



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

June 15, 2009

**MEMORANDUM**

**TO:** John D. Gibson  
Chief Compliance Officer

Joseph F. Stoltz  
Assistant Staff Director

**FROM:** Christopher Hughey *pch*  
Deputy General Counsel

Lawrence L. Calvert, Jr. *[Signature]*  
Associate General Counsel

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Assistant General Counsel  
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Attorney

**SUBJECT:** Final Audit Report on Tennessee Republican Party (LRA # 745)

**I. INTRODUCTION**

The Office of General Counsel has reviewed the Final Audit Report ("Proposed Report") on the Tennessee Republican Party ("TRP"). We offer the following comments regarding Finding 3 (Excessive Coordinated Party Expenditures) in the Proposed Report. We concur with the Audit staff that TRP did not meet the volunteer materials exemption and recommend that the Audit staff revise the Proposed Report to: 1) summarize the Commission's actions in MUR 5598; and 2) state that it appears that TRP might have made an excessive coordinated contribution of \$716,093 but no further corrective action by TRP is necessary to resolve this finding. We concur with the remaining findings and issues in the Proposed Report not specifically addressed in this memorandum. If you have any questions, please contact Delanie DeWitt Painter, the attorney assigned to this audit.<sup>1</sup>

<sup>1</sup> The Office of General Counsel recommends that the Commission consider this document in open session since the Proposed Report does not include matters exempt from public disclosure. See 11 C.F.R. § 2.4.

## II. DIRECT MAIL EXPENSES DID NOT MEET THE VOLUNTEER MATERIALS EXEMPTION (Finding 3)

The Proposed Report concludes that TRP exceeded the coordinated party expenditure limits by \$716,093 because it paid for direct mail supporting Bob Corker for Senate which, the auditors contend, meets the content and common vendor conduct standards for coordinated expenditures. See 11 C.F.R §§ 109.37, 109.21. TRP assigned its coordinated party expenditure limitation to the National Republican Senatorial Committee, which spent most of the combined limit on media supporting Bob Corker for Senate. The auditors questioned whether TRP disbursements to Creative Direct, LLC for direct mail which appears to support Bob Corker were excessive coordinated expenses because the Corker campaign had previously used the same vendor. In response to Audit questions, TRP and Creative Direct indicated that they considered the direct mailings to be exempt volunteer activities. See 2 U.S.C. § 431(8)(B)(ix) and (9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. In determining whether mailings qualify for the volunteer materials exemption, the Commission has considered whether there was sufficient volunteer involvement based on the specific facts and circumstances of the case, even where there was some involvement by a commercial vendor. If the direct mail pieces qualify for the volunteer materials exemption, the possible "common vendor" coordination issue would be immaterial because exempt activity may be coordinated, and TRP would not have exceeded the coordinated party expenditure limitations by paying for the direct mail.

The Interim Audit Report ("IAR") requested additional information about the volunteer activities. In response, TRP described its procedures at the Victory Field office. TRP recruited volunteers and organized them to complete the following tasks: 1) unloaded boxes of unmarked mail (without stamps and addresses) from wrapped pallets and carried them into the office; 2) stacked the boxes in the office; 3) sat at tables and applied the Tennessee Republican Party non-profit postage indicia with a hand operated ink stamp to each piece of mail; 4) placed the mail pieces back into boxes after they had been stamped with the party indicia; 5) stacked the boxes of mail near the door and 6) loaded the truck for delivery to the mail house to address the mail. A Volunteer Team Leader opened the boxes and stacked the mail on tables for the volunteers to stamp. TRP stated that during this process a volunteer physically touched each piece of mail to hand stamp it with the non-profit party indicia. The Audit Division concludes that this "limited participation" by volunteers does not meet the requirements of the volunteer materials exemption and that TRP made an excessive coordinated contribution and should seek reimbursement from Bob Corker for Senate in the amount of \$716,093.

