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2012 OCT 23 PM 3:59

FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

October 23, 2012

SENSITIVE

MEMORANDUM

TO: The Commission

FROM: Lisa J. Stevenson
Deputy General Counsel - Law

Lorenzo Holloway
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SUBJECT: Request for Consideration of a Legal Question (LRA 917)

I. INTRODUCTION

On September 28, 2012, the Commission received a Request for Consideration of a Legal Question ("Request") from counsel on behalf of eight state party committees that the Commission voted to audit pursuant to 2 U.S.C. § 438(b).[1] Attachment.

The Request addresses a proposed audit finding for each of the Committees pertaining to the requirement in 11 C.F.R. § 106.7(d)(1) that state party committees maintain monthly payroll logs of the percentage of time each employee spends in connection with a federal election. The issue presented in the Request is whether the monthly time log requirement applies to employees

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[1] The eight committees are: the Mississippi Democratic Party PAC, [redacted] At least two Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 76 *Fed. Reg.* 45798-45799 (Aug. 1 2011).

The Commission's action on this Request affects a total of 13 state party committees. The Commission has also received another request regarding this issue, which will be addressed in a separate memorandum from the Office of General Counsel.

who are paid with 100% federal funds. We conclude that under the literal language of the regulation, it does. But there is a separate question, as a prudential matter, of whether the Commission wishes to pursue recordkeeping findings in these circumstances. Where employees are paid with 100% federal funds, the soft money concerns underlying the regulations are absent. The only significance a log could have in these circumstances is verifying whether the disclosure of disbursements is on the correct line on the Detailed Summary Page of a committee's disclosure reports. The Audit Division submits that it needs the logs for this purpose and a recordkeeping finding is appropriate. Whether the Commission believes this purpose is sufficiently important to require a recordkeeping finding where no logs (or affidavits) are available is a matter of policy for the Commission to determine.

II. COMMITTEES ARE REQUIRED TO KEEP MONTHLY LOGS FOR EMPLOYEES PAID EXCLUSIVELY WITH FEDERAL FUNDS

A state party committee "must keep 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). To determine if a state party committee must allocate the salary, wages, and benefits of its employees, it must examine the percentage of time that its employees spent on federal election activity ("FEA") or activity in connection with federal elections. Salaries and benefits for employees who spend more than 25% of their compensated time on FEA or activities in connection with a federal election in a given month must be paid only from a federal account. 2 U.S.C. § 431(20)(A)(iv); 11 C.F.R. § 106.7(d)(1)(ii); *see* 2 U.S.C. § 441i(b)(2). Employees who spend less than 25% of their time on FEA or activities in connection with a federal election may be allocated as administrative costs or paid from the federal account. 11 C.F.R. § 106.7(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 with funds that comply with state law. 11 C.F.R. §§106.7(c)(1) and 106.7(d)(1)(iii). The Committees concede that failure to keep logs for employees "who were paid either in part or with no federal funds would support a recordkeeping finding." Attachment at 2. The Committees, however, object to "any finding that employees who were paid exclusively with federal funds required any entry in a time log." *Id.*

We conclude that, read literally, the regulations support the conclusion that state party committees must maintain a monthly log under 11 C.F.R. § 106.7(d)(1) for all employees, including those paid from and reported as solely 100% federal funds. Although 100% of the time spent on federal activity represents the whole or complete time spent on federal activity, this is still a percentage and therefore must be documented.

We understand the Committees' concern about the necessity for a log when employees are paid with 100% of federal funds. Section 106.7(d) supports the statute's requirement that state and local party committees treat as "federal election activity," payable with 100% federal funds, the salaries and benefits of any employee who spends more than 25% of his or her compensated time during the month on activities in connection with a federal election. 2 U.S.C. §§ 431(20)(A)(iv), 441i(b)(1). Where employees are paid with 100% federal funds, there is by definition no concern

that an inadequate share of federal funds was used to pay these employees.[2] Thus, the Committees might question why the Audit Division would inquire about time logs in this situation and, in the absence of such logs, impose a recordkeeping finding

The additional purpose served by the logs is to differentiate salary and benefits payments that qualify as FEA – which are reported on line 30(b) of the Detailed Summary Page – from payments to employees who spent less than 25% of their compensated time during a month on activities in connection with a federal election, but whose salaries and benefits the Committee voluntarily chose to pay with 100% federal funds. Payments in this latter category should be reported as federal operating expenses on line 21(b) of the Detailed Summary Page, not as FEA. *See* 11 C.F.R. §§ 104.14(b)(1), 104.17(a)(4). In these audits, it appears that many of the Committees recognized this distinction because a number of the Committees reported payroll payments as other federal operating expenditures on Schedule B, line 21b. The Audit Division submits that it needs the logs to verify that the salary and benefit payments at issue have been disclosed on the correct lines of the Detailed Summary Page. *See* 11.CF.R. § 104.14(b)(1).

