FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna C. Brown
Assistant Staff Director
Audit Division

FROM: Neven Stipanovic NFS
Associate General Counsel
Policy Division

Lorenzo Holloway LH
Assistant General Counsel
Compliance Advice

Joshua Blume ~~jb~~
Attorney

SUBJECT: Draft Final Audit Report on the Kentucky State Democratic Central Executive Committee (LRA 1107)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report ("DFAR") on the Kentucky State Democratic Central Executive Committee ("Committee"). The DFAR contains five findings: (1) Misstatement of Financial Activity; (2) Receipt of Contributions in Excess of the Limit; (3) Recordkeeping for Employees; (4) Excessive Coordinated Party Expenditures; and (5) Failure to File 24-Hour Report. We comment on Findings 2, 4 and 5, and otherwise concur with the findings. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. RECEIPT OF CONTRIBUTIONS IN EXCESS OF THE LIMIT (Finding 2).

The DFAR concludes that the Committee received apparent excessive contributions totaling $78,043. The Committee transferred these excessive contributions to its non-federal account; however, the DFAR finds that the Committee did not provide timely notice to the contributors of its plan to do so. We commented on the legal basis for this finding in our comments on the Interim Audit Report ("IAR"), *see* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Interim Audit Report on the Kentucky State Democratic Central Executive Committee (LRA 1107), at 1-2 (May 27, 2021). Our view has not changed since that time and we therefore do not reiterate it here.

In its response to the IAR, the Committee states that each contributor fully understood at the time of providing the contribution that the amount provided was to be split between the Committee's federal and non-federal accounts. It observes that nothing in the Commission's regulations requires a political committee to notify a contributor that a contribution is excessive and to offer a refund in lieu of splitting the contribution. Finally, it notes that it nevertheless notified the contributors and that none of them objected to the splitting of the contributions.

In asserting that the contributors fully understood that their contributions were to be split between the Committee's federal and non-federal accounts, the Committee appears to be arguing that the contributors intended the total sums contributed to include both a federal and a non-federal component. In a 2001 advisory opinion, the Commission endorsed a national party committee's stated intention to deposit the total amount of a contribution intended to be split into a federal and a non-federal component (hereafter "composite contribution") in its federal account and to transfer the non-federal component of the contribution to its non-federal account. Advisory Opinion 2001-17 (DNC Services).[1] That endorsement was accompanied by the endorsement of a specific reporting regime for composite contributions proposed by the national party committee, with some modifications. *Id*.

Thus, to the extent that contributions deposited in the federal account and partly transferred to the non-federal account were composite contributions, the Committee's treatment of these would appear to be permissible under the reasoning set forth in Advisory Opinion 2001-17 (DNC Services). This would entail the conclusion that such contributions were not excessive federal contributions.

However, there does not currently appear to be evidence to support the Committee's

[1] The requestor in that advisory opinion was a national party committee. Although national party committees were able at that time to maintain separate federal and non-federal accounts, this is no longer the case. *See* 52 U.S.C. § 30125(a). State party committees are, however, permitted to maintain separate federal and non-federal accounts, and we therefore believe that the reasoning of the advisory opinion would permit state party committees to receive composite contributions. *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 2 (July 7, 2017) (accepting committee's argument that treatment of composite contributions acceptable under reasoning of Advisory Opinion 2001-17 (DNC Services)).

factual premise that the contributions at issue in this finding *were* composite.[2] In the advisory opinion, the national party committee proposed to use a donor card that solicited contributions to either the committee's federal or non-federal account, that advised the donor of the relevant limitations on federal contributions, and that informed the donor of the Committee's intent to allocate amounts exceeding the federal contribution limit to the non-federal account. Advisory Opinion 2001-17 (DNC Services), at 2. The donor card asked the donor to designate either the entire contribution, or such amount as would not exceed the federal limit, to the federal account, or to designate the entire contribution to the non-federal account. *Id*. Thus, the donor's signature on the donor card would constitute the donor's express permission to split the contribution between the federal and the non-federal account. *Id*.

We recommend therefore that the DFAR be revised to solicit evidence from the Committee that would show that the contributors intended or directed that their contributions be split between the Committee's federal and non-federal accounts.

III. EXCESSIVE COORDINATED PARTY EXPENDITURES (Finding 4)

The DFAR finds that the Committee spent $155,420 more on communications supporting then-House of Representatives candidate, Amy McGrath, than it was entitled to spend when considering both its coordinated party expenditure limit for the 2017-18 election cycle ($49,700)[3] and its contribution limit for that cycle ($5,000). This represents a deduction of $402,900 from the amount of $558,320 deemed excessive in the IAR.

