



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

2010 JUN 09 AM 11:34

January 27, 2010

AGENDA ITEM

MEMORANDUM

TO: The Commission

For Meeting of 04-15-10

THROUGH: Alec Palmer
Acting Staff Director *AP*

FROM: John D. Gibson *JDG*
Chief Compliance Officer

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

Thomas J. Nurthen *TJN*
Audit Manager

BY: Brenda E. Wheeler *BW*
Lead Auditor

SUBJECT: Report of the Audit Division on the Tennessee Democratic Party (TDP)
(A07-07)

Attached is the subject report. Also attached is the legal analysis provided by the Office of General Counsel that was forwarded to the Committee with the Draft Final Audit Report. The report incorporates information presented at the audit hearing which was held on November 4, 2009, as well as the Audit staff analysis of that information. The Audit staff and the Office of General Counsel agree with the contents of this report.

The report is being forwarded for your consideration even though the Commission has not finalized its procedures for processing reports subsequent to audit hearings.

Recommendation

The Audit staff recommends that the report be approved.

This report is being circulated on a tally vote basis. Should an objection be received, it is recommended that the report be considered at the next regularly scheduled open session.

Should you have any questions, please contact Brenda Wheeler or Tom Nurthen at 694-1200.

Attachment as stated:

Report of the Audit Division on the Tennessee Democratic Party

Legal Analysis dated May 22, 2009



Report of the Audit Division on the Tennessee Democratic Party

January 1, 2005 - December 31, 2006

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 Tennessee Democratic Party is a state party committee headquartered in Nashville, TN. For more information, see the chart on the Committee Organization, p. 2.

Financial Activity (p. 2)

- **Federal Receipts**
 - Contributions from Individuals \$ 1,771,653
 - Contributions from Other Political Committees 234,775
 - Transfers from Affiliated Party Committees 3,022,463
 - Transfers from Non-federal and Levin Funds 797,430
 - Other Receipts 48,176
 - **Total Federal Receipts** \$ 5,874,497
- **Federal Disbursements**
 - Operating Disbursements \$1,691,580
 - Transfers to Affiliated Committees 211,950
 - Independent Expenditures 912,496
 - Coordinated Party Expenditures 712,459
 - Federal Election Activity 2,237,958
 - Other Disbursements 160,981
 - **Total Federal Disbursements** \$5,927,424
- **Levin Receipts** \$319,869
- **Levin Disbursements** \$319,869

Findings and Recommendations (p. 3)

- Non-allocable Federal Election Activity Disclosed on Schedule H6 (Finding 1)
- Disclosure of Disbursements (Finding 2)

¹ 2 U.S.C. §438(b).

Report of the Audit Division on the Tennessee Democratic Party

January 1, 2005 – December 31, 2006



Table of Contents

	Page
Part I. Background	
Authority for Audit	1
Scope of Audit	1
Part II. Overview of Committee	
Committee Organization	2
Overview of Financial Activity	2
Part III. Summaries	
Findings and Recommendations	3
Part IV. Findings and Recommendations	
Finding 1. Non-allocable Federal Election Activity Disclosed on Schedule H6	4
Finding 2. Disclosure of Disbursements	12

Part I

Background

Authority for Audit

This report is based on an audit of the Tennessee Democratic Party (TDP), 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

This audit examined:

1. The receipt of excessive contributions and loans.
2. The receipt of contributions from prohibited sources.
3. The disclosure of contributions received.
4. The disclosure of disbursements, debts and obligations.
5. The disclosure of expenses allocated between federal, non-federal, and Levin accounts.
6. The consistency between reported figures and bank records.
7. The completeness of records.
8. Other committee operations necessary to the review.

Part II

Overview of Committee Committee Organization

Important Dates	Tennessee Democratic Party
• Date of Registration	May 18, 1983
• Audit Coverage	January 1, 2005 - December 31, 2006
Headquarters	Nashville, Tennessee
Bank Information	
• Bank Depositories	Two
• Bank Accounts	Seven Federal, Three non-Federal, One Levin
Treasurer	
• Treasurer When Audit Was Conducted	Chip Forrester
• Treasurer During Period Covered by Audit	Robert Tuke & Delainia Davis
Management Information	
• Attended FEC Campaign Finance Seminar	Yes
• Used Commonly Available Campaign Management Software Package	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

