



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 6, 2011

MEMORANDUM

To: The Commission

Through: Alec Palmer
Acting Staff Director

From: Patricia Carmona *PC*
Chief Compliance Officer

Joseph F. Stoltz *JFS*
Assistant Staff Director
Audit Division

Thomas I. Nurthen *TIN*
Audit Manager

By: Mary Moss *MM for MM*
Lead Auditor

Subject: Audit Division Recommendation Memorandum on the United Association
Political Education Committee (UAPEC) (A09-27)

Discussed below are revisions to the attached Draft Final Audit Report (DFAR) as well as the Audit Division's recommendations. The revisions and recommendations are based on UAPEC's response to the DFAR. The Office of General Counsel reviewed this memorandum, concurs with the recommendations and provided the attached comments.

UAPEC declined the opportunity for an audit hearing.

Finding 1. Excessive Contributions to Candidates and Other Political Committees.

In response to the Draft Final Audit Report, UAPEC acknowledged that it made excessive contributions. It stated, however its belief that the Draft Final Audit Report statement that the excessive contributions resulted from its failure to track contributions made by its affiliates was misleading.

UAPEC stated it had certain procedures in place, albeit not foolproof, to track contributions by affiliated committees. Through the years, UAPEC had requested its affiliates, in writing, to advise it of contributions made to federal candidates. UAPEC explained that it called or otherwise communicated with affiliates that had PACs organized within a state where a candidate was seeking office to ascertain whether a contribution had already been made by the affiliate. UAPEC further stated it had no control over affiliates' day-to-day operations or access to their records. Therefore, identifying contributions made by affiliates was a difficult and challenging process. With respect to the remaining excessive contributions, UAPEC noted that it made written requests for refunds prior to the audit.

Finally, UAPEC provided documentation that it received an additional refund of \$500 from a candidate committee, thus reducing the remaining excessive contributions to \$25,000 (\$25,500 - \$500).

The Audit staff offers the following concerning UAPEC's response. With respect to the two excessive contributions totaling \$10,000, these contributions would not have been addressed in the Interim Audit Report had the documentation submitted in response been made available during the audit fieldwork.

The following was noted with respect to the remaining nine excessive contributions:

- o Prior to the audit, UAPEC sent letters to four committees, requesting refunds from three and asking that the excessive amount be applied to debt reduction for another.¹ These letters were sent subsequent to UAPEC's receipt of Requests for Additional Information from the Commission that questioned whether the contributions were excessive.
- o For the remaining five excessive contributions, UAPEC has not presented any evidence that it attempted to resolve the matter prior to the audit.

It is the Audit staff's opinion that UAPEC resolved excessive contributions totaling \$17,225 and made efforts to resolve the remaining excessive contributions totaling \$25,000.

The Audit staff recommends that the Commission find that UAPEC made excessive contributions in the amount of \$42,225 and that \$25,000 of that amount remains outstanding.

¹ UAPEC subsequently requested that this committee refund the excessive contribution.

Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures.

In response to the Draft Final Audit Report, UAPEC stated, that although it understood the 24-hour and 48-hour independent expenditure notice requirement, it did not believe that the Act or Regulations provided any guidance on when materials such as yard signs, mini-billboards, shirts, hats, etc., should be considered disseminated. Therefore, although it planned on implementing its new revised procedures, it requested a clarification concerning the precise date when the 24 and 48-hour notices should have been filed.

The Audit staff and the Office of General Counsel agree that the practical dissemination date for campaign materials as described in this report can either be the date UAPEC receives the materials from its vendors at its headquarters or the first date that UAPEC's local unions make the materials available to members of its restricted class.

The Audit staff recommends that the Commission find that UAPEC was required to file 24 or 48-hour notices for independent expenditures based on the dissemination date rather than payment date, and that UAPEC failed to keep a record of the dissemination date for the materials that were the result of the independent expenditures. Finally, UAPEC may consider the date such materials are delivered to its headquarters as the dissemination date for the purpose of filing 24 or 48-hour notices.

