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December 14, 2012

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson *LJS by 12/15*
Deputy General Counsel – Law

SUBJECT: Withdrawal and Resubmission of Directive 69 Memorandum in LRA 912,
Request for Guidance Regarding Itemization of Ultimate Payees

As we had previously indicated in an email to the Commission, we are hereby withdrawing and recirculating the attached memorandum to the Commission from the Office of General Counsel and the Office of Compliance seeking guidance from the Commission, pursuant to Commission Directive 69, on questions regarding the itemization of ultimate payees of certain disbursements by political committees. Although we had originally circulated this memorandum on a tally vote, we now ask that it be placed on the agenda for the Commission's open session of Thursday, December 20.

Cc: Commission Secretary

AGENDA ITEM

For Meeting of 12-20-12

SUBMITTED LATE



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 14, 2012

MEMORANDUM

TO: The Commission

THROUGH: D. Alec Palmer
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SUBJECT: Request for Guidance from the Commission, Pursuant to Directive 69, regarding Itemization of Ultimate Payee of Committee Disbursements (LRA # 912, Itemization of Ultimate Payee)

Pursuant to Commission Directive 69, the Office of Compliance and the Office of General Counsel request the Commission's guidance on three issues regarding committees' reporting of itemized disbursements. The issues center on whether a committee must disclose (as a memo entry on Schedule B of its reports) the entity that provided goods and services to the committee when the committee pays an intermediary (a staff person, candidate, or credit card company). Without such a memo entry, an intermediary would be shown as the only payee, rather than also disclosing the ultimate entity that provided goods or services to the committee.

I. STATEMENT OF THE ISSUES AND SHORT ANSWER

We request guidance on three particular scenarios:

- First, when a committee staff person (or a candidate, if the committee is an authorized committee) pays for committee expenses aggregating to \$200 to a single vendor out of personal funds and is later reimbursed, must the committee's reports identify, in a memo entry, the vendor who provided the goods or services?

- Second, when a candidate makes an in-kind contribution to his or her authorized committee by paying for committee expenses aggregating to \$200 to a single vendor out of personal funds and does *not* receive reimbursement, must the committee's reports identify, in a memo entry, the vendor who provided the goods or services?

- Third, when a committee reports a disbursement to pay the committee's credit card bill, must the committee identify, in memo entries, the vendors who provided the goods or services reflected in the charges on the bill when the committee's payment to the vendor exceeds the \$200 threshold?

We believe that itemization through a memo entry is required in each of these situations. We also believe, however, that this question warrants Commission consideration because existing guidance is unclear.¹

The Commission's *Campaign Guides* could be interpreted as requiring memo entries in the first scenario only if the reimbursements to the staff member or candidate were: 1) for travel, 2) in excess of \$500 in total reimbursed to that individual, and 3) in excess of \$200 to any single vendor. In addition, the *Campaign Guides* could be interpreted as not requiring any memo entries in the second scenario and as requiring them in the third scenario.

II. ANALYSIS OF THE ISSUES

A. Itemization of Ultimate Payee is Required for Reimbursements to Staff

As to scenario one, we recommend that the Commission conclude that itemization of the ultimate payee for disbursements is required in a memo entry (1) when a committee staff member is reimbursed for travel expenses in excess of \$500, and payments to any one vendor used for those expenses aggregate in excess of \$200; and (2) when a committee staff person is reimbursed for any other campaign expenses and the disbursement would otherwise have to be itemized if paid directly to the payee.

By statute, committees must disclose the name and address of each person to whom an expenditure in an aggregate amount or value in excess of \$200 is made within the calendar year

¹ It has been the long-standing practice of the Reports Analysis Division ("RAD") to require memo entries in the first and third scenarios. RAD sends committees that do not provide memo entries for staff reimbursements or credit card payments Requests for Additional Information ("RFAIs") that explain the memo entry requirement. Until recently, RAD did not send RFAIs in the second scenario, the candidate personal funds context. However, RAD recently sent an RFAI to one authorized committee where the candidate had made in excess of \$335,000 in in-kind contributions to his committee using his own funds, one of the largest such amounts ever encountered by RAD.

(or within an election cycle for an authorized committee.) 2 U.S.C. § 434(b)(4), (5); 11 C.F.R. § 104.3(b)(3)(i) (unauthorized committees), 104.3(b)(4)(i) (authorized committees). The cited statutory provision and regulations are the underlying authority for the requirement that committees report the payee of their disbursements. However, there is an open question as to whether committees must report the vendor that provided the goods and services when the disbursement was made to an intermediary payee, such as a committee staff person. The regulations governing recordkeeping require a committee to maintain a receipt or invoice from the “payee” for each disbursement in excess of \$200. *See* 11 C.F.R. § 102.9(b)(2). The regulation further defines “payee” as the person who “provides the goods or services to the committee or agent thereof in return for payment, except for an advance of \$500 or less for travel and subsistence to an individual who will be the recipient of the goods or services.” *See* 11 C.F.R. § 102.9(b)(2)(i).