Overview of Financial Activity (Audited Amounts)

Federal Cash on hand @ January 1, 2005	\$128,779
○ Contributions from Individuals	\$1,771,653
○ Contributions from Other Political Committees	234,775
○ Transfers from Affiliated Party Committees	3,022,463
○ Transfers from Non-federal and Levin Funds	797,430
○ Other Receipts	48,176
Total Federal Receipts	\$5,874,497
○ Operating Disbursements	\$1,691,580
○ Transfers to Affiliated Committees	211,950
○ Independent Expenditures	912,496
○ Coordinated Party Expenditures	712,459
○ Federal Election Activity	2,237,958
○ Other Federal Disbursements	160,981
Total Federal Disbursements	\$5,927,424
Federal Cash on hand @ December 31, 2006	\$75,852
Levin Cash on hand @ September 26, 2006	\$0
Total Levin Receipts	\$319,869
Total Levin Disbursements	\$319,869
Levin Cash on hand @ December 31, 2006	\$0

Part III

Summaries

Findings and Recommendations

Finding 1. Non-allocable Federal Election Activity Disclosed on Schedule H6

A review of disbursements revealed that non-allocable federal election activity was reported on Schedule H6 (Disbursements of Federal and Levin Funds for Allocated Federal Election Activity). Payments, totaling \$98,321, for polls, automated phone banks, and campaign rallies were allocated as 21% federal and 79% Levin. However, a clearly identified candidate running for federal office was addressed in each of the above activities/programs. In response, TDP agreed that the automated phone banks were not allocable federal election activity, but disagreed with the recommendation concerning the polls and the campaign rallies. (For more detail, see p. 4)

Finding 2. Disclosure of Disbursements

A sample review of itemized expenditures revealed that for approximately 18% of the items tested TDP did not disclose the payees' address. In response, TDP filed amended reports that materially disclosed the missing information. (For more detail, see p. 12)

Part IV

Findings and Recommendations

Finding 1. Non-allocable Federal Election Activity Disclosed on Schedule H6

Summary

A review of disbursements revealed that non-allocable federal election activity was reported on Schedule H6 (Disbursements of Federal and Levin Funds for Allocated Federal Election Activity). Payments, totaling \$98,321, for polls, automated phone banks, and campaign rallies were allocated as 21% federal and 79% Levin. However, a clearly identified candidate running for federal office was addressed in each of the above activities/programs. In response, TDP agreed that the automated phone banks were not allocable federal election activity, but disagreed with the recommendation concerning the polls and the campaign rallies.

Legal Standard

A. Reporting Allocable Expenses between Federal Funds and Levin Funds. A State, district, or local political party committee that makes a disbursement for Federal election activity that is allocated between Federal funds and Levin funds must state the category of Federal election activity for which each allocable disbursement was made. 11 CFR §300.36(b)(2)(i)(B).

B. Categories of Allocable Federal Election Activity. A State, district, or local political party committee may allocate disbursements between Federal funds and Levin funds for:

- Voter Registration Activity;
- Voter Identification;
- Get-Out-The-Vote Activity; and
- Generic Campaign Activity. 11 CFR §300.33(a)(1) and (2).

C. Categories of Non-Allocable Federal Election Activity. The following costs incurred by State, district, and local party committees and organizations must be paid for only with federal funds:

- A public communication that refers to a clearly identified candidate for federal office and that promotes, attacks, supports or opposes any candidate for federal office. 11 CFR §300.33(c).

D. Coordinated Party Expenditures. National party committees and state party committees are permitted to purchase goods and services on behalf of candidates in the general election—over and above the contributions that are subject to contribution limits.

Such purchases are referred to as “coordinated party expenditures.” They are subject to the following rules:

- The amount spent on “coordinated party expenditures” is limited by statutory formulas that are based on the Cost of Living Adjustment (COLA) and the voting age population.
- Party committees are permitted to coordinate the spending with the candidate committees.
- The parties may make these expenditures only in connection with the general election.
- The party committees—not the candidates—are responsible for reporting these expenditures.
- If the party committee exceeds the limits on coordinated party expenditures, the excess amount is considered an in-kind contribution, subject to the contribution limits.
- A national or state party committee may assign all or part of its coordinated party spending authority to another party committee. 2 U.S.C. §441a(d) and 11 CFR §§109.32(b) and 109.33(a).

