



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

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JAN 27 2017

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SUBJECT: Interim Audit Report on the New York Republican Federal Campaign Committee
(LRA 1038)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Interim Audit Report ("IAR") on the New York Republican Federal Campaign Committee ("the Committee"). The IAR contains five findings: Misstatement of Financial Activity (Finding 1); Recordkeeping for Employees (Finding 2); Disclosure of Occupation/Name of Employer (Finding 3); Reporting of Apparent Independent Expenditures (Finding 4); and Recordkeeping for Communications (Finding 5). Our comments address certain aspects of Findings 1, 2, and 4. We concur with all other findings and with other aspects of Findings 1, 2, and 4 that we do not discuss in this memorandum. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. MISSTATEMENT OF FINANCIAL ACTIVITY (Finding 1)

The IAR identifies certain misstatements of receipts and disbursements reflected on the Committee's reports, and the principal cause of the misstatements appears to have been unreported receipts and disbursements of non-federal contributions by the Committee's federal account. The Committee stated that it used its federal account as a general purpose merchant account to process both non-federal and federal credit card contributions for administrative convenience. According to the IAR, approximately \$347,000¹ in non-federal contributions, as identified by the Committee, were transferred from the Committee's federal account to its non-federal account. The Audit Division informs us that the Committee transferred most of the non-federal contributions out of the federal account on the same day on which the federal account received them.² In response to the exit conference, the Committee stated that its non-federal contributions were in fact also permissible under the Federal Election Campaign Act (the "Act") and Commission regulations; however due to the lack of documentation, the Audit Division was unable to verify this assertion. The Committee also stated that it has since implemented a new system for processing credit card contributions that will be able to deposit federal and non-federal contributions directly into the appropriate accounts.

Commission regulations do not allow federal accounts to accept funds that do not comply with the limitations and prohibitions of the Act. 11 C.F.R. § 102.5(a)(1)(i). It appears that by using its federal account to process non-federal contributions, the Committee may have deposited contributions into its federal account that did not comply with the limitations and prohibitions of the Act, the Committee's undocumented assertion to the contrary notwithstanding. We, therefore, recommend that the Audit Division either revise the IAR to note the prohibition and to cite section 102.5(a)(1)(i), or to create a separate additional finding, and to reflect an improper use of the federal account. *See* Final Audit Report of the Commission on the Arizona Republican Party, approved Nov. 14, 2013, at 6; OGC Comments on Draft Final Audit Report on the Arizona Republican Party (LRA 889), Apr. 8, 2013, at 2; Final Audit Report on the Utah State Democratic Committee, approved Feb. 9, 2016, at 12.

III. RECORDKEEPING FOR EMPLOYEES (Finding 2)

The IAR finds that the Committee did not maintain monthly payroll logs documenting the percentage of time each Committee employee spent in connection with a federal election. The total quantity of salary subsumed in the finding is approximately \$713,000, all of which represents an allocated mixture of federal and non-federal funds. The Committee provided affidavits in which its former executive director stated that he was able to identify those employees who spent less than 25 percent of their time on federal activity. The IAR does not discuss the Audit staff's decision to disregard the affidavits when making its assessment. We agree that because the affidavits were not contemporaneous records, they could not resolve the finding. *See* Final Audit

¹ While approximately \$347,000 was transferred, the Audit Division was able to verify, with bank deposit records, \$310,000 of this total. The Audit Division was able to verify that the Committee reported approximately \$320,000 in non-federal contributions in its state disclosure reports.

² One transfer occurred approximately thirty days after the federal account received the funds.

Report of the Commission on the Democratic Party of Wisconsin, approved Mar. 25, 2015, at 12; Final Audit Report of the Commission on the Georgia Federal Elections Committee, approved July 21, 2011, at 10. We recommend, however, that the Audit Division revise the IAR to state its rationale for disregarding the affidavits expressly so that the Committee may be informed of it.

IV. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 4)

The Audit staff reviewed 90 mail pieces and concluded that all of them are express advocacy communications as that term is defined in 11 C.F.R. § 100.22.³ The Committee did not disclose the costs of any of the advertisements as independent expenditures in its reports, but instead disclosed them as Federal Election Activity. In support of this classification, the Committee contends that all of the direct mail advertisements at issue were processed and distributed by volunteers. Consequently, the Committee argues that the costs of the advertisements should be considered exempt from the Commission's definition of the term "expenditure"⁴ under the Commission's volunteer materials exemption ("VME"). See 11 C.F.R. § 100.147.

