



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Interim Audit Report on the Republican Party of Minnesota – Federal
(LRA 1108)

The Office of the General Counsel has reviewed the proposed Interim Audit Report (“Proposed IAR”) of the Republican Party of Minnesota - Federal (“RPOMF”). The Proposed IAR contains six findings: Recordkeeping for Employees (Finding 1), Recordkeeping for Communications (Finding 2), Reporting of Apparent Independent Expenditures (Finding 3), Disclosure of Transfers and Allocation Ratios (Finding 4), Excessive Coordinated Party Expenditures (Finding 5), and Disclosure of Loans and Loan Repayments (Finding 6).¹ We concur with the findings, except as provided in our comments on Findings 1 and 3. If you have any questions, please contact Margaret J. Forman, 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).

I. RECORDKEEPING FOR EMPLOYEES (FINDING 1).

The Proposed IAR found that RPOMF failed to maintain any monthly employee payroll logs for \$297,945² in payroll for 2017 and 2018, as required, to document the percentage of time that each employee spends in connection with a federal election. 11 C.F.R. § 106.7(d). This amount includes payroll totaling \$290,060 for employees reported on Schedule H4 (Disbursements for Allocated Federal and Non-Federal Activity) and paid with an allocation of federal and non-federal funds, and payroll expenses totaling \$7,885 for employees paid exclusively with nonfederal funds. The Audit Division recommends that RPOMF provide evidence that monthly logs were maintained for such employees, or that RPOMF implement a plan to maintain such monthly payroll logs in the future.

The Audit Division's decision to include the employees paid exclusively with nonfederal funds raises a legal issue as to whether the requirement that a State or local party committee keep a monthly log "of the percentage of time each employee spends in connection with a Federal election" applies to employees who work exclusively on non-federal matters and are paid solely with non-federal funds. 11 C.F.R. § 106.7(d)(1). We believe that it does, as explained below. However, the Commission has not been consistent on this issue. We, therefore, recommend that the Audit Division raise the issue in the cover memorandum to the Commission.

Section 106.7(d)(1) requires state and local party committees to maintain "a monthly log of the percentage of time each employee spends in connection with a Federal election." 11 C.F.R. § 106.7(d)(1). Depending on the percentage of time the employee spends on federal activities, the regulation dictates which accounts the committee may use to pay for the salary and benefit of the employee. Accordingly, salaries and benefits for employees who spend more than 25% of their compensated time on federal election activity ("FEA") or activities in connection with a federal election in a given month must be paid only from a federal account. 52 U.S.C. § 30101(20)(A)(iv); 11 C.F.R. § 106.7(d)(1)(ii); *see* 52 U.S.C. § 30125(b)(2). Employees who spend 25% or less of their time on FEA or activities in connection with a federal election must be paid either from a federal account or allocated as administrative costs. 11 C.F.R. § 106.7(c)(1), (d)(1)(i). Employees who spend none of their compensated time on FEA or activities in connection with a federal election may be paid entirely from a nonfederal account as long as the funds comply with state law. 11 C.F.R. § 106.7(d)(1)(iii).

Although a committee may use nonfederal funds to pay the salary and benefits of employees who spend no time on federal activities, the regulation nonetheless requires committees to maintain a monthly log for "each employee." This necessarily includes all of the committee's employees, including those who spend no time in connection with federal elections, because zero percent is also a percentage of time spent in connection with federal elections. This reasoning parallels the reasoning that the Commission adopted when considering whether committees must maintain monthly logs for employees spending 100% of their time in connection with federal elections. *See* Memorandum from Lisa J. Stevenson to Commission on

² This amount in payroll does not include payments to employees paid 100% with federal funds. *See* Proposed IAR, at Part 1. Background, Commission Guidance, at 1.

Request for Consideration of a Legal Question involving the Vermont Democratic Party (LRA 917) at 2-3 (Oct. 23, 2012) (Commission approved OGC recommendation to require logs for employees who spend 100% of time in connection with federal elections); Memorandum from Lisa J. Stevenson to Commission on Request for Consideration of a Legal Question on Democratic Party of Illinois (LRA 921) at 2 (Oct. 31, 2012) (same).

