FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report ("DFAR") on the New York Republican Federal Campaign Committee ("the Committee"). The DFAR 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 principal cause of the misstatements of receipts and disbursements identified in this finding appears to have been unreported receipts and disbursements of non-federal contributions by the Committee's federal account. The Committee stated that it had used its federal account as a general purpose merchant account to process both non-federal and federal credit card contributions for administrative convenience.

We recommend that the Audit Division revise the DFAR to address whether the Committee's use of its federal account in this manner complied with 11 C.F.R. § 102.5. The DFAR recites the prohibition imposed by section 102.5, but the DFAR does not address whether the Committee complied with this provision.

The analysis of whether the Committee complied with section 102.5 should address the Committee's contention that the credit card company it employed allowed only one Committee account to serve as the merchant account and that the Committee promptly transferred any contributions intended for the non-federal accounts to those accounts. The Committee cites Advisory Opinion 2001-17 (DNC Services) in support of its position. In that advisory opinion, the Commission primarily addressed the question of how a national committee should report contributions intended to be split into a federal and a non-federal component, but also endorsed the requestor's stated intention to deposit the total amount of such a contribution in its federal account and to transfer the non-federal component of the contribution to its non-federal account. Advisory Opinion 2001-17 (DNC Services). The Commission also deemed it permissible for the requestor to report a receipt of the federal component of the contribution by the federal account and, through itemization on Schedule A, a receipt of the non-federal component of the overall contribution by the non-federal account. *Id.*

Thus, to the extent that the contributions routed through the federal account were composite contributions, containing both federal and non-federal components, the Committee's treatment of these would appear to be permissible under the reasoning set forth in Advisory Opinion 2001-17 (DNC Services). However, given the Committee's statement that it was required to use its federal account as a global merchant account for the processing of all credit card contributions, it is conceivable that some contributions intended to be wholly non-federal, and having no federal component, were also routed through the federal account. The depositing of these non-federal contributions into the federal account would violate 11 C.F.R. § 102.5(a)(2)(i)-(iii). Accordingly, we recommend that the Audit Division revise the DFAR to include a request that the Committee clarify, with respect to the contributions at issue in the discussion of this aspect of the finding, whether and to what extent the contributions involved were "composite" contributions containing both a federal and a non-federal component.

III. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 4)

The DFAR concludes that disbursements the Committee incurred for communications totaling approximately $1.35 million contain express advocacy as that term is defined in 11 C.F.R. § 100.22, and therefore should have been reported as independent expenditures. The Committee contends, however, 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 under the Commission's volunteer materials exemption ("VME"). *See* 11 C.F.R. § 100.147.

We have two comments on this finding. First, we address the DFAR's conclusions about the application of the VME. Second, we comment on the express advocacy content of a new communication that the Committee submitted in response to the IAR, which was not previously among the communications reviewed by the Audit Division or by this office.

A. Conclusions Regarding Application of the VME

The DFAR divides the disbursements 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:

- $209,615, for which the Committee submitted affidavits, volunteer statements and photographs;
- $906,027, for which the Committee submitted affidavits alone;[1] and
- $236,476, for which the Committee did not submit any information.

The DFAR states that the disbursement for the advertisements in the first category, totaling $209,615, was not determined to be an independent expenditure, and that the Committee did not sufficiently document the involvement of volunteers with respect to the remaining two categories of disbursements. We comment below on these three categories of disbursements.

With respect to the first disbursement category, totaling $209,615, the DFAR notes that the Committee submitted pictures of a single volunteer working on each individual mail piece, as well as signed volunteer forms, and states that this disbursement was not determined to be an independent expenditure. Because the DFAR's statement could be read to suggest that the Audit Division concluded that the documentation the Committee submitted sufficed to warrant the application of the VME, we recommend that the conclusion of the DFAR be modified to indicate that in light of the lack of clarity regarding the degree of volunteer involvement and the quantum and type(s) of evidence needed to qualify a given disbursement for an express advocacy communication as exempt under the VME, the disbursement will not be deemed an independent expenditure. *See, e.g.*, Final Audit Report on Nebraska Democratic Party, at 16-17 (approved Oct. 23, 2014); Final Audit Report on South Dakota Democratic Party, at 15 (approved Apr. 17, 2015); Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Colorado Republican Committee (LRA 961), at 5 (Aug. 15, 2016). The lack of clarity regarding the VME

[1] To be precise, the Committee submitted seven affidavits dated in 2015 that relate to both the $209,615 mail piece group and to the $906,027 mail piece group, for a total amount of approximately $1.128 million. Of this total, the Committee submitted additional documentation with respect to $209,615 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 $906,027 in mail pieces were supported by the seven affidavits alone. The Committee submitted five additional affidavits dated in 2017 as an attachment to its response to the IAR. Thus, the Committee has submitted a total of 12 affidavits.

indicates that definite positive or negative conclusions about the adequacy of submitted evidence to meet the VME would not be appropriate.