Following the Commission's approval of the IAR, the Commission considered the volunteer materials exemption in the context of Matter Under Review ("MUR") 5598. See Statement of Reasons of Commissioners Petersen, Bauerly, Hunter and Weintraub in MUR 5598, Utah Republican Party et al. (April 9, 2009) ("MUR 5598 SOR"). That matter had very similar facts to the volunteer activity described by TRP here. In the Utah Republican Party ("URP") case, this Office concluded that the volunteer activity was not sufficient to meet the volunteer materials exemption. URP claimed that its mailers met the volunteer materials exemption because volunteers processed, sorted, and hand-stamped the mail pieces and delivered

them to the post office for mailing, but this Office's investigation found that URP's volunteers only stamped the bulk mail permit indicia on the mailers and helped load boxes of mailers into a truck that took the mailers back to the mail vendor, which then printed addresses, sorted them by postal route and delivered them to the post office for mailing. *Id.* at 3. The majority of the Commission neither accepted nor rejected this Office's legal analysis but instead, concluded that there is great confusion in the regulated community about how much volunteer involvement is necessary to qualify for the exemption. The four Commissioners concluded that they "voted to dismiss this matter against all parties in an exercise of our prosecutorial discretion." MUR 5598 SOR at 2, citing *Heckler v. Chaney*, 470 U.S. 821, 831 (1985). The Commissioners explained:

The Office of the General Counsel concluded that the URP's mailers did not qualify for the exemption. URP stated that it believed that its actions were consistent with the exemption, and given the complicated history of the application of the volunteer materials exemption, we voted to dismiss this matter in an exercise of our prosecutorial discretion. See *Heckler v. Chaney* 470 U.S. 821, 831 (1985). We plan to issue more detailed guidance to clarify the volunteer materials exemption and the circumstances in which it applies.

*Id.* at 4.

MUR 5598 is not cited in the Proposed Report, but is only noted in the cover memorandum to this Office, which states that the Audit staff concluded that TRP did not meet the requirements for the volunteer materials exemption because the MUR 5598 SOR "is inconclusive as it does not address whether the activity by the volunteers did, or did not, meet the requirements for the exemption."

This Office concurs with the Audit Division's conclusion that TRP's volunteer activity was not sufficient to meet the volunteer materials exemption. Our conclusion is consistent with this Office's analysis of the similar facts in MUR 5598. In both matters, the volunteers did little more than stamping the indicia on the direct mail pieces, and it appears that most of the processing and mailing was done by the direct mail vendor. This Office does not believe such minimal volunteer activity is sufficient to meet the volunteer materials exemption. Nevertheless, the Proposed Report should also acknowledge the outcome of MUR 5598. While the Commission did not expressly conclude in MUR 5598 that the volunteer activity was substantial enough to meet the volunteer materials exemption, it also did not conclude that the activity was *not* substantial enough to meet the exemption. Rather, the Commission discussed the "complicated history of the application of the volunteer materials exemption" and indicated a need for "more detailed guidance to clarify the volunteer materials exemption and the circumstances in which it applies." MUR 5598 SOR at 4. In the absence of that additional Commission guidance clarifying the application of the volunteer materials exemption, we do not

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think this finding should be pursued further in the audit process or in any other context that might otherwise be appropriate.<sup>2</sup>

We recommend that the Audit Division revise the Proposed Report at Finding 3. in two ways. First, the finding should summarize the Commission's actions in MUR 5598. Second, the finding should be less definitive about the potential violation and conclude that it appears that TRP might have made an excessive coordinated contribution of \$716,093 but no further corrective action by TRP is necessary to resolve this finding.

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<sup>2</sup> Currently, the volunteer materials exemption issue is not the subject of any proposed rulemaking. If the Audit Division believes that this audit should be the vehicle in which the Commission issues this guidance, then the Audit Division should indicate this in the cover memorandum that forwards the Audit Report to the Commission.