The Audit Division reduced the amount of excessive expenditures in the finding as a result of its evaluation of evidence submitted in tandem with the Committee's response to the IAR. The Committee asserted in the response that none of the 13 mailings at issue in the finding should be deemed coordinated party expenditures because volunteers prepared them for dissemination, thus invoking the "volunteer material exemption" ("VME"), which would exempt the communications from being considered expenditures. *See* 52 U.S.C. § 30101(9)(B)(viii); 11 C.F.R. § 100.147.

The Committee submitted evidence to support its assertion that the VME applies with respect to 10 of the 13 mailings.[4] This evidence consists of photographs, sign-in sheets and affidavits submitted by persons who coordinated the volunteering exercises, or who were

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[2] According to the Audit Division, the Committee has provided bank statements, a contributor check, and a merchant account statement for contributions given via "Stripe", but no documents showing that the donors intended or directed that their donations be split between federal and non-federal accounts.

[3] The DFAR notes that the Democratic Congressional Campaign Committee apparently spent twice the applicable party coordinated expenditure limit, or $99,400, to support Amy McGrath's House campaign. The auditors have no evidence that the Committee transferred its authority to make coordinated expenditures to the DCCC, however, and therefore credit the Committee with an independent $49,700 limit.

[4] We agree with the Audit Division's decision to maintain the finding with respect to the cost of the three mailings for which the Committee submitted no VME documentation. *See* Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Colorado Republican Committee (LRA 961), at 6 (Aug. 15, 2016) (Commission has never approved application of VME based solely on general, conclusory assertion that VME applies).

otherwise personally familiar with the activities involved. We agree with the Audit Division's discussion and analysis of this evidence, as well as its ultimate disposition of the finding. We comment only to recommend that the language in which the conclusion is stated be rephrased so that it is consistent with the absence of a clear standard for determining the degree and type(s) of volunteer involvement necessary to qualify a mailing for the VME. Specifically, the DFAR states that the Audit staff "determined that the affidavits, pictures and sign-in sheets sufficiently demonstrated volunteer involvement for the ten mailers totaling $402,900". Given the absence of a clear standard, however, we do not believe it would be possible to make a firm positive or negative determination regarding the VME. Rather, we recommend that the DFAR state that the Audit staff decided not to attribute the cost of the 10 mailers to the Committee's coordinated party expenditure limit. *See, e.g.,* Final Audit Report on the Arizona Republican Party, at 13 (Nov. 25, 2013). *See also* Memorandum from Lisa J. Stevenson to Patricia C. Orrock, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 3-4 (July 7, 2017).

IV. FAILURE TO FILE A 24 HOUR REPORT (Finding 5)

The DFAR concludes that the costs of a door hanger, reported by the Committee as Federal Election Activity[5] paid entirely with federal funds, should have been reported instead as an independent expenditure because the door hanger expressly urged the election of then-House of Representatives candidate, Amy McGrath. 11 C.F.R. §§ 100.16, 100.22(a). In response to the IAR, which contained the same conclusion, the Committee disagrees with the classification of the door hangers as independent expenditures, asserting that it fully coordinated its activities with respect to the door hangers with the candidate. Despite this conceded coordinated activity, the Committee argues that the door hangers nevertheless do not qualify as coordinated party expenditures because door hangers are not "public communications" as that term is defined in 11 C.F.R. § 100.26.[6] Finally, the Committee states that in any event the door hangers were distributed by volunteers and therefore qualify for the VME. The Committee submitted a declaration from its executive director, in which she recalls that the door hanger was distributed by volunteers 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

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[5] "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 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).

[6] 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).

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 with the candidate, we do not believe that the door hanger may continue to be classified as an independent expenditure. Although the Committee does not elaborate upon the nature of the coordination involved, its statement that the door hanger was "fully coordinated" with the candidate implies that the candidate was materially involved in the decision-making process regarding the door hanger. 11 C.F.R. § 100.16(c). We therefore recommend that the Audit Division revise Finding 5 to state that the disbursement for the door hanger should not be classified as an independent expenditure. *See* [redacted] (arriving at identical conclusion).

We also agree with the Committee that the door hanger 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 hanger is not an electioneering communication because it is 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 a door hanger may be a public communication, we previously concluded in the negative and we reiterate the rationale and conclusion from that previous audit here. *See* [redacted] (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.[7]

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 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).[8]

In light of the above history, we recommend that the Audit Division raise the question of whether the door hanger is 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 executive director 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 executive director's recollection is premised, whether upon personal knowledge

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[7] *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).

[8] 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 in light of minimal cost of communication at issue).

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.