

SANDLER, REIFF, YOUNG & LAMB, P.C.

September 28, 2012

Shawn Woodhead Worth
Secretary
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Dear Ms. Worth:

The undersigned serves as counsel to the following Democratic State Party Committees:

Mississippi Democratic Party PAC
Massachusetts Democratic State Committee – Fed. Fund
State Democratic Executive Committee of Alabama
Nebraska Democratic Party
Vermont Democratic Party
South Dakota Democratic Party
Democratic Party of South Carolina
[REDACTED]

This letter serves as a request for consideration of a legal question raised during each of the Audits of the above referenced committees for the 2010 election cycle. This request is being made in accordance with the FEC's recent Policy Statement, Notice 2011-11, Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 Fed. Reg. 45798 (August 1, 2011). Our office received notification of this proposed finding, via conference call, on September 10, 2012.

Specifically, during this call, our office was notified by the Audit Division that it intended to include, as a finding in the Interim Audit Report for each Audit that the committee failed to comply with Commission recordkeeping requirements by failing to maintain employee time logs for those employees who were paid exclusively with federal funds. It is my understanding that all of the above referenced committees would be affected by this proposed finding. Our clients disagree with this proposed finding as a "novel" approach to this issue" and "inconsistent with prior Commission matters dealing with the same issue" 76 Fed. Reg. at 45799.

During the fieldwork and the Exit Conference for each of these committees, the Audit Division raised the issue of time logs and suggested that, according to 11 C.F.R. § 106.7(d)(1),

logs must be kept for all employees percentage of time spent on federal activity regardless of whether they were paid all, in part, or with no federal funds. During the fieldwork, each committee conceded that the failure to keep logs for employees who were paid either in part or with no federal funds would support a recordkeeping finding. However, each committee objected to any finding that employees who were paid exclusively with federal funds required any entry in a time log.¹

DISCUSSION

Commission regulations at 11 C.F.R. § 106.7(d)(1) require that party committees "keep a monthly log of the percentage of time each employee spends in connection with a Federal election." Contrary to the proposed regulation that preceded the final regulation, the final regulation does not appear to specify that such a log be kept for all employees.

The proposed regulation at proposed 11 C.F.R. § 300.33(b)(1) stated: "Committees must keep time records for all employees for purposes of determining the percentage of time spent on activities in connection with a Federal Election." Notice of Proposed Rulemaking, *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 97 Fed. Reg. 35654, 35684 (May 20, 2002) (emphasis added).

Although the Commission left provisions regarding the allocation of salary in the final section 300.33, it also created a new section of the regulations, 11 C.F.R. § 106.7, to address all issues relating to the allocation of expenses between federal and non-federal activities by state and local party committees. In doing so, it moved the recordkeeping requirement, in its entirety from proposed section 300.33 to section 106.7. The shift of this language from section 300.33 which relates to Federal Election Activities, to section 106.7, which deals exclusively with the allocation of expenses is significant. In our view, this shift signifies that the Commission believed that the recordkeeping requirement related solely to issues relating to the use of non-federal funds and did not intend to create a universal, burdensome recordkeeping requirement for all employees.

More significantly, the Commission changed the language of the proposed regulation and specifically deleted the word "all" from the proposed version of the regulation. This clearly shows the intent of the Commission to not require time records for all employees but only for those covered by 11 C.F.R. § 106.7, which would include only those employees that the party was claiming to pay either entirely non-federal funds or with a combination of federal and non-federal funds.

¹ Notwithstanding this concession, it should be noted that prior to the 2010 election cycle, it is my understanding that the committees were permitted to demonstrate during the audit process that employees did not exceed the 25% threshold by providing affidavits where inadequate records were maintained. Provision of these affidavits would negate a potential finding that the committee potentially over-funded its federal account from its non-federal account. Once these affidavits were adequately provided, and the over-funding issue resolved, the Commission did not pursue any separate recordkeeping finding for employee time log recordkeeping. Although the Audit Division continues to allow affidavits to be provided to resolve over-funding issues, to the extent that providing for a separate recordkeeping finding under any circumstances where the committee provides subsequent, acceptable documentation during the audit process appears to be inconsistent with past practice in Commission audits.

