



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

FROM: Neven F. Stipanovic *NFS*
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SUBJECT: Interim Audit Report on the 21st Century Democrats (LRA 1109)

I. INTRODUCTION

The Office of the General Counsel has reviewed the draft Interim Audit Report (“IAR”) on the 21st Century Democrats (“Committee”). The draft IAR contains five findings: (1) Misstatement of Financial Activity; (2) Disclosure of Occupation and Name of Employer; (3) Disclosure of Disbursements; (4) Reporting of Debts and Obligations; and (5) Reporting of Apparent Independent Expenditures.¹ We comment on Findings 1 and 5 and otherwise concur with the findings. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. MISSTATEMENT OF FINANCIAL ACTIVITY (Finding 1).

The draft IAR concludes that the Committee understated its receipts and disbursements in

¹ We recommend that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the proposed IAR. 11 C.F.R. § 2.4(a), (b)(6).

both 2017 and 2018. The principal reason for the understatements in both categories in both years was the Committee's failure to report the activity of a bank account that the Committee shared with a media company, Gordon and Schwenkmeyer, Inc. ("GSI"). GSI apparently solicited contributions on behalf of the Committee, which it received and deposited directly into the shared account, and drew upon the funds in the account to reimburse itself for services it provided to the Committee. The Committee apparently was not aware of the existence of the shared account during the audit period and hence did not report any of the transactions associated with the shared account.

The arrangement described in the draft IAR appears similar to GSI's maintenance of a "custodial account" on behalf of a political party committee for the purpose of receiving solicited contributions, which the Commission addressed in Advisory Opinion 1991-18 (New York State Democratic Central Committee). The Commission specified in that advisory opinion that such a custodial account is to be considered a depository of the committee benefiting from the arrangement, and therefore must be disclosed as such. Advisory Opinion 1991-18 (New York State Democratic Central Committee). *See also* 52 U.S.C. §§ 30102(h), 30103(b); 11 C.F.R. §§ 102.2(a)(1)(vi); 103.2. The Committee did not designate the shared account with GSI as a depository in its Statement of Organization during the audit period.² Because committees are required to deposit receipts in, and make disbursements from, their *designated* depositories, the Committee appears to have violated this requirement as well, since the shared account with GSI was not designated during the audit period. 52 U.S.C. § 30102(h); 11 C.F.R. § 103.3(a). We therefore recommend that the Audit Division include a finding in the draft IAR that addresses the Committee's failure to designate the shared account as a campaign depository on its Statement of Organization, as well as the Committee's failure to deposit a portion of its receipts in a designated campaign depository and its failure to make a portion of its disbursements utilizing checks drawn on a designated depository account, as required by the authorities cited immediately above.

The Audit Division may also wish to consider evaluating GSI's solicitation practices in connection with the shared account, which must conform to the standards set forth in 11 C.F.R. § 102.5, and whether any commingling of Committee funds and corporate funds might have occurred. *See* 52 U.S.C. § 30118; 11 C.F.R. § 102.15 (prohibiting commingling of committee and personal funds, but also cross-referencing 52 U.S.C. § 30118 and Part 114 of Commission regulations); Advisory Opinions 2017-06 (Stein-Gottlieb), at 8 and 1990-01 (Digital Corrections). The Audit Division may also wish to consider acquiring information from the Committee regarding the parameters of the solicitation program and GSI's billing practices to ascertain whether the administration of the program may have resulted in a prohibited corporate contribution, 52 U.S.C. § 30118, an extension of credit outside of the terms provided in 11 C.F.R. § 116.3, or the generation of debt to GSI that the Committee did not report in accordance with 11 C.F.R. § 104.11.

III. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 5)

The draft IAR concludes that media expenditures totaling \$382,986 that the Committee

² The Committee amended its Statement of Organization to designate this additional depository after the audit began.

disclosed in its reports as operating expenditures and \$106,563 in additional media expenditures that the Committee did not report together comprise \$489,549 in apparent independent expenditures that should have been disclosed as such. The draft IAR also finds that the Committee did not file 24 and 48-hour independent expenditure reports in connection with these expenditures.

By way of background, the Committee requested, and the Commission granted, a Request for Consideration of two Legal Questions relating to this finding by the Commission, pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 84 Fed. Reg. 36602 (July 29, 2019). We submitted a memorandum to the Commission, dated February 26, 2021, which provided legal analysis of two questions: (1) whether the cost of email communications may be considered independent expenditures as a matter of law; and (2) whether the cost of fundraising communications may be deemed independent expenditures as a matter of law. Memorandum to Commission from Neven F. Stipanovic, Request for Consideration of a Legal Question Submitted by 21st Century Democrats (LRA 1109), at 1 (Feb. 26, 2021). In our analysis, we concluded that the cost of emails may qualify as independent expenditures and that the cost of fundraising communications may qualify as independent expenditures. *Id.* The Commission was unable to reach an agreement and issue a response.³ The Audit Division has proceeded in this matter by including the independent expenditure finding in the draft IAR. Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 84 Fed. Reg. 36602, 36603 (July 29, 2019).