Moreover, maintaining a log for all staff, including those who did not spend time on federal activity, is necessary to ensure that the Commission can verify that those employees did not spend any time on federal activity. 11 C.F.R. § 104.14(b)(1). As a practical matter, the Commission has no way of knowing whether any employees spent none of their time on federal election-related activities unless it can review documentation such as a log that indicates that information. The Commission has adopted this rationale in the two most recent audits involving this recordkeeping requirement. *See* Final Audit Report on Democratic Party of Hawaii (Feb. 16, 2018) at 25 (approving a finding that the committee failed to maintain a monthly payroll log for each employee, including those employees on the payroll who worked exclusively on nonfederal activities); Final Audit Report on Illinois Republican Party (Apr. 6, 2015) at 12 (same).

We note, however, that in several earlier audits the Commission could not agree whether monthly payroll logs were required for employees who were paid exclusively with nonfederal funds. *See* Final Audit Report on Utah Republican Party (Jan. 23, 2017), Final Audit Report on South Dakota Democratic Party (Apr. 27, 2015), Final Audit Report on Kentucky State Democratic Central Committee (Apr. 20, 2015), Final Audit Report on Democratic Party of Wisconsin (Apr. 6, 2015), Final Audit Report on Democratic Party of Illinois (Nov. 5, 2014), Final Audit Report on State Democratic Executive Committee of Alabama (May 12, 2014), Final Audit Report on Republican Party of Iowa (Mar. 18, 2014).³ In these audits, the Commission moved the findings related to this issue to the additional issues section of the respective final audit reports because there were not four affirmative votes to include the findings. Commission Directive 70 at 4 (Apr. 26, 2011).

Given this inconsistent treatment of the audits on this issue, we recommend that the Audit Division raise this issue in the cover memorandum to the Commission that will accompany this audit report.

II. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (FINDING 3).

The proposed IAR finds that RPOMF failed to disclose any independent expenditures on Schedule E, including for 24-/48-hour reports. The proposed IAR notes, however, that RPOMF made apparent independent expenditures totaling \$781,290 and disclosed them on Schedule B, Line 21(b) (Other Federal Operating Expenditures); Schedule B, Line 30(b) (Federal Election

³ The Office of General Counsel and the Audit Division have consistently recommended that the Commission find that monthly payroll logs are required for employees paid with 100% nonfederal funds. *See*, Memorandum from Lisa J. Stevenson to Patricia C. Orrock, IAR on the Democratic Party of Wisconsin (LRA 952) (Jan.29, 2014) and Interim Audit Report on the Democratic Party of Wisconsin (Apr. 10, 2014).

Activity Paid Entirely With Federal Funds), and Schedule H4 (Disbursements for Allocated Federal/NonFederal Activity).

In response, RPOMF representatives stated that "...expenditures referenced were all general party building fundraising for the committee's general fund. The letters and scripts contained multi-candidate references and did not advocate or oppose one single candidate."

We concur with the Audit Division that the costs associated with these media-related communications should have been disclosed on Schedule E as Independent Expenditures. We disagree with RPOMF's apparent assertion that the cost of fundraising communications by political committees are exempt from being treated as independent expenditures as a matter of law.

An independent expenditure is an expenditure for a communication that expressly advocates the election or defeat of a clearly identified candidate that is not coordinated with a candidate or their agent. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16. In turn, 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 constitutes 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) [r]easonable 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).

