

AUDIT REFERRAL # 12-07

August 15, 2012

MEMORANDUM

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General Counsel

Through: Alec Palmer
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Subject: The Legacy Committee Political Action Committee (A09-22) -
Referral Matter

On July 31, 2012, the Commission approved the Final Audit Report of the Commission on The Legacy Committee Political Action Committee. This report includes the following matter that is referable:

Failure to File Notices and Properly Disclose Independent Expenditures

All work papers and related documentation are available for review in the Audit Division. Should you have any questions regarding this matter, please contact Paula Nurthen or Alex Boniewicz at 694-1200.

Attachment: Finding - Failure to File Notices and Properly Disclose Independent Expenditures

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

Summary

LCP disclosed independent expenditures totaling \$1,159,647 on Schedule E (Itemized Independent Expenditures). During audit fieldwork, the Audit staff noted that only \$412,891 of these expenditures appeared to meet the definition of independent expenditures and contained language expressly advocating the election or defeat of a clearly identified candidate. Of these independent expenditures (\$412,891):

- LCP did not file 24/48-hour notices for \$374,327 in a timely manner and did not file any 24-hour notices for \$17,571; and
- LCP did not properly disclose independent expenditures totaling \$293,575 made (i.e., publicly disseminated) prior to payment as "memo" entries on Schedule E and as a reportable debt on Schedule D (Debts and Obligations).

In response, LCP provided information supporting its position that the purpose of its direct-mail letters was fundraising and that they did not require reporting as independent expenditures. Regarding the Audit staff's recommendation that it submit and implement revised procedures for reporting independent expenditures, LCP indicated that it plans to terminate after the audit is completed.

The Commission approved the finding that, for specific communications, LCP failed to file notices and properly disclose independent expenditures. The Commission agreed that of the \$412,891 in expenditures that the Audit staff identified, \$310,090 should have been reported as independent expenditures. Therefore, the Commission approved a finding that LCP did not timely file 24/48-hour notices of \$281,439, did not file 24-hour notices for \$17,571, and did not properly disclose independent expenditures totaling \$123,326 prior to payment as "memo" entries.

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.

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,

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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 each time additional independent expenditures aggregate \$1,000 or more. 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. 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 be disclosed within 48 hours each time 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

A. Facts

Initially, LCP disclosed all expenditures as operating expenditures (Schedule B, Line 21(b)). During 2008, LCP received notices from the Commission's Reports Analysis Division (RAD) questioning whether any of the expenditures, e.g., "Printing," were for public communications containing express advocacy. LCP's Treasurer acknowledged that some of the communications contained express advocacy but contended that the purpose of the communication was fundraising. RAD advised LCP that if the communication contained express advocacy, LCP should amend its reports to disclose the expenditures as independent expenditures. Subsequently, LCP filed the requested amended reports.

LCP disclosed independent expenditures totaling \$1,159,647 on Schedule E. During fieldwork, Audit staff noted that most of these disbursements were for the printing and postage of direct mail solicitation letters and were disclosed as either in support of John McCain for President or in opposition to Hillary Clinton or Barack Obama for President. The Audit staff reviewed these expenditures to determine whether LCP reported them properly on Schedule E and filed the required 24/48-hour notices. Audit staff noted that only \$412,891 of these expenditures appeared to meet the definition of an independent expenditure and contained language expressly advocating the election or defeat of a clearly identified candidate. A review of the direct mail pieces and invoices for those expenditures (\$412,891) revealed the following:

- LCP did not timely file 24/48-hour notices of its independent expenditures for \$374,327. In addition, LCP did not file any 24-hour notices for \$17,571 of these expenditures.
- LCP reported the independent expenditures when the invoices were paid. However, most of these payments were weeks or months after the dissemination date of the printed material. For expenditures totaling \$293,575, LCP should have disclosed independent expenditures as memo entries on Schedule E, filed

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with reports covering the dates when the materials were disseminated, and included a corresponding debt on Schedule D.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff addressed these matters at the exit conference and provided appropriate schedules to LCP representatives. The Audit staff indicated that, at this time, no amended reports were necessary to correct the reporting of the independent expenditures or to address the 24/48-hour notices that were not filed or not filed timely. LCP representatives stated that they would review these schedules.

