reimbursements between the General Committee and the Primary Committee ‘reflect[s] the comparative actual use of the aircraft between the Primary and General Committees...’ The Audit Division nonetheless advocates a new, never-before-announced technique for calculating a travel segment’s hourly rate, and by extension, the proper allocation of Press reimbursements: divide each weekly installment of the \$6,384,000 Swift Air payment ‘divided by the actual weekly hours flown during the general election period...’”

“The Audit Division’s method is conveniently simple. But this simplicity is wrought by ignoring important realities about the Swift Air contract. For one, the Swift Air contract was jointly held by the Primary Committee and the General Committee. It spanned four months, straddling the divide between primary and general-election periods. The Committees and Swift Air intended this exact structure. A four-month contract held by two entities is manifestly different than a two-month contract held by one. The Audit Division, however, wants to now artificially bisect the Swift Air contract without even considering whether the parties would have structured two separate two-month contracts another way. For instance, the amount and frequency of the weekly installment payments might have been different, and the costs certainly would have been greater since a key factor in the cost of securing a dedicated aircraft is the lease’s duration. The Audit Division cannot disregard a contract’s fundamental elements without its analysis spinning into the realm of fiction.”

“The Audit Division also ignores that the Swift Air transaction was a fixed \$6,384,000 fee in exchange for up to 425.6 flight hours. The payment and the hours were divided into equal weekly installments, but a particular week’s fixed installment payment was *not* in exchange for that week’s flight hours. Dividing a week’s installment payment by the week’s actual flight hours therefore does not reflect what a travel segment’s hourly rate and “total actual cost” were. Yet the Audit Division does that very thing, presumably to simplify the hourly rate calculations since one uses only a week’s actual flight hours rather than waiting until the end of the contract to determine how many actual flight hours over which to spread the \$6,384,000 fixed fee. Simplicity is indeed attractive. It interferes with accurately calculating each travel segment’s “total actual cost” here, though.”

“The Committees’ calculation method for a travel segment’s hourly rate, on the other hand, does not rely on counterfactuals. It recognizes the Swift Air contract as it is, and in doing so, is more consistent with Commission precedent and with Generally Accepted Accounting Principles. The Primary Committee and the General Committee therefore used a reasonable process to predict the eventual, proper allocation of Press reimbursements between the Committees.”

The General Committee then asserted that the calculation method used by the Committees was more consistent with Commission precedent. It defined Commission precedent by citing the methods used by three other campaigns, Dole – Kemp 1996, Kerry – Edwards 2004, and Bush – Cheney 2000, and maintaining that its method coincided closely with those of the campaigns cited. The General Committee contended that the Kerry-Edwards 2004 charter “straddled the primary- and general-election periods,” like the Swift Air contract. The General Committee also maintained that its methodology was more consistent with GAAP.

Further, the General Committee stated that the Audit staff “relied on non-GAAP cash-basis accounting to estimate the fixed-expense share of each travel segment’s total actual cost of the transportation” and pointed out, “The Commission has endorsed GAAP’s use in presidential campaign audits and cited GAAP to make an adverse audit finding against the Kerry-Edwards Campaign.”

The General Committee went on to state:

“The Primary Committee and the General Committee used GAAP-compliant accrual-basis accounting to calculate the fixed-expense share of each travel segment’s “total actual cost of the transportation.” Accrual-basis accounting required that the Swift Air contract expenses (and offsets to those expenses in the form of Press reimbursements) were recognized as actual flight hours were used. A portion of the Swift Air contract’s fixed cost was assigned to each travel segment using a depreciation technique called the “units of production” method, which is expressed as $\text{Cost} / \text{Estimated Units} = \text{Depreciation Per Unit Produced}$ (i.e. $\$6,384,000 / \text{Estimated Flight Hours} = \text{Aircraft Hourly Rate}$). The “units of production” method was most appropriate here because the actual flight hours, and thus the actual contract costs, were not incurred ratably over the individual weeks of the contract.”

“By contrast, the Audit Division relied on non-GAAP cash-basis accounting to estimate the fixed-expense share of each travel segment’s “total actual cost of the transportation. The Audit staff used the weekly \$336,000 installment as the trigger for recording expenses (and offsets to those expenses in the form of Press reimbursements). Like all cash-basis accounting, this simplifies the hourly rate calculations since one uses only a week’s actual flight hours rather than waiting until the end of the contract to determine how many actual flight hours over which to spread the \$6,384,000 fixed fee. But again, like all cash-basis accounting, this does not offer a fully accurate picture of the transaction here because a week’s installment payment was *not* paid to Swift Air in exchange for that week’s installment of flight hours.”

