



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

May 22, 2009


**MEMORANDUM**


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**SUBJECT:** Report of the Audit Division on Tennessee Democratic Party (LRA #772)

**I. INTRODUCTION**

The Office of General Counsel reviewed the Report of the Audit Division ("Proposed Report") on the Tennessee Democratic Party ("Committee") submitted to this Office on December 17, 2008. We concur with any findings not specifically discussed in this memorandum. In this memorandum, we address issues pertaining to the Committee's disclosure on schedule H6 of non-allocable Federal election activity (Finding 1). The Proposed Report found that the Committee improperly paid non-allocable Federal election activity ("FEA") with Levin funds and reported these transactions as Disbursements of Federal and Levin Funds for Allocated Federal Election Activity (on Schedule H6). The allocated amount includes payments for campaign rallies, polls, and automated phone banks. The Proposed Report concludes that the disbursements were non-allocable FEA because each of the Committee activities referred

to a clearly identified Federal candidate. We raise some proof questions about the auditors' conclusion that the payments for the rallies were not allocable because the communications at the rallies referenced a clearly identified Federal candidate. We recommend that the auditors raise this issue in the cover memorandum that forwards the Proposed Report to the Commission. We recommend that the Audit Division accede to the Committee's position as to whether the polls constituted FEA because the Committee did not use the polls to collect information to identify voters, but we concur with the Audit Division's conclusion that the polls constituted FEA because the poll questions promoted, supported, attacked, or opposed Federal candidates. We agree that payments for the phone banks should not have been allocated, but we recommend that the auditors clarify the analysis in the Proposed Report regarding the automated phone bank allocation. If you have any questions, please contact Danita C. Lee, the attorney assigned to this audit.

## **II. NON-ALLOCABLE FEDERAL ELECTION ACTIVITY DISCLOSED ON SCHEDULE H6 (Finding 1)**

### **A. Background**

The auditors found that some of the Committee's campaign rallies, polls, and automated phone banks were FEA that included references to a clearly identified candidate running for Federal office and concluded that expenses for these activities should not have been allocated between the Federal account and the Levin fund. Rather, the Proposed Report concludes, these expenses should have been paid entirely by the Federal account. The auditors identified 12 invoices directed to a specific Federal candidate that the Committee paid, reported as "generic get-out-the-vote" ("GOTV") activity, and disclosed as allocable FEA. The Committee submitted an affidavit contending that all but one of the invoices was improperly labeled and that the campaign rallies were for "generic GOTV." The Committee states that its polls were not FEA and that the costs should have been properly reported as operating expenditures. The Committee agrees with the auditors that the automated phone bank expenses were not allocable Federal election activity. We discuss the specifics of each of these findings in the remainder of this memorandum.

### **B. Commission Must Decide Whether Campaign Rally Invoices Represent GOTV activity**

The auditors identified payments associated with 12 apparent campaign rally invoices totaling \$37,421 that were addressed to or referenced events on behalf of candidate Harold Ford, Jr. The respective invoices stated, "Prepared for Harold Ford for Senate Campaign," "Sold to Harold Ford Jr. Campaign," or "Bill to Harold Ford Jr." The Committee paid the invoices which were for items or services such as tents, staging, refreshments, audio, parking, and clean-up. The Committee reported the disbursements for the invoices as "generic GOTV" activities and disclosed them on Schedule H6 as Federal election activity allocable between Federal and Levin funds.

The auditors conclude that the Committee's payments for the invoices were not for generic GOTV. The auditors conclude that the invoices show that the services were for campaign rallies benefitting and, apparently, incurred by the Senate candidate, Harold Ford, Jr. The Committee conceded that one invoice was for the benefit of the Ford campaign. It stated that the remaining 11 invoices were improperly labeled by the vendors as services provided to the Ford campaign. The Committee submitted a declaration from Randy Button, the Director of Tennessee Victory 2006, a Committee project, stating that the costs associated with the rallies were not for the Ford campaign. Mr. Button said that the invoices should have been invoiced to the Committee, the services or items provided were for generic GOTV rallies, the rallies were not coordinated with any Federal candidate, and no Federal candidates attended the rallies.

A state committee of a political party that makes expenditures or disbursements for Federal election activity must use Federal funds for that purpose. 11 C.F.R. § 300.32(a)(2). Paying an invoice incurred by a Federal candidate's authorized committee may or may not be FEA, but it is unquestionably a coordinated party expenditure, subject to limit pursuant to 2 U.S.C. § 441a(d), and also payable with 100% Federal funds. 11 C.F.R. § 109.32(b); 11 C.F.R. § 106.7(b). A state committee, however, may spend Levin funds on Federal election activity for voter identification, GOTV, or generic campaign activity conducted in connection with an election in which a candidate for Federal office appears on the ballot. 11 C.F.R. § 300.32(b)(1)(ii). The FEA for which the disbursement is made must not refer to a clearly identified candidate for Federal office. 11 C.F.R. § 300.32(c). A state committee may allocate disbursements or expenditures between Federal funds and Levin funds for voter identification, GOTV, or generic campaign activities. 11 C.F.R. § 300.33(a)(2).

