FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

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

I. INTRODUCTION

The Office of the General Counsel has reviewed the draft Interim Audit Report ("IAR") on the Kentucky State Democratic Central Executive Committee ("Committee"). The draft IAR 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.[1] We comment on Findings 2 and 4 and otherwise concur generally with the findings. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

[1] We recommend that the Commission consider this document in Executive Session because the Commission may eventually decide to pursue an investigation of matters contained in the proposed IAR. 11 C.F.R. § 2.4(a), (b)(6).

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

The draft IAR concludes that the Committee received apparent excessive contributions totaling $78,043. The Committee transferred these excessive contributions to its non-federal account; however, the draft IAR finds that the Committee did not provide timely notice to the contributors of its plan to do so. At issue is whether the Committee's failure to notify contributors in advance of its transfer of funds may serve as the basis for an excessive contribution finding in an audit report when neither the Federal Election Campaign Act of 1971, as amended (the "Act"), nor Commission regulations, explicitly require committees that transfer excessive contributions to do so. We recommend that the Audit Division raise this issue in the cover memorandum that will accompany the transmission of the draft IAR to the Commission.

Commission regulations require political party committees to resolve excessive contributions either by refunding or, with the contributor's permission, reattributing them.[2] 11 C.F.R. §§ 103.3(b)(3), (4); 110.1(k)(3). Transferring excessive contributions to the non-federal account is not covered in the regulations, and therefore nothing in the regulations explicitly requires timely notice to contributors of the intent to effect a transfer. We therefore reiterate comments we made in a previous audit raising this question, and recommending that the question be raised for the Commissioners in the cover letter accompanying the transmission of the report. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Proposed Interim Audit Report on Tennessee Democratic Party (LRA 1073), at 2 (Nov. 29, 2018). In that previous audit, the Commission approved the proposed finding relating to receipt of excessive contributions without discussion.[3] *See* Final Audit Report on Tennessee Democratic Party, at 9-13 (Sept. 16, 2019). Subsequently when the Audit Division referred this finding to the Office of General Counsel's Enforcement Division, and that division submitted a First General Counsel's Report to the Commission, the Commission was divided on the question of whether to find reason to believe that the Tennessee Democratic Party accepted excessive contributions. *See* Vote Certification, Tennessee Democratic Party and Geeta McMillan, Audit Referral 19-12 (Feb. 10, 2021) (dividing 3-3 on vote to approve all OGC recommendations, and voting 6-0 to approve all OGC recommendations except RTB recommendation that Tennessee Democratic Party knowingly accepted excessive contributions).[4]

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[2] Contributions to state party committees, such as the Committee, may not be redesignated, as this is an option available only to candidates and their authorized committees. *See* 11 C.F.R. § 110.1(b)(5).

[3] The Commission similarly approved a proposed finding relating to receipt of excessive contributions involving a failure to transfer the excessive contributions within 60 days of receiving them. *See* Final Audit Report on Utah Republican Party, at 12 (Jan. 23, 2017).

[4] As noted above, before its consideration of the Tennessee Democratic Party audit, the Commission had approved a finding of receipt of excessive contributions in an audit of the Utah Republican Party, based upon that party's failure to transfer excessive contributions to its non-federal account within 60 days of receiving them. *See* Final Audit Report on Utah Republican Party, at 12 (Jan. 23, 2017). The Utah Republican Party audit's findings were also referred to OGC's Enforcement Division. In that case, the Commission adopted OGC's recommendations to find RTB regarding the Committee's receipt of excessive contributions and entered into a conciliation agreement with the Utah Republican Party. *See* MUR 7235 (Utah Republican Party), Conciliation Agreement, at 3 (Dec. 7, 2017). *See also* MUR 7235 (Utah Republican Party), Factual and Legal Analysis, at 5 (May 1, 2017) (noting that violations, including receipt of excessive contributions, "are clear").

Given this development, which suggests some continued uncertainty on the part of the Commission regarding whether Commission regulations require a notice to contributors before transferring excessive contributions to the non-federal account, we recommend that the Audit Division raise this issue in the cover letter that will accompany the transmission of the IAR to the Commission.

III. EXCESSIVE COORDINATED PARTY EXPENDITURES (Finding 4)

The draft IAR finds that the Committee spent $558,320 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)[5] and its contribution limit for that cycle ($5,000). The draft IAR finds that the communications in question, 13 mail pieces, were coordinated party expenditures under 11 C.F.R. § 109.37.

Section 109.37 sets forth three criteria, or "prongs," that a communication must satisfy in order to be deemed a party coordinated expenditure. First, under the "payment prong," a party committee or its agent must have paid for the communication. Second, under the "content prong," the communication must qualify as at least one of three possible types of communications, one of the three types being a public communication that expressly advocates the election or defeat of a clearly identified federal candidate. Finally, under the "conduct prong," the party committee and the candidate must have engaged in one of six possible types of conduct. 11 C.F.R. § 109.37. We agree that the "payment" prong has been satisfied because the Committee, and not the candidate, paid for the communications. We address the "content" and "conduct" prongs below.

The Audit Division concludes that the 13 communications meet the content prong by virtue of their containing express advocacy, as that term is defined in Commission regulations. *See* 11 C.F.R. § 100.22 (defining "express advocacy"). In addition to qualifying as express advocacy, however, such communications must also be "public communications" as that term is defined in Commission regulations. *See* 11 C.F.R. §§ 109.37(a)(2)(ii) (public communication expressly advocating election or defeat of clearly identified federal candidate meets content prong), 100.26 (defining "public communication").