The General Committee summarized its position on GAAP by stating, “...the calculation method used by the Primary Committee and the General Committee is more consistent with GAAP. The two Committees therefore used a reasonable process to predict the eventual, proper allocation of Press reimbursements between the Committees.”

In the conclusion of its response, the General Committee offered its rationale in opposing the Audit staff’s position that a payment to the Primary Committee to correct the imbalance would constitute an impermissible use of public funding resulting in a non-

qualified campaign expense subject to repayment. The General Committee made four arguments.

1. Funds received under circumstances outside Part 9005 (concerning the general election public grant), such as Press reimbursements, are not similarly restricted and therefore their use is not restricted.
2. Because the primary campaign is long over, the General Committee will not actually incur any primary-related expenses. The transfer is simply to correct what the Audit Division views as the original “misdeposit” (sic) of Press reimbursements.
3. The transfer would not be a “non-qualified expense” because in the past, the Commission has repeatedly permitted transfers from publicly funded general-election committees to their affiliated primary-election committees to correct misallocation and similar issues.
4. Finally, a General-to-Primary Committee transfer should not be prevented under the Audit Division’s “non-qualified expense” rationale because the only reason for this misallocation issue is the Commission’s failure to provide guidance on how to prospectively calculate the fixed-cost portion of a particular travel segment’s “total actual cost of ... transportation.” The Primary Committee and the General Committee had no notice that they were not using the Commission’s preferred calculation method.

The Audit staff noted that the General Committee’s response to the Preliminary Audit Report concedes that an imbalance existed between the reimbursements it sought from the Press during the primary portion of the Swift Air contract and that sought during the period attributable to general portion. The imbalance resulted from the Primary Committee billing the Press for reimbursements at a lower hourly rate than actual cost would have suggested during the primary period. The Audit staff maintained that the amount represented by what the General Committee calls an “imbalance” actually represents the amount the General Committee overcharged the traveling Press during the general election period.

The Audit staff conceded that the General Committee’s explanation of the origin of the imbalance was accurate. It explained how the Primary Committee billed significantly less in the primary period, and the General Committee billed at a higher rate in the general period; this was essentially the problem. The General Committee over billed the Press during the general election by exceeding 110 percent of the actual reimbursable cost incurred for transportation.

The General Committee described the contract as a “fixed \$6,384,000 fee in exchange for up to 425.6 flight hours.” The duration of the contract was 19 weeks with nine weeks falling in the primary period and the last 10 weeks in the general period. There were additional terms in the contract. The General Committee could fly up to 22.4 hours of flight time per week. Any additional hours flown would be billed at \$15,000 per hour. Should the General Committee use the entire allotment of 22.4 hours in a given week, it would be entitled to draw on any hours not used in a successive week. This issue never arose because neither campaign ever exceeded the weekly allotment of 22.4 hours.

The General Committee objected to the Audit staff's calculation of fixed costs based only on the portion of the contract that applied solely to the general election period. The Audit staff noted that the only portion of the Swift Air contract for which the General Committee was responsible was the final 10 weeks. The General Committee seemed to have understood that it was liable for the portion of the contract beginning in the contract's tenth week because that is how the contract obligation was paid. The Primary Committee was not permitted to pay for any of the contract beyond its obligation because, in so doing, the Primary Committee would have made a contribution to the General Committee. This would not have helped the General Committee since it was limited to the federal grant. The Audit staff necessarily focused on the fixed cost incurred and paid during the general election period.

The General Committee also objected to the Audit staff calculation of weekly fixed costs based on payments each week divided by the hours flown that week. The General Committee contention that "the payment and the hours were divided into equal weekly installments, but a particular week's fixed installment payment was *not* in exchange for that week's flight hours" does not square with the facts. Swift Air did intend that it be paid weekly for services provided under the contract, and it limited the services to be provided on a weekly basis to a maximum of 22.4 flight hours. Swift Air charged the General Committee weekly for its services and monitored total use weekly to determine whether it had provided services beyond the number of hours prescribed in the contract. As a consequence, the Audit staff believed that its method of dividing the fixed payment by the number of hours flown provided a reasonable calculation of fixed weekly costs. Moreover, this method would associate the correct weekly hourly costs based on the campaign's use each week.

