



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

May 6, 2013

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

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FROM: Lisa J. Stevenson *LJS*
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For Compliance Advice

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SUBJECT: Proposed Interim Audit Report on Nebraska Democratic Party (LRA 888)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report ("IAR") for the Nebraska Democratic Party ("the Committee"). The IAR contains three findings: Recordkeeping for Employees (Finding 1), Reporting of Debts and Obligations (Finding 2), and Excessive Coordinated Party Expenditures (Finding 3).¹ Our comments address Recordkeeping for Employees (Finding 1) and Excessive Coordinated Party Expenditures (Finding 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) and (b)(6).

II. RECORDKEEPING FOR EMPLOYEES (Finding 1)

The proposed IAR finds that the Committee did not maintain monthly payroll logs for the percentage of time each employee spent on federal election activity in accordance with 11 C.F.R. § 106.7(d)(1). The auditors found that the amount of federal and non-federal funds paid for employees, including contract workers, for which logs were not maintained totaled \$300,708. Of this amount, the Committee paid a total of \$17,928 to its contract workers. In the absence of providing monthly payroll logs, the proposed IAR recommends that the Committee implement a plan to maintain monthly payroll logs to track the percentage of time each employee spends on federal election activity for payroll not reported and paid with 100% federal funds.

In two currently pending audits, the Commission considered whether the payroll recordkeeping requirement under 11 C.F.R. § 106.7(d)(1) should be applied to individuals who perform work for committees as "contract" workers. In those audits, the Commission did not approve, by the required four votes, the Audit Division's recommendations to include contract workers within the scope of the section 106.7(d)(1) monthly payroll log requirement, and the recordkeeping findings as to the contract workers were removed from the reports (two Commissioners voted for the original recommendations). The Commission's guidance had previously been sought on this issue pursuant to Commission Directive 69, and the recommendation of the Audit Division and the Office of General Counsel to include contract workers within the scope of the recordkeeping requirement failed to receive the affirmative vote of four or more Commissioners. Pursuant to Directive 69, the Office of Compliance proceeded, in the two pending audits previously referenced, to include the payroll for contract workers within the recordkeeping finding in the Interim Audit Report as submitted to the Commission. We understand that the Office of Compliance also is proceeding in this audit to include the payroll for contract workers within the recordkeeping finding.

Pursuant to Directive 69, the Audit Division may continue to include in the proposed IAR consideration of contract workers in determining whether and/or the extent to which the Committee complied with the monthly payroll log requirement under 11 C.F.R. § 106.7(d)(1). We recommend that the Audit Division make a note of its inclusion, and the Commission's prior decisions in the two pending audits, in its cover memo transmitting the proposed IAR.²

III. EXCESSIVE COORDINATED EXPENDITURES (Finding 3)

The proposed IAR finds that 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. When a political committee receives an excessive contribution from another political committee, it should refund the excessive contribution. 11 C.F.R. § 103.3(b). Additionally, nothing in the Federal Election Campaign Act or the Commission's regulations prohibits the committee making the contribution, here the

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Nebraska Democratic Party, from seeking a refund of the excessive contribution. However, a contribution refund is not feasible here as the committee of the House candidate that received the apparent excessive contribution was terminated. The Commission approved the candidate's request for termination of his principal campaign committee on May 10, 2011.³ Therefore, we believe that the proposed recommendation appropriately excludes such a remedy.⁴

Additionally, the Audit Division has informed the Office of General Counsel that the Committee made approximately \$100,000 in additional expenditures that the Committee claimed to be exempt under 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. The proposed IAR does not discuss these expenditures because the Audit Division concluded that the expenditures qualified for the exemption. We recommend that the Audit Division include in the proposed IAR and the cover memorandum to the Commission a discussion of these expenditures. Because of the uncertainty regarding the level of volunteer involvement needed to qualify State or local party disbursements for the exemption as it applies to mailings, however, we believe that the Audit Division should decline to reach a conclusion on the issue, consistent with another pending audit, as well as with the Commission's approach in two other recent audits.⁵

The Commission addressed the applicability of the volunteer materials exemption in the Final Audit Reports in the Democratic Executive Committee of Florida (DECF) and the Tennessee Republican Party Federal Election Account. 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 (2012), at 3, 6-10. In that matter, the DECF had provided a cell phone picture that had been taken by an individual who had averred by e-mail that he was present at the mailings of the mail pieces. *See* OGC Comments on DFAR on the DECF at 3. Similarly, in the earlier Tennessee Republican Party FAR, the Commission noted the "lack of clarity" regarding application of the exemption and did not 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 (2011), at 3, 12-15. Our recommended approach here is consistent with the Commission's conclusions in both of these FARs.

