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FIRST GENERAL COUNSEL'S REPORT

CELESTENSITIVE

AUDIT REFERRAL: 13-01
DATE REFERRED: February 26, 2013
LAST RESPONSE RECEIVED: August 23, 2013
DATE ACTIVATED: August 16, 2013

ELECTION CYCLE: 2008
EXPIRATION OF SOL: 4/2/14 (Earliest)
4/3/14 (Latest)

SOURCE:

Audit Referral

RESPONDENTS:

Maine Republican Party and Ben Lombard
in his official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 431(17)
2 U.S.C. § 434(b)
2 U.S.C. § 434(b)(6)(B)(iii)
2 U.S.C. § 434(g)
11 C.F.R. § 104.3(b)(3)(vii)
11 C.F.R. § 104.4(a), (c)

INTERNAL REPORTS CHECKED:

Audit Documents
Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

The Audit Division referred the Maine Republican Party and Ben Lombard in his official capacity as treasurer ("Committee") to the Office of General Counsel following an audit of the Committee's activity between January 1, 2007, and December 31, 2008. See Audit Referral 13-01 (Maine Republican Party) (hereinafter "Referral"). In its Final Audit Report ("FAR"), the

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1 Commission found that the Committee understated disbursements in 2007 (Finding 1) and failed
2 to file notices and properly disclose independent expenditures in 2008 (Finding 4). FAR at 3, 4.
3 On the basis of the FAR, which we incorporate herein by reference, we recommend that the
4 Commission open a Matter Under Review, find reason to believe that Maine Republican Party
5 and Ben Lombard in his official capacity as treasurer violated 2 U.S.C. § 434(b) and (g) and
6 11 C.F.R. § 104.4(a) and (c), enter into pre-probable cause conciliation, and approve the attached
7 conciliation agreement.

8 II. FACTS

9 The Committee is a state party committee. Pursuant to 2 U.S.C. § 438(b), the
10 Commission authorized an audit of the Committee's activity during the 2008 election cycle.
11 FAR at 1. In comparing the Committee's bank records with its disclosure reports, Audit found
12 that in 2007 the Committee understated disbursements by \$29,346. Referral at 1, 2. This figure
13 is the net of unreported disbursements (\$36,506); reported disbursements not supported by check
14 or debit (\$4,006); a disbursement from the non-federal account erroneously reported (\$3,165);
15 erroneous reporting of disbursement amounts (\$227); and an unexplained difference (\$216). *See*
16 *id.* at 2.

17 The Audit Division also examined, *inter alia*, the Committee's disbursements for 250,000
18 absentee ballot application mailers disseminated on October 28 and 29, 2008. The Committee
19 provided Audit with two versions of the mailer. *See* Referral at 4. The top of the first version
20 states, "Good Jobs. A Strong Economy. Independence from Foreign Oil." Attach. 1. Directly
21 below this text are photos of Presidential candidate Senator John McCain; Vice-Presidential
22 candidate Governor Sarah Palin; United States Senate candidate Susan Collins; and Charlie
23 Summers, a candidate for the U.S. House of Representatives in the First Congressional District

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1 of Maine. The name of each pictured candidate appears next to a checked box directly under the
2 corresponding photo. There is also blank space reserved for the inclusion of two state
3 candidates.² *Id.* At the bottom, the mailer states, "Help Team Maine Today by Signing up to ...
4 Canvass a local precinct door to door." (ellipsis in original). *Id.* The second version of the
5 mailer is predominantly the same as the first except for Summers' photograph — in its place is a
6 blank space reserved for a "us congress" candidate.³ Attach. 2.

7 In its original 2008 October Quarterly Report, the Committee reported the total cost of
8 the mailers, \$84,902, as an operating expenditure on Schedule B. The Committee asserts that it
9 was reported as an operating expenditure because a previous treasurer believed it qualified for
10 the "slate card" exemption. Referral at 5-6. The Audit Division determined that "[s]ince the
11 documents contain a statement of the candidates' positions on several issues and include a
12 solicitation of volunteer canvassing, they go beyond the limitations of the state card exemption."⁴

² The copies of the mailer provided by the Committee during the audit process were draft versions that are cut-off around the edges. The space for the state candidates was not yet complete, merely designating generically that the space was reserved for their inclusion. See Attach. 1, 2.

³ During the Audit process, the Committee provided an invoice indicating that the Committee was billed for two different versions of the mailer. Approximately half of the mailers were itemized as "Summers" (presumably Charlie Summers, who is pictured in version 1), and half were itemized as "Frery" (presumably John Frery, the 2008 U.S. Congressional candidate in Maine's Second Congressional District), but we do not have any copy of the mailer that includes a photo of Frery. See Invoice, Attach. 3.

