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**FEDERAL ELECTION COMMISSION
FIRST GENERAL COUNSEL'S REPORT**

SENSITIVE

RAD Referral 16L-17

DATE REFERRED: Sept. 26, 2016

DATE OF NOTIFICATION: Sept. 28, 2016

RESPONSE RECEIVED: Nov. 17, 2016

DATE OF ACTIVATION: March 16, 2017

ELECTION CYCLE: 2016

EXPIRATION OF SOL:

EARLIEST: Oct. 8, 2020

LATEST: Jan. 31, 2021

SOURCE:

Internally Generated

RESPONDENTS:

The Committee To Defend The President and
Dan Backer in his official capacity as treasurer¹

¹ The Committee was previously named Stop Hillary PAC. See Amended Statement of Organization, The Committee To Defend The President (Jan. 28, 2017).

**RELEVANT STATUTES
AND REGULATIONS:**

52 U.S.C. § 30104(b)(6)(B)(iii)
52 U.S.C. § 30104(b)(4)
11 C.F.R. § 104.3
11 C.F.R. § 104.4

INTERNAL REPORTS CHECKED:

Disclosure Reports
RAD Referral Materials

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

RAD referred The Committee To Defend The
President ("CDP"), independent-expenditure-only
committees, for apparent reporting violations stemming from their disclosure of independent
expenditures made in support of Donald J. Trump ("Trump"), and in opposition to Hillary
Rodham Clinton ("Clinton") in the 2016 Republican and Democratic presidential primary

elections.³

The CDP Referral concerns three independent expenditures on two 48-Hour Reports totaling \$28,200 for communications disseminated in October 2015 in opposition to Clinton.⁵

None of the Committees' 24- and 48-Hour Reports specify the election state for the expenditures.⁷ In addition, RAD referred CDP for its failure to disclose \$163,732.16 in disbursements on its original 2015 Year-End Report.⁸

In Response to the Referrals, each Committee asserts that the independent expenditures were nationwide advertisements and communications distributed on national television networks, online videos, and other communications such as e-mails, which were not targeted to, nor did they mention, any particular state presidential primary election.⁹ Thus, Respondents argue that they are not required to disaggregate or assign the independent expenditures to different state-

³ RAD Referral 16L-17 (Stop Hillary PAC (now known as The Committee To Defend The President)) (Sept. 26, 2016) ("CDP Referral");

⁵ CDP Referral at 1.

⁷ CDP Referral at 1;

⁸ CDP Referral at 4-6.

⁹ CDP Resp. at 3 (Nov. 18, 2016);

1 level presidential primaries.¹⁰ With respect to the failure to disclose disbursements, CDP asserts
2 that the some of the discrepancies were due to estimating the debts owed to vendors, and that
3 other discrepancies were the result of inadvertent errors.¹¹

4 We do not recommend that the Commission open Matters Under Review in connection
5 with these referrals. As discussed below, the language of the current rules does not provide clear
6 guidance on how election state information for nationwide advertisements should be disclosed in
7 independent expenditure reports. It also appears that , CDP, otherwise complied
8 with the reporting requirements of the Federal Election Campaign Act of 1971, as amended
9 (the Act), regarding these reports. Thus, we recommend that the Commission exercise its
10 prosecutorial discretion and take no action with respect to the allegations that CDP,
11 failed to provide election state information in such reports. Further, because CDP's failure
12 to disclose disbursements, standing alone, meets the threshold for referral to the Office of
13 Alternative Dispute Resolution ("ADRO") but not OGC, we recommend that the Commission
14 refer that apparent violation to ADRO for further action.¹²

15 II. FACTUAL BACKGROUND

16 A. CDP, Reporting of Multi-State Independent Expenditures
17 Beginning September 2015 and through August 2016, RAD sent , CDP,
18 multiple Requests for Additional Information ("RFAs") regarding the missing election state

¹⁰ CDP Resp. at 5-10;

¹¹ CDP Resp. at 13-21.

¹² CDP's failure to disclose all disbursements was included in the referral to OGC pursuant to the RAD Review and Referral Procedures to avoid duplicate consideration of matters. See RR 16L-17 Cover Memorandum from Patricia C. Orrock, Chief Compliance Officer, FEC, to Lisa Stevenson, Acting General Counsel, FEC (Sept. 26, 2016).

