



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Proposed Interim Audit Report on the Freedom's Defense Fund (LRA 1030)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report ("proposed IAR") on the Freedom's Defense Fund ("FDF"). The proposed IAR contains four findings: Misstatement of Financial Activity (Finding 1), Disclosure of Occupation and Name of Employer (Finding 2), Reporting of Independent Expenditures (Finding 3) and Recordkeeping for Communications (Finding 4).¹ We concur with the findings, and comment on Findings 3 and 4. 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. FUNDRAISING COMMUNICATIONS AS INDEPENDENT EXPENDITURES

In Finding 3 of the proposed IAR, the Audit Division noted that FDF disclosed independent expenditures totaling \$385,619 on Schedule E; however, FDF also made apparent media-related expenditures totaling \$868,015 that were disclosed as operating expenditures on Schedule B, Line 21b. The Audit Division concluded that these media-related expenditures should have been disclosed on Schedule E as Independent Expenditures. FDF responded at the exit conference that these expenditures were fundraising expenditures, and not independent expenditures.

We concur with the Audit Division that the costs associated with these media-related communications should have been disclosed on Schedule E as Independent Expenditures. Preliminarily, FDF's assertion that fundraising communications are exempted from disclosure as independent expenditures has no basis in law. The Commission has found that fundraising solicitations consisting of express advocacy should be reported as independent expenditures. For example, in the audit of the National Campaign Fund, the Commission found that 41 fundraising communications constituted express advocacy and therefore were independent expenditures. *See* Commission Certification of Audit Division Recommendation Memorandum, The National Campaign Fund, A09-26, August 27, 2012. In the audit of the Legacy Committee Political Action Committee, the Commission found that 36 fundraising communications constituted express advocacy and therefore were independent expenditures. *See* Commission Certification of Audit Division Recommendation Memorandum, The Legacy Committee Political Action Committee, A09-22, June 11, 2012. In both the National Campaign Fund audit and The Legacy Committee Political Action Committee audit, the communications found to have been independent expenditures were in the form of express advocacy fundraising letters akin to those at issue here.² Furthermore, nothing in the Commission's regulations suggests that a fundraising purpose is an exception to a communication constituting express advocacy and therefore requiring disclosure as an independent expenditure. *See* Audit of The National Campaign Fund and Audit of the Legacy Committee Political Action Committee, *See also* MUR 5809 (Christian Voter Project) (Committee failed to file independent expenditure notices for the costs of fundraising letters that expressly advocated the election/defeat of candidates).

III. RECORDKEEPING FOR COMMUNICATIONS

This finding concerns apparent communication-related expenses totaling approximately \$90,814 that the Committee reported as operating expenditures with the purposes of "direct mail-creative" and "direct mail – postage." The finding concludes that the documentation provided by the Committee relating to these expenses was insufficient to enable the Audit staff to determine whether these categorizations were correct, or whether some or all of the expenses should have been reported as independent expenditures.

² The treasurer of FDF, Scott Mackenzie, was also treasurer of the National Campaign Fund and The Legacy Committee Political Action Committee.

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” (emphasis added). 11 C.F.R. § 104.14(b)(1).

Although the text of this regulation lists only certain types of financial documents, and does not specifically mention communication 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).³ Finally, in a matter involving enforcement of the requirement to file 24-Hour reports of

³ 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

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 necessarily include the type of information that is required to verify that the Committee used the disbursements for "dinner expenses, media, salary, [and] polling." *Id.*

In this case, while the Committee reported the media expenses as operating expenditures, the Audit staff needs to ascertain the nature of the disbursements in order to determine whether any of these should have been reported as independent expenditures. Because in most cases the text of the communication associated with the disbursement constitutes the only evidence of the nature of the disbursement,⁴ and the Commission's regulations require the Committee to maintain and provide "the necessary information . . . from which [its] filed reports and statements may be

them is a sound recordkeeping practice and in many cases they may serve as best documentation of deduction authorization).

⁴ Indeed, in previous comments we provided to the Audit Division on several interim audit reports ("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.

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.