The Commission interpreted section 102.9(b)(2)(i) in Advisory Opinion (“AO”) 1996-20 (Lucas), and that AO provides more specific guidance on the reporting of the reimbursements. In *Lucas*, the Commission concluded that expenses associated with the campaign travel and subsistence of a staff person could be paid directly by the campaign or reimbursed to the staff person. *See id.* at 2. Citing 11 C.F.R. § 102.9(b)(2)(i), the Commission noted that “[i]f the total amount [of disbursements] exceeds \$500 and payments to any one vendor used for the expenses aggregates in excess of \$200, the payments to that vendor should be reported as a memo entry in order to achieve full disclosure but not inflate disbursement figures.” *Id.* at 3 n.3.² Thus, the *Lucas* advisory opinion seems to indicate that where a committee is required to keep records identifying the ultimate payee, it should also itemize, in memo entries, the ultimate payee. The AO was issued within the context of reimbursing travel and subsistence expenses, and the campaign guides reflect that limitation. However, there is no indication that its authority is limited to that context, and we know of no reason its application should be so limited. As noted above, the recordkeeping requirement which *Lucas* mirrored extends beyond travel and subsistence advances to payments to “payees” in excess of \$200 who provide “goods or services to the committee or agent.” The memo reporting requirement should by logic similarly extend to those disbursements.³

In response to Requests for Additional Information from RAD, some committees have responded by stating that itemization of ultimate payees is not required, based on 11 C.F.R. § 104.9. *See, e.g.*, Letter from Keith Davis, Treasurer, NRCC to Laura Sinram, Sr. Analyst, RAD (Dec. 8, 2008) (images 28993923364-5); Misc. Text Related to Report (Jan. 31, 2012) (image

² The Commission also noted that if the travel and subsistence advance to the staffer was \$500 or less, “the Committee should report the [staff person] as the payee.” As noted above, section 102.9(b)(2)(i) expressly provides that the staffer is treated as the payee for recordkeeping purposes when the payment is an advance of \$500 or less for “travel and subsistence to an individual who will be the recipient of the goods and services.”

³ The Commission has not extended this principle to situations in which a vendor, acting as the committee’s agent, purchases goods and services on the committee’s behalf from subvendors. *See* AO 1983-25 (Mondale) (concluding disclosure of the ultimate payees was not required, when payment was made to a outside consultant who then made media purchases); *see also* Final Audit Report of the Commission on SEIU COPE, 5 (approved Oct. 20, 2011) (explaining divergent views of Commissioners on whether SEIU COPE was in material compliance when it did not itemize in memo entries the ultimate payees for expenditures made to SEIU general organization).

12970306444). Like section 104.3, section 104.9 requires reporting of the full name and mailing address of “each person to whom an expenditure in an aggregate amount or value in excess of \$200” is made. But that merely begs the question: who is such a “person”? Logically, it could include both the candidate, staffer or volunteer who is reimbursed, *and* the “payee” as that term is defined in 11 C.F.R. § 102.9. The campaign guides reflect the Commission’s limited advice on these points and in so doing leave open the possibility of conflicting conclusions. *See FEC Campaign Guide: Congressional Candidates and Committees*, at 98 (2011) (“Candidate Committee Guide”); *FEC Campaign Guide: Nonconnected Committees*, at 60 (2008); *FEC Campaign Guide: Political Party Committees*, at 86 (2009). The guides only explain the itemization requirement within the context of reporting travel expenses and do not provide guidance on the itemization of other expenses. For example, the *Candidate Committee Guide* explains that itemization is required when the reimbursement is for travel or subsistence, the total amount reimbursed to the staff person for travel or subsistence expenses exceeds \$500, and the payment by the staff person to a single vendor aggregates in excess of \$200. *Candidate Committee Guide*, at 98. It describes this as a “special rule” and cites AO 1996-20 (Lucas) as the basis of this requirement. *Id.* Thus, the *Candidate Committee Guide* could be interpreted to mean that itemization of the ultimate payee is *only* required when *travel or subsistence* expenses are reimbursed, and *then* only when the other specific circumstances set forth in the guide are present. As noted above, however, we have not identified a reason why this disclosure should be limited to that context.

We recognize that committees could interpret the campaign guides in multiple ways and that they therefore could benefit from clarification on the requirements for reporting the ultimate payee. To address this circumstance, we recommend that the Commission update the campaign guides or otherwise notify the committees as soon as practically possible as to this requirement. Such other notifications can be made through the *Record* and *Tips for Treasurers* publications. Formal Guidance from the Commission that the memo entry requirement described in AO 1996-20 applies to reimbursements to staff persons for all campaign expenses that must otherwise be itemized, and not just reimbursements for travel or subsistence expenses, will significantly clarify these reporting requirements. Other existing exceptions and related reporting rules would be unaffected by this clarification.⁴

It should be noted that since 2005, in accordance with the RAD Review and Referral Procedures, RAD began sending RFAs to all committees who did not itemize the ultimate payee for reimbursements above the applicable thresholds to staff persons for campaign expenses.⁵

⁴ See 11 C.F.R. § 100.79(a)(1), (2) (explaining that unreimbursed travel and subsistence expenses by an individual up to \$1,000 on behalf of a candidate with respect to a single election is not a contribution to that candidate and that travel and subsistence expenses by an individual up to \$2,000 on behalf of political parties is likewise not a contribution); 11 C.F.R. § 116.5 (explaining reporting obligations based on the timing of the reimbursement).