Finding 3. Failure to Properly Disclose Transfers from Affiliated Committees

The Audit staff recommends that the Commission find that UAPEC incorrectly disclosed transfers from affiliated political committees.

If the above recommendations are approved, the Audit staff will prepare a Proposed Final Audit Report within 30 days of the Commission's vote.

Should an objection be received, Directive No. 70 states that the Audit Division Recommendation Memorandum will be placed on the next regularly scheduled open session agenda.

Documents related to this audit report can be viewed on Voting Ballot Matters. Should you have any questions, please contact Mary Moss or Thomas Nurthen at 694-1200.

Attachments:

- Draft Final Audit Report of the Audit Division on the United Association Political Education Committee
- Office of General Counsel Analysis Received January 18, 2011

cc: Office of General Counsel



Draft Final Audit Report of the Audit Division on the United Association Political Education Committee

January 1, 2007 – December 31, 2008

Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.¹ The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

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 Committee (p. 2)

The United Association Political Education Committee is a separate segregated fund of the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, headquartered in Annapolis, Maryland. For more information, see the Committee Organization chart, p. 2.

Financial Activity (p. 2)

• Receipts	
○ Contributions from Individuals	\$ 3,130,530
○ Transfers from Affiliates	313,467
○ Refunds from Federal Candidates	33,500
○ Other Receipts	<u>230,574</u>
Total Receipts	\$ 3,708,071
• Disbursements	
○ Contributions to Federal Candidates	\$ 2,103,850
○ Independent Expenditures	510,314
○ Operating Expenditures	72,655
○ Other Disbursements	<u>1,392,617</u>
Total Disbursements	\$ 4,079,436

Findings and Recommendations (p. 3)

- Excessive Contributions to Candidates and Other Political Committees (Finding 1)
- Failure to File Notices and Properly Disclose Independent Expenditures (Finding 2)
- Failure to Properly Disclose Transfers from Affiliated Committees (Finding 3)

¹ 2 U.S.C. §438(b).

Draft Final Audit Report of the Audit Division on the United Association Political Education Committee

January 1, 2007 – December 31, 2008



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Part I

Background

Authority for Audit

This report is based on an audit of the United Association Political Education Committee² (UAPEC), undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 2 U.S.C. §438(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 2 U.S.C. §434. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. 2 U.S.C. §438(b).

Scope of Audit

Following Commission approved procedures, the Audit staff evaluated various factors and as a result, this audit examined:

1. The disclosure of disbursements, debts and obligations.
2. The disclosure of expenses allocated between federal and non-federal accounts.
3. The review of contributions made to federal candidates.
4. The disclosure of individual contributor's occupation and name of employer.
5. The consistency between reported figures and bank records.
6. The completeness of records.
7. Other committee operations necessary to the review.

² On June 10, 2010, UAPEC amended its Statement of Organization and changed its name to the United Association Political Education Committee (United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada). UAPEC also added its connected organization's name to its Statement of Organization in this amendment.

Part II

Overview of Committee Committee Organization

Important Dates	UAPEC
• Date of Registration	September 23, 1976
• Audit Coverage	January 1, 2007 – December 31, 2008
Headquarters	Annapolis, Maryland
Bank Information	
• Bank Depositories	Two
• Bank Accounts	Three
Treasurer	
• Treasurer When Audit Was Conducted	William P. Hite
• Treasurer During Period Covered by Audit	William P. Hite
Management Information	
• Attended FEC Campaign Finance Seminar	Yes
• Used Commonly Available Campaign Management Software Package	Yes
• Who Handled Accounting and Recordkeeping Tasks	Volunteer staff and consultant

Overview of Financial Activity (Audited Amounts)

Cash on hand @ January 1, 2007	\$ 1,121,310
o Contributions from Individuals	3,130,530
o Transfers from Affiliates	313,467
o Refunds from Federal Candidates	33,500
o Other Receipts	230,574
Total Receipts	\$ 3,708,071
o Contributions to Federal Candidates	2,103,850
o Independent Expenditures	510,314
o Operating Expenditures	72,655
o Other Disbursements	1,392,617
Total Disbursements	\$ 4,079,436
Cash on hand @ December 31, 2008	\$ 749,945