E. Assignment of Coordinated Party Expenditure Limit. A political party may assign its authority to make coordinated party expenditures authorized by 11 CFR §109.32 to another political party committee. Such an assignment must be made in writing, must state the amount of the authority assigned, and must be received by the assigned committee before any coordinated party expenditures is made pursuant to assignment. 11 CFR §109.33(a).

Facts and Analysis

The Audit staff identified payments, totaling \$98,321, for polls, automated phone banks, and campaign rallies. TDP considered these expenditures to be allocable federal election activity and allocated each payment 21% federal and 79% Levin.

The poll questions and the automated phone bank scripts both refer to a clearly identified candidate for federal office. Invoices for expenses associated with campaign rallies were billed to the federal candidate’s campaign but paid by TDP. It is the opinion of the Audit staff that these types of expenditures, some of which appear to represent coordinated party expenditures, do not qualify as allocable federal election activity and should have been paid entirely by the federal account.

Polls – TDP paid \$24,500 for two statewide tracking polls conducted during the period October 14, 2006 through October 28, 2006. Poll questions related to candidates running for election to the United States Senate and candidates for the Governor of Tennessee. The majority of the questions related to the senate election. The cost of the polls cannot be allocated between the federal account and Levin fund since both polls refer to a clearly identified candidate running for federal office. As such, the cost should have been paid entirely by the federal account. The reported Levin share of this expense was \$19,355 (\$24,500 x 79%)

Automated Phone Banks – TDP paid \$36,400 for two automated phone bank programs. The phone scripts for both programs refer to a clearly identified candidate running for

federal office. As such, this cost cannot be considered allocable federal election activity and paid for, in part, with Levin funds. The reported Levin share of this expense was \$28,756 ($\$36,400 \times 79\%$).

The cost of this program appeared to represent coordinated party expenditures on behalf of Harold Ford, Jr., candidate for the United States Senate. The first phone script was narrated by the Governor of Tennessee (Governor Script), who was running for re-election. He asked for "your support and your vote." He also asked that "you support Harold Ford, Jr.", and continued to speak on his behalf. He closes by stating, "vote for me, Harold Ford, Jr., and all of our great democratic candidates running for election." The script concluded with a second speaker stating, "paid for by the Tennessee Democratic Party" and "approved and authorized by Harold Ford, Jr. for Tennessee."

The second phone bank script was narrated by former president Bill Clinton (Clinton Script). He asked that "everyone go to the polls and take someone with you who hasn't voted." He also stated that "Tennessee has an historic chance to send Harold Ford, Jr. to the United States Senate," and continued talking on his behalf. He ended by telling "everyone to go to the polls and vote." The script concluded with a second speaker stating, "paid for by the Tennessee Democratic Party" and "approved and authorized by Harold Ford, Jr. for Tennessee."

It appears that the automated phone program was coordinated with Harold Ford, Jr. for Tennessee (Ford Committee) since the caller stated that the candidate approved and authorized each phone script. Further, the contracts for each phone bank program were signed by Jim Hester, representing TDP. His email addresses at both TDP and at the candidate's campaign headquarters were listed on one of the contracts. Finally, prior to the date of each contract, Mr. Hester was employed by the Ford Committee.

The Audit staff allocated the cost of the Governor Script one-third (Governor), one-third (Harold Ford, Jr.), and one-third to all other (unnamed) candidates running for election. Therefore, \$6,300 ($\$18,900 \times 33\%$) represented a coordinated expenditure on behalf of Harold Ford, Jr. Further, since Harold Ford, Jr. is the only candidate named in the Clinton Script, the entire cost (\$17,500) represents a coordinated expenditure on behalf of Harold Ford, Jr.

Campaign Rallies - The Audit staff identified payments, associated with 12 invoices, totaling \$37,421, which were dated in October 2006 and addressed to Harold Ford's campaign. The invoices denoted, "Bill to Harold Ford Jr." or "Prepared for Harold Ford for Senate Campaign" or "Sold to Harold Ford Jr. Campaign." Each disbursement was reported as get-out-the-vote activity and disclosed on Schedule H6 as allocable federal election activity.

These payments do not appear to represent the cost of get-out-the-vote activities since the rallies appear to benefit Harold Ford, Jr. Therefore, the cost of this activity should have been paid entirely by the federal account.

