



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

December 23, 2021

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna C. Brown
Assistant Staff Director
Audit Division

FROM: Neven Stipanovic *NFS*
Associate General C
Policy Division

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Danita Alberico *DA*
Attorney

SUBJECT: Draft Final Audit Report on the Democratic Party of Arkansas (LRA 1153)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report (“DFAR”) on the Democratic Party of Arkansas (“Committee”). The DFAR contains four findings: (1) Reporting of Debts and Obligations; (2) Recordkeeping for Employees; (3) Reporting of Apparent Independent Expenditures; and (4) Disclosure of Loans and Loan Repayments. We comment on Finding 3, and otherwise concur with the findings. If you have any questions, please contact Danita Alberico, the attorney assigned to this audit.

II. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 3)

The DFAR concludes that disbursements totaling \$22,803, reported by the Committee as Federal Election Activity¹ paid entirely with federal funds, should have been reported instead as

¹ “Federal Election Activity” includes specific types of activities engaged in by a state party committee during specific time frames, public communications containing specific content, or activities consuming more than a

independent expenditures because the communications expressly urged the election of a clearly identified federal candidate. 11 C.F.R. §§ 100.16, 100.22(a). These disbursements were for direct mail pieces through Resonance Campaigns totaling \$18,423.97 and printed materials (characterized by the Committee as door hangers) totaling \$4,378.53.

In response to the Interim Audit Report (“IAR”), which contained the same conclusion, the Committee disagrees with the classification of both the Resonance Campaign direct mailer and the door hangers as independent expenditures, asserting that it fully coordinated its activities with respect to these expenditures with the candidate. Despite this conceded coordinated activity, and specifically with respect to the door hangers, the Committee also contends that the door hangers nevertheless do not qualify as coordinated party expenditures because door hangers are not a “public communication” as that term is defined in 11 C.F.R. § 100.26.² Finally, the Committee states that in any event the door hangers were distributed by volunteers, that the production and preparation of the Resonance Campaign direct mailers included substantial volunteer participation, and therefore that both qualify for the volunteer materials exemption (“VME”). The Committee submitted a declaration from its executive director, in which she recalls that the door hangers and Resonance Campaign direct mailers involved volunteer activity in accordance with the pertinent regulatory requirements. The declaration is submitted “under penalty of perjury.”

Commission regulations define an “independent expenditure,” in pertinent part, as an expenditure for a communication that expressly advocates the election or defeat of one or more candidates for federal office that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate. 11 C.F.R. § 100.16(a). A communication is “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate” if it is a coordinated communication under 11 C.F.R. § 109.21 or a party coordinated communication under 11 C.F.R. § 109.37. *Id.* In no event, however, may a communication be an independent expenditure “if the person making the expenditure allows a candidate, a candidate’s authorized committee, or their agents . . . to become materially involved in decisions regarding the communication . . . or [to share] financial responsibility for the costs of production or dissemination with any such person.” *Id.* § 100.16(c).

Given the Committee’s assertion that it fully coordinated the distribution of the door hangers and the Resonance Campaign direct mailers with the candidate, we do not believe that the door hangers and direct mailers may continue to be classified as independent expenditures. Although the Committee does not elaborate on the nature of the coordination involved, its statement that the door hangers and direct mailers were “fully coordinated” with the candidate implies that the candidate was materially involved in the decision-making process regarding the

specific percentage of an employee’s time in a given month. 52 U.S.C. § 30101(20); 11 C.F.R. § 100.24. A state party committee must pay for the costs of such activities exclusively with federal funds, subject to certain exceptions. 52 U.S.C. § 30125(b); 11 C.F.R. § 300.32(a)(2).

² A “public communication”, in pertinent part, means “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any form of general public political advertising.” 11 C.F.R. § 100.26. *See also* 52 U.S.C. § 30101(22).

door hangers and direct mailers. 11 C.F.R. § 100.16(c). We therefore recommend that the Audit Division revise Finding 3 to state that the disbursements for the door hangers and Resonance Campaign direct mailers should not be classified as independent expenditures. *See* Memorandum from Erin Chlopak to Patricia C. Orrock, Draft Final Audit Report on the Democratic Party of South Carolina (LRA 1054), at 2 (Apr. 18, 2018) (arriving at identical conclusion).

We also agree with the Committee that the door hangers at issue in the finding cannot be classified as a coordinated communication under 11 C.F.R. § 109.21 or as a party coordinated communication under 11 C.F.R. § 109.37. To qualify as a coordinated communication or a party coordinated communication, a communication must, among other things, be either an electioneering communication or a public communication as that term is defined in 11 C.F.R. § 100.26. 11 C.F.R. §§ 109.21(c)(1), 109.37(a)(2). The door hangers are not an electioneering communication because they are not a broadcast, cable, or satellite communication. 52 U.S.C. § 30104(f)(3)(A); 11 C.F.R. § 100.29(a).