While the Committee and the auditors reference "generic GOTV," there is a distinction between generic campaign activity and GOTV activity. Generic campaign activity means a public communication that promotes or opposes a political party and does not promote or oppose a clearly identified Federal candidate or a non-Federal candidate. 11 C.F.R. § 100.25. GOTV activity means contacting registered voters by telephone, in person, or by other individualized means, to assist them in engaging in the act of voting. 11 C.F.R. § 100.24(a)(3). GOTV activity includes, but is not limited to: (1) providing to individual voters information such as the date of the election, the times when polling places are open, and the location of particular polling places; and (2) offering to transport or actually transporting voters to the polls. 11 C.F.R. § 100.24(a)(3)(i) and (ii).

Although the Committee reported the expenditures associated with the invoices as "generic GOTV" and the auditors also refer to the activities as "generic GOTV," generic campaign activity (and not GOTV) is the focal point of our analysis because the Committee states that the expenses were associated with rallies and invoices reference items and services normally associated with rallies such as tents, staging, audio, meals, parking and traffic management. Rallies generally do not involve assisting individuals by

individualized means in engaging in the act of voting.<sup>1</sup> The specific issue is whether there is sufficient documentation to show that the rallies constitute generic campaign activity.

Whether the documentation shows that there was generic campaign activity, however, is a close issue because there is little documentation on either side of the question. The documentation and/or information necessary to resolve the question may not be available and may not exist. Generic campaign activity may promote or oppose a political party but may not promote or oppose a clearly identified Federal or non-Federal candidate. 11 C.F.R. § 100.25. Whether a Federal candidate was promoted or opposed at the rallies depends on what was said at the rallies and what authorized signage was displayed. About this we know little or nothing. We have not uncovered any documentation or information either supporting or contradicting Mr. Button's declaration that the invoice expenditures were for generic activity. The auditors reviewed the documentation obtained during the course of the audit to determine whether invoices from other vendors might provide insight about the rallies. The auditors, however, did not identify other vendor invoices that could be linked to the rallies or that provided additional insight. The auditors reviewed the Ford committee's disclosure reports to determine whether the Ford committee used common vendors which might then reveal more information on the specifics of the rallies. The auditors found that the Ford campaign did not use common rally vendors. The audit did not uncover copies of invitations or announcements or the specific dates of the rallies. We do not have a copy of Mr. Ford's campaign itinerary during the time period covered by the invoices. Invitations or announcements might state the purpose of the rallies or indicate whether Mr. Ford or other candidates participated in the rallies. The dates of the rallies could be used to link Mr. Ford to rallies or be used to research media accounts of the rallies. Mr. Ford's itinerary might show which, if any, Committee rallies he attended. This Office also attempted to identify media accounts of the rallies but was unable to do so.

Accordingly, the Commission must weigh the information on the invoices themselves against Mr. Button's declaration that the invoices were mislabeled and his conclusory assertion that the rallies were generic, and determine what weight to give each. We recommend the auditors raise this issue, noting the lack of supporting documentation, in the cover memorandum that forwards the Proposed Report to the Commission.

### **C. Polls May Not Have Constituted Federal Election Activity**

The Committee paid \$24,500 for two statewide telephone interview polls conducted between October 14, 2006 and October 28, 2006.<sup>2</sup> The polls' questions refer to

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<sup>1</sup> The Committee may be reporting the expenses as GOTV because GOTV activity took place at the rally. The type of expenses noted on the invoices, however, do not indicate that the expenses were related to GOTV activity.

<sup>2</sup> The Committee originally reported the cost of polls on Schedule H6 as allocated between Federal and Levin funds. The Interim Audit Report correctly pointed out that polls could not be paid with Levin funds because they referred to clearly identified Federal candidates. The Committee responded by agreeing

two clearly identified candidates for the United States Senate and a candidate for Governor of Tennessee. The auditors conclude that the cost of the polls represented Federal election activity that should have been paid solely by the Federal account. The auditors identified four factors they believe support their conclusion that the polls should have been paid solely with Federal funds. The four factors are that: 1) the polling occurred within the FEA time frame as set forth in 11 C.F.R. § 100.24(a)(1); 2) the Committee initially disclosed the payments for the polls as “voter identification;” 3) the poll questions asked about the respondents’ personal impressions (“favorability/unfavorability”) of the Federal candidates; and 4) the polls asked respondents their likelihood of voting for specific Federal candidates. The auditors also explained to staff their belief that the nature and tone of the poll questions required that the polls be paid by Federal account funds. The Committee, in response to the interim audit report, stated that the polls were not FEA and that it used the polls internally to track information on the 2006 Federal and non-Federal elections and to get information regarding the views and opinions of Tennessee voters for general planning purposes. The Committee also said that it did not append any of the information collected from the polls to voter lists or voter files maintained by the Committee.