Part III

Summaries

Findings and Recommendations

Finding 1. Excessive Contributions to Candidates and Other Political Committees

The Audit staff identified 12 contributions made by UAPEC to nine candidate committees and two other political committees that, when aggregated with contributions made by its affiliates, appeared to have exceeded the limitation by \$42,225. The excessive contributions were not eligible for redesignation. The Audit staff recommended that UAPEC provide evidence demonstrating that the contributions were not excessive or provide evidence that refunds were received from the recipient committees. In response, UAPEC provided evidence that two of the excessive contributions, totaling \$10,000, were timely resolved and that it received refunds totaling \$6,725 from four recipient committees. UAPEC also provided copies of letters mailed to the remaining five committees requesting refunds of \$25,500. (For more detail, see p.4.)

Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures

UAPEC disclosed independent expenditures, totaling \$510,314 on Schedule E (Itemized Independent Expenditures). The independent expenditures were reported when paid, which in most cases was after the date of the election. UAPEC should have disclosed these independent expenditures as memo entries on Schedule E and a corresponding debt on Schedule D. Finally, UAPEC failed to timely file any corresponding 24 or 48-hour notices. UAPEC agreed with the Audit staff's conclusion and, as recommended, provided a written copy of its new procedures. (For more detail, see p. 5.)

Finding 3. Failure to Properly Disclose Transfers From Affiliated Committees

UAPEC incorrectly disclosed transfers from affiliated political committees totaling \$313,467 as either unitemized contributions from individuals or as contributions from other political committees. These transfers should have been reported and itemized as Transfers from Affiliated/Other Party Committees. UAPEC complied with the Audit staff's recommendation and filed amended reports properly disclosing all of the transfers. (For more detail, see p. 7.)

Part IV

Findings and Recommendations

Finding 1. Excessive Contributions to Candidates and Other Political Committees

Summary

The Audit staff identified 12 contributions made by UAPEC to nine candidate committees and two other political committees that, when aggregated with contributions made by its affiliates, appeared to have exceeded the limitation by \$42,225. The excessive contributions were not eligible for redesignation. The Audit staff recommended that UAPEC provide evidence demonstrating that the contributions were not excessive or provide evidence that refunds were received from the recipient committees. In response, UAPEC provided evidence that two of the excessive contributions, totaling \$10,000, were timely resolved and that it received refunds totaling \$6,725 from four recipient committees. UAPEC also provided copies of letters mailed to the remaining five committees requesting refunds of \$25,500.

Legal Standard

A. Authorized Committee Limits. No multicandidate political committee shall make contributions to an authorized committee that aggregate more than \$5,000 per election or to any other political committee in any calendar year which, in the aggregate, exceeds \$5,000. 2 U.S.C. §441a(a)(2)(A) and (C); 11 CFR §110.2(b) and (d).

B. Contribution Limitations for Affiliated Committees. For the purposes of the contribution limitations of 11 CFR §110.2, all contributions made by more than one affiliated committee, regardless if they are political committees under 11 CFR §100.5, shall be considered to be made by a single political committee. 11 CFR §110.3(a)(1).

C. Redesignation of Excessive Contributions. When an authorized candidate committee receives an excessive contribution, (or a contribution that exceeds the committee's net debts outstanding), the committee may ask the contributor to redesignate the excess portion of the contribution for use in another election. The committee must inform the contributor that:

1. The redesignation must be signed by the contributor;
2. The redesignation must be received by the committee within 60 days after the committee received the original contribution; and
3. The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(b)(5).

Within 60 days after receiving the excessive contribution, the committee must either receive the proper redesignation or refund the excessive portion to the donor. 11 CFR §§103.3(b)(3) and 110.1(b)(5)(i)(A). Further, a political committee must retain written records concerning the redesignation in order for it to be effective. 11 CFR §110.1(l)(5).