The Audit staff recommended that LCP take the following action:

- Provide any documentary evidence that would demonstrate that these disbursements were not independent expenditures and therefore did not require 24/48-hour notices; and
- Submit and implement revised procedures for reporting independent expenditures, as well as for tracking dissemination dates for such expenditures, in order to allow for timely filing of 24/48-hour reporting notices.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report, LCP offered background information for why it was created and the purpose of its direct-mail fundraising letters. LCP explained that it was formed in 2007 as a non-connected Political Action Committee (PAC) that was not supported by any sponsoring organization such as a labor union or corporation. There was no permanent staff, office or office equipment. It was formed with the intention of raising funds to allow it to participate in the 2008 general election by making direct contributions to candidates for federal office. LCP indicated that the committee was the epitome of a "grass roots" attempt to participate in the 2008 Federal elections.

LCP explained that its direct-mail advisors obtained lists of proven donors to Republican and conservative causes and tested various content appeals in the letters to these donors. The various tests included content with references to elected officials and presidential candidates to clue the recipient audience that LCP was a conservative Republican PAC worthy of their support. LCP stated that the purpose of these mailings was not to intervene in any election. LCP indicated that the facts demonstrated that: the *timing* of all of its mailings had no reference to the timing of primary elections during 2008; the *content* of the letters, other than sometimes including some words considered "express advocacy" by the Commission, did not urge the recipient audience to vote for any particular candidate; and the *audience* was selected for its fundraising value, with no consideration for its electoral value. Thus the expenditures' content, timing and distribution, and audience served a fundraising purpose but not an electoral purpose.

LCP stated that it disagreed that any of its direct-mail fundraising letters constituted independent expenditures. LCP noted that the Commission defines an independent expenditure at 11 CFR §100.16 as a communication expressly advocating the election or defeat of a clearly identified candidate. LCP acknowledged that some of its mailings did include words of express advocacy. However, LCP thought that if the Commission

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considered all of the facts, it should agree that LCP's fundraising letters were not independent expenditures and that the special reporting rules applicable to independent expenditures (such as the 24/48-hour notices or memo entries) should not apply. LCP stated its belief that direct-mail fundraising letters should be excluded from the definition of independent expenditures, and that the intent of the regulation was not to include direct mail fundraising expenditures as independent expenditures. LCP urged the Commission to reform its reporting requirements for grass-roots organizations that engage in direct-mail fundraising since it believes that these letters are not independent expenditures. LCP indicated that it had decided that the time requirements, coordination and record keeping are not worth the effort of continuing to participate and as such, plan to terminate the committee after the audit is completed.

The Audit staff does not dispute that LCP's intention was to raise funds via the direct-mail letters. However, LCP acknowledges, and the Audit staff agrees, that some of these letters included express advocacy language such as "Vote for John McCain". Since these expenditures meet the definition of an independent expenditure and the regulation does not exclude direct-mail fundraising letters from the definition, the Audit staff believes that the documentary evidence provided does not support LCP's assertion that none of these expenditures are independent expenditures.

D. Draft Final Audit Report

The Draft Final Audit Report concluded that LCP failed to file notices and properly disclose independent expenditures. LCP's response to the Draft Final Audit report did not address this matter.

Commission Conclusion

On June 7, 2012, the Commission considered the Audit Division Recommendation Memorandum in which the Audit Division recommended that the Commission adopt a finding that LCP did not timely file 24/48-hour notices of \$374,327 and did not file 24-hour notices for \$17,571¹ and did not properly disclose independent expenditures totaling \$293,575 prior to payment as "memo" entries.

The Commission approved this finding with respect to specific communications. (See Additional Issue below). The Commission agreed that of the \$412,891 in expenditures that the Audit staff identified \$310,090 should have been reported as independent expenditures. Therefore, the Commission approved a finding that LCP did not timely file 24/48-hour notices of \$281,439 and did not file 24-hour notices for \$17,571 and did not properly disclose independent expenditures totaling \$123,326 prior to payment as "memo" entries.

¹ Due to a typographical error in the Audit Division Recommendation Memorandum, the amount was improperly presented as \$17,491.