In adopting the definition of express advocacy in section 100.22, the Commission explained that the "subjective intent of the speaker" is not a relevant consideration when deciding whether a communication contains express advocacy. *See Express Advocacy; Independent Expenditures; Corporate and Labor Expenditures*, 60 Fed. Reg. 35,292, 35,295 (July 6, 1995). Moreover, the Commission explained that urging recipients to contribute money to a candidate may be deemed express advocacy: "Please note that exhortations to contribute time or money to a candidate would also fall within the revised definition of express advocacy. The expressions enumerated in *Buckley* included 'support,' a term that encompasses a variety of activities beyond voting." *Id.* at 35294. *See also Federal Election Commission v. Christian Coalition*, 52 F.Supp.2d 45, 61-62 (D.D.C. 1999) ("The most obvious electoral action is to vote for or against the candidate. But as the *Buckley* Court recognized when it included the verb

“support” in its non-exclusive list, *see* 424 U.S. at 44 n.52, 96 S. Ct. 612, express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate.”⁴

Since the adoption of the express advocacy definition, the Commission has consistently affirmed that the cost of fundraising communications may be independent expenditures if they contain express advocacy. Notably, the Commission included fundraising communications in independent expenditure reporting-related findings in four previous audits. *See* Final Audit Report on National Campaign Fund at 9, 12-13 (Oct. 12, 2012); Final Audit Report on the Legacy Committee Political Action Committee at 8, 10 (July 31, 2012); Final Audit Report on the Conservative Majority Fund, at 16-17 (approved Dec. 6, 2017); Final Audit Report on the Freedom’s Defense Fund, at 12-13 (Dec. 6, 2017); *but see* Vote Certification, Audit Division Recommendation Memorandum on the Mississippi Republican Party (Feb. 11, 2021) (failing to agree by four votes to include a finding relating to the reporting of fundraising communications as independent expenditures). The Commission similarly found reason to believe that a failure to file independent expenditure reports for the costs of fundraising letters expressly advocating the election or defeat of clearly identified candidates violated the Federal Election Campaign Act. *See* MUR 5809 (Christian Voter Project), Factual & Legal Analysis (Sept. 20, 2006) (finding reason to believe that the committee failed to file independent expenditure reports for fundraising letters), General Counsel’s Report #2 (Apr. 13, 2007). *See also* MURs 5511 and 5525 (Swiftboat Veterans and POWs for Truth), Conciliation Agreement, pars. 23-24 (finding fundraising communications constituted express advocacy under section 100.22(a)) (Dec. 13, 2006).

We further note, in response to RPOMF’s assertion that none of the communications referenced only one candidate, that 11 C.F.R. § 100.22 does not limit express advocacy to communications that only reference one candidate. Express advocacy applies to “one or more clearly identified candidate(s).” 11 C.F.R. § 100.22(a), (b). An independent expenditure, in turn, applies to an expenditure for a communication that expressly advocates in accordance with section 100.22. 11 C.F.R. § 100.16. As such, taking the two provisions together, any expenditure for a communication expressly advocating the election or defeat of one or more clearly identified candidates, and which is not a coordinated communication, constitutes an independent expenditure subject to appropriate disclosure requirements under the statute and regulations.⁵ 11 C.F.R. §§ 100.16; 100.22.

While we generally agree with the finding in the Proposed IAR, we recommend that the Audit Division revise the Proposed IAR in accordance with this Office's categorization of

⁴ *See also* MURs 5511 and 5525 (Swift Boat Veterans and POWs for Truth), Conciliation Agreement, par. 24 (Dec.13, 2006) (finding fundraising communications like fundraising appeal discussed in paragraph contained express advocacy of defeat of presidential candidate under section 100.22(a), because they reference an election and specific candidates and “it advocates action – in this case contributing funds – designed to lead to the candidate’s defeat in the election.”).

⁵ Similarly, the allocation regulation in Part 106 addresses more than one clearly identified candidate, but the reporting regulation for separate segregated funds and connected organizations which allocate expenditures among candidates pursuant to Part 106 addresses one or more clearly identified candidates. Taking these provisions together, the purpose of these regulations is to allocate and report independent expenditures and other expenditures that clearly identify more than one federal candidate.

individual communications addressed below. The materials associated with these communications appear in a chart, "Schedule of Review of Communications – to OGC." We incorporate this chart by reference in this memorandum, and we advise the Audit Division to make this chart, along with the communications addressed in the chart, available to the Commission. Each of these communications is identified below by the index to server code as it appears in the chart, and are grouped in accordance with the reasoning for our conclusions.