Facts and Analysis

The Audit staff identified contributions made by UAPEC that appeared to exceed the limitations by \$42,225. These excessive contributions consisted of 10 contributions to nine candidate committees totaling \$32,225 and two contributions to other political committees totaling \$10,000. A majority of the excessive contributions were the result of UAPEC not tracking contributions made by its affiliated committees. UAPEC and its affiliates share a contribution limitation. At this time, the excessive contributions are not eligible for redesignation and UAPEC can only request a refund from the recipient committees.

At the exit conference, the Audit staff provided UAPEC representatives with a schedule of the excessive contributions. In response, UAPEC's counsel (Counsel) provided copies of letters sent to each recipient committee requesting refunds of the excessive contributions. Counsel also related that well before the audit, UAPEC underwent a 100% turnover in staff. The new director instituted programs and procedures designed to monitor the contributions made by affiliates and comply more fully with the requirements of the Act.

Interim Audit Report Recommendation and Committee Response

The Audit staff recommended that UAPEC provide evidence demonstrating the contributions were not excessive or continue to seek refunds and provide evidence of any refunds received.

In response to the recommendation, UAPEC demonstrated that:

- Two excessive contributions (\$10,000) were resolved in a timely manner. For one excessive contribution, UAPEC provided documentation that it received a \$5,000 refund in 2009. For the second excessive contribution, UAPEC provided copies of letters to and from the recipient committee, agreeing that the excessive portion (\$5,000) should be deposited into the committee's non-federal account. The documentation discussed above was not available during the audit fieldwork.
- It received refunds from four of the recipient committees totaling \$6,725.
- Second letters were sent to the remaining committees requesting refunds totaling \$25,500.

Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures**Summary**

UAPEC disclosed independent expenditures, totaling \$510,314, on Schedule E (Itemized Independent Expenditures). The independent expenditures were reported when paid, which in most cases was after the date of the election. UAPEC should have disclosed these independent expenditures as memo entries on Schedule E and a corresponding debt on Schedule D. Finally, UAPEC failed to timely file any corresponding 24 or 48-hour

notices. UAPEC agreed with the Audit staff's conclusion and, as recommended, provided a written copy of its new procedures.

Legal Standard

A. Definition of Independent Expenditures. The term "independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. 11 CFR §100.16(a)

B. Disclosure requirements – general guidelines. An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same payee during the same calendar year, it exceeds \$200. Independent expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as "memo" entries on Schedule E and as a reportable debt on Schedule D. Independent expenditures of \$200 or less do not need to be itemized, though the committee must report the total of those expenditures on line (b) on Schedule E. 11 CFR §§104.3(b)(3)(vii), 104.4(a) and 104.11

C. Last-Minute Independent Expenditure Reports (24-Hour Notices). Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20th day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour notice is required for each additional \$1,000 that aggregates. The 24-hour notice must be filed on a Schedule E. The date that a communication is publicly disseminated serves as the date that the Committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).

D. Last-Minute Independent Expenditure Reports (48-Hour Notices). Any independent expenditure aggregating \$10,000 or more with respect to any given election, at any time during a calendar year, up to and including the 20th day before an election, must disclose this activity within 48 hours each time that the expenditures aggregate \$10,000 or more. The notices must be filed with the Commission within 48-hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

Facts and Analysis

Between August 27, 2008 and December 3, 2008, UAPEC made eight disbursements totaling \$510,314 for the purchase of materials such as mini-billboards, yard signs, posters, shirts, hats, etc. These disbursements were itemized on Schedules E, in support of Barack Obama, filed with the report covering the period in which the payments were made. A majority of the independent expenditures were related to one payment, in the amount of \$324,209, that was paid after the 2008 General election.³ UAPEC should have disclosed these independent expenditures as memo entries on Schedules E, filed with reports covering the dates when the materials were disseminated and included a corresponding debt on Schedule D (Debts and Obligations).