1 information for nationwide communications.¹³ In response, , CDP, stated that the
2 identification of an election state was not required because the expenditures were for nationally
3 distributed communications that do not reference or target any specific state's primary election,
4 but rather the 2016 Republican and Democratic National Nominating Conventions.¹⁴

5 Consistent with their responses to the RFAs, Respondents argue in their Responses to
6 the referrals that 52 U.S.C. § 30104(b)(6)(B)(iii) and its implementing regulation at 11 C.F.R.
7 § 104.3(b)(3)(vii)(B) do not specifically require a non-connected committee to identify the
8 particular election to which its independent expenditure relates.¹⁵ Alternatively, Respondents
9 argue that if they are required to provide the election state information, they have already
10 complied by identifying either the Republican or Democratic nominating conventions, which
11 qualify as an "election" as defined by 52 U.S.C. § 30101(1)(B) and 11 C.F.R. § 100.2(e) because
12 the conventions have authority to nominate a candidate.¹⁶ Respondents further assert that by
13 disclosing their expenditures as a single expenditure without allocating it among states, their
14 reporting was consistent with the Commission's proposed interpretative rule and notice of
15 proposed rulemaking on reporting multistate independent expenditures and electioneering
16 communications in presidential primary elections.¹⁷ CDP argue that their reporting

¹³ CDP Referral at 2-4;

¹⁴ *Id*

¹⁵ CDP Resp. at 6, 8;

¹⁶ CDP Resp. at 8;

¹⁷ CDP Resp. at 9-10. Both Responses cite to *Reporting Multistate Independent Expenditures and Electioneering Communications*, Agenda Doc. No. 15-50-A, at 15 (Oct. 1, 2015); *Reporting Multistate Independent Expenditures in Presidential Primary Elections*, Agenda Doc. No. 15-50-B, at 4 (Oct. 1, 2015).

1 method resulted in more disclosure because if they had disaggregated each of their independent
2 expenditures, which totaled \$40,000 and \$28,000, respectively, none of the expenditures would
3 have been sufficiently large to trigger a 48-Hour reporting requirement.¹⁸ Last, Respondents
4 argue that the applicable statute is unconstitutional as applied to the reporting of non-connected
5 political committees' independent expenditures relating to Presidential primary elections.¹⁹

6 **B. CDP's Failure to Disclose Financial Activity**

7 CDP's Response to the Referral does not deny the discrepancies between the original and
8 amended 2015 Year-End Reports. CDP maintains that the increase in disbursements was
9 primarily due to the following: (1) that the independent expenditures were disseminated before
10 CDP received the final invoices from the vendors, therefore it disclosed estimated amounts on
11 the original report; (2) that other disbursements were mis-categorized as independent
12 expenditures, rather than operating expenditures; and (3) that some of the individual contribution
13 refunds were inadvertently excluded from the original report.²⁰ CDP asserts that the errors and
14 omissions were inadvertent, and that it promptly amended the affect report as soon as it
15 recognized the discrepancies.²¹

18

CDP Resp. at 6-7 citing
<http://www.fec.gov/pubrec/fe2016/2016pdates.pdf> (identifying 56 jurisdictions holding presidential primaries or
caucuses).

19 ; CDP Resp. at 10-13;

20 CDP Resp. at 13- 21.

21 *Id.*

1 **III. LEGAL ANALYSIS**

2 **A. CDP, Failure to Include Election State Information Does**
3 **Not Warrant Further Enforcement Proceedings**

4
5 An unauthorized political committee that makes independent expenditures must report
6 them in its regularly scheduled disclosure reports.²² In addition, a political committee that makes
7 independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24 hours
8 before a given election must file a report describing those expenditures within 24 hours.²³ A
9 political committee that makes independent expenditures aggregating \$10,000 outside of that 20
10 day period, up to and including the 20th day, must file a report describing those expenditures
11 within 48 hours.²⁴

12 The 24- and 48-Hour filing requirements begin to run when the independent expenditures
13 aggregating to at least \$1,000 and \$10,000 respectively, are "publicly distributed or otherwise
14 publicly disseminated."²⁵ For purposes of aggregating independent expenditures, each state's
15 presidential primary election is a separate election.²⁶ When filing independent expenditure
16 reports, a committee, other than an authorized committee, must "provide a statement which
17 indicates whether such independent expenditure is in support of, or in opposition to a particular

22 52 U.S.C. § 30104(b)(4)(H)(iii); 11 C.F.R. § 104.3(b)(3)(vii).

23 52 U.S.C. § 30104(g)(1)(A); 11 C.F.R. § 104.4(c).

24 52 U.S.C. § 30104(g)(2)(A); 11 C.F.R. § 104.4(b)(2).

25 11 C.F.R. §§ 104.4(b)(2),(c),(f); 109.10(c).