According to the evidence presented by the Audit Division, we believe that the communications qualify as "public communications" under 11 C.F.R. § 100.26 because more than 500 identical pieces of each of the 13 communications were sent. 11 C.F.R. §§ 100.26 (defining "public communication" to include "mass mailing"), 100.27 (defining "mass mailing" to include 500 or more mail pieces of an identical or substantially similar nature within any 30-

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[5] The draft IAR 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.

day period[6]). The invoices accompanying each of the communications appear to show that 70,749 copies of seven of the mail pieces; 92,557 copies of four of the mail pieces; and 81,016 copies of two of the mail pieces were mailed, depending upon the individual piece, significantly exceeding the 500 pieces required.

According to the definition of express advocacy, a communication expressly advocates the election or defeat of a clearly identified federal candidate if it uses phrases such as "vote for the President," "re-elect your Congressman," "support the Democratic nominee," "cast your ballot for the Republican challenger for U.S. Senate in Georgia," "Smith for Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent" or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One", "Carter '76", "Reagan/Bush" or "Mondale!" 11 C.F.R. § 100.22(a).

A communication also may constitute express advocacy if, when taken as a whole and with limited reference to external events, such as the proximity to the election, it could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s), because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. § 100.22(b).

We agree with the Audit Division that the communications constitute express advocacy, but would classify most of them as being so under subsection (a). All but two of the communications contain the candidate's campaign logo "Lt. Col. (ret.) Amy McGrath Congress", which is similar to "Smith for Congress" or "Carter '76",[7] and therefore these constitute express advocacy under 11 C.F.R. § 100.22(a).[8] [9]

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[6] It is our understanding that we do not have precise information regarding the period of mailing. The Committee should be given the opportunity to demonstrate that the mailings in question do not meet this criterion of the mass mailing definition.

[7] The mail pieces "Two Peas in a Pod" and "Cozying Up" do not contain the campaign slogan, but we agree with the Audit Division's classifications of these two communications as express advocacy under subsection (a) and subsection (b), respectively.

[8] We note that the communications also may well meet the requirements of an additional content standard, because all of them refer to a clearly identified House candidate, Ms. McGrath and, in some cases, also her opponent, Andy Barr. 11 C.F.R. § 109.37(a)(2)(iii)(A). The Audit Division has informed us that it lacks precise information at this time about whether the communications were distributed within the 6th Congressional District and about whether the mail pieces were sent within 90 days of the election. The Audit Division may wish to consider acquiring this information from the Committee.

[9] The Audit Division also notes the presence of the slogan "amymcgrathforcongress.com" in the domain name listed on many of the communications. We agree that this is an additional contextual factor supporting the express advocacy determination where it exists. We presented similar arguments regarding the use of campaign

Regarding the conduct prong, the Audit Division observes that most of the communications contain the disclaimer "Paid for by the Kentucky Democratic Party and authorized by Amy McGrath for Congress"[10] The content of the disclaimer is not one of the listed conduct standards set forth in 11 C.F.R. § 109.37(a)(3) (cross referencing 11 C.F.R. § 109.21(d)(1)-(6)). Nevertheless, we have concluded in past audits that the conduct prong is satisfied when the communication indicates on its face that it was approved by the candidate, and the Commission has adopted this conclusion.[11] *See* Memorandum from Christopher Hughey to Joseph F. Stoltz, Interim Audit Report - Democratic Executive Committee of Florida (LRA 805), at 5 (Apr. 15, 2011); Final Audit Report on Democratic Executive Committee of Florida, at 9-10 (Sept. 24, 2012) (finding DECF exceeded coordinated party expenditure limit); Memorandum from Christopher Hughey to Patricia Carmona on Interim Audit Report on the Maine Republican Party (LRA 817), at 2, n.2 (Dec. 17, 2010); Final Audit Report on the Maine Republican Party, at 14 (Feb. 25, 2013).

slogans in the domain names of website addresses before; however, the Commission did not approve our proposed Factual and Legal Analyses in those matters by the requisite four votes. *See* MUR 6697 (League of Conservation Voters), First General Counsel's Report ("FGCR") (Mar. 7, 2014), at 7-9 (arguing that website name "DanCox4Senate" constituted express advocacy under section 100.22(a) or (b) because domain name placed matter within electoral context); MUR 6704 (John Doe), FGCR ("Feb 34, 2014" [sic.] Mar. 6, 2014), at 7-8 (same regarding "GoodeForPresident2012"); MUR 6697(League of Conservation Voters), Certification in the Matter of League of Conservation Voters [et al.]), July 17, 2015; MUR 6704 (John Doe), Certification in the Matter of John Doe, July 17, 2015.

[10] Three of the mail pieces however, carry the disclaimer "Paid for by the Kentucky Democratic Party". These are: McGrath Plan #01 "Reminding Congress", McGrath #7 "Two Peas", and McGrath #10 "Cozying Up".

[11] We note that the Audit Division has indicated informally to us in previous conversations that it may have evidence of the party's and candidate's use of a common vendor, one of the express criteria for meeting the conduct prong. *See* 11 C.F.R. § 109.21(d)(4). If so, we would recommend adding this information, and the evidentiary basis for it, to the audit report. This would be especially appropriate for the three communications that carried disclaimers without indication of candidate authorization.