



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Thomas E. Hintermister
Assistant Staff Director
Audit Division

FROM: Adav Noti *AN*
Associate General Counsel
Policy Division

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Margaret J. Forman *MJF*
Attorney

SUBJECT: Draft Final Audit Report on the Illinois Republican Party (LRA 1006)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Draft Final Audit Report ("proposed DFAR") on the Illinois Republican Party ("IRP"). The proposed DFAR contains six findings: Misstatement of Financial Activity (Finding 1), Reporting of Apparent Independent Expenditures (Finding 2), Recordkeeping for Communications (Finding 3), Receipt of Apparent Prohibited In-Kind Contributions (Finding 4), Reporting of Debts and Obligations (Finding 5), and Recordkeeping for Employees (Finding 6). We concur with the findings, and comment on Finding 2. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

II. AUDIT DIVISION CONCLUDES EXPENDITURES FOR MAILERS ARE REPORTABLE AS INDEPENDENT EXPENDITURES

A. Background

The IRP made 16 media-related expenditures, or mailers, totaling \$273,126 that it reported as Federal Election Activity (FEA). The IRP also made an unknown amount of expenditures for 27 mailers that the Audit Division could not associate with any invoices. Both the 16 media-related expenditures and the 27 additional mailers¹ appear to constitute independent expenditures according to the Audit staff. The proposed DFAR, therefore, concludes that all 43 (16+27) mailers should have been disclosed either on 24 hour or 48 hour reports as independent expenditures.

The IRP does not challenge the Audit Division's classifications of the mailers on the basis of whether they constitute express advocacy. *See* 11 C.F.R. §§ 100.16, 100.22 (independent expenditures defined in part as communications that expressly advocate, a term defined in section 100.22). Rather, the IRP argues that the mailers are not properly regarded as independent expenditures because they were distributed by volunteers, invoking the "volunteer materials exemption" ("VME") to the definition of "expenditure."² *See* 52 U.S.C. § 30101(9)(B)(viii); 11 C.F.R. § 100.147. The IRP submitted some documents in support of this assertion: 24 pictures of individuals sorting, bundling and placing the direct mailers into mail bags, four sign in sheets to document the use of volunteers in the mail program, and three affidavits attesting to the use of volunteers for all 43 mailers. According to the proposed DFAR, many of these documents can only be connected to a few specific mailings on which the volunteers may have worked.

The Audit Division concludes that the documentation provided by the Committee is insufficient to support its assertion that the VME applies. The proposed DFAR concludes that as a result of the absence of sufficient documentation, the Audit staff considers the communications to be independent expenditures.

¹ These 27 mailers are referred to in the proposed DFAR as "direct mail." As we understand it, the term is not being used here in its technical sense to mean mail distributed by a commercial firm or from a commercial list. *See* 11 C.F.R. § 100.147. The "volunteer materials exemption," with which this portion of our comments is concerned, does not apply to direct mail in this sense. *Id.*; 52 U.S.C. § 30101(9)(B)(viii)(1); *but see* Audit of the Tennessee Republican Party, Office of the General Counsel's legal comments on the Interim Audit Report of the Tennessee Republican Party (LRA 745) at 3-4 (Aug. 13, 2008), *discussing* Missouri Democratic State Committee (MUR 5837) Statement of Reasons of Commissioners Lenhard, Mason, von Spakovsky and Weintraub, Dec. 20, 2007 at 4 (Commission has interpreted mailings to qualify for the VME if there was sufficient volunteer involvement even if there was some involvement by a commercial vendor). We recommend revising the proposed DFAR to refer to "mailers" or "mailings" rather than to "direct mail" in order to avoid potential confusion.

² The IRP also states that it did not intend for the mailers to be independent expenditures, but the regulation defining express advocacy does not permit an examination of the speaker's intent. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 466-472 (2007) (subjective intent is irrelevant); *see* Audit of The National Campaign Fund and Audit of the Legacy Committee Political Action Committee (communications intended as fundraising letters not exempt from independent expenditures).

We believe that the 43 mailers can be divided up into two categories: 1) mailers for which IRP offered documentation to show volunteer involvement that can be directly connected to the individual mailers, and 2) mailers for which IRP offered only affidavits to show volunteer involvement. We analyze and make recommendations on each category in turn.

B. Mailers for which IRP offered documentation, which can be linked to specific mailers, to show volunteer involvement

Of the 16 media-related expenditures totaling \$273,126 that the Audit Division could connect with an invoice, \$33,972 of these expenditures could be matched to four mailers for which the IRP provided photographs showing volunteer involvement in the distribution of the mailers.³ Because the expenditures can be directly connected to the documentation provided in support of the VME, we conclude that the proposed DFAR should not conclude that this \$33,972 in expenditures are independent expenditures that required reporting as such. While we acknowledge there is a lack of clarity with respect to the information that is necessary to show VME, the Commission has not found mailings to be attributable to the coordinated party limit where committees have provided photographs showing volunteers participating in activities relating to the mailings on behalf of a specific candidate identified in the mailer. *See* Audit of the Arizona Republican Party, Amended Commission Certification for Audit Division Recommendation Memorandum (Aug. 22, 2013), Final Audit Report at 13, 17 (approved Nov. 14, 2013), Office of the General Counsel's legal comments to the Draft Final Audit Report at 5 (Apr. 8, 2013); *see also* 11 C.F.R. § 100.147. We, therefore, recommend that the proposed DFAR not consider the \$33,972 in expenditures for the four mailers for which the IRP provided photographs documenting volunteer involvement in the distribution of those mailers to be reportable as independent expenditures.

