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: Neven F. Stipanovic NFS
Acting Associate General Counsel
Policy Division

Lorenzo Holloway
Assistant General Counsel
Compliance Advice

Margaret J. Forman MJF
Attorney

SUBJECT: Proposed Interim Audit Report on Ambulatory Surgery Center Association PAC (LRA 1072)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report ("proposed IAR") on Ambulatory Surgery Center Association PAC ("ASCAPAC" or "Committee"). The proposed IAR contains five findings: (1) Misstatement of Financial Activity, (2) Receipt of Prohibited Contributions, (3) Recordkeeping for Receipts, (4) Disclosure of Receipts, and (5) Untimely Deposit of Receipts.[1] We generally concur with the findings and

[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).

comment on findings 2, 3, and 5. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

II. FINDING 2 – CONTRIBUTIONS FROM PROFESSIONAL LIMITED LIABILITY COMPANIES ARE SUBJECT TO 11 C.F.R. § 110.1(g); CONTRIBTUIONS FROM LIMITED PARTNERSHIPS ARE SUBJECT TO 11 C.F.R. § 110.1(e)

The proposed IAR states that the Committee received $2,014 in contributions from "limited partnerships" and "professional limited liability companies" and the proposed IAR then categorizes them as prohibited contributions under the Federal Election Campaign Act of 1971, as amended (the "Act"). The Audit Division asks whether these contributions are properly treated as prohibited contributions. The Audit Division notes that the 2016 Unauthorized Committee Error Definitions refer to contributions from limited liability companies ("LLCs") and limited liability partnerships ("LLPs,") but mention no other business organizations (such as limited partnerships or professional limited liability companies). The Committee argues that it was not responsible for determining the legality of the LLC contributions. We address the Audit Division's question and the Committee's argument below.

With respect to the Committee's contributions received from limited partnerships ("LP's"), we conclude that the Audit Division should analyze these contributions in the same manner as contributions from any other partnership. *See* 11 C.F.R. § 110.1(e); *see also Treatment of Limited Liability Companies Under the Federal Election Campaign Act*, 64 Fed. Reg. 37,397-37,398 (July 12, 1999). Neither the Act nor Commission regulations draw a distinction between general partnerships and limited partnerships. Thus, we look to the law in each respective LP's State of organization to determine whether the LP should be treated as a corporation. Advisory Opinion 2008-05 (Holland & Knight).

The LPs in this case are organized in the states of California, Delaware, and Wisconsin. In each of these states, a limited partnership, similar to a limited liability partnership, is a type of partnership under state law. *See California Uniform Limited Partnership Act of 2008,* Cal. Corp. Code 4.5 [15,900-15,912.07]; *Delaware Limited Partnerships,* Del. Code Title 6, § 17-101(9); *Wisconsin Uniform Limited Partnership Act,* Wis. Stat. § 179.01(7). Because each of these LPs was organized and operates as an LP — and not as a corporation — under the respective state laws, each LP is treated as a partnership under the Act and Commission regulations. *See* Advisory Opinion 2008-05 (Holland & Knight). We, therefore, conclude that a contribution from one of these limited partnerships is governed by the attribution requirements for a partnership, 11 C.F.R. § 110.1(e), and should not be treated as a prohibited corporate contribution.

With respect to the Committee's contributions received from professional limited liability companies ("professional LLCs"), we conclude that the Audit Division should analyze these contributions in the same manner as contributions from any other LLC. Nothing in the

Commission's regulations distinguishes professional LLCs from any other type of LLC.[2] An LLC "is a business entity that is recognized as a limited liability company under the laws of the State in which it is established." 11 C.F.R. § 110.1(g)(1). We conclude, therefore, that the Audit Division should examine the legality of the contribution based on how the professional LLC elected to be treated by the Internal Revenue Service. *Id*.

Finally, the Committee maintains that it was not responsible for determining the status of the LLCs, and it asserts that it sought full compliance with the 'best efforts' obligations in the Commission's regulations. Committee Response to Exit Conference. According to the Audit Division, the Committee made at least one attempt to ascertain the status of the LLCs.