³ UAPEC received a refund of \$30,710 relative to this payment.

Further, UAPEC did not timely file any 24 or 48-hour notices of its independent expenditures and did not maintain documentation of the dissemination date for any of the materials. However, the invoices were dated either October 31, 2008 or November 18, 2008. Therefore, it appears likely that the materials were disseminated within a notice period.

This matter was discussed with UAPEC representatives during the exit conference. In response, Counsel stated that as a result of the audit, UAPEC's staff now understands the reporting requirements for independent expenditures, including 24 and 48-hour notices, and the need to document dissemination dates. However, they were unsure how the dissemination date would be determined since UAPEC generally distributes materials directly to local union members or ships the materials to local unions for distribution. Counsel suggested that in the future, UAPEC will change its method of recording, aggregating and filing the required notices based on the date that materials are first received at UAPEC headquarters. This date would be UAPEC's dissemination date for 24 and 48-notices.

Interim Audit Report Recommendation and Committee Response

The Audit staff recommended that UAPEC implement revised procedures in order to properly disclose independent expenditures on Schedules E and/or D and track aggregation and dissemination for both the 24 and 48-hour notice requirements.

In response, UAPEC agreed with the Audit staff's conclusion and, as recommended, provided a written copy of its new independent expenditure tracking procedures.

Finding 3. Failure to Properly Disclose Transfers from Affiliated Committees

Summary

UAPEC incorrectly disclosed transfers from affiliated political committees totaling \$313,467, as either unitemized contributions from individuals or as contributions from other political committees. These transfers should have been reported and itemized as Transfers from Affiliated/Other Party Committees. UAPEC complied with the Audit staff's recommendation and filed amended reports properly disclosing all of the transfers.

Legal Standard

Disclosure Required for Transfers from Affiliated Committees. A political committee must disclose the total amount of transfers from affiliated committees, and the identification of each affiliated committee that makes a transfer to the reporting committee during the reporting period, together with the date and amount of each transfer. 2 U.S.C. §434(b)(2)(F) and (3)(D).

Facts and Analysis

UAPEC incorrectly disclosed transfers totaling \$313,467 from affiliated political committees. Transfers from four affiliated committees totaling \$27,867 were included in

the unitemized contributions from individuals' total. The remaining transfers from 21 affiliated committees, totaling \$285,600, were itemized as contributions from Other Political Committees. All of these transfers should have been reported and itemized as Transfers from Affiliated/Other Party Committees. UAPEC representatives were advised of these disclosure errors at the exit conference.

In response, UAPEC's Legal Counsel related there had initially been some uncertainty among UAPEC staff concerning whether the affiliates (local unions) were acting as collecting agents. Counsel stated after further investigation, UAPEC staff concluded the receipts were in fact transfers from affiliates and agreed to amend the reports as recommended.

Interim Audit Report Recommendation and Committee Response

The Audit staff recommended that UAPEC amend its reports to properly disclose the transfers from the affiliated committees totaling \$313,467 (\$285,600 + 27,867) on Schedule A, Line 12, Transfers from Affiliated/Other Party Committees. In response, UAPEC filed amended reports properly disclosing all of the transfers.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

TO: Patricia Carmona
Chief Compliance Officer

Joseph F. Stoltz
Assistant Staff Director

FROM: Christopher Hughey *pch*
Acting General Counsel

Lawrence L. Calvert, Jr. *LC*
Associate General Counsel

Lorenzo Halloway *LH*
Assistant General Counsel
For Public Finance and Audit Advice

Delanie DeWitt Painter *DDP*
Attorney

SUBJECT: Draft Final Audit Report of the Audit Division on the United Association Political Education Committee (LRA 818)