C. Mailers for which IRP offered only affidavits to show volunteer involvement

With regard to the remaining \$239,154 (\$273,126 - \$33,972) in media-related expenditures that could be connected with an invoice, and 27 mailers that the Audit Division was unable to connect with any invoice,⁴ the only information that IRP has offered to show that volunteers were used to distribute the mailers is three affidavits.⁵

As to these expenditures, the proposed DFAR correctly observes that a lack of clarity exists, in the context of the mailings, regarding how to apply the VME and what quantum and

³ Additionally, two volunteer sign in sheets could be matched to these photographs and invoices, and one additional sign in sheet could be matched to a mailer. It is unclear from the proposed DFAR if this additional sign in sheet was matched to one of the mailers for which the IRP was unable to provide invoices.

⁴ Because the Audit Division is unable to connect these 27 mailers with any invoice, we cannot determine the amount of the expenditures associated with those mailers.

⁵ According to the Audit Division, the IRP provided 10 additional photographs and a fourth sign in sheet that the Audit Division cannot connect to any mailer. Because these documents cannot be connected to any mailer, we are not attributing these documents to any mailer in support of the VME.

type(s) of documentation are necessary to substantiate a claim that the VME applies. *See, e.g.,* OGC Comments on Draft Final Audit Report - Arizona Republican Party (LRA 889), at 4-5 (Apr. 8, 2013). In recent audits addressing this issue, the Commission has approved findings that reported expenditures should not be attributed to a committee's coordinated expenditure limit where there was sufficient evidence of volunteer activity.⁶

The facts in this case are distinguishable from those of the Arizona Republican Party audit, due to the production of these affidavits. The Commission deadlocked in the Arizona Republican Party audit on whether to apply the VME on the basis of unsworn written assertions regarding volunteer activity. *See* Final Audit Report of the Commission on the Arizona Republican Party, at 16-17. In the Arizona Republican Party audit, the Commission could not agree on whether a written description of volunteer involvement was, by itself, sufficient to qualify the associated expenses for the VME. While some Commissioners approved the recommended finding, "other Commissioners determined that unsworn written assertions absent any documentation of the nature and extent of the volunteer involvement would not be sufficient." *Id.* at 17. Here, the IRP has provided sworn affidavits that could potentially be viewed as having more evidentiary value than unsworn statements. Two of the affidavits provided by IRP are sworn by individuals who appear to be in a position to have direct knowledge of the volunteer activities,⁷ state that every mail piece sent by IRP on behalf of federal candidates was processed by volunteers, and delineate nine steps taken by the volunteers to process and distribute the mailers.⁸

Given the Commission's split on unsworn statements provided in the Arizona audit, and the lack clarity in the application of the VME in general, we do not know if sworn affidavits such as these are sufficient documentation for the purposes of the VME. We, therefore, recommend

⁶ *See, e.g.,* Final Audit Report of the Commission on the Arizona Republican Party, at 13, 17 (approved Nov. 14, 2013) (Commission did not count mailings supporting candidate David Schweikert against committee's coordinated expenditure limit where committee provided written description of process and photographs of volunteers working on mailers to support claim of VME, but did not approve recommendation by four votes to find similarly regarding mailings on behalf of two other candidates, where committee provided only written description of process); Final Audit Report of the Commission on the Nebraska Democratic Party, at 16-17, 19-20 (approved Oct. 23, 2014) (Commission does not count cost of mailings against coordinated expenditure limit where committee provided vendor statements and invoices along with photographs of volunteers participating in various duties, but did not approve recommendation to find similarly, by four votes, where committee submitted unsworn written assertions without documentation of nature and extent of volunteer involvement); Final Audit Report of the Commission on the South Dakota Democratic Party, at 14-15 (approved Apr. 17, 2015) (Commission does not count cost of mailings against coordinated expenditure limit where committee provided photographs of volunteers working on mailers and signed declaration that that type of mailing generally performed by volunteers).

⁷ One affiant was a volunteer during the entire audit period, and was promoted to volunteer coordinator. This individual worked directly on all but three or four of the mailers. *See* Affidavit of Andrew Heffernan. Another affiant oversaw the volunteer component of the IRP's volunteer mail program. *See* Affidavit of Jon Callaway.

⁸ Two of the three affidavits provided a detailed list of the volunteers' role in processing the mailers, similar to the procedures of the volunteers in the Tennessee Republican Party audit. *See* Audit of the Tennessee Republican Party, Office of the General Counsel's legal comments on the Final Audit Report at 2 (Jun. 15, 2009) (comparing facts of volunteer activity in the Tennessee Republican Party audit to the volunteer activity for the Utah Republican Party, MUR 5598).

that the Audit Division raise this issue in the cover memorandum accompanying the transmission of the DFAR to the Commission.