We disagree with the Committee. Commission regulations require a committee treasurer to exercise best efforts to determine the legality of the contribution received, and if the legality cannot be determined, the treasurer must refund the contribution to the contributor within 30 days of receipt. 11 C.F.R. § 103.3(b)(1). Under 11 C.F.R. § 110.1(g)(5), the LLC "shall, at the time it makes the contribution, provide information to the recipient committee as to how the contribution is to be attributed and affirm to the recipient committee that it is eligible to make the contribution." This provision was intended to assist the Committee in determining the legality of the contribution. *See Treatment of Limited Liability Companies Under the Federal Election Campaign Act*, 64 Fed. Reg. 37,397, 37,399 (July 12, 1999) (purpose or requirement that LLC provide information on corporate status to help committee avoid inadvertently accepting an illegal contribution — noting that committee has no other way of determining legality other than by obtaining this information); Advisory Opinion 1995-19 (Indian-American Leadership Investment Fund) ("Commission regulations prescribe the obligations of a committee treasurer upon receipt of a contribution that appears unlawful or presents genuine questions of illegality when received, or upon discovery of the contribution's unlawful nature at a later date"). Here, while the Committee made an attempt to ascertain the status of the LLCs, the Committee ultimately was unable to determine the legality of these contributions, and therefore was required to refund them within 30 days of receipt. 11 C.F.R. § 103.3(b)(1).

[2] Furthermore, when the Commission first promulgated its regulations regarding the treatment of LLCs under the Act, it considered the potential distinction of professional corporations due to a reference in the legislative history to professional corporations. The Commission noted that Congress directed "the Commission to look to State law to determine the status of professional corporations, but is silent as to all other types of corporations." 64 Fed. Reg. at 37,399; *citing* H.R. Rept. 1438 (Conf.). 93d Cong., 2d Sess. 68-69 (1974).

Ultimately, the Commission reasoned that, because the legislative history only references professional corporations, but was silent as to all other types of corporations, as well as LLCs, "Congress did not 'directly address the precise question at issue' – whether the definition of *corporation* includes LLCs." *Id*. 64 Fed. Reg. at 37,399 (emphasis included in original); *citing* H.R. Rept. 1438 (Conf.). 93d Cong., 2d Sess. 68-69 (1974). Therefore, "the Commission is free to refer to the IRS rules, as long as its interpretation is not 'manifestly contrary to the statute.'" *Id.; citing Chevron U.S.A., Inc. v. National Resources Defense Council, Inc.*, 837 U.S. 837, 842-44 (1984)). Under the same reasoning, we see nothing manifestly contrary to the Act in applying the provisions of 11 C.F.R. § 110.1(g) to professional LLCs.

III. FINDING 3 – BECAUSE OF THE DUAL ATTRIBUTION RULE, THE COMMITTEE IS REQUIRED TO KEEP RECORDS OF THE AMOUNT OF CONTRIBUTIONS FROM THE INDIVIDUAL PARTNERS, IN ADDITION TO THE PARTNERSHIP CONTRIBUTION

The proposed IAR states that the Committee failed to maintain information about the attribution of $60,730 in contributions received from partnerships. The Audit Division asks how the proposed IAR should address the Committee's failure to maintain these partnership contribution attribution records.