The Office of General Counsel has reviewed the Draft Final Audit Report of the Audit Division ("Draft Report") and the Audit Division's Recommendation Memorandum ("ADRM") on the United Association Political Education Committee ("UAPEC" or the "Committee") and has the following comments. The Draft Report sets forth the Audit Division's basis for three findings: Finding 1. Excessive Contributions to Candidates and Other Political Committees; Finding 2. Failure to File Notices and Properly Disclose Independent Expenditures; and Finding 3. Failure to Properly Disclose Transfers from Affiliated Committees. The Committee responded to the Draft Report on December 7, 2010 ("DFAR Response") but did not request an audit hearing. The Committee, however, raises the legal issue of how to determine for reporting purposes when independent expenditures are disseminated to the public if the nature of the materials (yard signs, mini billboards, shirts, hats, etc.) that are sent from the national union to local chapters and members makes it difficult to know when the materials are disseminated to the public.¹ Our comments focus on this legal issue (Finding 2). If you

¹ We note that we have not commented at any prior stage of this audit.

have any questions, please contact Delanie DeWitt Painter, the attorney assigned to this audit.

I. BACKGROUND -- FAILURE TO FILE NOTICES AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES (FINDING 2)

The auditors conclude that UAPEC did not properly disclose independent expenditures on its reports and did not timely file 24 and 48 hour notices for its independent expenditures.² UAPEC made 8 disbursements totaling \$510,314 to purchase materials such as mini billboards, yard signs, posters, shirts, hats, etc. UAPEC itemized these disbursements as independent expenditures supporting Barack Obama on Schedule E as of the date of payment.³ Most of these independent expenditures relate to one payment of \$324,209 made on December 3, 2008, after the 2008 general election, and disclosed on line 24 Schedule E with a date of December 10, 2010. The auditors state that UAPEC should have disclosed these independent expenditures as memo entries on Schedule E for the reports covering the dates when the materials were publicly disseminated, and included a corresponding debt on Schedule D. In addition, UAPEC did not timely file any 24 or 48-hour notices of independent expenditures. Because UAPEC did not maintain documentation of the public dissemination date for any of the materials, the auditors do not know the exact amount that required such notices. The auditors conclude that some of the materials were likely disseminated within the notice period because of the dates of some invoices close to the election and the \$324,209 payment after the election and because UAPEC acknowledges that the materials were disseminated prior to the election.

The Draft Report states that UAPEC representatives told the auditors they were unsure how to determine the dissemination date because UAPEC generally distributes these materials directly to local union members or ships the materials to local unions for distribution. UAPEC suggested that in the future it would change its method of filing the required notices and use the date that materials are first received at UAPEC headquarters as the dissemination date for filing 24 and 48-hour notices.

In the Interim Audit Report ("IAR"), the auditors recommended that UAPEC implement revised procedures to properly disclose independent expenditures on

² The auditors provided us with additional information to clarify the facts in the Draft Report. We suggest that this information be included in the revised finding. Specifically, the auditors have informed us that the revised finding will clarify that UAPEC eventually filed notices, but did not file them timely, and that a \$324,209 payment on December 3, 2008 was related to numerous invoices.

³ According to the Audit staff, one payment check dated December 3, 2008 related to \$324,209 of the independent expenditures and was payment for a number of invoices dated between March 31, 2008 and November 18, 2008, but the invoices could not be traced directly to the payment. The remaining seven invoices for independent expenditures totaling \$186,105 were dated between August 20, 2008 and November 7, 2008 and paid between August 27, 2008 and November 12, 2008.

Schedules E and D and to track aggregation and dissemination for the 24 and 48 hour notice requirements. The Draft Report states that in response to the IAR, UAPEC agreed with the Audit staff's conclusion, and provided the recommended written copy of its new independent expenditure tracking procedures.

Nevertheless, the Committee addresses the issue in its response. It states that it understood the independent expenditure notice requirements but was not able to identify an earlier dissemination date because the nature of the material made it unable to know precisely when the material was disseminated to the public. The Committee explained that the material "is not typically disseminated on the date the material is received at UAPEC headquarters, the date the material is sent to the affiliates or the date the material is sent to members of the restricted class." DFAR Response at 2. Instead, the material would only be disseminated to the public on "multiple unknown dates" when "a shirt is worn in public or a yard sign is posted in a yard." *Id.* The Committee contends that the statute and regulations do not provide guidance on when such materials should be considered disseminated. The Committee stated, however, that "given the impossibility of identifying the dates of dissemination" it will in the future consider the material to be disseminated for reporting purposes on the date the material is received. *Id.* at 2-3. We understand that the auditors concur that this approach would be acceptable.