The total cost of all the communications discussed in the IAR is approximately⁵ \$1.36 million. This total is divided into three categories based upon whether, and to what extent, the Committee submitted information or documentation to support its assertion that the VME applies as follows:

- \$209,000, for which the Committee submitted affidavits, volunteer statements and photographs;
- \$919,000, for which the Committee submitted affidavits alone;⁶ and
- \$236,000, for which the Committee did not submit any information.

³ Before proceeding with our principal comments, we have a brief ancillary comment relating to the presentation of this finding to the Committee. We recommend that the Audit Division furnish to the Committee, along with the IAR, lists or charts that indicate how the Audit Division classified the mail pieces, whether as express advocacy according to 11 C.F.R. § 100.22(a) or § 100.22(b), and why, so that the Committee may provide a fully informed response.

⁴ An "expenditure" includes any purchases or payments made by any person for the purpose of influencing any election for federal office. 52 U.S.C. § 30101(9); 11 C.F.R. § 100.111(a). An "independent expenditure" is a type of expenditure by a person that expressly advocates the election or defeat of a clearly identified candidate for federal office and that is not made in concert or cooperation with, or at the request or suggestion of, that candidate, the candidate's authorized committee or agents, or a political party committee. 52 U.S.C. § 30101(17); 11 C.F.R. § 100.16(a).

⁵ All dollar amounts stated in these comments are approximations based upon rounding of the amounts stated in the IAR.

⁶ To be precise, the Committee submitted seven affidavits that relate to both the \$209,000 mail piece group and to the \$919,000 mail piece group, for a total amount of approximately \$1,128 million. Of this total, the Committee submitted additional documentation with respect to \$209,000 in mail pieces that was added as an attachment to one of the seven affidavits: the affidavit of Brett Buerck of Majority Strategies. The remaining \$919,000 in mail pieces were supported by the seven affidavits alone.

The Audit staff concludes that the advertisements in the first category, totaling \$209,000, are in fact exempt under the VME. The Committee submitted seven affidavits and, in addition, photographs of a single volunteer working on each individual mail piece and of signed volunteer forms for eight mail pieces showing basic identifying information for each volunteer. Accordingly, The Audit staff subtracted this amount, \$209,000, from the total cost of the mail pieces to arrive at the total amount that it characterizes as spent for apparent independent expenditures: approximately \$1.15 million.

Of this \$1.15 million, the second category, totaling \$919,000, is supported by the seven affidavits alone, without additional documentation. These affidavits were executed by individuals claiming to have personal knowledge of, and responsibility for administering, the Committee's volunteer mailing program. These individuals include the counsel to the Committee, campaign managers for two campaigns assisted by the Committee's efforts, and the heads of businesses, including campaign consulting firms and print and/or mail vendors, involved with these efforts. The affidavits described the volunteers' precise activities under the program. With respect to the third category, \$236,000, the Committee submitted no information to support its assertion that the VME applies. With respect to these final two categories, the IAR recommends that the Committee submit any other information or documentation it may possess.

We have three comments relating to the substance of this finding. First, while we agree with the Audit Division's recommendation that the Committee submit any additional evidence or documentation of volunteer involvement that it may possess, we offer a comment with respect to the group of mail pieces, totaling approximately \$919,000, for which the Committee submitted affidavits alone.

Second, we recommend that one advertisement be removed from the scope of the apparent independent expenditure finding because we do not believe that it constitutes express advocacy. Third, we comment upon three additional mail pieces that the Audit Division classified as express advocacy based upon section 100.22(a). While we agree that these mail pieces constitute express advocacy, we believe that they qualify as such based upon the criteria set forth in section 100.22(b) rather than section 100.22(a). We agree with the express advocacy determinations made by the Audit Division for all of the other mail pieces not expressly discussed in these comments.

