



November 10, 2014

MEMORANDUM

To: Lisa J. Stevenson
Deputy General Counsel - Law

AUDIT REFERRAL # 14-02

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Subject: Nebraska Democratic Party (A11-18)-
Referral Matters

On October 23, 2014, the Commission approved the Proposed Final Audit Report on the Nebraska Democratic Party. The report was released to the public on November 7, 2014. In accordance with the Materiality Thresholds for Unauthorized Committees, the Final Audit Report of the Commission includes a finding that meets the criteria for referral to the Office of General Counsel.

Finding – Excessive Coordinated Party Expenditures

All workpapers and related documentation are available for review in the Audit Division. Should you have any questions regarding this matter, please contact Sheraline Thomas or Zuzana Pacious at 694-1200.

Attachments: Finding – Excessive Coordinated Party Expenditures
Designation of Counsel

2014-11-10 10:31:16 -0500

Finding 3. Excessive Coordinated Party Expenditures

Summary

During audit fieldwork, the Audit staff identified \$114,789 of coordinated party expenditures made by NDP for a House candidate that appeared to exceed the 2010 coordinated party expenditure limitation by \$34,789.

In response to the Interim Audit Report recommendation, NDP argued that of the \$114,789 identified by the Audit staff as coordinated expenditures, two expenditures totaling \$5,174 should not be considered excessive coordinated party expenditures and that the unspent coordinated party expenditure limitation of \$6,600, ceded by the DCCC, remains available under the spending authority and therefore should reduce the amount of excessive expenditures. NDP also acknowledged that it incorrectly reported expenses for "Get Out The Vote" (GOTV) calls totaling \$29,615 due to a miscommunication with the candidate campaign. As part of its response, NDP materially amended its disclosure reports to include these expenditures on Schedule F (Coordinated Party Expenditures).

After considering NDP's Interim Audit Report response, the Audit staff recalculated the excessive coordinated expenditures to account for the \$4,596 for a candidate postcard which NDP claims as exempt under the volunteer materials exemption and the \$578 for a window sign which NDP indicated was not a public communication. However, while the Audit staff recognized that the \$6,600 represented unspent funds under the combined spending authority of both committees, the Audit staff did not allow for the additional spending authority of \$6,600 because, in similar cases, the Commission has rejected assignments of spending authority after the fact. Accordingly, the Audit staff recommended that the Commission find that NDP exceeded the coordinated party expenditure limit by \$29,615 (\$34,789 less the candidate postcard of \$4,596 and campaign sign of \$578).

The Commission approved a finding that NDP exceeded the 2010 coordinated party expenditure limit by \$29,615.

In addition, the Audit staff recommended that due to the lack of clarity on the volunteer materials exemption, the reported expenditures of \$99,206 should not be attributed to NDP's coordinated expenditure limit. The Commission agreed that \$95,188 should not be attributed to NDP's coordinated expenditure limit. The Commission did not approve by the required four votes the portion of the Audit staff's recommended finding related to the \$4,596 for the candidate postcard. As such, this expenditure is presented in the "Additional Issue" section.

Legal Standard

A. Coordinated Party Expenditures. National party committees and state party committees are permitted to purchase goods and services on behalf of candidates in the general election—over and above the contributions that are subject to contribution limits. Such purchases are referred to as "coordinated party expenditures." They are subject to the following rules:

- The amount spent on “coordinated party expenditures” is limited by statutory formulas that are based on the Cost of Living Adjustment (COLA) and the voting age population;
- Party committees are permitted to coordinate the spending with the candidate committees;
- The parties may make these expenditures only in connection with the general election;
- The party committees—not the candidates—are responsible for reporting these expenditures; and
- If the party committee exceeds the limits on coordinated party expenditures, the excess amount is considered an in-kind contribution, subject to the contribution limits. 2 U.S.C. §30116(d) (Formerly 2 U.S.C. §441a(d)) and 11 CFR §§109.30 and 109.32.