The General Committee made a case for its methodology being consistent with the past campaigns of Dole-Kemp 1996, Bush-Cheney 2000 and Kerry-Edwards 2004. The Audit staff noted that Dole-Kemp 1996 had a distinct contract for the general election and is not comparable to the problems of a contract spanning two elections as laid out by the General Committee. The audit of Bush-Cheney 2000 indicated that this committee did not materially overcharge the Press for campaign related travel. Finally, the General Committee cited the audit of Kerry-Edwards 2004⁷, which found that the general campaign had received bankable flight hours that had been earned by the primary campaign. In this instance, the Commission determined that the general campaign should reimburse the primary campaign for these flight hours. The reimbursement was required to avoid a prohibited contribution from the primary campaign to the general campaign. Further, the Audit staff noted that the issue was not of methodology but of results. Committees are limited in the amount they may seek as reimbursement for travel provided to the Press. Once they establish administrative costs of 10 percent of the total, they may receive reimbursement for no more than 110 percent of actual costs. The General Committee received reimbursements in total that exceeded 110 percent.

⁷ The audit of Kerry-Edwards 2004 found no material non-compliance with press billing. Apart from the fact that the Kerry-Edwards 2004 charter contract spanned the primary and general election, there was little similarity between the two campaigns. The repayment of banked hours was unrelated to press billing in Kerry-Edwards 2004. Indeed, Kerry-Edwards 2004 recognized that the banked hours were appropriately an asset of the primary campaign and had calculated a repayment equal to 99 percent of the amount identified in the audit; this amount eventually was repaid.

The General Committee objected to the Audit staff calculations based on the period of the contract that coincided with the general election. It maintained that by using these calculations, the Audit staff was resorting to (non-GAAP) cash-basis accounting. As outlined above, the focus of the review was necessarily the general election period. Within the general election period, the Audit staff matched, on a weekly basis, the services received with the contract cost paid. In summary, the amount the Press was overcharged is the difference between the maximum amount the Audit staff calculated as appropriately billable and the reimbursements actually received in the general election period.

The General Committee made arguments for allowing a transfer to the Primary Committee to correct the imbalance. The Audit staff acknowledged that transfers were sometimes permitted between the primary and general committees in Presidential campaigns when it had been shown in the course of an audit that funds or obligations belonging to a primary or general committee were in the possession of the other. This was not the case in this instance.

The General Committee believed that the Commission should find that the Press reimbursements were calculated correctly, resulting in no violation of the Act, and that the General Committee may terminate immediately.

In the final analysis, the focus of the audit was the General Committee. As such, the Audit staff maintained that the General Committee received Press reimbursements during the general election campaign period, which in the aggregate exceeded the maximum allowed, and that the General Committee should return, on a pro rata basis, \$344,892 to Press representatives and provide documentation to support the refunds. Disgorgement to the U.S. Treasury, however, may be acceptable if the General Committee is unable to reconstruct the precise amounts owed to Press representatives.

D. Draft Final Audit Report

In the Draft Final Audit Report, the Audit staff stated the General Committee received reimbursements totaling \$344,892 from the Press for campaign travel, which was above the maximum amount billable to the Press. This amount should be refunded to the Press representatives on a pro rata basis. The General Committee maintained that it used a reasonable process for the allocation of Press reimbursements between the primary and general period. The General Committee also stated the Commission should find that the Press reimbursements were calculated correctly, resulting in no violation of the Act, and that the General Committee may terminate immediately.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, the General Committee requested an audit hearing to discuss the findings; and provided arguments previously submitted in response to the Preliminary Audit Report with one additional argument. The General Committee also stated that the Commission should find that no legal violation occurred and the committee may terminate its registration with the Commission immediately.

The General Committee argued again that “the Primary Committee and the General Committee used a reasonable process to predict the eventual, proper allocation of Press reimbursements between the General Committee and the Primary Committee.” The

General Committee also stated again that “to the extent a misallocation of Press reimbursements between the committees still exists, the General Committee may correct the imbalance through a payment to the Primary Committee.”

To support the arguments the General Committee explained that its calculation was:

- more consistent with Audit precedent from the Commission, specifically stating “the Dole-Kemp Audit staff’s methodology for determining a travel segment’s hourly rate for a fixed-rate contract was to divide the total amount of payments made under the aircraft lease by the total number of actual flight hours”;
- more consistent with Generally Accepted Accounting Principles (GAAP), specifically stating “the Primary Committee and the General Committee used a GAAP-compliant accrual-basis accounting to calculate the fixed-expense share of each travel segment”, which, “...required that the Swift Air contract expenses (and offsets to those expenses in the form of Press reimbursements) were recognized as actual flight hours were used”; and
- more consistent with the “benefit derived” principle, which was a new explanation offered by the Committees.

According to the General Committee, under the “benefit derived” principle a committee derived benefit from an aircraft only when it used an aircraft. Therefore, citing 11 CFR §106.1(a)(1), the General Committee believed it correctly determined “use” of the aircraft by using a “rolling basis by continually adjusting each new travel segment’s hourly cost based on the evolving total of estimated hours to be flown under the Swift Air contract.” The General Committee also argued that the Audit staff ignored the aircraft usage altogether and only focused on the timing of the payments.