A. Affidavits Submitted in Connection with \$919,000 Mail Piece Group

We agree with the Audit Division's recommendation that the Committee submit any additional documentation or evidence pertaining to its claim that the VME applies. With respect to the group of mail pieces totaling approximately \$919,000 for which the Committee submitted affidavits alone, we note that in an audit of the Arizona Republican Party ("ARP"), the Commission did not approve by the requisite four votes an Audit Division recommendation that the Commission not count certain disbursements made by the ARP against the ARP's coordinated party expenditure limit on account of the lack of clarity associated with the VME where the Committee had submitted a written description of the volunteers' activities. *See* Final Audit Report of the Commission on the Arizona Republican Party, approved Nov. 14, 2013, at 15-17. In that matter, the Commission could not reach a consensus that a written description alone sufficed to meet the VME requirements, and some Commissioners determined that unsworn written

assertions absent any accompanying documentation of volunteer involvement would not suffice. *Id.*, at 17. Although the facts in this matter differ because the Committee here has presented sworn written assertions from various individuals who appear to have had general responsibilities for designing and overseeing the implementation of the mailing program,⁷ the similarity of the issue presented suggests that it may need to be raised for the Commission's attention at a later stage of the audit. At this interim stage of the audit, however, we agree that the Committee should be given an opportunity to submit any additional evidence or documentation it may possess.

B. Express Advocacy Determination

We recommend removing the mail piece designated J.1.43 from the scope of this finding because it does not constitute express advocacy. A communication can expressly advocate the election or defeat of a candidate in two ways. First, a communication expressly advocates the election or defeat of a clearly identified candidate when it uses phrases such as "vote for the President", "re-elect your Congressman", "support the Democratic nominee", "cast your ballot for the Republican challenger for U.S. Senate in Georgia", "Smith for Congress", "Bill McKay in '94", "vote Pro-Life" or "vote Pro-Choice" accompanied by a listing of clearly identified candidates described as Pro-Life or Pro-Choice, "vote against Old Hickory", "defeat" accompanied by a picture of one or more candidate(s), "reject the incumbent" or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as posters, bumper stickers, advertisements, etc. which say "Nixon's the One", "Carter '76", "Reagan/Bush" or "Mondale!" 11 C.F.R. § 100.22(a).

Second, a communication is express advocacy if, when taken as a whole and with limited reference to external events, such as the proximity to the election, it could only be interpreted by a reasonable person as containing advocacy for the election or defeat of one or more clearly identified candidate(s), because: (1) the electoral portion of the communication is unmistakable, unambiguous, and suggestive of only one meaning; and (2) reasonable minds could not differ as to whether it encourages actions to elect or defeat one or more clearly identified candidate(s) or encourages some other kind of action. 11 C.F.R. § 100.22(b). In its discussion of then-newly promulgated section 100.22, the Commission stated that "[c]ommunications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question." *See Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35292, 35295 (July 6, 1995); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 470 (2007) (noting that "indicia of express advocacy" include "tak[ing] a position on a candidate's character, qualifications, or fitness for office").

Advertisement J.1.43 criticizes the clearly identified candidate Jack Davis's claims of fiscal responsibility and presents three areas in which he has allegedly demonstrated fiscal irresponsibility. The advertisement includes photographs of Representative Nancy Pelosi and

⁷ The affidavits of John McGrath of Digital X-Press and of Edward Feldstein of Atlas Direct may indicate actual observation of or participation in the mailing program, however this is not entirely clear to us.

President Obama as well as of him, and notes the respective costs of his three campaigns for Congress, his support for Representative Pelosi's efforts to "take control of Congress and pass Obamacare" and of his endorsement of President Obama's candidacy and new debt allegedly resulting from the President's victory. This advertisement does not employ the kinds of words or phrases listed in section 100.22(a) that are considered representative of express advocacy. Further, it contains no clear and unambiguous electoral portion; while it refers to previous campaigns and endorsements, it does not clearly refer to an impending election or to an electoral opponent, and it can reasonably be interpreted as voicing opposition to the "fiscal [ir]responsibility" of governmental policies that Mr. Davis supported. Thus, this advertisement also does not meet all of the criteria of section 100.22(b).

C. Communications Classified as Express Advocacy Under Section 100.22(a) That Should Be Deemed Express Advocacy Under Section 100.22(b).

We agree with the Audit Division that advertisements J.1.2, J.1.25 and J.1.50 are express advocacy communications under section 100.22. However, we believe that these advertisements are such because they satisfy the criteria of section 100.22(b) rather than section 100.22(a), as the Audit Division appears to have concluded.