B. Assignment of Coordinated Party Expenditure Limit. A political party may assign its authority to make coordinated party expenditures to another political party committee. Such an assignment must be made in writing, state the amount of the authority assigned, and be received by the assignee before any coordinated party expenditure is made pursuant to the assignment. The political party committee that is assigned authority to make coordinated party expenditures must maintain the written assignment for at least three years. 11 CFR §§104.14 and 109.33(a) and (c).

C. Volunteer Activity. The payment by a state committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids or newsletters, and yard signs) used by such committee in connection with volunteer activities on behalf of any nominee(s) of such party is not a contribution, provided that the following conditions are met:

1. Such payment is not for cost incurred in connection with any broadcasting, newspaper, magazine, bill board, direct mail, or similar type of general public communication or political advertising. The term direct mail means any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists.
2. The portion of the cost of such materials allocable to Federal candidates must be paid from contributions subject to the limitations and prohibitions of the Act.
3. Such payment is not made from contributions designated by the donor to be spent on behalf of a particular candidate for Federal office.
4. Such materials are distributed by volunteers and not by commercial or for-profit operations.
5. If made by a political committee, such payments shall be reported by the political committee as a disbursement in accordance with 11 CFR §104.3 but need not be allocated to specific candidates in committee reports.
6. The exemption is not applicable to campaign materials purchased by the national party committees. 11 CFR §100.87 (a), (b), (c), (d), (e) and (g) and 11 CFR §100.147 (a), (b), (c), (d), (e) and (g).

D. Limits on Contributions Made by State and Local Party Committees.

State and local party committees must comply with the contribution limits below:

- \$5,000 per election to a Federal campaign if the contributing committee has qualified as a multicandidate committee;

- \$2,400 per election to a Federal campaign if the contributing committee has not qualified as a multicandidate committee;
- \$5,000 per year to a separate segregated fund (corporate or labor political action committee) or a non-connected committee; and
- unlimited transfers to other party committees. 52 U.S.C. §30116(a) (Formerly 2 U.S.C. §441a(a)).

Facts and Analysis

A. Facts

The coordinated expenditure limit for the 2010 election cycle for a House candidate in the state of Nebraska was \$43,500 each for the state and national party committees.

During audit fieldwork, the Audit staff reviewed the correspondence between NDP and the DCCC that addressed the coordinated expenditures. On May 25, 2010, NDP transferred its entire coordinated spending limit to DCCC. This permitted DCCC to make coordinated expenditures of \$87,000 on behalf of Tom White, Democratic candidate for the United States House of Representatives from Nebraska's 2nd Congressional District (the candidate). Additional documentation indicated that DCCC authorized NDP to spend no more than \$80,000 of its coordinated party spending limit on behalf of the candidate.¹

The Audit staff's review of disbursements during field work indicated that NDP appeared to make coordinated expenditures on behalf of the candidate that totaled \$114,789, as outlined below.

- NDP reported three media-related expenditures totaling \$85,174 as coordinated expenditures on behalf of the candidate. Specifically, NDP spent \$80,000 on a media ad in opposition of the candidate's opponent, \$4,596 on production of a candidate postcard, and \$578 for campaign signage.
- After the coordinated spending limit was established, NDP reported two additional disbursements, totaling \$29,615, for generic GOTV calls as federal election activity on its disclosure reports. The scripts provided by the vendor seem to indicate there was possible coordination with the candidate's committee since the scripts contained the message to vote for the candidate and included a disclaimer that the message was paid for by NDP and authorized by the candidate.

In addition to the \$114,789 in expenditures discussed above, NDP spent \$94,610 to produce a single mailer on behalf of the candidate. This amount consisted of the following components: layout and production (\$92,610) and postage (\$2,000). NDP considered the cost of the entire mailer to be an exempt activity under the volunteer materials exemption. To support its assertion, NDP provided vendor statements and invoices along with photographs of the volunteers participating in various duties such as reviewing, sorting, and packing the direct mail pieces.