II. UAPEC MAY REPORT INDEPENDENT EXPENDITURES AS OF DATE WHEN IT RECEIVES MATERIALS FROM VENDORS BECAUSE OF PRACTICAL IMPOSSIBILITY OF DETERMINING ACTUAL DATES OF PUBLIC DISSEMINATION

The issue here is how to determine when materials are publicly disseminated for reporting purposes when the nature of the materials, such as yard signs, mini billboards, shirts, hats, etc. that are sent from a union to local union chapters and members makes it difficult to know when the materials are actually disseminated to the public by union members. We concur with the Audit staff that UAPEC may use the date when UAPEC receives the independent expenditure materials from vendors as the date of public dissemination for reporting and aggregation purposes. UAPEC could also use a later date, such as the date it ships the materials to local unions or union members, if it maintains records to support that date.

An independent expenditure is a communication expressly advocating the election or defeat of a clearly identified candidate that is not coordinated with any candidate or authorized committee. 11 C.F.R. § 100.16(a). A committee must report independent expenditures as of the date when they are publicly distributed or publicly disseminated. See 11 C.F.R. §§ 104.4, 104.5(g), see also 11 C.F.R. § 109.10.

A committee must file notices within 48 hours of the date an independent expenditure is publicly distributed or otherwise publicly disseminated for independent expenditures aggregating \$10,000 or more with respect to a given election made at any

time during the calendar year up to and including the 20th day before an election. 11 C.F.R. §§ 104.4(b)(2) and 104.5(g). In addition, a committee must file a notice within 24 hours of when each independent expenditure aggregating \$1,000 or more with respect to any given election is publicly distributed or otherwise publicly disseminated if that occurs after the 20th day but more than 24-hours before the election. 11 C.F.R. §§ 104.4(c) and 104.5(g). To determine when a committee must file 24 and 48-hour notices, independent expenditures are aggregated as of the first date that an independent expenditure is publicly distributed or otherwise publicly disseminated. 11 C.F.R. § 104.4(f), 104.5(g).

The Commission explained in the rulemaking that the term “publicly distributed” for independent expenditures has the same meaning as the term does for electioneering communications in 11 C.F.R. § 100.29(b)(3).⁴ Explanation and Justification, “Bipartisan Campaign Reform Act of 2002 Reporting,” 68 *Fed. Reg.* 404, 407 (Jan. 3, 2003). The Commission further explained that “publicly disseminated” “refers to communications that are made public via other media, e.g., newspaper, magazines, handbills.” *Id.* at 407 and 409. The Commission noted that when a communication is publicly distributed or disseminated, the person paying for the communication would be able to determine whether the communication meets the independent expenditure requirements including express advocacy. *Id.* at 407

The materials at issue here would be “publicly disseminated” rather than “publicly distributed” because they are not broadcast communications. *See* 68 *Fed. Reg.* 404, 407 and 409 (Jan. 3, 2003). The regulations and regulatory history are silent on how to determine the date when independent expenditures such as shirts, hats, yard signs, or mini billboards provided by a union to local unions and members are “publicly disseminated.” The term “publicly disseminated,” however, can be generally understood to mean the first date when a communication could be seen or heard by a member of the public, equivalent to the publication date for printed media such as a newspaper.⁵ Thus, we believe that the date these materials are publicly disseminated is the first date when the materials can be viewed or heard by members of the public, rather than only members of the union’s restricted class under section 114.1(j). The types of materials at issue here

⁴ Section 100.29 (b)(3)(i) defines “publicly distributed” for electioneering communications as aired, broadcast, cablecast or otherwise disseminated through the facilities of a television station, radio station, cable television system, or satellite system. Electioneering communications do not include any communication publicly disseminated through a means other than broadcast, such as print media. 11 C.F.R. § 100.29(b)(3).

