FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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SENSITIVE

MEMORANDUM

TO: The Commission

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SUBJECT: Request for Commission Directive 69 Guidance involving the Dallas County Republican Party (LRA # 903)

I. STATEMENT OF ISSUE AND BRIEF ANSWERS

Pursuant to Commission Directive 69, the Office of Compliance ("OC") and the Office of General Counsel ("OGC") seek the Commission's guidance on an issue addressing what requirements exist under 11 C.F.R. § 106.7(d)(1) for individuals who perform work for a committee but appear to be "contract" employees. The Dallas County Republican Party ("DCRP" or "Committee") disclosed some individuals as "contract labor." The Commission's statute and regulations use the term "employee" for the purpose of 2 U.S.C. § 431(20)(A)(iv) and 11 C.F.R. § 106.7(d)(1), but that term is not defined in those provisions.

We recommend the Commission conclude that the DCRP's "contract labor" be treated as "employees" under the provisions addressing Federal election activity at 2 USC § 431(20)(A)(iv) and 11 CFR §106.7(d)(1).

II. ANALYSIS

The Federal Election Campaign Act of 1971, as amended by the Bipartisan Campaign Reform Act of 2002 ("BCRA"), defines "Federal election activity" in several different ways, including as "services provided during any month by an employee of a State, district or local committee of a political party who spends more than 25% of that individual's compensated time during that month on activities in connection with a Federal election." 2 U.S.C. § 431(20)(A)(iv). Costs of this so-called "type IV Federal election activity" must be paid with 100% Federal funds. 2 U.S.C. § 441i(b)(2). "[S]alaries, wages and fringe benefits paid for employees who spend 25% or less of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election must either be paid only from the Federal account or allocated" between Federal and non-Federal funds as administrative costs. 11 C.F.R. § 106.7(d)(1)(i). "Salaries, wages and fringe benefits paid for employees who spend none of their compensated time in a given month on Federal election activities or on activities in connection with a Federal election may be paid entirely with funds that comply with State law." 11 C.F.R. § 106.7(d)(1)(iii). In aid of these statutory and regulatory provisions, the Commission's regulations require State and local party committees to "keep a monthly log of the percentage of time each *employee* spends in connection with a Federal election." 11 C.F.R. § 106.7(d)(1) (emphasis added). However, neither the statute nor the regulations define "employee" for these purposes.

The audit of DCRP presents the question of whether individuals whom the Committee asserts are independent contractors are "employees" as that term is used in the statute's definition of "Federal election activity" ("FEA") and for purposes of the monthly log-keeping requirement. According to the Audit Division, the DCRP disclosed payments for the services of 132 individuals during the audit period. Of this total, payments for the services of 128 individuals were disclosed as "contract labor;" DCRP disclosed $74,936 in payments for these individuals' services, of which $18,195 was disclosed as being paid from the Committee's Federal account and $56,741 was disclosed as being paid from the Committee's non-Federal account. The Committee described the purpose of these payments in a number of ways, including as "election worker," "phone banker," "field director for judicial candidate," and so forth. Payments for the services of the remaining four individuals were disclosed as salary and payroll expenses. DCRP disclosed $115,333 in payments for these four individuals' services, of which $100,333 was disclosed as paid from the Federal account and $15,000 was disclosed as paid from the non-Federal account. DCRP, however, did not maintain a log for any of the 132 individuals pursuant to 11 C.F.R. § 106.7(d)(1).

We recommend that the Commission interpret section 106.7(d)(1) to include contract workers, with few exceptions.[1] We are unaware of any discussion in the legislative history, in the FEA rulemaking Explanation and Justifications, or in any advisory opinions construing the term "employee" in the Federal election activity provisions. In another BCRA provision that uses the statutory term "employees," the Commission expressly interpreted that term to include "independent contractors" in its implementing regulations. Congress had required the Commission to promulgate new regulations pertaining to its coordination provisions to address communications made "by persons who previously served as an *employee* of a candidate or political party." Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, sec. 214(c)(3) (provisions codified at Note, 2 U.S.C. § 441a, pertaining to Commission regulations implementing 2 U.S.C. § 441a(a)(7)) (emphasis added). In adopting the "former employee or independent contractor" conduct standard at 11 CFR § 109.21(d)(5), the Commission stated:

> This conduct standard expressly extends to an individual who had previously served as an "independent contractor" of a candidate's campaign committee or a political party committee. One commenter opposed the inclusion of independent contractors, arguing that an "independent contractor" is legally distinct from an "employee" and Congress, recognizing this distinction in other statutes, must have made an intentional decision to exclude independent contractors by using the term "employee" in section 214(c)(3). The Commission disagrees with this assumption and instead notes that the inclusion of independent contractors is entirely consistent with the use of "employee" because both groups receive some form of payment for services provided to the candidate, authorized committee or political party committee. Therefore, the Commission includes the term "independent contractor" in the final rule to preclude circumvention by the expedient of characterizing an "employee" as an "independent contractor" where the characterization makes no difference in the individual's relationship with the candidate or political party committee.

Final Rules for Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 438 (Jan. 3, 2003).

While the regulation at issue here, 11 C.F.R. § 106.7(d)(1), does not contain the "or independent contractor" language of 11 C.F.R. § 109.21(d)(5), the rationale for reading the provision to include contractors in the case of the coordination regulations applies equally, if not more so, to Federal election activity. The Federal election activity provisions of BCRA, including the regulation of workers as "employees," were intended "to close existing loopholes, thereby ensuring that activities that actually influence Federal elections are subject to Federal limitations and rules, while leaving purely State and local campaign activities by State parties subject to applicable State law." 148 Cong. Rec. S2096-02, S2138 -S2140 (daily ed. March 20, 2002) (statement of Sen. McCain) (discussing the Federal election activity provisions generally).

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[1] We have no information that any of the 128 individuals described as "contract labor" were "commercial vendors" within the meaning of 11 C.F.R. § 116.1(c). If the audit develops such information, our divisions will revisit this issue with respect to those individuals to determine whether such individuals would nevertheless fall within the scope of "employees."

As with the coordination provisions, this purpose is served by including independent contractors within the ambit of "employee" in 2 U.S.C. § 431(20)(A)(iv) and the associated regulations where such characterization makes no difference in the individual's relationship with the political party committee.[2]

We recommend the Commission conclude that the DCRP's "contract labor" be treated as "employees" under the provisions addressing Federal election activity at 2 USC § 431(20)(A)(iv) and 11 CFR § 106.7(d)(1).

III. RECOMMENDATION

Conclude that the DCRP's "contract labor" be treated as "employees" under the provisions addressing Federal election activity at 2 USC § 431(20)(A)(iv) and 11 CFR § 106.7(d)(1).

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[2] We do not recommend applying the IRS's classification of "employees," to 11 C.F.R. § 106.7(d)(1). *See* 26 C.F.R. § 31.3401(c)-1 (IRS multi-factor standard for determining an "employee" for the purpose of income withholding tax on employee wages under the Internal Revenue Code of 1954, § 3402). The IRS's classification of workers as either employees or independent contractors has a different purpose, namely, to balance various factors given differing tax consequences. *See* Joint Committee on Taxation, *Present Law and Background Relating to Worker Classification for Federal Tax Purposes* (JCX-26-07), part II, May 7, 2007, available at http://www.irs.gov/pub/irs-utl/x-26-07.pdf.