The auditors’ concerns about the polls relate to two ways in which activity can be FEA: voter identification, 11 C.F.R. § 100.24(a)(4), and, through the concern about the “nature and tone” of the questions, public communications that promote, attack, support or oppose (“PASO”) any candidate for Federal office, 11 C.F.R. § 100.24(b)(3). Their concerns led them to conclude that the polling expenditures should have been paid with Federal funds. Therefore, we examine whether the polls constitute either voter identification or PASO communications.

We begin by examining the meaning of voter identification. The regulations define voter identification, in part, as “acquiring information about potential voters” and also provide a non-exhaustive list of examples of voter identification. 11 C.F.R. § 100.24(a)(4). The list of examples include “obtaining voter lists” and “creating or enhancing voter lists by verifying or adding information about the voters’ likelihood of voting in an upcoming election or their likelihood of voting for a specific candidates.” *Id.* Nothing in the regulation, or in the Explanation and Justification for either the 2002 version of the regulation or the amendments adopted in 2006 in response to *Shays v. Federal Election Commission*, 337 F. Supp. 2d 28 (D.D.C. 2004), suggests that ordinary opinion polling is voter identification if no information about individual voters is supplied to the committee paying for the poll. We believe the plain language of the definition, noting that the information is used to create or enhance a list and the information is used in such a manner to recall the voters’ likelihood of voting or likelihood of voting for specific candidates, suggests that voter identification involves activity that identifies individual voters.

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it had incorrectly reported payments on Schedule H6, but asserted the polls could have been paid for as ordinary Federal/non-Federal operating expenses reportable on Schedule H4. The auditors’ position is that because the polls referred to candidates, occurred within the FEA time frame, and was voter identification activity, it had to be paid for with Federal funds.

The facts in this case do not show that the Committee collected and maintained information for these purposes. The Committee's interim audit report response states that it did not include any of the information from the polls in its voter lists or voter files. The results of the polls, which the Commission possesses, are presented only in terms of aggregate percentages. The auditors indicate that they do not have any information showing that the Committee used the poll results to identify individual voters. The fact that the Committee's polling occurred within the FEA time frame does not convert ordinary opinion polling to voter identification. Therefore, we conclude that the polls did not constitute voter identification.

The auditors have also asserted in staff conversations that the nature and tone of the poll questions promote, support, attack or oppose candidates for Federal office. Some of the poll questions contain positive and/or negative information about Federal candidates and ask if the recited statements make the listener more or less likely to vote for a candidate. However, in order to be so-called "type 3" FEA payable with 100% Federal funds, a communication must be both a "public communication" *and* must promote, support, attack or oppose a clearly identified candidate. 2 U.S.C. § 431(20)(a)(iii).

We believe that the poll phone banks constituted public communications in that there were more than 500 calls of a substantially similar nature within a 30-day period. 2 U.S.C. § 431(22) and (24); 11 C.F.R. § 100.28. We also believe the nature and tone of the positive and negative statements promoted, supported, attacked or opposed the named candidates.<sup>3</sup> Thus, we concur with the auditors that the polls constituted "type 3" FEA. 2 U.S.C. § 431(20)(a)(iii).

#### **D. Auditors Should Clarify the Purpose of Allocating Phone Bank Expenditures**

The auditors indicate that the Committee paid \$36,400 for two automated phone bank programs. The scripts for both phone banks refer to a clearly identified candidate running for Federal office. The auditors, therefore, conclude that the costs of the phone banks can not be considered allocable FEA or paid with Levin funds. However, in the final paragraph of the Proposed Report's discussion on the automated phone banks, the auditors state that "the Audit staff has *allocated* the cost of the Governor Script . . ." (emphasis added). The auditors also conclude that the costs of the phone banks

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<sup>3</sup> The Office of General Counsel acknowledges that there may be some questions as to whether these types of polls support or attack named candidates. The polls in this case are similar to the polls in a recent Matter Under Review, MUR 5835. In MUR 5835 (Democratic Congressional Campaign Committee or "DCCC"), the Commission considered whether telephone calls containing negative statements about a Federal candidate required a disclaimer under 2 U.S.C. § 441d. Section 441d includes a list of modes of communications that require a disclaimer. The modes include newspaper, magazines, and "any other type of type of general public political advertising." In recommending probable cause to believe that the DCCC violated the disclaimer provision, the Office of General Counsel argued that a telephone bank was a mode of communication under 2 U.S.C. § 441d. We also argued that the telephone banks in that case included political advertising. The probable cause recommendation failed on a 2-3 vote (with one recusal).

represented coordinated party expenditures. We recommend the auditors clarify the Proposed Report to explain that the Audit staff must first allocate the phone bank expenditures between candidates, in accordance with 11 C.F.R. § 106.1, to determine the amount of coordinated party expenditures. Thus, the Proposed Report should make clear that the allocation is not related to FEA but instead is necessary to analyze the coordinated expenditures.