



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 20, 2013

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Thomas Hintermister
Assistant Staff Director
Audit Division

FROM: Lisa J. Stevenson
Deputy General Counsel - Law *LJS*

Lorenzo Holloway
Assistant General Counsel
For Compliance Advice *LH by ljs*

Danita C. Alberico
Attorney *DA by ljs*

SUBJECT: Draft Final Audit Report on the Nebraska Democratic Party (LRA 888)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report ("DFAR") for the Nebraska Democratic Party ("Committee"). The DFAR contains three findings: Recordkeeping for Employees (Finding 1), Reporting of Debts and Obligations (Finding 2), and Excessive Coordinated Party Expenditures (Finding 3). Our comments address Reporting of Debts and Obligations (Finding 2) and Excessive Coordinated Party Expenditures (Finding 3). If you have any questions, please contact Danita C. Alberico, the attorney assigned to this audit.

II. REPORTING OF DEBTS AND OBLIGATIONS (Finding 2)

The DFAR finds that the Committee failed to correctly disclose debts and obligations totaling \$120,447. The DFAR states that the Committee filed amended reports in response to the Interim Audit Report ("IAR") recommendations to materially disclose the debts and obligations. Our comments address two aspects of the finding. First, we address whether the Committee

should have disclosed its rent payments as debts. We also address whether two other transactions should be reported as debts.

The DFAR finds that the Committee did not disclose as debts rent payments for office space totaling \$4,500 that were made more than 30 days after the rent due dates. Although the Committee amended its reports to disclose the late rent payments as debts, the Committee contended in its exit conference response that the rent payments were not reportable debt because the rent was a reoccurring obligation.

The Commission's regulations require that "[a] debt or obligation, including a loan, written contract, written promise or written agreement to make an expenditure, the amount of which is over \$500 shall be reported as of the date on which the debt or obligation is incurred, except that any obligation incurred for rent, salary or other regularly reoccurring administrative expense shall not be reported as a debt before the payment due date." 11 C.F.R. §104.11(b). The Commission has clearly explained the disclosure requirements for rent paid after the due date: "periodic administrative costs incurred for rent and staff salaries need not be reported as debts if payment is not due before the end of the reporting period. However, if payment is not made on the due date, the amount outstanding must be reported as debt." Explanation and Justification for Continuous Reporting of Debts and Obligations, 55 Fed. Reg. 26,378, 26,385 (June 27, 1989). Here, the Committee paid its rent after the due dates. Thus, we concur with the DFAR that the Committee failed to properly disclose as debts rent payments totaling \$4,500.

Regarding two additional transactions, the Committee declined to amend its disclosure reports and offered the following explanations as to why those transactions did not constitute reportable debts: payments to one vendor totaling \$7,344 were for non-federal activity; and a second debt totaling \$1,000 was the result of a billing error. The Audit Division advised this Office that it accepts the Committee's explanations regarding the two debts. However, the DFAR does not explicitly state the auditors' position or provide an analysis supporting its decision to accept the Committee's explanations. Therefore, we recommend that the Audit Division expressly state its position in the DFAR regarding the explanations that the Committee offered on the two debts and set forth the basis for the Audit Division's position.

III. EXCESSIVE COORDINATED PARTY EXPENDITURES (Finding 3)

The DFAR finds the Committee made an apparent excessive in-kind contribution of \$34,789 to a House candidate, resulting from coordinated expenditures made in excess of the coordinated party spending limitation.

First, the DFAR includes in the coordinated expenditure activity a payment of \$578 to a vendor for a campaign sign in support of a House candidate that was placed in the window of the party's field office during the 2010 general election. The Committee contends in its IAR response that the window sign was not coordinated activity and was not intended as a public communication. The Committee said that it placed the sign in its field office window next to signs of other Nebraska candidates and that this practice is common activity for party offices. The DFAR states that since the Committee originally classified the window sign as a coordinated expenditure, it does not believe that the Committee's explanation is sufficient to overcome its

original reporting regarding the window sign. The auditors also explained to this Office that Committee's continued reporting of the expenditure on Schedule F (Itemized Coordinated Expenditures Made by Political Party Committees or Designated Agent(s) On Behalf of Candidates for Federal Office) instead of Schedule B (Itemized Disbursements) supports its determination to treat the window sign as a coordinated expenditure. Since the Committee contends that the window sign was not a coordinated expenditure, we recommend that the auditors analyze the issue consistent with the Commission's regulatory provisions. We do not believe the Audit Division has applied the appropriate standard to determine whether the window sign should be applied to the Committee's coordinated expenditure limit.

A State committee of a political party may make coordinated party expenditures in connection with the general election campaign of a candidate for Federal office in that State who is affiliated with the party. 11 C.F.R. § 109.32(b)(1). The coordinated party expenditures shall not exceed the coordinated party expenditure limit. 11 C.F.R. § 109.32(b)(2). A payment by a political party committee for a communication that is coordinated with a candidate must be treated by the political party committee making the payment as either an in-kind contribution to the candidate with whom it was coordinated or a coordinated party expenditure pursuant to coordinated party expenditure authority under 11 C.F.R. §§ 109.37(b)(1) and (2).

