



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Interim Audit Report on the Conservative Majority Fund (LRA 986)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Interim Audit Report ("IAR") on the Conservative Majority Fund ("the Committee").¹ The IAR contains five findings: Misstatement of Financial Activity (Finding 1); Disclosure of Occupation and Name of Employer (Finding 2); Failure to File Reports and Properly Disclose Independent Expenditures (Finding 3); Reporting of Debts and Obligations (Finding 4); and Recordkeeping for Communications (Finding 5). Our comments address Findings 3 and 5. We have no comments regarding the other findings. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

¹ We submitted comments on a previous version of this IAR on May 2, 2016. The Audit Division subsequently withdrew that version of the IAR from circulation to the Commission. These comments supersede our earlier comments.

II. FAILURE TO FILE REPORTS AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES (Finding 3)

Based upon its review of invoices documenting the Committee's media-related disbursements, the Audit staff concludes that the Committee failed to report \$469,136 in disbursements as independent expenditures. The Audit staff arrived at this conclusion by totaling costs reflected in invoices attributable, in the Audit staff's judgment, to communications constituting express advocacy (\$1,816,390)² and then deducting from this amount the amount of independent expenditures that the Committee reported during the same time period (\$1,347,233).

In arriving at its express advocacy conclusions, the Audit staff examined the texts of communications that the Committee created. These consist of two telephone scripts with two accompanying follow-up letters and three television advertisements.³ The Audit staff evaluated the content of these communications, partly with assistance from this office. *See Audit Query: Conservative Majority Fund, LRA 986 (Feb. 26, 2015)*. The Audit staff concluded that one telephone script and follow-up letter were express advocacy, while the other telephone script and follow-up letter were not, and that all three television advertisements were express advocacy.⁴ According to the Audit staff, the Committee has indicated that the communications currently in the Audit staff's possession represent the entire universe⁵ of communications distributed by the Committee during the audit period.⁶

While the Audit staff has invoices documenting media-related services on the one hand and the texts of all the communications the Committee distributed on the other hand, it does not have the information that it would need to associate specific invoices with the specific telephone scripts

² The Audit staff includes in its calculation of the total costs attributable to independent expenditures a variety of other types of cost described on the invoices, such as, among other things, postage for "fulfillment letters"; costs associated with credit card processing connected with "fulfillment letters" and with "acquisition and processing"; check debiting for "acquisition and processing"; "rental lists"; "prospecting"; "lockbox services," and costs associated with creating and sending "premiums" such as a flag and a bumper sticker. These costs described on the invoices are not defined in terms of how they are related to the communications, but the descriptions might raise questions of whether some of them should be considered costs for the communications. *See* 11 C.F.R. § 100.16.

³ Certain invoices allude to two other potential television advertisements; the invoices refer to them as "Obamacare" and "Repeal Obamacare". The Committee has not supplied texts for these communications; accordingly, these costs are included in Finding 5, Recordkeeping for Communications.

⁴ We do not comment upon the Audit staff's evaluations of the communications because we agree with them. In our earlier comments on a previous version of this IAR, we recommended that the costs of certain communications be relocated from Finding 3 to Finding 5 because of the unavailability of the actual texts of those communications. The Audit staff's revised IAR indicates that it has followed this recommendation.

⁵ We recommend that the Audit staff indicate this in the IAR. We note, however, that there appear to have been at least two other television advertisements. *See* footnote 3, *supra*.

⁶ The IAR does not describe the communications or the rationale that the Audit staff used to classify these communications as express advocacy. We recommend that the Audit staff provide the Committee with a list or a chart of the communications that contain express advocacy, and an explanation of the aspects of each communication that qualify it as express advocacy to assist the Committee in responding to the IAR.

and follow up letters furnished by the Committee. With respect to the television advertisements, some invoices do indicate the television advertisement with which they are associated while others do not.

Based on this state of the evidence, the Audit staff made a methodological assumption. With respect to the telephone scripts and follow-up letters and the television advertisements that could not be definitively linked with invoices, the Audit staff assumed that the express advocacy communications would most likely have been disseminated before the date of the general election and the communications not containing express advocacy would most likely have been disseminated after the date of the general election. The Audit staff then assigned the itemized services on the invoices to the communications based on the date upon which the vendor completed those services.⁷ If the services were completed before the general election, then the auditors assigned the cost for these services to independent expenditures. If the services were completed after the general election, the auditors assigned the costs for these services to operating expenditures.

This assumption enabled the Audit staff to calculate the quantity of costs attributable to independent expenditures that were not reported, \$469,136, as described above.