⁵ During the 2005-2006 election cycle, RAD began sending RFAs to party and non-party committees for travel and non-travel staff reimbursements. Due to the change in policy, RAD implemented a grace period for 2005 reports, and did not assess audit points for failure to itemize the ultimate vendor. However, RAD did continue to send the RFAs on reports covering activity during 2005 to inform committees of the requirement. Candidate committees have been receiving RFAs for travel and non-travel staff reimbursements at least as far back as the

Since that time, committees who received RFAIs have been informed of the itemization requirement for the reimbursement of non-travel expenses. For committees that may have been unaware of the reporting requirement for non-travel staff reimbursements, we recommend that corrective action not be required for the first RFAI sent during the current election cycle.

B. Itemization of Candidate In-Kind Contributions

As to scenario two, we recommend that the Commission conclude that unreimbursed out-of-pocket spending by a candidate, as an agent of his or her campaign, also requires memo entry itemization of the ultimate payee if the transaction otherwise exceeds the itemization threshold. A candidate may make unlimited expenditures or contributions from personal funds on behalf of his or her authorized committee. See 11 C.F.R. §§ 110.10 (unlimited expenditures), 100.33 (definition of personal funds). However, by statute any candidate who “makes a disbursement in connection with such campaign shall be considered, for purposes of this Act, . . . as having made the disbursement . . . as an agent of the authorized committee or committees of such candidate.” 2 U.S.C. § 432(e)(2). These disbursements must be disclosed under the same authority as any other regular committee disbursements that are not made by the candidate. The campaign guide provides detail on the proper reporting of in-kind contributions. See *Candidate Committee Guide*, at 94-96. However, it does not address the circumstance presented here, where a candidate is functioning as an agent of the campaign and making an expenditure that is also a contribution.

Any “in-kind contribution shall also be reported as an expenditure” on the appropriate schedule. 11 C.F.R. § 104.13(a)(2). There is no provision in the FECA that would exempt expenditures by a candidate from the otherwise applicable itemization requirement. In AO 1992-1 (Faulkner), the Commission concluded that payments made by a candidate from his personal funds for travel and other campaign related expenses – such as photocopying and postage – must be itemized by the Committee as in-kind contributions if not reimbursed and the itemization thresholds are otherwise exceeded. *Id.* at 2 (citing 2 U.S.C. § 434(b)(4)(A), (5)(A)). We recommend that the Commission not require corrective action for the first RFAI sent to a committee during the current election cycle relating to this scenario. The RFAI can serve as a further notification of the itemization requirement. In addition, as explained above, notification of the requirements for reporting the ultimate payee, through its *Record* and *Tips for Treasurers* publications will provide further notice to the committees.

C. Itemization of Credit Card Disbursements

Finally, as to scenario three, we recommend that the Commission conclude that operating expenditures to a single vendor over the \$200 threshold charged on a credit card should also be itemized. While not explicit in the regulations, this requirement is a reasonable and longstanding interpretation of the statute and regulations and prevents a committee from circumventing the disclosure requirements by placing its operating expenditures on a credit card. See MUR 4369, General Counsel’s Brief, at 3 (Sept. 16, 1997) (explaining that a “committee must . . . itemize as a memo entry any specific transaction charged on a credit card if the payment to the actual

1999-2000 election cycle. These procedures were made public in the *Reports Analysis Division Review and Referral Procedures* (released May 23, 2012).

vendor exceeded the \$200 threshold”); MUR 4112, First General Counsel’s Report, 16-17 (Sept. 21, 1995) (same). The *Candidate Committee Guide* explains that a memo entry disclosing the actual vendor must be included when the expenditure exceeds the \$200 threshold. See *Candidate Committee Guide*, at 100-01. The guide notes that the “memo entry must include the name and address of the vendor; the purpose of the disbursement; and the amount of the disbursement.” *Id.* Furthermore, this approach is consistent with the recordkeeping regulation that defines a “payee” as the “person who provides the goods or services to the committee” 11 C. F. R. §§ 102.9(b)(2), 104.9. Itemizing the ultimate payee, as the provider of goods or services to the committee, accurately reflects the credit card company’s limited role as an intermediary providing payment services rather than as the purveyor of goods and services.

III. RECOMMENDATIONS

We recommend that the Commission conclude that disclosure of the ultimate payee as a memo entry on a Schedule B is required when a committee makes a reimbursement to its staff or candidate, when the candidate makes an in-kind contribution, or the committee makes a credit card payment and the itemization thresholds are otherwise exceeded. For all three scenarios, we recommend that the Commission update the campaign guides as soon as practically possible and, more immediately, notify committees through its *Record* and *Tips for Treasurers* publications of the itemization requirement. We further recommend that corrective action not be required for the first RFAI sent during the current election cycle for non-travel staff reimbursements and candidate in-kind contributions.