26 Advisory Op. 2003-40 at 4 (Navy Veterans) ("AO 2003-40").

1 candidate, as well as the name of the candidate and office sought by such candidate (including
2 State and Congressional district, when applicable).”²⁷

3 The Commission’s regulations do not specifically address how the public distribution
4 criteria and other reporting requirements apply to independent expenditures made in the context
5 of a presidential primary election and distributed in multiple states. In Advisory Op. 2011-28
6 (Western Representation PAC) (“AO 2011-28), however, the Commission considered this
7 question and determined that a committee could not exclude from its per state expenses the
8 amount it spent for national advertisements on Facebook relating to a presidential primary.²⁸ For
9 such advertisements that did not reference or target a specific state or primary election, the
10 Commission instructed the committee to “divide the cost of placing each advertisement by the
11 number of upcoming primary elections”²⁹ and use the resulting amounts to determine whether it
12 should file 24- and 48-Hour Reports and for which states.³⁰

²⁷ 11 C.F.R. § 104.3(b)(3)(vii)(B); *see also* 52 U.S.C. § 30104(b)(6)(B)(iii).

²⁸ AO 2011-28 at 2.

²⁹ *Id.* at 3-4.

³⁰ *Id.* at 4.

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3 Since the Commission's issuance of AO 2011-28, however,
4 the Commission has taken steps to revisit the approach in AO 2011-28 and is currently
5 considering a rulemaking on this issue.³⁴

6 Here, CDP, did not disclose the election state information for their
7 independent expenditures for its nationwide communications. Nevertheless, unlike the requestor
8 in AO 2011-28, which sought to exclude all costs of placing national advertisements from its 24-
9 and 48 Hour Reports, CDP, did not exclude any costs from their reports and
10 included all of the information required by the regulations, except for the election state
11 information, and instead specified that these were made in connection with either the Republican
12 or Democratic national conventions. Under these circumstances and absent clear guidance as to
13 how committees such as, CDP, should identify the election state for multistate

³⁴ The Commission has considered proposals addressing this issue, but it has not promulgated a final rule. The proposals include a draft Interpretative Rule on Reporting Nationwide Independent Expenditures in Presidential Primary Elections (Agenda Document No. 14-7, Jan. 15, 2014.) and a draft Notice Proposed Rulemaking for Reporting Multistate Independent Expenditures and Electioneering Communications (Agenda Document No. 15-50-A, Sept. 29, 2015) ("NPRM"). But the Commission did not reach consensus to adopt either an Interpretive Rule or the NPRM. See Minutes of Open Meeting of the Federal Election Commission for Thursday, December 17, 2015 (Agenda Document No. 16-04-A). RAD and the OGC Policy Division have been working with the Commission to try to finalize an NPRM on the nationwide independent expenditure issue, and that the matter will be on an open meeting agenda in the near future.

1 independent expenditures, we recommend that the Commission exercise it prosecutorial
2 discretion and decline to pursue CDP, failure to include in election state
3 information for its 24- and 48-Hour Reports.³⁵

4 **B. CDP's Failure to Disclose Disbursements**

5 Committee treasurers are required to file reports of receipts and disbursements in
6 accordance with the provisions of the Act.³⁶ The reports must include the total amount of all
7 disbursements made by the political committee.³⁷ When the treasurer of a political committee
8 shows that best efforts have been used to obtain, maintain, and submit the information required
9 by the Act, any report of such committee shall be considered in compliance with the Act.³⁸

10 CDP states that the aggregate \$163,732 discrepancy between the amount of
11 disbursements it originally reported on its 2015 Year-End Report and reported on its amended
12 2015 Year-End Report was the result of underestimating amounts owed to vendors by
13 \$84,187.64, and other inadvertent errors and omissions which it corrected.

14 The CDP violated 52 U.S.C. § 30104(b)(4) by failing to include financial activity in its
15 original 2015 Year-End Report. However, because this violation, standing alone, does not meet

³⁵ OGC recently circulated a First General Counsel's Report containing this analysis and recommendation in a RAD Referral also involving nationwide independent expenditures in connection with the 2016 presidential election. See RR 16L-21 (Right to Rise USA).

³⁶ 52 U.S.C. § 30104(a)(1), 11 C.F.R. § 104.1(a).

³⁷ 52 U.S.C. § 30104(b)(4); 11 C.F.R. § 104.3(b).

³⁸ See 52 U.S.C. § 30102(i); 11 C.F.R. § 104.7

1 the referral threshold for OGC, we recommend that the Commission refer the issue of CDP's
2 failure to disclose financial activity to ADRO as it qualifies for such a referral.³⁹

3 **IV. RECOMMENDATIONS**

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12 **RR 16L-17:**

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- 14 1. Decline to open a MUR in RR 16L-17 as to The Committee To Defend The
15 President and Dan Backer in his official capacity as treasurer for failure to include
16 election state information in its 48-Hour disclosure reports.
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 - 18 2. Refer The Committee To Defend The President and Dan Backer in his official
19 capacity as treasurer to the Alternative Dispute Resolution Office for failure to
20 report all financial activity.
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 - 22 3. Approve the appropriate letter.
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³⁹ See *supra* n.12. 2015-2016 RAD Review and Referral Procedures for Unauthorized Committees (Standard 7) at 71.

2. Approve the appropriate letter.

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June 14, 2017

Date

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