Further, the Audit staff believes these disbursements represent coordinated party expenditures on behalf of Harold Ford, Jr. As previously stated, the invoices contained notations as either billed to, prepared for, or sold to the Ford Committee. The invoices represented expenditures for Ford Committee rallies, such as, tents, staging, refreshments, audio, parking and clean-up. One invoice was for custom labeled bottled water – label name “Ford for Tennessee Bottled Water.” Another invoice described the event name as a “Political Rally for Harold Ford, Jr.”

Coordinated Party Expenditure Limit – TDP’s coordinated expenditure limit for a United State Senate candidate from the state of Tennessee was \$362,200. The national party committee has the same limit; which was assigned to TDP. Therefore, TDP could make coordinated expenditures of behalf of Harold Ford, Jr. in the amount of \$724,400.

TDP reported on Schedule F (Itemized Coordinated Party Expenditures Made by Political Party Committees or Designated Agent(s) on Behalf of Candidates for Federal Office) coordinated party expenditures on behalf of Harold Ford, Jr. totaling \$712,459. With the addition of the cost for the automated phone bank (\$23,800 [\$6,300 + \$17,500]) and campaign rallies (\$37,421), it appeared that TDP exceeded the limitation by \$49,280 (\$773,680 - \$724,400). The normal remedy would have been for the Ford Committee to reimburse TDP \$49,280. However, since the Ford Committee transferred \$154,000 in excess campaign funds to TDP on November 6, 2006, the Audit staff considered this matter to be timely resolved; requiring no further action.

This matter was discussed at the exit conference. TDP representatives received copies of the documentation in order to further review these issues.

In response to the exit conference, the former director of Tennessee Victory 2006 submitted a signed statement that addressed four campaign rally invoices, totaling \$17,401. With respect to each, he stated Tennessee Victory 2006 expenditures were incorrectly invoiced to the Harold Ford Jr. campaign; the expenditures were related to get-out-the-vote activities; activities were not planned or conducted in coordination with any federal candidates; and, no federal candidates attended these events. The response did not address the polls or automated phone banks.

Two of the invoices addressed in the response, Jackson Centre (\$1,522) and Royal Reed Catering (Jackson Centre Menu - \$8,120) contained references to Harold Ford, Jr. The Jackson Centre invoice referred to the event name as “Political Rally for Harold Ford, Jr.” The Royal Reed Catering invoice “order info” section appeared to have had Harold Ford, Jr.’s name on the first line but that information had been redacted.

Interim Audit Report Recommendation

The Audit staff recommended that TDP demonstrate that expenditures:

- For polls, automated phone banks, and campaign rallies represented allocable federal election activity; or

Absent such evidence, it was recommended that the federal account reimburse the Levin Fund \$77,674 (polls \$19,355, automated phone banks \$28,756, campaign rallies \$29,563) and file amended reports disclosing the expenditures on Schedule B or Schedule F as appropriate (see below).

- For automated phone banks and campaign rallies did not represent coordinated party expenditures on behalf of Harold Ford, Jr.; or

Absent such evidence, TDP should have filed amended reports disclosing expenditures for the automated phone banks \$23,800 (\$6,300 + \$17,500) and campaign rallies (\$37,421) as coordinated party expenditures on Schedule F.

Committee Response to Recommendation and Audit Staff's Assessment

In response, Counsel for TDP (Counsel) stated:

Polls – Counsel acknowledged that the cost of the polls should not have been reported on Schedule H6 but indicated this cost should have been reported on Schedule H4 (Disbursements for Allocated Federal/Nonfederal Activity); as shared operating expenditures. Counsel further stated, the tracking polls were conducted to get a sense of issues and voting trends based on general polling principals; the polls did not promote, support, attack or oppose any federal candidate; the polls did not constitute generic campaign activity; the polls did not constitute voter registration activity; the polls did not constitute get-out-the-vote activity; and, most importantly the polls did not constitute voter identification activity. TDP amended its reports to reflect the cost for the polls on Schedule H4; allocating \$5,145 (21%) to the federal account and \$19,355 (79%) to the non-federal account.

It remains the opinion of the Audit staff that the cost of the polls represented federal election activity that should have been paid solely by the federal account and not allocable as a shared activity. The telephone interviews of 1,200 likely voters occurred October 2006; represented a public communication that referred to a clearly identified candidate for federal office that promotes, attacks, supports or opposes such candidates.