We believe that it is reasonable for the Audit staff to assume that express advocacy would more likely than not have been disseminated or distributed before the date of the general election.⁸ Express advocacy communications are communications that include such words as “vote for” and “re-elect” or that otherwise encourage actions to elect or defeat a candidate. 11 C.F.R. § 100.22(a) and (b). There would be little reason to run communications advocating the electoral defeat of President Obama after his re-election. And regarding communications that are not express advocacy, the timing would not matter for current purposes: if they were distributed before the election, they would not be independent expenditures under section 100.22, and if they were distributed after the 2012 general election date, then President Obama was not at that time a candidate for any office. 11 C.F.R. §§ 100.3, 100.16(a). See *Response to Audit Query on Conservative Majority Fund*, LRA 986 (Feb. 26, 2015), at 6. See also *Informal Guidance to*

⁷ The Audit staff used the range of dates listed on each invoice to estimate the date on which the Committee’s vendor completed the services. It treated the last day of the date range printed on the invoice as the date of completion. The Audit staff has informed us that it used this approach in all cases except in the case of invoices in which the date range occurred partly before and partly after the general election date. In that case, the Audit staff chose to pro-rate the cost of the service according to the proportion of the date range occurring before and after the general election. Since the Audit Division does not know when the vendor actually completed the services, we think this approach is reasonable, but we recommend that the Audit Division include a brief description of this methodology in the IAR to explain this methodology to the Commission and the Committee. See Comments of OGC on IAR on TeaPartyExpress.Org, LRA 995, at 5, dated Dec. 1, 2015. We also recommend that the Audit staff add information about the pro-rating of certain invoices as described above to footnote 5 of the IAR.

⁸ We also note that, unlike some recent audits related to independent expenditures, here the auditors have most of the underlying communications. Therefore, the auditors are making assumptions only about the *timing* of the communications, not about their *content*, which were the assumptions that we found problematic in certain previous cases. See Comments of OGC on IAR on the Colorado Republican Committee (LRA 961), received by Audit Division on Dec. 11, 2015; Comments of OGC on IAR on the Conservative Campaign Committee (LRA 996), dated Nov. 25, 2015; Comments of OGC on IAR on TeaPartyExpress.Org (LRA 995), dated Dec. 1, 2015; and Comments of OGC on IAR on the Illinois Republican Party (LRA 1006), dated Dec. 22, 2015.

Reports Analysis Division, Table Talk LLC – Independent Expenditure Reporting, LRA 1013 (Feb. 4, 2016) (no requirement to file quarterly or 48 hour reports of independent expenditures relating to advertisements opposing Hillary Clinton before she became a candidate).

III. RECORDKEEPING FOR COMMUNICATIONS (Finding 5)

This finding concerns disbursements to a media vendor totaling \$304,399, some of which the Committee did not report, and some of which the Committee likely reported. However, with respect to these latter amounts, the Audit staff cannot associate invoices with reports. The available records for these disbursements include neither associated invoices nor communications. In the absence of these records, the Audit Division cannot determine how the disbursements should have been reported. The finding recommends that the Committee provide these materials so that the Audit Division may ascertain the nature and the proper reporting of the disbursements.

We concur with this finding. The basis for the finding is 11 C.F.R. § 104.14(b)(1). This regulatory provision requires reporting committees to “[m]aintain records, including bank records, with respect to the matters required to be reported, including vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information and data from which the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness.”

Although the plain text of this regulation lists only certain types of financial documents, and does not specifically mention communications scripts, the authority of the regulation is not confined to the mentioned documents alone. The regulation does not define the “records” that a committee is required to maintain so narrowly. Rather, the committee is required to maintain records, “including” bank records, which, in turn, “includ[e]” the kinds of financial documents listed in the text. 11 C.F.R. § 104.14(b)(1). When a statutory or regulatory definition of terms “includes” certain items, the otherwise applicable canon of construction, *expressio unius est exclusio alterius*, generally does not apply. See 2A Norman J. Singer, *Sutherland Stat. Const.*, § 47.25 (7th ed. 2014) (“The word “include” in a statute generally signals that entities not specifically enumerated are not excluded.”). See also, e.g., *White v. National Football League*, 756 F.3d 585, 595 (8th Cir. 2014); *Jones v. American Postal Workers Union*, 192 F.3d 417, 426 (4th Cir. 1999). Thus, the mere mention of certain kinds of documents in section 104.14(b)(1) does not exclude other kinds of documents from its scope.

The Commission has not interpreted this provision so narrowly as to exclude other kinds of documents. For example, in an advisory opinion that addressed the extent to which the Commission’s personal use regulation, 11 C.F.R. § 113.1(g)(1)(i)(H), would allow salary payments to a member of a candidate’s family, the Commission indicated that the committee would be required to maintain a copy of the committee’s employment contract with the family member and other documentation relating to the family member’s employment under the authority of section 104.14(b). Advisory Opinion 2001-10 (Jackson). In another advisory opinion that construed the personal use provisions, here in the context of the use of a car for campaign and for personal purposes, the Commission observed that the preservation of a mileage log that would be updated with each use of the car would satisfy the recordkeeping requirements of 11 C.F.R.