The DFAR also states that the second category of disbursements lacked sufficient documentation to qualify for the VME and that the Audit staff considers the question unresolved. In this category, the Committee submitted affidavits from individuals involved in supervising or coordinating aspects of the volunteer mailing process, but no other evidence or documents. These affidavits were executed by individuals claiming to have personal knowledge of, and responsibility for administering, the Committee's volunteer mailing program, including the former counsel to the Committee during the relevant period of time, campaign managers for two campaigns assisted by the Committee's efforts, and the heads of businesses, including campaign consulting firms and print or mail vendors, involved with these efforts. Several affidavits, including that of the former counsel to the Committee, provide fairly detailed descriptions of the types of volunteer mailing activities that they recommended the volunteers perform in order to qualify the mailings for the VME.

We recommend that the DFAR be revised to remove the conclusion that the Committee did not sufficiently document the involvement of volunteers. A definite conclusion on this question would not be consistent with the DFAR's acknowledgement elsewhere of the lack of a clear standard for applying the VME.[2] We recommend that the DFAR state instead that because of the lack of a clear standard for applying the VME, the Audit staff is unable to determine whether sworn affidavits of the nature submitted by the Committee suffice to document the involvement of volunteers and is therefore referring this question to the Commission for decision. We also recommend that the Audit Division raise the issue of the qualification of the second category of disbursements for the VME in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

Finally, the DFAR concludes that the third category of disbursements lacked adequate documentary support to meet the VME. We agree with this conclusion in spite of our general concerns regarding the drawing of definite conclusions on the applicability of the VME, as discussed above. The Commission has not approved application of the VME based solely on a general, conclusory assertion made by the committee's representative. *See* Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Colorado Republican Committee (LRA 961), at 6 (Aug. 15, 2016). Given the uncertainty in this area, however, we recommend that the Audit Division raise this issue in the memorandum accompanying the transmission of the DFAR to the Commission. *Id.*

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[2] In comments on the DFAR on the Illinois Republican Party, we stated that in light of the lack of clarity regarding the application of the VME, we could not draw a conclusion about whether the sworn affidavits in that matter, similar to the sworn affidavits in this matter, sufficed to document the applicability of the VME. *See* Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Illinois Republican Party (LRA 1006), at 4-5 (Jan. 31, 2017).

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

Included in the Committee's response to the IAR were copies of mail pieces that were previously reviewed by the Audit Division and by this office. However, two of the mail pieces appear to be new in the sense that they were not previously submitted by the Committee. The Committee associates the two new mail pieces with two invoices in its response. However, the Committee had previously associated these same invoices with two different mail pieces. The Audit Division had determined that the two mail pieces previously associated with the invoices contained express advocacy according to the standard set forth in 11 C.F.R. § 100.22(a), and has not changed this classification in light of the submission of the new mail pieces partly because it considers the new mail pieces to contain express advocacy according to the standard set forth in 11 C.F.R. § 100.22(a). We believe it is appropriate to substitute the two new mail pieces for the prior mail pieces associated with the invoices, because the most reasonable interpretation of the Committee's action is consistent with that intent.

Regarding the content of the new mail pieces, we agree that both of them contain express advocacy. However, we comment on the classification of one of the communications because we believe that its characteristics qualify it as containing express advocacy according to the standard set forth in 11 C.F.R. § 100.22(b), rather than subsection (a).[3]

The communication in question criticizes candidate Dan Maffei for using tax dollars to award $200,000 in bonuses to his staff following his defeat in a 2010 election for his Congressional seat. It also contains images of Mr. Maffei and states, "Don't let Dan Maffei get his hands on your tax dollars again!" The communication observes that "[i]n 2010, we fired Dan Maffei for bankrupting our economy and voting for one of the largest tax increases in American history." It further states, "We fired Maffei from Congress for wasting our money once before. Let's not let him do it again." While this communication qualifies as express advocacy, it does 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 advertisement contains express advocacy as that term is defined in section 100.22(b) because the exhortation in the advertisement, "[l]et's not let him do it again" immediately following a statement that Mr. Maffei had been fired from Congress before for wasting money constitute a clear and unmistakable reference to an impending election. 11 C.F.R. § 100.22(b)(1). Further, the same phrases constitute a criticism of Mr. Maffei's character, qualifications and accomplishments, and this criticism has no reasonable meaning other than that the reader should vote against Maffei, because it is by preventing him from regaining his Congressional position that the reader would ensure that he will not be in a position to waste taxpayer funds again. 11 C.F.R. § 100.22(b)(2); Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35295 (July 6, 1995) ("Communications 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*

[3] We believe that substituting this mail piece for the previous mail piece is particularly appropriate for the additional reason that the description of the mail piece on the invoice, "Hands on Money," appears to reflect more closely the content of the new mail piece than it does the content of the older one.

have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.").