The Commission has addressed the applicability of the volunteer materials exemption in the Final Audit Reports of the Republican Party of Arizona, the Democratic Executive Committee of

¹ DCCC filings disclosed an additional candidate expenditure in the amount of \$353, leaving DCCC with an available coordinated limit of \$6,647; (\$87,000 - \$80,000 - \$353.)

Florida, and the Tennessee Republican Party. In these reports, the Commission recognized a lack of clarity regarding the application of the volunteer materials exemption.²

In view of the uncertainty regarding the amount of volunteer involvement needed to qualify for the volunteer materials exemption, as well as the amount of documentation required to support such an exemption, the expenditures for the mailer totaling \$94,610 were not attributed to NDP's coordinated expenditure limit.

The Audit staff concluded that NDP spent \$114,789 on coordinated expenditures and exceeded its authorized coordinated party expenditure limit by \$34,789.³ As a result, these expenditures are considered an excessive in-kind contribution to the candidate.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter at the exit conference and provided schedules detailing the possible excessive in-kind contributions NDP made on behalf of the candidate. In response, NDP representatives stated their belief that some of the amounts reported on Schedule F might not actually have been coordinated expenditures.

The Interim Audit Report recommended that NDP provide additional documentation demonstrating that it did not exceed the coordinated party expenditure limitation for the candidate.⁴

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, NDP argued that of the \$114,789 identified by the Audit staff as coordinated expenditures, two expenditures totaling \$5,174 (items 1 and 2 below) do not represent coordinated activity and that the unspent coordinated party expenditure limitation of \$6,600 (item 3 below), ceded by the DCCC, should further reduce the amount of the excessive expenditures. NDP explained as follows:

1. The payment of \$578 to an NDP vendor was for a sign that was placed in the window of the party's field office during the 2010 general election period. The sign was not intended as a public communication; it was placed next to the sign of many other Nebraska candidates as is commonplace for party offices.
2. NDP provided a declaration, signed and dated September 16, 2013, from its Executive Director who oversaw all political and administrative operations of NDP during the 2009/2010 election cycle. In the document, the Executive Director attested that NDP paid for the printing of the postcards (\$4,596) which advocated the election of the

² In recognizing the lack of clarity, the Commission has attempted to formulate a consensus policy regarding what constitutes substantial volunteer involvement for the purpose of applying the exemption. Proposed Interim Enforcement Policy, Open Session Agenda document No. 10-16 dated March 10, 2010, Drafts A through D.

³ The amount over the limit was calculated as follows: Total spent by NDP less amount authorized by DCCC: \$114,789 - \$80,000=\$34,789. NDP made and reported the maximum allowable contribution to the candidate during the 2010 election cycle.

⁴ The authorized committee of Tom White was approved for administrative termination on May 10, 2011. Therefore, a recommendation to seek refund from the candidate committee is not warranted.

candidate. According to his recollection, the volunteers distributed, hand stamped, and placed the mailing labels on the postcards at the party headquarters. NDP incorrectly disclosed this payment on Schedule F and plans to amend its reports by disclosing the expenditures as Federal Election Activity (Line 30b).

3. NDP acknowledged that it received spending authority of only \$80,000 from the DCCC prior to making expenditures.⁵ In addition, NDP presented an unsigned letter from the DCCC dated April 24, 2012, in which DCCC designated NDP as its agent "...for the exclusive purpose of making expenditures pursuant to 52 U.S.C. §30116(d) (Formerly 2 U.S.C. §441a(d)) on behalf of [the Candidate] up to \$6,600." NDP acknowledged this authority was not ceded in a timely fashion. Nevertheless, NDP urged the Commission to acknowledge that this amount remains available under the spending authority and should therefore reduce the amount of excessive expenditures.
4. In its response, NDP also acknowledged that it incorrectly reported expenses for GOTV calls totaling \$29,615 due to a miscommunication with the candidate campaign. NDP materially amended its disclosure reports and included these expenditures on Schedule F (Coordinated Party Expenditures).