⁵ In a pre-BCRA rulemaking in 2001 and early 2002 for then-section 109.1, the Commission considered a multi-prong test to determine when an independent expenditure was made for reporting purposes but decided on a rule that an independent expenditure is made on the first date on which the communication is published, broadcast or otherwise publicly disseminated. *See* Explanation and Justification for 11 C.F.R. § 109.1, 67 *Fed. Reg.* 12837 (Mar. 20, 2002). One commenter on the rulemaking objected to the other possible prongs and to using the word “printed” (which the Commission changed to “published” based on the comment) because an independent expenditure is not made until the communication is disseminated to the public. *Id.*

are likely to be eventually seen by members of the public at some time. *See* Memorandum to Joseph F. Stoltz, "Proposed Interim Audit Report, Democrat, Republican, Independent Voter Education Political Campaign Committee ("DRIVE") LRA 729" at 3-4 (Dec. 27, 2007). The committee here implicitly acknowledged that was its intent for these materials by reporting disbursements for them as independent expenditures. The materials were paid for and obtained by the national office of UAPEC, distributed by the national office to local unions, and then either publicly disseminated by the local unions or, and particularly in the case of items such as t-shirts, and yard signs, distributed by local unions to the individual members of the restricted class who then "publicly disseminated" the materials when they decided to wear the t-shirt, put up a sign in their yard, etc.

We concur with the auditors that UAPEC failed to timely file 24 and 48 hour notices or to properly report these independent expenditures. While we acknowledge the inherent difficulty of determining the precise date of public dissemination of these materials, there is no indication that UAPEC made any attempt to disclose these independent expenditures in a way that would make the information available to the public prior to the date of the election. Nor did it maintain records that would assist it or the auditors in determining a date that would be as close as possible to the date of public dissemination.

The problem for future disclosure is that in the case of the materials that are distributed by UAPEC through the local unions to union members for display at a time of the individual members' choosing, it is practically impossible for UAPEC to know precisely when these kinds of campaign materials are first viewed by members of the public rather than only by members of its restricted class. A union member could wear a shirt, for example, to a union meeting or in the member's home and the shirt would only be seen by members of the restricted class, but once the individual ventures out in public, assuming the shirt is visible, the message would be disseminated to the public. Similarly, a local union could give a yard sign to a member, who could put it into his garage for several days before putting it on his lawn where it could be viewed by the public passing by. So one box of materials sent to one local union chapter could result in public dissemination of the materials over a number of different dates, because each of many union members would make individual decisions about when to publicly disseminate the materials by wearing or displaying them. Those individual decisions are the actual dates when the independent expenditures are "publicly disseminated." It would be burdensome and impractical to require a union to track the use of these types of materials to determine when they are first viewed by members of the public.

Because it is impractical to determine the actual dates when these materials are publicly disseminated, UAPEC could use the next earliest date in the distribution chain: the first date when the local union makes those materials available to members of its restricted class (or when the local union itself publicly displays materials such as "mini-billboards," which we understand are four-foot by eight-foot signs.) These dates could be

determined for future independent expenditures, but might create an additional recordkeeping responsibility for UAPEC and its local union chapters. These would be the latest dates that UAPEC could pragmatically use to determine the dates of public dissemination of these independent expenditures. The Committee, however, has evidently decided that using those dates – or an earlier date, when it sends the materials from its national headquarters to its local unions or members -- would impose too much of a recordkeeping burden, and instead proposes an even earlier date, when it receives the materials from its vendors. The Audit Division appears to concur with this approach.

The date a national union receives materials from vendors is not the actual date of public dissemination; however, this date is earlier than would otherwise be required and would disclose the relevant information to the public for a longer period before the election. Therefore, we concur that this approach is acceptable, as long as UAPEC ensures that the materials are eventually publicly disseminated by the local unions and union members so that their reporting of them as independent expenditures is accurate.