⁴ The slate card exemption from the Act's definitions of contribution and expenditure for state party committees, see 2 U.S.C. §§ 431(8)(B)(v) and (9)(B)(iv), is available when the materials are confined to certain information such as identification of candidates by name or picture, the office or position currently held, the office being sought, party affiliation, and procedural voting information. But, "[p]ublications that go beyond these informational limitations and provide additional biographical information, descriptions of candidates' positions on the issues, or statements of party philosophy, do not qualify under the slate card exemption." Advisory Op. 2008-06 (Democratic Party of Virginia) at 3. In addition to the pictures of candidates and the checked boxes, the Committee's mailers stated above the candidates' pictures, "Good Jobs. A Strong Economy. Independence from Foreign Oil," and at the bottom stated, "Help Team Maine Today by Signing up to ... Canvass a local precinct door to door," (ellipsis in original), making them ineligible for the slate card exemption.

1 *Id.* at 5. Based on the amount of space devoted to the federal candidates, the Audit staff
2 determined that \$56,601 of the cost should have been reported as independent expenditures.⁵ *Id.*

3 At the Audit exit conference, the Committee asserted that the printed materials at issue
4 "were slate cards and, as such, were exempt from independent expenditure rules." *Id.* Following
5 the Interim Audit Report and after further review, however, the Committee agreed that the
6 disbursements were independent expenditures and that the slate card exemption did not apply.

7 *Id.* at 6. The Committee partially amended its disclosure reports in response to the Interim Audit
8 Report and completed its amendments in response to the Draft FAR; the Committee's disclosure
9 reports now properly disclose the \$56,601 federal portion of the mailers as independent
10 expenditures. *Id.*

11 The Commission approved the Final Audit Report on February 14, 2013, and the Audit
12 Division referred the Committee to this Office on February 26, 2013. On February 28, 2013, this
13 Office notified the Committee of the Referral in accordance with the Commission's policy
14 regarding notification in non-complaint generated matters. 74 Fed. Reg. 38617 (Aug. 4, 2009).
15 The Committee responded on August 23, 2013. *See supra* p. 1, n.1.

16 The Committee's response does not dispute the Commission's findings, instead asserting
17 that two mitigating factors counsel for dismissal or referral to the Alternative Dispute Resolution
18 Office ("ADRO") rather than enforcement. *Resp.* at 1. First, the Committee argues that the
19 amounts at issue were a small fraction of the Committee's total 2007-2008 receipts and
20 disbursements (\$1,400,000 and \$1,300,000, respectively) and that, therefore, the Commission
21 should dismiss the Referral or, in the alternative, send the matter to the ADRO. *Resp.* at 1-2.

⁵ Audit also determined that \$28,301, the portion allocated to the state candidates, should have been reported as Federal Election Activity ("FEA"). Referral at 5.

1 The Committee also argues that an employee of the Committee's then-accounting firm pleaded
2 guilty to embezzling approximately \$48,000 in Committee funds, leading the Committee to hire
3 a different accounting firm, audit its books, and institute improved internal controls. Resp. at 2;
4 *see also* Referral at 2-3 (noting the embezzlement).

5 III. LEGAL ANALYSIS

6 The Federal Election Campaign Act of 1971, as amended, (the "Act") requires treasurers
7 to file reports disclosing the total amount of disbursements for the reporting period and for the
8 calendar year. 2 U.S.C. § 434(b)(4). As the Commission found in the FAR, in 2007 the
9 Committee understated disbursements by \$29,346.

10 The Act defines "independent expenditure" as an expenditure by a person expressly
11 advocating the election or defeat of a clearly identified federal candidate that is not made in
12 concert or cooperation with or at the request or suggestion of such candidate, the candidate's
13 authorized political committee, or their agents, or a political party committee or its agents.
14 2 U.S.C. § 431(17). *See also* 11 C.F.R. § 100.22.

15 Every political committee that makes independent expenditures must report those
16 expenditures in its regularly scheduled disclosure reports in accordance with 11 C.F.R.
17 § 104.3(b)(3)(vii). 11 C.F.R. § 104.4(a). Such a political committee must disclose on Schedule
18 E the name of a person who receives any disbursement during the reporting period in an
19 aggregate amount or value in excess of \$200 within the calendar year in connection with an
20 independent expenditure by the reporting committee. The report also must disclose the date,

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1 amount, and purpose of any such independent expenditure and include a statement that indicates
2 whether such independent expenditure is in support of or in opposition to a candidate, as well as
3 the name and office sought by such candidate. 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R.
4 §§ 104.3(b)(3)(vii), 104.4(a).

5 A political committee that makes or contracts to make independent expenditures
6 aggregating \$1,000 or more in connection with a given election after the 20th day but more than
7 24 hours before the date of an election must also file a report describing the expenditures within
8 24 hours. 2 U.S.C. § 434(g)(1)(A); 11 C.F.R. § 104.4(c). These reports, known as 24-hour
9 notices, must be filed "on the day following the date on which a communication is publicly
10 distributed or otherwise publicly disseminated." 11 C.F.R. § 104.4(c). A political committee
11 must file additional reports within 24 hours after each time it makes or contracts to make
12 independent expenditures aggregating an additional \$1,000. 2 U.S.C. § 434(g)(1)(B); 11 C.F.R.
13 § 104.4(c).