The General Committee questioned whether “Commission rules and precedents prohibit the General Committee from correcting a Press reimbursement misallocation through a payment to the Primary Committee.” The General Committee supported its position again with the arguments below.

- “... (T)hese primary-election Press reimbursements, which offset an initial outlay of privately raised funds by the Primary Committee, are simply not comparable to public funds received by the General Committee as a general-election grant under Part 9005. They are therefore not subject to the “qualified campaign expense” restriction.”
- The General Committee and Primary Committee are affiliated and therefore the transfer of any misallocation Press reimbursement would not be an expense.
- The General Committee would not actually incur any “primary-related expenses” due to the fact that the 2008 election was four years ago and the transfer is to correct a “misdeposit of primary-election Press reimbursements into a General Committee account.”
- “... (T)he transfer would not be a “non-qualified expense” because the Commission has in the past repeatedly permitted transfers from publicly funded general-election committees to their affiliated primary-election committees to correct misallocations and similar issues.”
- “... (A) General-to-Primary transfer should not be prevented under the Audit Division’s “non-qualified expense” rationale because the only reason for this misallocation issue is the Commission’s failure to provide guidance on how to prospectively calculate the fixed-cost portion of a particular travel segment’s “total

actual cost of ...transportation.” The Primary Committee and the General Committee had no notice that they were not using the Commission’s preferred calculation method.”

F. Audit Hearing

During the audit hearing, the General Committee’s presentation centered on the argument that it used a reasonable method to determine campaign press travel billing and the result amounted to an imbalance in collections from Press between the primary and general periods. If required, the \$344,892 imbalance could be corrected with a transfer to the Primary Committee. The General Committee requested the Commission take no further action with regard to the campaign travel billing for the Press.

Commission Conclusion

On December 6, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find the General Committee’s method of billing the Press during the campaign did not result in material harm.

The Commission could not reach a consensus on whether the General Committee’s method of billing the Press during the campaign resulted in material harm. The Commission did not approve the Audit staff’s recommended finding by the required four votes.

Some Commissioners concluded that the General Committee received Press reimbursements during the general election campaign period that exceeded the maximum allowed under 11 C.F.R. §9004.6(b). Other Commissioners concluded that the General Committee’s method of billing the Press during the campaign did not result in material harm.

Pursuant to Commission Directive 70, this matter is discussed in the “Additional Issue” section.

Part VII

Attachment

McCain-Palin 2008 Inc.
Statement of Net Outstanding Qualified Campaign Expenses
As of December 4, 2008
As Determined on December 31, 2012

Assets

Cash in Bank			\$3,693,508	
Accounts Receivable:				
Due from the Compliance Fund	\$2,772,033	(a)		
Due from the Primary Committee	\$339,056			
Due from Other Vendors	<u>\$4,312,156</u>	(b)		
			<u>\$7,423,245</u>	
TOTAL ASSETS				\$11,116,753

Obligations

Accounts Payable:				
For Qualified Campaign Expenses			\$8,448,103	
Due to the Compliance Fund			\$100,107	
Due to the Primary Committee			\$167,828	
Payment to Press for Campaign Travel			\$344,892	(c)
Amount Due U.S. Treasury:				
Disgorgement of Interest Earned			\$58,319	(d)
Disgorgement of Stale-Dated Checks			\$2,882	(e)
Winding Down Costs:				
Actual: December 5, 2008 to December 31, 2012			<u>\$1,994,622</u>	(f)
TOTAL OBLIGATIONS				\$11,116,753
NET OUTSTANDING QUALIFIED CAMPAIGN EXPENSES (DEFICIT)				<u><u>(\$0)</u></u>

- (a) This amount represents repayments for expenditures paid by General, \$87,217 for Secret Service shortfall for campaign travel, \$76,841 for transfers, and \$2,399,908 for 5 percent allocable portion of media costs. A receivable for \$208,067 is due for compliance-related winding-down costs.
- (b) This amount represents Press and Secret Service receipts, media refunds through December 31, 2012, interest earned, capital assets sold, and capital assets in-house to be sold.
- (c) This amount represents payment due to Press as discussed in the Campaign Travel Billing for Press (see Additional Issue on page 11).
- (d) This amount represents a disgorgement made on Jan. 2, 2009 for interest.
- (e) This amount represents a disgorgement made on Jan. 2, 2010 for stale-dated checks.
- (f) The General Committee has not exceeded the winding-down cost limitation at 11 CFR §9004.11(b).