Advertisements J.1.2 and J.1.25 appear to have similar content in slightly different arrangements, and therefore may be considered together. In both cases, the advertisements criticize Mark Murphy for wishing to raise the reader's taxes while not paying his own. They state that two tax liens were filed against Mr. Murphy. The advertisements further state that Mr. Murphy supports Nancy Pelosi's plan to increase taxes by \$1.5 trillion, and that the "Murphy-Pelosi plan" will have adverse effects on middle class families and small businesses. Advertisement J.1.2 also states, "[y]ou work hard to pay your taxes. With Mark Murphy, you will have to work even harder" and "Hollywood Mark Murphy: Doesn't pay his own taxes. But he wants to raise yours." Advertisement J.1.25 states "Mark Murphy: You'll Pay More. He Won't Pay At All" and "Hollywood Mark Murphy: Just Another Bad Actor." While these advertisements qualify as express advocacy, they do not contain words or phrases exhorting the reader to vote for or against a candidate of the kind listed in section 100.22(a). Rather, the advertisements constitute express advocacy pursuant to section 100.22(b) because the observation in the advertisements that with Mark Murphy the reader's taxes will be raised could only come to be true if Mr. Murphy were elected to Congress. Interpreted in the context of the whole advertisement, the phrases have no reasonable meaning other than that in order to avoid increased taxation, the reader should vote against Mark Murphy.

Advertisement J.1.50 contains a photograph of handcuffs accompanying the statement, "If telling desperate lies about your opponent was a crime . . . Congressman Tim Bishop would already be wearing these." The other side of this mail piece states that Mr. Bishop is one of the most corrupt politicians in Washington and one of the most dishonest. The piece alleges that Mr. Bishop has made false statements about his opponent's positions on the subject of abortion and presents the opponent's actual positions. The advertisement also characterizes a position Mr. Bishop espouses as extreme. It suggests that readers contact Mr. Bishop's opponent directly if they have questions about abortion or about any other issue. Although the Audit Division characterizes this advertisement as express advocacy pursuant to section 100.22(a), we believe

that in light of the applicable authorities,⁸ section 100.22(b) would be the more apposite provision. This is because the advertisement contains an unambiguous and unmistakable electoral portion in the form of references to Mr. Bishop's opponent. Further, in context and when taken as a whole, even though a portion of the advertisement suggests that the reader take action by contacting Mr. Bishop's opponent with any questions about issues, the advertisement's primary focus is upon Mr. Bishop's lack of character and qualification for office as evinced by his alleged mendacity and corruption. As noted above, advertisements discussing a candidate's character, qualifications and accomplishments constitute express advocacy pursuant to section 100.22(b) when in context they can only be reasonably seen as urging a reader to vote for or against the candidate. Here, Mr. Bishop's alleged corruption and lying about his opponent's positions have no reasonable interpretation other than that of encouraging the reader to vote against him.

⁸ This advertisement includes the phrase "Randy2012," a reference to Mr. Bishop's opponent, Randy Altschuler, in the domain name of an email address that readers are encouraged to contact for additional information. "Randy 2012" is similar to words or phrases considered illustrative of express advocacy in 11 C.F.R. § 100.22(a). In previous enforcement matters, this office has advanced the position that words or phrases similar to those that appear in section 100.22(a) render an advertisement express advocacy when those words or phrases appear as part of a website domain name mentioned in the advertisement. See MUR 6697 (League of Conservation Voters), First General Counsel's Report ("FGCR") (Mar. 7, 2014), at 7-8 (arguing that website name "DanCox4Senate" constituted express advocacy under section 100.22(a)); MUR 6704 (John Doe), FGCR ("Feb 34, 2014" [sic.] Mar. 6, 2014), at 7-8 (arguing same with respect to website name "GoodeForPresident2012"). We recognized that applying this standard strictly might lead to formalistic or absurd results, however we argued that the additional content in the advertisements enhanced the exhortative call in the domain names. MUR 6697, FGCR, at 7; MUR 6704, FGCR, at 8. We also argued in one of the MURs that the advertisements were express advocacy pursuant to section 100.22(b), in part because the domain names squarely placed the matters within the context of an election. MUR 6697, FGCR, at 8-9. The Commission did not approve either FGCR by the requisite four votes, however. See Certification in the Matter of League of Conservation Voters [et al.], MUR 6697, July 17, 2015; Certification in the Matter of John Doe, MUR 6704, July 17, 2015. Regardless, for the reasons stated above, we believe that J.1.50 constitutes express advocacy even apart from the use of the domain name.