14 The Committee made independent expenditures in the aggregate amount of \$56,601 on
15 October 28 and 29, 2008 (within 20 days of the November 4 general election) in connection with
16 absentee ballot mailers that expressly advocated the election of at least four federal candidates.
17 Referral at 5; 2008 Amended October Quarterly Report at 132-33 (filed June 21, 2012). The
18 Committee, however, failed to file 24-hour notices for these independent expenditures, as
19 required by 2 U.S.C. § 434(g) and 11 C.F.R. § 104.4(c), and improperly disclosed the
20 independent expenditures as operating expenditures on Schedule B in its original 2008 October
21 Quarterly Report, rather than Schedule E, as required by 2 U.S.C. § 434(b)(6)(B)(iii); 11 C.F.R.
22 §§ 104.3(b)(3)(vii), 104.4(a). *Id.*

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As previously discussed, the Committee argues that the Commission should dismiss the Referral or, in the alternative, send the matter to the ADRO because the amounts at issue were a small fraction of the Committee's total 2007-2008 receipts and disbursements, and the Committee has since instituted significant additional compliance measures in response to an apparently unrelated embezzlement by a staff member of the Committee's former accounting firm. Resp. at 1-2. However, this matter was referred to OGC pursuant to the referral threshold approved by the Commission. See Audit Division 2007-2008 Materiality Thresholds for Unauthorized Committees at 34 (approved April 16, 2009). Moreover, neither the FAR nor the Committee link the embezzlement to the Committee's 2007 understated disbursements or failure to report \$56,601 for independent expenditures. Therefore, we believe that pre-probable cause conciliation — rather than dismissal or transfer to ADRO — is the appropriate course. Accordingly, we recommend that the Commission find reason to believe that the Committee violated 2 U.S.C. § 434(b) and (g) and 11 C.F.R. § 104.4(a) and (c), and that the Commission enter into conciliation with the Committee prior to a finding of probable cause to believe that the Act has been violated.

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8 **V. RECOMMENDATIONS**

- 9 1. Open a MUR;
10
11 2. Find reason to believe that Maine Republican Party and Ben Lombard in his
12 official capacity as treasurer violated 2 U.S.C. § 434(b) and (g) and
13 11 C.F.R. § 104.4(a) and (c);
14
15 3. Approve the attached Factual and Legal Analysis;
16
17 4. Enter into conciliation with Maine Republican Party and Ben Lombard in his
18 official capacity as treasurer prior to a finding of probable cause to believe;
19
20 5.

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6. Approve the appropriate letter.

Daniel A. Petalas
Associate General Counsel

10-25-13
Date

Kathleen M. Guith
Kathleen M. Guith
Deputy Associate General Counsel for Enforcement

Susan L. Lebeaux
Susan L. Lebeaux
Assistant General Counsel

Elena Paoli
Elena Paoli
Attorney

Attachments:

1. Absentee Ballot Mailer – Version 1
2. Absentee Ballot Mailer – Version 2

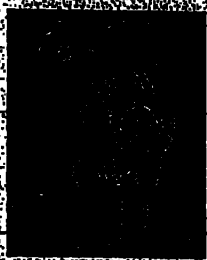
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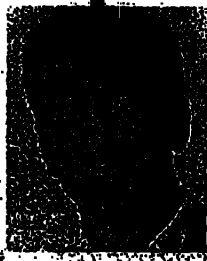
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☒ Governor
Sarah Palin
Vice President



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☒ Charlie Summers
U.S. Congress

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Postcard Application for Absentee Ballot
November 4, 2008 General/Referendum Election

Maine Election Law permits any registered voter
to cast an absentee ballot at any election.

Full Name of Voter fn1 mn1 ln sfx1 DOB / /
m m d

Residence Address of Voter madr1 mcity
(Street Address) (Municipality)

Mailing Address to which the ballot should be sent (if different from above): _____

Signature of Voter _____ Date _____

NOTICE TO VOTERS

- This application is for voters who want to receive and return their ballot by n help to read and/or sign this application, or if you want your ballot to be delivered person, call your municipal clerk's office to request the expanded application form those purposes.
- For more information on absentee voting, call the Elections Division at (207) 624-7656

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Postcard Application for Absentee Ballot
November 4, 2008 General/Referendum Election

Maine Election Law permits any registered voter
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Attachment 1

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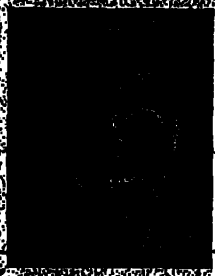
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am Maine... am Reform

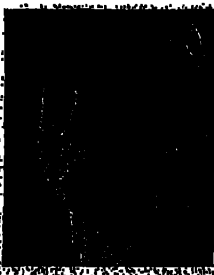
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1 McCain
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☒ Governor
Sarah Palin
Vice President



☒ Senator
Susan Collins
U.S. Senate

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