We incorporate our memorandum on the Request for Consideration by reference. Our comments here will supplement our memorandum dated February 26, 2021. We recommend that the Audit Division attach a copy of the February 26 memorandum to the Interim Audit Report when it is submitted to the Commission. The Committee has not submitted any new information or argument relating to the issues addressed in the February 26 memorandum since that time, and our analysis of them has not changed.⁴ We therefore proceed to comment in this memorandum on the Audit Division's characterization of the communications as

³ Specifically, the Commission first voted 3-3 on a motion to conclude that the cost of political committee email communications included in the finding may be independent expenditures and to conclude that the cost of fundraising communications may be independent expenditures as a matter of law. *See* Amended Certification, Request for Legal Consideration of a Legal Question Submitted by 21st Century Democrats, LRA 1109 (Apr. 9, 2021). The Commission then voted 3-3 on a motion to reject the recommendations made by the Office of General Counsel in the Memorandum circulated on March 1, 2021 and conclude that the cost of the political committee emails referenced in the Memorandum are not independent expenditures. *Id.*

⁴ In the portion of the February 26 memorandum pertaining to the issue of whether fundraising communications may qualify as independent expenditures as a matter of law, we noted that the Commission had included fundraising communications in independent expenditure reporting-related findings in four previous audits. *See* Memorandum to Commission from Neven F. Stipanovic, Request for Consideration of a Legal Question Submitted by 21st Century Democrats (LRA 1109), at 6 (Feb. 26, 2021). The Commission also considered the question in the audit of Rightmarch.com PAC, Inc. and was unable to agree upon a resolution by the requisite four votes. *See* Vote Certification in the Matter of Rightmarch.com PAC, Inc. (LRA 842) (Apr. 7, 2011); Final Audit Report on Rightmarch.com PAC, Inc., at 13-18 (Feb. 26, 2013) (identifying "Reporting Payment for Communications" as an additional issue).

communications containing express advocacy.

Commission regulations define an “independent expenditure” as “an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate . . .”. 11 C.F.R. § 100.16(a); *see also* 52 U.S.C. § 30101(17).

Under Commission regulations, a communication expressly advocates the election or defeat of a clearly identified federal candidate if it uses phrases such as “vote for the President,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for U.S. Senate in Georgia,” “Smith for Congress,” “Bill McKay in ’94,” “vote Pro-Life” or “vote Pro-Choice” accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, “vote against Old Hickory,” “defeat” accompanied by a picture of one or more candidate(s), “reject the incumbent” or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say “Nixon’s the One”, “Carter ‘76”, “Reagan/Bush” or “Mondale!” 11 C.F.R. § 100.22(a).

A communication also constitutes express advocacy if, when taken as a whole and with limited reference to external events, such as the proximity to the election, it could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s), because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. § 100.22(b).

We first comment below on communications that the Audit Division classified as containing express advocacy. We agree with the Audit Division’s conclusions, recommending only that we regard section 100.22(b) rather than section 100.22(a) as the more apposite basis for the classification. We then comment on certain communications that the Audit Division deemed not to contain express advocacy, concluding that these communications do contain express advocacy. We therefore recommend that the Audit Division add the costs of these latter communications to the finding.

A. Communications Classified by Audit Division as Containing Express Advocacy

The draft IAR concludes that 102 mailers and emails⁵ and nine telephone scripts, for a

⁵ The emails contain hyperlinks that apparently connect to a webpage on the Committee’s website that in turn contains a “Donate” button that the reader may select to be conveyed to a donation webpage maintained by ActBlue. The Audit Division informs us that it does not have access to the content of these additional webpages as they would have appeared during the audit period. Thus, our analysis of the express advocacy content of the emails is limited to the emails themselves. An underlying communication accessible by hyperlink and containing additional language would be a separate communication and would be added to the available collection of communications if that additional language constituted express advocacy. *See* Memorandum from Christopher Hughey to Patricia Carmona, Interim Audit Report on National Campaign Fund (LRA 847), at 2-3 (Nov. 10, 2011) (citing and discussing MUR 4957 (Buchanan Reform, Inc.), First General Counsel’s Report, at 5 (July 3, 2002)).

total of 111 communications, contain express advocacy and therefore should have been reported as independent expenditures. Of these 111 communications, the Audit Division concludes that all but two emails contain express advocacy under 11 C.F.R. § 100.22(a) while the remaining two emails contain express advocacy as that term is defined in § 100.22(b).