Both polls referred to clearly identified candidates running for federal office. Among the questions asked of callers were: if they favored either of the federal candidates; whether they would vote for a certain federal candidate if the election were held today; their opinion of attack ads against one of the federal candidates; and their opinions of various positions of each federal candidate.

Automated Phone Banks – Counsel acknowledged that the automated phone calls included advocacy for a Federal candidate and should not have been disclosed on Schedule H6. TDP filed amended reports to disclose 50% of the cost of the Governor Script on Schedule B (\$9,450) and 50% on Schedule F. The entire cost of the Clinton Script was disclosed on Schedule F. According to Counsel, it is TDP's belief that,

despite their disclosure on Schedule H6, no allocation transfer was made in connection with these expenditures.

The Audit staff and Counsel agree that the expenditures were coordinated and reportable on Schedule F, although TDP has concluded that 50% of the cost of the Governor's Script represents coordinated spending, whereas, the Audit staff concluded a lesser percentage (33%). As previously stated, the Audit staff allocated the cost of the Governor's Script on a 1/3 basis since the script concluded "vote for me, Harold Ford, Jr., and all of our great democratic candidates running for election." Therefore, we allocated 1/3 of the cost to each the Governor, Harold Ford, Jr. and all other democratic candidates running for election. The TDP's allocation is also acceptable.

Campaign Rallies – Counsel stated that TDP believed the invoices represented generic campaign activity; that it was not uncommon for vendors to confuse a party organization with the campaign of a candidate; and, that the invoices were incorrectly sent to the Harold Ford campaign. The response also included a declaration from the Director of Tennessee Victory 2006, a project of the Tennessee Democratic Party.² He attested that of the twelve invoices, eleven were incorrectly invoiced to the Harold Ford campaign. TDP agreed that the remaining invoice for custom-labeled bottled water was a coordinated expenditure and amended its reports to disclose this expense on Schedule F.

The following was noted with respect to the 11 invoices in question:

The Jackson Centre and Royal Reed Catering invoices. The Jackson Centre invoice indicated in three places that the event was a "Political Rally for Harold Ford Jr." The client name and contact person noted on the invoice was also named in reports filed by the Ford Committee as receiving travel reimbursements in October and November 2006;³ the same time frame as the rally. A second Jackson Centre invoice indicated technical/production services rendered for: Harold Ford Jr. The Royal Reed Catering invoice, which represented the menu for the event, had "For Harold Ford Campaign" redacted.

Jason's Deli – There were three invoices. The name Harold Ford was redacted on one invoice. The other two invoices were billed to Harold Ford, Jr. at a Memphis, Tennessee address. Further, the Ford Committee reported a payment to Jason's Deli on September 13, 2006. The reported purpose was "Food for Campaign Event."

Grand Events & Party Rentals – This invoice was addressed to Harold Ford, Jr. Campaign at a Memphis, Tennessee address (same as Jason's Deli). TDP' is located in Nashville, Tennessee.

² This individual also submitted a similar declaration in response to the exit conference. That declaration only addressed invoices from four of the vendors.

³ This individual was also disclosed in reports filed by TDP as receiving travel reimbursements.

STC – Memphis, Inc. – Four invoices were billed to Harold Ford Jr. for US Senate at the same Memphis address discussed above. On three of the invoices, Harold Ford, Jr. for US Senate had been crossed out.

The Memphis, Tennessee address is for the Park Place Center that rents office space. The Ford Committee, located at different address in Memphis, disclosed this mailing address on Schedule B (Itemize Disbursements) for at least two individuals who received airfare reimbursements. This address was not recorded in TDP's electronic files.

Little Porky's – The invoice contained the following: Catering – “Family BBQ for Harold Ford Jr.”

Victor Chatman Productions – This invoice indicated sold to “Harold Ford Jr. Campaign.” Description – “Harold Ford Jr. Campaign Rally at Swing Time Golf Range on October 14, 2006.”

W.C. Hunter – This invoice indicated that the vendor would prepare sandwiches for the “Harold Ford, Jr., Campaign on Saturday, October 14, 2006. It should also be noted that the invoice for the Ford for Tennessee bottled water was delivered to a location on October 14, 2006.

Southern Rents & Sells – The name on the invoice had been redacted.

