

SANDLER, REIFF & YOUNG, P.C.

September 14, 2009

Mr. Thomas J. Nurthen
Audit Division
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Dear Mr. Nurthen:

This letter will serve as the response of the Tennessee Democratic Party ("TDP") to the Draft Final Audit Report ("Audit Report") of the Federal Election Commission's Audit Division ("the Audit Division") for the period covering the TDP's financial activities for 2005 and 2006.

Although the Audit Report's recommendations will likely not lead to any resulting enforcement actions against the TDP, the committee believes that certain positions taken by the Audit Division in the Audit Report are incorrect as a matter of both fact and law and would like to address these issues at a brief hearing in accordance with the Commission's procedures regarding Draft Final Audit reports.

At this hearing, the TNDP would like to address:

- 1) the Audit Report's conclusion that the polls reviewed by the Audit Division qualify as a Federal Election Activity as defined by the Commission's regulations; and
- 2) the Audit Report's conclusion that generic rallies were allocable as coordinated expenditures on behalf of Harold Ford Jr. and whether these rallies were Federal Election Activity as defined by the Commission's regulations.

Specifically, the TNDP disputes the conclusion that the polls should have been paid solely with federal funds and that the polls were ordinary, allocable, administrative costs that should be disclosed on Schedule H4. After a review of the Draft Final Audit Report, it is unclear what provision the Audit Division is relying upon to determine that the poll is Federal Election Activity. The draft report refers to the fact that the polls were undertaken "within the FEA time frame."

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However, the time frame is only relevant with respect to FEA that is for voter registration, voter identification, get-out-the-vote or generic activity. The Draft Report does not specify which provision covers the polling activity. The TNDP also believes that the poll was done as a legitimate polling activity and did not undertaken for the purpose of promoting, supporting, attacking or opposing any federal candidate. It is common for a legitimate poll to test messaging through the use of statements that may attack or oppose a candidate. These polls are designed to obtain information regarding the party's candidates and opposing candidates and a political committee should not be forced to federalize a poll that test both federal and non-federal messages. To be sure, the committee did not place any information regarding the poll back to its voter file as contemplated by 11 C.F.R. § 100.25(a)(4).¹ The Commission's regulations and the BCRA were designed to limit the use of non-federal funds for communications that were targeted to influence voters. A poll in which only 1,000 persons were contacted would clearly fall short of that goal. Therefore, it is proper to disclose the polls on Schedule H4 and allocate the costs accordingly on the committee's administrative split.²

With respect to the invoices regarding generic rallies, the TNDP stands by its assertion that these invoices were mistakenly addressed to the Harold Ford campaign and were, in fact, for generic rallies sponsored by the TNDP. This appears to be the sole basis for the Audit Division's conclusion. This conclusion is based solely upon the mistaken invoices and ignores the sworn affidavit provided by the TNDP's campaign director. This affidavit was provided because the TNDP believed that it was important these activities be properly disclosed and represented in the Final Audit Report. Based upon the Audit Division's representation that the TNDP does not have any exposure with regard to the overuse of Coordinated Expenditure authority or non-federal funds, the TNDP has no incentive to misrepresent these facts, and the Commission should accept, as true, the representations made in Mr. Button's affidavit.³

¹ The Office of General Counsel appears to agree that the poll did not constitute voter identification activity. See Memorandum to John D. Gibson of May 22, 2009, p. 4-6. For the reasons stated above, we disagree with OGC's conclusion that the polls were a federal election activity in accordance with 2 U.S.C. § 431(20)(A)(iii).

² Recently, three Commissioners determined that a public opinion poll did not require a disclaimer. In a Statement of Reasons, the Commissioners explained the important distinctions between a "phone bank" and a public opinion poll. The same reasoning is applicable in this instance. See Statement of Reasons of Vice Chairman Matthew S. Peterson and Commissioners Caroline C. Hunter and Donald F. McGahn, MUR 5835.

³ Although the committee disclosed payments for these rallies on Schedule H6, the Commission may also wish to address whether a partybuilding rally is a "public communication" as defined in 11 C.F.R. § 100.26. This is a significant question since it will determine whether the non-federal portion of a generic rally that does not reference a federal candidate can be paid for with Levin funds (when there is no mention of any federal candidates) or whether a rally would merely be considered a "voter drive" activity as defined by 11 C.F.R. § 106.7(c)(5). In addition, the Commission should determine whether a rally should be considered a "coordinated communication" as defined by 11 C.F.R. § 109.21. Based upon the analysis of several Commissioners in MUR 5564, it appears that a rally may not be a public communication. See e.g. Statement of Reasons of Commissioner Chairman Robert D. Lenhard, MUR 5564, Statement of Reasons of Chairman Michael E. Tener, and Commissioners David M. Mason and Hans A. von Spokovsky, MUR 5604.

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If you require any further information, or have any other questions, please call me at (202) 479-1111.

Sincerely,

A handwritten signature in black ink, appearing to read 'Neil Reiff', written in a cursive style.

Neil Reiff
Counsel to the Tennessee Democratic Party