To be sure, there is no reason, as a matter of policy, to make a finding that state party committees have violated Commission recordkeeping requirements by requiring time sheets that serve no purpose. When queried by our office during the teleconference call as to the reason such documentation should be kept, the Audit Division replied that such time sheets would help track state party allocation transfers for payroll, by employee. However, the Commission already has access to sufficient information from committee payroll and other financial records, as well as the actual reports filed by the committee which show whether that the employee's payroll was intended to be paid for exclusively with federal funds. Adding a time log requirement for such employees serves absolutely no additional purpose other than to increase the recordkeeping requirements of state parties. In fact, it is my understanding that several state parties have chosen to not allocate their payroll costs because they find the time recordation requirements to be too burdensome.

We also find it troubling that the Audit Division has chosen to include this finding in an Audit Report with respect to a regulation that the Commission has addressed in the Audit context on several occasions in prior cycles without once making a separate recordkeeping violation finding. The 2010 election cycle was the fourth election cycle under this regulation and the Audit Division's decision to include this as a finding now after three prior cycles under this regulation is clearly inconsistent with the Commission's approach in prior audits where no time logs were maintained. For example, in the 2006 Final Audit Report for the Georgia Federal Elections Committee, the Commission determined that the failure to maintain proper documentation would result in the requirement that employees must be disclosed on Line 30(b):

The Audit staff's review of payroll expenses reported on Schedules H4 revealed that GFEC failed to maintain supporting documentation detailing the time spent on federal activities for employees whose salaries and related expenses totaled \$231,366. Absent the supporting documentation, GFEC should have disclosed these salary and related expenses as non-allocable FEA on Schedules B, Line 30b, (Federal Election Activity Paid Entirely with Federal Funds).

The Audit staff discussed this matter with GFEC's representatives during the audit and requested monthly logs, timesheets and affidavits. GFEC representatives were unable to locate any of the items requested.....

....The Commission considered the Audit Division's Recommendation Memorandum in which the Audit Division recommended that the Commission adopt a finding that GFEC had not maintained adequate documentation detailing the time spent on federal activities for employees whose earnings and related payroll expenses were allocated on Schedules H4.

Final Audit Report of the Georgia Federal Elections Committee for the 2006 Election Cycle, p. 10 (emphasis added).

Similarly, the Commission treated the same issue for the Tennessee Republican Party Federal Election Account as purely an over-funding and reporting issue in its 2006 Audit. The Audit Report did not discuss any specific recordkeeping violation.

According to these prior audits, the recordkeeping requirement exists for the sole purpose of determining the appropriateness of allocation by the committee under section 106.7(d) and the Commission did not create a separate recordkeeping finding in these prior audits. The recordkeeping requirement merely supports the need to further document the use of non-federal funds for these activities. Therefore, the separate recordkeeping finding is clearly duplicative and unnecessary.

Thus, this recordkeeping provision is not mandated by the Federal Election Campaign Act and it was the Commission who created this regulation for the apparent and sole purpose of assisting the Commission in monitoring compliance with the 25% provision found in 2 U.S.C. § 431(20)(A)(iv). The payment by a state party of an employee's salary and benefits with 100% federal dollars, and the disclosure of such payments on Line 30(b) of the committee's report is a clear concession that it is subject to the mandate found in this statute and the need to comply with the FEC's recordkeeping requirement is completely moot with respect to that employee.

I can assure you that state parties have, as a general matter, proceeded with this assumption, and I would expect that, due to the burden of the recordkeeping requirement, that few, if any, maintain time logs for 100% federal employees. If the Commission wishes to create a new standard for this recordkeeping requirement, it should do so by providing the regulated community with advanced notice and not penalize state parties by creating a new and novel finding of a violation of Commission regulations during the Audit process.

Based upon the above, it is clear that the Audit Division's recommendation to include a separate finding of a violation of Commission regulations if a state party committee does not maintain time logs for employees who are paid exclusively with federal funds is inconsistent with Commission regulations. Therefore, the Commission should direct the Audit Division to omit such a finding in the Interim Audit Report.

If you have any additional questions regarding this matter, I can be reached at (202) 479-1111.

Sincerely,


Neil Reiff