B & B Cleaning Services – This invoice indicated sold to “Ford's.”

Based on the above it does not appear as if the vendors mistakenly invoiced the Ford Committee (instead of the TDP). The vendors use of the phrases - Political Rally for Harold Ford Jr. - For Harold Ford Campaign - Family BBQ for Harold Ford Jr. - Harold Ford Jr. Campaign Rally at Swing Time Golf Range on October 14, 2006 - Harold Ford, Jr., Campaign on Saturday, October 14, 2006, as well as, three vendors used a billing address that the Ford Committee also disclosed on its reports supports the conclusion that the above events benefited the Ford Committee. Therefore, it is the opinion of the Audit staff that the payments, for these events, by TDP represented coordinated party expenditures that should have been disclosed on Schedule F.

TDP's assertion that the Levin Fund may not have made a transfer of funds for the automated phone bank cost could be correct and also applicable to the cost of the polls and campaign rallies. TDP reported on Schedule H6 shared activity totaling \$715,056; the Levin Fund portion being \$564,894 ($\$715,056 \times 79\%$). However, the Levin Fund reported only \$319,399⁴ in transfers to the federal account for its portion of shared activity. It is not possible to determine specifically which expenses were reimbursed. Therefore, unreimbursed Levin activity totaled \$245,495 ($\$564,894 - \$319,399$); that amount was paid by the federal account. The overpayment by the federal account is greater than the Levin activity in question (\$77,673) and eliminates the need for any

⁴ TDP reported Levin Fund receipts and disbursements totaling \$319,869.

reimbursements by the Levin Fund for the cost of the automated phone banks, poll, or campaign rallies.

Conclusion

TDP filed amended reports that disclosed the cost of automated phone banks on Schedule F as Coordinated Expenditures on behalf of Harold Ford Jr. However, it remains the opinion of the Audit staff that the cost of the polls should have been disclosed on Schedule B, Line 21b as Other Federal Operating Expenditures, and the cost of campaign rallies should have been disclosed on Schedule F (Itemized Coordinated Party Expenditures Made by Political Party Committees or Designated Agent(s) on Behalf of Candidates for Federal Office); they were not.

Audit Hearing

TDP requested a hearing before the Commission. The request was granted and the hearing was held on November 4, 2009. At the hearing, Counsel for TDP (Counsel) addressed the polls and campaign rallies.

With respect to the polls, Counsel stated that no information obtained from the polls was posted to the party's voter files and that a legitimate survey poll with a limited number of respondents should not be considered a public communication and therefore federal election activity. Counsel stated that the purpose of these surveys was to test messages for future activities, not to persuade those contacted. He noted that such small numbers of persons contacted using an extensive list of questions is not an effective way to persuade voters.

With respect to the campaign rallies, Counsel reiterated that it is TDP's belief that all of the invoices identified by the Audit staff erroneously identified the Ford campaign as having been involved in the transactions and argued that such mistakes are common. Counsel also objected to what he termed the cursory dismissal of Mr. Button's representations concerning the rallies.

With respect to the polls and campaign rallies, the position of the Audit staff has not changed as a result of the audit hearing. The polls meet the statutory definition of a public communication. A public communication includes a telephone bank. The statutory definition of a telephone bank is more than 500 telephone calls of an identical or substantially similar nature within any 30-day period. The polls consisted of 1,200 telephone interviews conducted of a two-week period. Certain poll questions referred to clearly identified candidates for federal office and promoted, attacked, supported or opposed such candidate. Currently, there is no distinction in the statute or Commission regulations between telephone calls that are meant to persuade voters and those that are used for message or other research if they meet the definition of a public communication.

Campaign Rallies – The invoices from the 11 vendors represent at least 5 separate events. No explanation was provided of how all 11 vendors mistakenly invoiced the Ford Committee (instead of TDP). As previously stated, the invoices contained notations of

the events, such as, Family BBQ for Harold Ford, Jr. – Harold Ford, Jr. Campaign Rally at Swing Time Gold Range on October 14, 2006 – Political Rally for Harold Ford, Jr.⁵

The Declaration provided by Mr. Button, likewise does not explain how such a widespread misunderstanding could have occurred. Rather, it makes general statements such as it is his belief that the invoices were incorrectly invoiced to the Ford campaign. He states that in his experience it is common for vendors to make such mistakes. Mr. Button in one place says that the rallies were not coordinated with or attended by any federal candidate and in another says that it is his recollection that Mr. Ford did not attend any of the rallies. Further, Mr. Button declaration did not indicate his personal knowledge concerning any of the activities that occurred at the events, if any of the materials displayed at the event mentioned Mr. Ford's campaign, or whether the Mr. Ford was mentioned at the events. Counsel was unable to provide any further information at the hearing.