A party coordinated communication must satisfy the three-prong test set forth at 11 C.F.R. § 109.37(a)(1)-(3). First, the expenditures must be paid for by a political party committee or its agent. 11 C.F.R. § 109.37(a)(1). Second, the communication must satisfy at least one of the following content standards: (1) a public communication that disseminates, distributes or republishes campaign materials; (2) a public communication that contains express advocacy; or (3) a public communication, as described in 11 C.F.R. § 100.26, that satisfies 11 C.F.R. § 109.37(a)(2)(iii)(A) or (B). 11 C.F.R. § 109.37(a)(2). Finally, the communication must satisfy at least one of the conduct standards set forth at 11 C.F.R. § 109.21(d)(1) through (d)(6). 11 C.F.R. § 109.37(a)(3).

The Committee paid \$578 for the window sign.¹ Thus, the expenditure satisfies the payment prong for coordinated activity. 11 C.F.R. § 109.37(a)(1). However, the auditors do not appear to possess any information to establish that the window sign constitutes a public communication so as to satisfy the content prong. A public communication is defined as 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 other form of general public political advertising. 2 U.S.C. § 431(22) and 11 C.F.R. § 100.26. Here, the Committee merely placed the sign in its field office window and did not pay an intermediary for any form of access to the public. Explanation and Justification for Definition of Public Communication, 71 Fed. Reg. 18,593, 18,594-18,595 (Apr. 12, 2006). The auditors also do not appear to possess any information establishing that the conduct prong has been

¹ The Committee issued a check dated July 9, 2010 to the vendor for \$577.80. The invoice for the window sign, however, shows a balance due totaling \$963; but, the invoice also contains a handwritten notation of "\$577.80." The auditors do not have any additional information regarding the differing amounts on the invoice. Our review of the candidate's July and October 2010 Quarterly reports do not show any payments to the window sign vendor.

satisfied. Absent information or documentation showing that window sign satisfies the content and conduct prongs, we recommend that the Audit staff accept the Committee's explanation and find that the cost for the window sign does not constitute a coordinated expenditure.²

Second, the DFAR states that the Audit Division is not attributing expenditures totaling \$4,596 for a candidate postcard and \$94,610 for the production of a mailer to the Committee's coordinated expenditure limit because the Committee asserts that the expenditures were subject to the volunteer materials exemption. *See* 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. Regarding the postcard, the Committee provided a statement from its executive director attesting that volunteers distributed, hand-stamped, and placed mailing labels on the postcards at party headquarters to demonstrate volunteer activity. With respect to the mailer, the Committee provided vendor statements and invoices and photographs of volunteers participating in various duties such as reviewing, sorting, and packing the mailers to support its assertion for the volunteer materials exemption. The auditors did not include the expenditures in calculating the Committee's coordinated expenditures because of uncertainty regarding the level of volunteer involvement needed to qualify State or local party disbursements for the exemption as it applies to mailings.

The Commission addressed the applicability of the volunteer materials exemption in the Final Audit Reports in the Democratic Executive Committee of Florida (DECF), the Tennessee Republican Party Federal Election Account, and the Arizona Republican Party. In the DECF FAR, the Commission concluded that there existed a "lack of clarity in recent audits regarding the amount of volunteer involvement needed to qualify for the volunteer materials exemption," and the Audit staff did not count the expenses toward the coordinated party expenditures. *See* Final Audit Report of the Commission on the DECF (Sep. 24, 2012), at 3. Similarly, in the earlier Tennessee Republican Party FAR, the Commission noted the "lack of clarity" regarding application of the exemption, and failed to approve a finding that certain mail pieces did not qualify for the volunteer material exemption. *See* Final Audit Report of the Commission on the Tennessee Republican Party Federal Election Account (Feb. 4, 2011), at 3.

Recently, in the audit of the Arizona Republican Party, the Commission approved a finding that reported expenditures should not be attributed to a committee's coordinated expenditure limit when there was some evidence of volunteer activity. The evidence consisted of a written statement and photographs documenting volunteers participating in activities related to mailings. On the other hand, the Commission could not reach a consensus regarding a mailing with only a written statement and no photographs of volunteer involvement. The discussion of this latter mailing containing little evidence of volunteer involvement was placed in an additional issues section of the audit report. *See* Draft Final Audit Report of the Commission on the Arizona Republican Party (May 8, 2013), 15.³

² The Committee may need to amend its disclosure report to disclose its disbursement for the window sign as an independent expenditure since the sign contains express advocacy. 11 C.F.R. § 104.4(a).

³ As of the date of this memorandum, the Commission has not yet approved the Final Audit Report of the Arizona Republican Party.

In the matter at issue, regarding the postcard, the Committee submitted a declaration from its executive director asserting personal knowledge that mailing the postcard involved volunteer activity but the Committee did not submit any photographs of the activity. With respect to the mailers, the Committee submitted photographs, vendor statements, and invoices to show that production of the mailers involved volunteer activity but it did not submit any affidavits or declarations from individuals with personal knowledge of the volunteer activity. The uncertainty regarding the amount of volunteer involvement needed to qualify for the volunteer materials exemption renders it difficult for committees to discern what is sufficient evidence to provide the Commission. Here, the Committee appears to have provided similar evidence of volunteer activity to that deemed sufficient by the Commission in Arizona Republican Party. Nevertheless, to aid the Commission in drawing a distinction between some evidence and no evidence of volunteer activity, we agree with the approach taken in the DFAR to encourage the Committee to provide any further documentation it may have such as photographs of volunteers participating in the dissemination of the candidate postcard and affidavits or declarations from individuals with personal knowledge of the volunteer activity associated with producing the mailers.