We agree with the Audit Division that the communications it has classified as independent expenditures contain express advocacy but would classify several of the communications the Audit Division classifies as express advocacy under § 100.22(a) as qualifying under § 100.22(b) instead. We refer the Audit Division to the spreadsheet of communications that it made available to us, into which we have recorded our conclusions regarding the presence of express advocacy under either section 100.22(a) or section 100.22(b), and our basis for arriving at these conclusions.⁶

B. Communications Classified by Audit Division as Not Containing Express Advocacy.

The Audit Division also evaluated numerous communications, including emails, telephone scripts and podcasts, that it deemed not to contain express advocacy. We believe, however, that three emails we have identified in the spreadsheet⁷ containing images of bumper stickers bearing the slogan “Dump Trump” should be classified as independent expenditures, if they were disseminated on or after January 20, 2017. While these emails were disseminated in 2017 and 2018, shortly after former President Trump’s election, the former President was a clearly identified candidate as early as January 20, 2017, the date upon which the former President filed a Form 99 Miscellaneous communication with the Commission stating that he had surpassed the threshold for attaining candidate status under the Federal Election Campaign Act and Commission regulations as of that date. *See* <https://docquery.fec.gov/pdf/569/201701209041436569/201701209041436569.pdf>. *See also* 52 U.S.C. § 30101(2)(A); 11 C.F.R. § 100.3(a)(1) (individual becomes candidate when individual receives contributions aggregating over \$5,000 or makes expenditures aggregating over \$5,000). We therefore recommend that the costs associated with these three emails be added to the finding.

We also believe that two telephone scripts we have identified in the spreadsheet contain express advocacy and refer the Audit Division to the spreadsheet for additional information.

Finally, we note that one podcast we have identified on the spreadsheet appears to contain express advocacy under section 100.22(a) in that portion of the podcast containing an

⁶ Telephone script number 1 contains express advocacy in the “second ask”, but not in the first, and therefore would only include express advocacy if the caller reaches the stage of the second ask. We recommend that the Audit Division include, in the recommendations section of this finding, an opportunity for the Committee to produce documentation showing that this script was never used or that the callers reading the script never reached the point in the script where the communication included express advocacy to demonstrate that the script did not require reporting as an independent expenditure. *See* Memorandum to Patricia C. Orrock from Neven F. Stipanovic, Interim Audit Report on the Republican Party of Minnesota – Federal (LRA 1108), at 6 (Mar. 17, 2021).

⁷ We have identified nine entries on the spreadsheet as “three” emails in this memorandum based on information from the Audit Division indicating that six of the nine entries are duplicates.

interview of Michael Eggman, then a candidate for the House of Representatives in California's 10th District.

Our conclusion regarding the podcast is tentative at present because it is not clear whether the cost of the podcast would be exempt from the definition of "expenditure" under the media or press exemption. *See* 11 C.F.R. § 100.132 (cost incurred in covering or carrying news story, commentary, or editorial by any broadcasting station, web site, newspaper, magazine, or other periodical publication, including any Internet or electronic publication, not expenditure unless facility owned or controlled by political committee, political party or candidate).

Here, America'sDemocrats.org appears to qualify as a press entity, because the website and its podcasts are generally available to the public, and because the website and its podcasts appear to be analogous to periodical print publications. *See* Advisory Opinion 2005-16 (Fired Up!), at 5. *See also* Internet Communications, 71 Fed. Reg. 18589, 18610 (Apr. 12, 2006) ("periodical" not to be construed rigidly to deny exemption to those updating content on frequent, but not fixed, schedule). However, America'sDemocrats.org, is advertised on the website as a project of the Committee. It is therefore presumably owned or controlled by the Committee, and thus the podcast would be protected by the Commission's press exemption only if the interview in question constitutes a "news story", rather than commentary or an editorial, and only if the further conditions of section 100.132(a) and (b) are satisfied. 11 C.F.R. § 100.132(a), (b). It is not clear that the second of these conditions would be satisfied based upon the information that we have at this juncture, which is admittedly limited. The interview itself does not purport to provide reasonably equal coverage to the featured candidate's opponent. Because we do not have complete information about the fulfillment of the press exemption criteria at this time, we recommend that the Committee be given the opportunity to demonstrate that the press exemption applies.