With respect to the question of whether door hangers may be a public communication, we previously concluded in the negative and we reiterate the rationale and conclusion from that previous audit here. *See* Memorandum from Erin Chlopak to Patricia C. Orrock, Draft Final Audit Report on the Democratic Party of South Carolina (LRA 1054), at 3 (Apr. 18, 2018) (palm cards and door hangers). In those comments, we noted that the subject palm cards and door hangers were not distributed by any of the means set forth in 11 C.F.R. § 100.26. *Id.* Further, the Commission has explained that the various means of mass communication encompassed by the public communication definition all lend themselves to the distribution of content through an entity ordinarily owned or controlled by another person. *See* Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006) (“Thus, for an individual to communicate with the public using any of the forms of media listed by Congress, he or she must ordinarily pay an intermediary (generally a facility owner) for access to the public through that form of media each time he or she wishes to make a communication.”). Distribution of a door hanger by hand does not require payment to an intermediate facility owner each time communication with an audience is sought (though payment to a printer for the creation of the door hanger may be required), but rather may be accomplished independently by the communicator. A door hanger is therefore more akin to a printed slate card, handbill, brochure, or bumper sticker than it is to any of the communication modalities enumerated in the definition of public communication.³

At the same time, we note that the Commission has been inconsistent in its treatment of door hangers in previous enforcement matters. In several matters, the Commission concluded that door hangers should be treated as public communications. *See* MUR 6778 (David Hale for Congress), Factual and Legal Analysis, at 3 (undated, *circa* Nov. 5, 2015); MUR 6924 (Andrew Winer), Factual and Legal Analysis, at 5 n.26 (Aug. 21, 2017). *See also* MUR 4643 (Democratic

³ *See, e.g.*, 11 C.F.R. §§ 100.140 (slate card exemption), 100.147 (VME for party committees), which expressly distinguish communications covered by the exemption from modes of public communication that are not. 11 C.F.R. §§ 100.140 (exception shall not apply to costs incurred respecting listings made on broadcasting stations, newspapers, magazines, and similar types of general public political advertising), 100.147(a) (exemption not applicable to broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising).

Party of New Mexico), Letter to Allen Weh from Jonathan Bernstein (June 23, 2005) (advising of Commission’s entry into Consent Judgment with respondent and enclosing Order and Judgment, United States District Court of New Mexico, Civil No. 02-0372 MCA/RHS (Apr. 29, 2005), Paragraph A of which notes disbursements from non-federal account for “public communications;” communications at issue in enforcement matter included some door hangers). In another enforcement matter, however, the Commission concluded that a door hanger was not a public communication because it qualified as a handbill subject to the “coattails exemption” (11 C.F.R. § 100.148). *See* MUR 6673 (Lee), Factual and Legal Analysis, at 5 (Sept. 13, 2013).⁴

Considering the above history, we recommend that the Audit Division raise the question of whether the door hangers are a public communication in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

Regarding the VME and the sufficiency of the declaration, we note that the Commission has divided over the question of whether unsworn written assertions suffice in the absence of documentation of the nature and extent of volunteer involvement. *See* Final Audit Report on Nebraska Democratic Party, at 19-20 (approved Oct. 23, 2014). Here, as noted above, the declaration of the director of operations was submitted under penalty of perjury. It is therefore somewhat stronger insofar as it may carry the same weight as a sworn statement. 28 U.S.C. § 1746 (unsworn declaration subscribed as true under penalty of perjury supports matter “with like force and effect” as sworn declaration or affidavit). However, in that the declaration is not accompanied by documentation of the nature and extent of volunteer involvement, it is arguably akin to the unsworn statement at issue in the Nebraska Democratic Party audit. Further, the basis upon which the director of operations’ recollection is premised, whether upon personal knowledge or not, is not clear. We have recommended in the past that even affidavits bearing such uncertainties be raised for Commission consideration. *See* Memorandum from Lisa J. Stevenson to Patricia C. Orrock, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 4 (July 7, 2017); Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Illinois Republican Party (LRA 1006), at 4-5 (Jan. 31, 2017). We therefore do so again here, recommending that the question be raised in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

⁴ The Commission has also divided over the question of whether the broader category of “door to door canvassing” constitutes a public communication. *See, e.g.,* MUR 5564 (Alaska Democratic Party), Statement of Reasons of Chairman Robert D. Lenhard, at 3-4 (Dec. 31, 2007) and Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky, at 8-10 (Dec. 21, 2007); Advisory Opinion 2016-21 (Great America PAC), at 4 n.3 (Commission could not agree on whether door to door canvassing is public communication); Advisory Opinion 2016-21 (Great America PAC), Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen (concluding door to door canvassing not public communication). *See also* MUR 7521 (Swing Left), Factual and Legal Analysis, at 7 n.34 (Oct. 6, 2021) (unnecessary to decide whether door to door canvassing is public communication considering minimal cost of communication at issue).