1. Donor scripts for which there is express advocacy only if the script reader advances to a certain point in the script:

In several of the telephone communications for which RPOMF provided a script, the communication only expressly advocates the election or defeat of one or more clearly identified candidates if the caller reaches a specified point in the script. We recommend that the Audit Division include, in the recommendations section of this finding, an opportunity for RPOMF to produce documentation showing that the scripts were never used or that the callers reading the script never reached the point in the script where the communication included express advocacy, as a means to demonstrate that the scripts did not require reporting as independent expenditures.

The following scripts include express advocacy only if a successful pledge is made:

- 02 - RPM Donor_Script_20170117
- 03 - RPM Donor_Script_20170509
- 12 - RPM Prospecting Script_20180304
- 34 - RPM UNF_Script_20181205
- 13 - RPM Donor_Script_20180702

The following script includes express advocacy only if the caller reaches the stage for a third ask for a pledge, or if the caller makes a successful pledge:

- 04 - RPM Donor_Script_20170926

The following scripts include express advocacy only if the caller reaches the stage for a second ask for a pledge, or if the caller makes a successful pledge:

- 04 - RPM Donor_Script_20171228
- 17 - RPM Donor_Script_20180918
- 12 - RPM Prospecting Script _ 030418

2. Communications that OGC believes fail to expressly advocate the election or defeat of one or more clearly identified candidates.

OGC disagrees with the conclusions concerning several communications identified in the Proposed IAR materials as expressly advocating the election or defeat of one or more clearly identified candidates. These communications either fail to identify one or more clearly identified candidates, fail to include phrases advocating the election or defeat of such candidate(s) (section 100.22(a)), or fail to include a call to action under section 100.22(b)(2). A parenthetical follows each communication identifier with a description of the language at issue.

a. No clearly identified candidate:

14 - MN Donor_L1_20180702
20 - MN Donor_L3_20180918

b. No "elect" or "defeat" along with the identification of the candidate (no 100.22(a)), and no call to action (100.22(b)):

20 - MN Donor_L3_20180918
27 - MN_L3_20170117
32 - MN Donor_L2_20181205
35 - Mailchimp-4-23-18
42 - MNGOP_MN_Eblast_Franken_V1
43 - MNGOP_MN_Eblast_Franken_V2
108 - LEWIS-CO-MN-005 - Craig Failed Leadership 1
94 - Lewis-CO-MN-003-Seniors 1
97 - Tina Smith A big spending Politician Facebook Ad.mp4
103 - PAULS-CO-MN-507 - Medicare Contrast
104 - LEWIS-CO-MN-007 - Craig Failed Leadership 2
105 - PAULS-CO-MN-508-Medicare Contrast 1
109 - LEWIS-CO-MN-006 - Seniors 2.pdf
115 - LEWIS-CO-MN-002 - Craig Hit - VDP #1.pdf
116 - LEWIS-CO-MN-004 - Multi-Issue #2 -- VDP.pdf
117 - LEWIS-CO-MN-008 - Multi-Issue #3 --- VDP.pdf
106 - PAULS-CO-MN-510-Guns Positive

3. OGC concludes express advocacy, Audit concludes not express advocacy.

One communication, 37 - Mailchimp-6-22-18, included a phrase expressly advocating the election of clearly identified candidates, but was not included among the communications in this finding. Near the end of this communication, a brochure, it says "Yes, I want to help elect our endorsed candidates today!" and the communication includes pictures and names of the endorsed candidates, including two United States Senate candidates. This meets the requirements of 11 C.F.R. § 100.22(a), because it uses the phrase "elect our endorsed candidates" accompanied by the names and pictures of two United States Senate candidates, who are identified as holding these offices.