§ 104.14(b) if maintained as part of the committee's accounting records. Advisory Opinion 2001-03 (Meeks). The Commission has also indicated that payroll deduction authorization forms are among the records that would satisfy the recordkeeping requirement of section 104.14(b)(1). *See, e.g.*, Advisory Opinion 1999-03 (Microsoft PAC); MUR 4955 (Metropolitan Life Insurance Company Employees' Political Participation Fund A), Factual and Legal Analysis (Dec. 22, 1999).⁹ Finally, in a matter involving enforcement of the requirement to file 24-Hour notices for independent expenditures, the Commission admonished the respondent committee for failing to maintain various types of documents memorializing the dissemination dates of the advertisements under section 104.14(b)(1). *See* MUR 5850 (Republican National Committee), Factual and Legal Analysis, at 6 (Dec. 17, 2007).

Although employment contracts, mileage logs, payroll deduction authorization forms, and the various documents memorializing independent expenditure dissemination dates are not specifically listed in section 104.14(b)(1), the Commission required the requesting committees to maintain these kinds of records under the authority of that provision because they were essential for enabling the Commission to verify the legal correctness of the committees' reports of their permissible campaign receipts and expenses in the context of an audit or other inspection. The same logic supports requiring committees engaged in making independent expenditures to maintain the communications associated with the disbursements to enable the Commission to verify, and to differentiate between, the committee's independent expenditures and its operating expenditures.

If the Commission interpreted the regulation narrowly to exclude all types of potentially verifying documents not enumerated in section 104.14(b)(1), then the capacity of the Commission to verify the accuracy and completeness of a committee's reporting would be severely restricted because not all information contained in reports may be verified by recourse to the types of records enumerated in section 104.14(b)(1). For example, the Federal Election Campaign Act of 1971, as amended, and Commission regulations require committees to report the purposes of their disbursements. *See* 52 U.S.C. § 30104(b)(4), (5). 11 C.F.R. §§ 104.3(b)(3); 104.9. The Commission has provided examples of acceptable purpose descriptions as "dinner expenses, media, salary, [and] polling." *See, e.g.*, 11 C.F.R. § 104.3(b)(3)(i)(B). The kinds of bank records enumerated in section 104.14, however, would not include the type of information that is required to verify that the Committee used the disbursements for "dinner expenses, media, salary, [and] polling."

⁹ In a subsequent unanimous Statement of Reasons, the Commission concluded that it would no longer consider copies of the original signed payroll deduction authorization form to be the sole adequate means of satisfying section 104.14(b)(1). *See Statement of Reasons of Chairman Michael E. Toner, Vice Chairman Robert D. Lenhard, and Commissioners David M. Mason, Steven T. Walther, Ellen L. Weintraub, and Hans A. Von Spakovsky in the Matter of Lockheed Martin Employees' PAC*, MUR 5721, Audit Referral 05-10, RAD Referral 06L-01 (Jun. 13, 2006). This revision of the policy does not, however, indicate that the payroll deduction authorization form is not appropriately included among the documents required to be maintained under section 104.14(b)(1). *See Statement of Policy[,] Recordkeeping Requirements for Payroll Deduction Authorizations*, 71 Fed. Reg. 38513 (Jul. 7, 2006) (signed payroll deduction authorization forms not the only adequate proof for meeting § 104.14(b)(1), but maintaining them is a sound recordkeeping practice and in many cases they may serve as best documentation of deduction authorization).

In this case, the Audit staff needs to ascertain the nature of the disbursements in order to determine how they should have been reported, whether as operating expenditures, independent expenditures, or other disbursements. Because in most cases the text of the communication associated with the disbursement constitutes the only evidence of the nature of the disbursement,¹⁰ and the Commission's regulations require the Committee to maintain and provide "the necessary information . . . from which [its] filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness," it is essential that the Audit staff have access to this information and that committees maintain it.

¹⁰ **Indeed, in previous comments we provided to the Audit Division on several IARs, we stated that using invoices alone to infer that disbursements on media expenses were made for independent expenditures would be legally inappropriate in the absence of the text of the associated communication. See Comments of OGC on IAR on the Colorado Republican Committee (LRA 961), received by Audit Division on Dec. 11, 2015; Comments of OGC on IAR on the Conservative Campaign Committee (LRA 996), dated Nov. 25, 2015; Comments of OGC on IAR on TeaPartyExpress.Org (LRA 995), dated Dec. 1, 2015; and Comments of OGC on IAR on the Illinois Republican Party (LRA 1006), dated Dec. 22, 2015.**