



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

November 12, 2013

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Thomas Hintermister
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FROM: Lisa J. Stevenson
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For Compliance Advice

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Attorney

SUBJECT: Proposed Interim Audit Report on the South Dakota Democratic Party (LRA 885)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report ("IAR") for the South Dakota Democratic Party ("the Committee"). The IAR contains five findings: Misstatement of Financial Activity (Finding 1), Recordkeeping for Employees (Finding 2), Reporting of Coordinated Party Expenditures (Finding 3), Contributions from Unregistered Political Organization (Finding 4), and Disclosure of Occupation/Name of Employer (Finding 5).¹ Our comments address Recordkeeping for Employees (Finding 2) and Reporting of Coordinated Party Expenditures (Finding 3). We concur with any findings not specifically discussed in this memorandum. If you have any questions, please contact Albert R. Veldhuyzen, 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 2)

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 for whom logs were not maintained totaled \$60,143. Of this amount, the Committee paid a total of \$17,586 exclusively with non-federal funds. The remainder of \$42,557 was reported as allocated between federal and non-federal funds, of which \$37,286 was reported in 2009 and \$5,271 in 2010. The audit uncovered one transfer from the non-federal to the federal account in the amount of \$4,999.99 for 2010. Post-audit notification, the Committee asserted that it misreported the \$37,286 in 2009 as allocated and amended its reports. The proposed IAR recommends that the Committee provide any additional information regarding required monthly payroll logs and implement a plan to maintain them to track the percentage of time each employee spends on federal election activity.

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 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 25% or less 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).

In a request for consideration of a legal question (LRA 917), the South Dakota Democratic Party, along with other state party committees, asked the Commission to consider the question of whether the monthly time log requirement applies to employees who are paid with 100% federal funds. The Commission concluded that the time log requirement applies even if the employees were paid exclusively with federal funds. However, “as an exercise of prosecutorial discretion, the Commission will not pursue recordkeeping violations for the failure to keep time logs or provide affidavits to account for employee salaries paid for with 100% federal funds and reported as such.” LRA 917, Certification dated November 30, 2012.

The Commission’s determination as applied to the facts of the present situation raises an important issue: Since the Committee paid the entire amount (\$37,286) for 2009 with federal funds, is it appropriate to make a finding in the audit report and require additional information and a plan to implement monthly payroll logs because the Committee misreported the activity as allocable?

The Committee states that allocation transfers were not made and that the original reporting of the activity as “allocable” was erroneous. Given the absence of transfers from the

nonfederal account to pay a portion of the salaries and the exclusive use of the federal funds to pay employees, the Committee's amendment of its 2009 reports to characterize the activity as paid solely with federal funds appears reasonable. In light of the Commission's decision not to pursue a failure to maintain logs when the committee pays the salaries with 100% federal funds, we do not think that a finding is warranted that requires the Committee to provide additional information about the log or implement a plan to maintain the log for salaries paid exclusively with federal funds.²

III. REPORTING OF COORDINATED PARTY EXPENDITURES (Finding 3)

The proposed IAR finds that the Committee made an apparent excessive in-kind contribution of \$16,277 to a House candidate, resulting from coordinated expenditures made in excess of the coordinated party spending limitation. During the audit exit conference, however, the Committee stated that they had erroneously reported \$19,529 for two direct mail pieces as coordinated party expenditures when they were actually for federal election/exempt activity. The Committee argues that the disbursements should not be counted towards its coordinated party expenditure limit because the disbursements qualify for the volunteer materials exemption but were not properly disclosed on its reports. *See* 2 U.S.C. §§ 431(8)(B)(ix) and (9)(B)(viii); 11 C.F.R. §§ 100.87 and 100.147. Consequently, the Committee would like to amend its reports accordingly.

The proposed IAR states that the Committee "provided pictures of the volunteers working on the direct mailers," implying that evidence of volunteer activity exists. However, a review of the pictures only shows two individuals (one with a badge) alongside campaign materials. In response to a question from the Audit Division, the Committee answered that, "we believe those are volunteers but the individuals who can provide details on this are no longer with the party." Email from Jennifer Rumpca to Douglas Kodish (Aug. 27, 2013). No other evidence of volunteer activity exists.

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.

² There was one transfer from the non-federal to the federal account in the amount of \$4,999.99 for 2010. However, the Committee is only claiming that 2009 payroll expenses should have been reported as 100% federal. The Committee did not amend its 2010 reports.

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

In the matter at issue, the Committee did not submit any affidavits or sworn declarations from individuals with direct knowledge of the mailings. The Committee did submit photographs and an email stating its belief that the mailing constituted 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 to provide the Commission. Nevertheless, to aid the Commission to draw a distinction between some evidence and no evidence of volunteer activity, we agree with the approach taken in the proposed IAR to encourage the Committee to provide a more detailed statement and any other evidence it deems appropriate to support the volunteer exemption.

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