³ Footnote 9 of the proposed IAR states that the candidate's committee was approved for administrative termination on May 10, 2011; however, the disclosure reports and related correspondence indicate that the candidate sought termination by the Commission pursuant to 11 C.F.R. § 102.3, rather than being administratively terminated pursuant to 11 C.F.R. § 102.4. We recommend that the proposed IAR be modified to reflect this information.

⁴ There is no procedure for the Reports Analysis Division to reactivate the candidate committee for the purpose of providing a refund to this Committee. Additionally, because the candidate committee already disbursed its funds prior to termination, it would have no funds to refund.

⁵ The Audit Division has informed us that the Committee also made approximately \$5,600 in expenditures on exempt yard signs. We understand that these expenditures are exempt activity and are not the subject of the uncertainty with regard to volunteer mailings. *See* 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147.

As noted in our comments on the DFARs in these prior audits, the Commission has failed to reach consensus in past enforcement matters regarding the application of the volunteer materials exemption under similar facts. *See* OGC Comments on Final Audit Report on Tennessee Republican Party Federal Election Account (LRA 745); OGC Comments on DFAR on the DECF (LRA 805); *see also* OGC Comments on Final Audit Report on the Washington State Democratic Central Committee (LRA 737). In particular, we noted MUR 5598, Utah Republican Party, *et al.*, in which four Commissioners issued a Statement of Reasons declining to draw a conclusion regarding whether the URP met the exemption in that case because of the “complicated history” of the exemption’s application, and therefore dismissing the complaint as an exercise of prosecutorial discretion. *See* OGC Comments on Final Audit Report on the Tennessee Republican Party Federal Election Account (LRA 745); OGC Comments on Final Audit Report on the Washington State Democratic Central Committee (LRA 737) (discussing Statement of Reasons of Commissioners Petersen, Bauerly, Hunter, and Weintraub in MUR 5598, Utah Republican Party, *et al.* (April 9, 2009)).

Recognizing the lack of clarity as to the volunteer materials exemption, the Commission has attempted, without success so far, to formulate a consensus policy regarding what constitutes “substantial volunteer involvement” for the purpose of applying the exemption. In particular, the Commission issued four draft documents for public comment in March 2010. *See* Proposed Interim Enforcement Policy, Agenda Document No. 10-16, Drafts A through D. While there appears to be broad agreement among the draft documents about some types of activities that would qualify a State or local committee for the volunteer materials exemption, there is disagreement among the drafts about whether any one of the potentially qualifying activities would, by itself, suffice to qualify the committee for the exemption, or whether only a number of activities taken together might suffice. *Compare, e.g.* Proposed Interim Enforcement Policy, *supra*, Draft A (Chairman Matthew S. Petersen, Commissioner Caroline C. Hunter, and Commissioner Donald F. McGahn II) at 5, Draft B (Commissioner Steven T. Walther) at 5, Draft C (Vice Chair Cynthia L. Bauerly, and Commissioner Ellen L. Weintraub) at 5, *and* Draft D (Commissioner Donald F. McGahn II) at 4.

In this matter, the Committee apparently submitted photographs documenting volunteers participating in activities relating to the mailings, as well as statements from the deputy director of the Nebraska Democratic Party and a vendor. Nevertheless, based on our conclusion regarding the Commission’s lack of consensus on the level of volunteer involvement needed to qualify a party committee for the volunteer materials exemption, as well as the amount of documentation required to support such an exemption, we recommend that the Audit Division raise this issue in the cover memorandum to the Commission and indicate in its audit report that because of this lack of clarity, it is not attributing the Committee’s spending on these mailings to the Committee’s coordinated expenditure limit.