The Audit staff considered NDP's response and reviewed the submitted documentation. Based on NDP's additional explanation regarding the nature and the location of the campaign sign, the Audit staff agreed that the payment of \$578 did not represent a coordinated expenditure as the sign was not intended as a public communication. Since NDP disclosed this expenditure on Schedule F, the Audit staff recommended that NDP amend its 2010 August Monthly report to disclose this disbursement on Schedule E (Independent Expenditures) since the sign contains express advocacy.

NDP's Executive Director attested to the volunteers' involvement with the printing of a candidate postcard (\$4,596). As with the other expenditures noted above, totaling \$94,610, for which NDP claims the volunteer materials exemptions, the Audit staff acknowledged the lack of clarity regarding the level of volunteer involvement needed to qualify for the volunteer materials exemption. As with the treatment of those expenditures, the Audit staff no longer attributed the \$4,596 expenditure toward NDP's coordinated limit. NDP was encouraged, however, to provide any further documentation such as photographs of the volunteers participating in the dissemination of the candidate postcard for the Commission's consideration of the matter.

Finally, by presenting the assignment authority letter from the DCCC, NDP demonstrated that it was granted additional spending authority (\$6,600) beyond \$80,000. The Audit staff noted that the letter was issued on April 24, 2012, well after the November 2, 2010, general election. As noted in the legal standards above, 11 CFR § 109.33(a) requires that an assignment must be made in writing, state the amount of the authority assigned, and be received by the assignee before any coordinated party expenditure is made pursuant to the assignment. In similar cases, the Commission has rejected assignments of spending authority after the fact. Therefore, while the Audit staff recognized that the \$6,600 represented unspent funds under the combined

⁵ NDP used these funds to finance its broadcast television media buy and production and disclosed this expenditure on Schedule F of its 2010 Post-General disclosure reports.

spending authority of both committees, the Audit staff did not allow for the additional spending authority of \$6,600.

As a result of NDP's response to the Interim Audit Report, the Audit staff recalculated the excessive coordinated expenditures to be \$29,615.⁶ The revised figure adjusts for \$578 which does not represent a coordinated expenditure and \$4,596 which NDP claims as exempt from the definition of a contribution under the volunteer materials exemption.

D. Draft Final Audit Report

In the Draft Final Audit Report, the Audit staff acknowledged NDP's response that provided a written description and documentation of the tasks performed by the volunteers. Given the lack of clarity regarding the amount of volunteer involvement deemed to qualify for the volunteer materials exemption, as well as the amount of documentation required to support such an exemption, the expenditures totaling \$99,206 were not attributed to NDP's coordinated expenditure limit.

E. Committee Response to the Draft Final Audit Report

NDP's response to the Draft Final Audit Report provided no additional comments.

Commission Conclusion

On April 23, 2014, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission adopt a finding that NDP exceeded the 2010 coordinated party expenditure limit by \$29,615. The Commission approved the Audit staff's recommendation as to the amount by which NDP exceeded the 2010 coordinated party expenditure limit.

In addition, the Audit Division Recommendation Memorandum recommended that due to the lack of clarity regarding the level of volunteer involvement needed to qualify for the volunteer materials exemption, the Commission not attribute expenditures totaling \$99,206 towards the coordinated expenditure limitation. The Commission agreed not to attribute \$95,188 of the reported expenditures to NDP's coordinated expenditure limit. The Commission concluded that the reported expenditures of \$94,610 (the amount associated with the candidate mailer) should not be attributed to NDP's coordinated expenditure limit due to the lack of clarity on the volunteer materials exemption. NDP had provided vendor statements and invoices along with photographs of the volunteers participating in various duties, such as reviewing, sorting, and packing the direct mail pieces, relating to these expenditures. In addition, the Commission concluded that the reported expenditure of \$578 (the amount associated with the window sign) should not be attributed to NDP's coordinated expenditure limit because the expenditure was not a public communication.

The Commission did not approve by the required four votes the portion of the Audit staff's recommended finding related to the \$4,596 for the candidate postcard. As such, this expenditure is presented in the "Additional Issue" section.

⁶ Calculated as follows: \$29,615 = [(\$114,789 - \$578 - \$4,596) - \$80,000].