It is understandable for an invoice to be addressed to the wrong party. However, it is unlikely that numerous vendor invoices could contain specific representations concerning the candidate and the events without obtaining such information from either the Ford campaign or someone with knowledge of the events at the time the services were ordered. In this matter, the physical evidence of vendor invoices contradicts Mr. Button's after the fact declaration which provides nothing more than his "belief that the invoices were incorrectly invoiced to the Ford campaign and should have been invoiced to TDP." Further, the declaration does not appear to contain Mr. Button's hand written signature.

Conclusion

It remains the opinion of the Audit staff that the cost of the polls should have been disclosed on Schedule B, Line 21b as Other Federal Operating Expenditures, and the cost of the campaign rallies should have been disclosed on Schedule F (Itemized Coordinated Party Expenditures Made by Political Party Committees or Designated Agent(s) on Behalf of Candidates for Federal Office).

Finding 2. Disclosure of Disbursements

Summary

A sample review of itemized expenditures revealed that for approximately 18% of the items tested TDP did not disclose the payees' address. In response, TDP filed amended reports that materially disclosed the missing information.

Legal Standard

Reporting Operating Expenditures. When operating expenditures to the same person exceed \$200 in a calendar year, the committee must report the:

- Amount;
- Date when the expenditures were made;

⁵ It is noted that there were only two statewide offices being contested in Tennessee in the 2006 election; Governor and U.S. Senator. The Democratic candidate for Governor won easily, while Mr. Ford lost the Senatorial contest by a narrow margin.

- Name and address of the payee; and
- Purpose (a brief description of why the disbursement was made). 2 U.S.C. §434(b)(5)(A) and 11 CFR §104.3(b)(3)(i).

Facts and Analysis

A sample review of itemized expenditures revealed that for 18% of the items tested, TDP did not disclose the payees' address. The majority of the disbursements lacking addresses related to canvassers whose mailing address was noted in TDP's records. This issue was discussed during the exit conference. TDP representatives had no significant comments.

Interim Audit Report Recommendation and Committee's Response

The Audit staff recommended that TDP file amended reports to disclose the missing information. In response, Counsel wrote that they have, "engaged extensive efforts to locate the missing information and will file amendments to include the address [es] which it has located." TDP filed amended reports that materially disclosed the missing information.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 22, 2009

MEMORANDUM

TO: John D. Gibson
Chief Compliance Officer

Joseph F. Stoltz
Assistant Staff Director
Audit Division

THROUGH: Robert A. Hickey
Staff Director

FROM: Christopher Hughey
Deputy General Counsel

Lawrence L. Calvert, Jr.
Associate General Counsel
General Law and Advice

Lorenzo Holloway
Assistant General Counsel
Public Finance and Audit Advice

Danita C. Lee
Attorney

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.¹ 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, 2006.² The polls' questions refer to

¹ 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.

² 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.

it had incorrectly *reported* payments on Schedule H6, but assented 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.³ 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

³ 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.

CASE INDEX FORM

CASE NO. & NAME: Tennessee Democratic Party (A07-07)

STAFF ASSIGNED: Thomas J. Nurthen, Audit Manager
Brenda E. Wheeler, Auditor

TELEPHONE: Audit - 202-694-1200

<u>DATE</u>	<u>DOCUMENT</u>
02/08/07	Doc 1 - RAD Referral (A07-07)
02/28/07	Doc 2 - Audit Scope Determination
06/26/08	Doc 3 - Interim Audit Report
09/15/08	Doc 4 - Committee Response to Interim Audit Report
05/22/09	Doc 5 - Legal Analysis
08/22/09	Doc 6 - Draft Final Audit Report
09/14/09	Doc 7 - Committee Request for Audit Hearing

The above documents can be found at the following server location:
\\Ntsrv1\ voting ballot matters\Audit\Tennessee Democratic Party\Final Audit
Report Documents

If you have any questions, please contact Thomas J. Nurthen at 694-1200.