In support of their assertion that a log is not required for employees that are paid with 100% federal funds, the Committees cite a proposed regulation which was never promulgated, which provided: "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." *Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money*, 67 *Fed. Reg.* 35654, 35684 (May 20, 2002) (Proposed section 300.33(b)(1)). The Committees apparently assert that the fact that the Commission (1) moved the recordkeeping requirement from proposed section 300.33 to section 106.7; and (2) changed the words "all employees" in the proposed provision to "each employee," in 11 C.F.R. § 106.7(d)(1), signifies that the monthly log requirement excludes employees paid with 100% federal funds.[3]

There is no indication in the regulatory history that the Commission moved this proposed provision into section 106.7 and changed the language because it intended to exclude employees

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[2] We recognize the Commission's 3-3 split on a similar issue in the Georgia Federal Elections Committee audit involving employees whom the committee asserted spent *no* time on activity in connection with federal elections. In that audit, the Commission split on the issue of whether the Commission could require a committee to keep a log for such employees. In a motion that failed 3-3, three Commissioners asserted that "the Commission does not have jurisdiction to impose recordkeeping and documentation requirements on employee activity that a State party committee claims is solely non-Federal." *See* Commission Agenda Document No. 11-10-B (Motion on Audit Division Recommendation memorandum on the Georgia Federal Elections Committee, *considered in Open Session* Mar. 3, 2011). Here, unlike with the Georgia Federal Elections Committee, a number of the employees of each of the Committees may have spent 100%, or some part thereof, of their time on activities in connection with a federal election and were paid with 100% federal funds, so the three Commissioners' concerns regarding jurisdiction over "solely non-federal" activity may be reduced.

[3] In their Request, the Committees appear to assert that section 106.7 applies to the allocation of expenses, and not to Federal Election Activities (FEA). We reiterate that section 106.7 supports the statute's requirement that state and local party committees treat as "federal election activity," payable with 100% federal funds, the salaries and benefits of any employee who spends more than 25% of his or her compensated time during the month on activities in connection with a federal election. 2 U.S.C. §§ 431(20)(A)(iv), 441i(b)(1).

paid with 100% federal funds. Rather, as the Commission explained, the proposed regulation at 300.33(b)(1) would have required state party committees to keep detailed time records for all employees to provide documentation for allocation purposes. *Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money*, 67 *Fed. Reg.* 49064, 49078 (Jul. 29, 2002). The Commission rejected the original proposed provision because it chose not to allocate employee salary, noting "in response to the NPRM, a State party committee asserted that time sheets would be 'burdensome,' that written certifications by employees would be 'equally impractical,' but that a tally sheet kept by the employer would be 'more reasonable.' The same commenter nonetheless urged the Commission not to require any particular method of documentation." *Id.* The Commission, acknowledging the reasons provided by the commenters, decided to "require[] only that a monthly log be kept of the percentage of time each employee spends in connection with a Federal election." *Id.* Thus, the Commission chose a recordkeeping requirement in the form of a monthly log as a lesser burden than the detailed time records as part of an allocation formula.

Nothing in the Commission's explanation for this requirement indicates that the Commission's change in the location of the recordkeeping requirement or change from the plural "all employees" to the singular "each employee" excludes employees paid with 100% federal funds. To the contrary, the subparagraphs of the regulatory provision imposing a monthly log requirement anticipate three allocation scenarios – paid with 100% federal funds under (d)(1)(i) or (ii), allocation between federal and non-federal under (d)(1)(i), and paid with 100% state funds under (d)(1)(iii). The Committees fail to explain how the language of the regulation, or its drafting history, supports imposing a monthly log requirement in the latter two scenarios but somehow excludes the first scenario where employees are paid with 100% federal funds.

The Committees also assert that the proposed finding is inconsistent with the Commission's approach in prior audits in other election cycles.[4] The Committee cites the 2006 audit of the Georgia Federal Elections Committee, and the 2006 Audit of the Tennessee Republican Party Federal Election Account as examples of audits where no recordkeeping finding was addressed for failure to maintain a log pursuant to section 106.7(d)(1). The Committees are correct about the findings in those prior audits – the Commission did not pursue a separate recordkeeping finding under section 106.7(d)(1), regardless of whether those committees maintained the logs.[5]

[4] The Committees suggests that the Commission should provide the regulated community with advance notice of its decision to apply the requirements of 11 C.F.R. § 106.7(d)(1) to employees paid with 100% federal funds. We do not believe there is a notice issue because nothing in section 106.7(d)(1) addresses a different category of employees for which committees would not be required to keep a log.

[5] In the audit of the Georgia Federal Elections Committee, the Commission split on whether that committee was required to keep a log. *See supra* note 2.

The Commission, as an administrative agency charged with administering the Federal Election Campaign Act, has discretion in deciding which matters of non-compliance will be findings in its audit reports. *Cf. Nader v. FEC*, 823 F. Supp. 2d 53, 65 (D.D.C. 2011); *Akins v. FEC*, 736 F. Supp. 2d 9, 21 (D.D.C. 2010) ("The FEC has broad discretionary power in determining whether to investigate a claim, and whether to pursue civil enforcement under the [FECA]."); *see also Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

III. RECOMMENDATION

The Office of the General Counsel recommends that the Commission conclude that 11 C.F.R. § 106.7(d)(1) requires the Committees to keep a monthly log for employees paid exclusively with federal funds.

Attachment

Request for Legal Consideration from Neil Reiff, as counsel representing the Mississippi Democratic Party PAC,