There are two regulatory provisions at issue here: 11 C.F.R. §§ 102.9 and 104.14(b)(1). Section 102.9 requires the Committee to maintain an account of contributions received, which includes the names and addresses of contributors, the date of receipt and the amount of such contribution, for contributions greater than $50. 11 C.F.R. § 102.9(a)(1). Under the dual attribution rule for partnerships, the contribution is attributable to the partnership, and to each individual partner as specified. 11 C.F.R. § 110.1(e); *see also Contribution and Expenditure Limitations and Prohibitions, Contributions by Partnerships*, 52 Fed. Reg. 760, 764-765 (Jan. 9, 1987) (Commission clarifying that the contributions are attributable to both the partnership and the individual partners, noting that the rule "ensures that members of a partnership do not receive the benefit of an additional contribution ceiling that is not available to others who do not belong to a partnership," and retaining the partnership contribution limitation as required under the Act). Because the contribution is attributable *both* to the partnership as a contributor, and to the individual partners as individual contributors, the Committee must keep an account of the contributor information of the partnership as well as the individual partners who are contributors.[3] 11 C.F.R. § 102.9(a)(1); *see* 11 C.F.R. § 110.1(e); 52 Fed. Reg. at 764-765. Specifically, the Committee must keep an account of the name and address of each contributor, the date of receipt, and the amount of the contribution from each contributor. 11 C.F.R. § 102.9(a)(1); *see* 11 C.F.R. § 110.1(e). Although the Committee has kept an account of some of the required contributor information, the Committee does not have a record of the amount of the contribution from each individual partner. Because of the attribution rule, the Committee is required to keep records of the amount of contributions from the individual partners, in addition to the partnership contribution. 11 C.F.R. § 102.9(a)(1); *see* 11 C.F.R. § 110.1(e). Thus, we conclude that the Committee failed to comply with 11 C.F.R. § 102.9, because it did not maintain the required information about the attribution of $60,730 in contributions received from partners within the partnerships.

Additionally, the Audit Division asked whether the recordkeeping requirements of 11 C.F.R. § 104.14(b)(1) apply to the partnership contributions. We conclude that it does. The proposed IAR notes that the Audit Division lacks partner attribution information. *See* proposed

[3] The Committee must also maintain a full-size photocopy of each check or written instrument, or a digital image of each check or written instrument, which digital image must be accessible at no cost to the Commission. 11 C.F.R. § 102.9(a)(4). This requirement is in addition to the accounting of contributor information required in section 102.9(a)(1). From the information provided by the Audit Division, the Committee has maintained the information required under section 102.9(a)(4).

IAR at 10. Without this attribution information, the Audit Division cannot verify whether the Committee attributed the contributions appropriately in the proposed IAR. *Id.*

Section 104.14(b)(1) requires a political committee to keep records of necessary information and data in sufficient detail so that the filed reports and statements may be verified, explained, clarified, and checked for accuracy and completeness. Because the Committee reported partnership contributions, it must maintain detailed records regarding those contributions, including, but not limited to, vouchers, worksheets, receipts, bills and accounts. 11 C.F.R. § 104.14(b)(1). The attribution information is necessary to ensure that the Committee reported the correct amount of contributions from each individual partner.

IV. FINDING 5 – CREDIT CARD CONTRIBUTIONS TRANSFERRED TO COMMITTEE ACCOUNT AFTER TEN DAYS ARE UNTIMELY DEPOSITED

The proposed IAR states that the Committee failed to deposit 104 contributions totaling $81,480 within 10 days of receipt, as required by 11 C.F.R. § 103.3(a). The Committee maintains that two of these contributions — totaling $2,852.12 — were deposited in error and therefore the 10 day rule should not apply to them. Committee Response to Exit Conference. The Committee also maintains that ten of these contributions — aggregating $7,732.12 — were received and processed through a credit card holding account by the Committee's FEC compliance consultant. *Id.* The Committee listed this credit card holding account as a cash account on its ledger. *Id.* These funds subsequently were transferred to the Committee's bank account. *Id.* The Committee maintains that these items should not be included on the list of late deposits. *Id.*

We disagree with the Committee on both counts. First, we note that depositing the funds in error does not excuse the Committee's failure to comply with the ten day rule. Section 103.3(a) is clear: *all* deposits must be made within ten days of the Committee's receipt. 11 C.F.R. § 103.3. Second, a credit card contribution is considered received on the date that the credit card holder authorizes his or her card to be charged with the contribution. *See* Advisory Opinions 2012-35 (Global Transaction Services Group), 2012-17 (Red Blue T *et al.*), 1995-34 (Politechs) and 1990-04 (American Veterinary Medical Association). According to the Audit Division, all of the funds in the credit card holding account were from credit card contributions, with no cash contributions included, and were not accessible to the Committee's staff until the funds were deposited into the Committee's bank account, which we understand was more than ten days after the date in which these funds were required to be deposited. Proposed IAR; *see* 11 C.F.R. § 103.3(a); *Final Audit Report on the Democratic Party of Orange County FED PAC,* at 7-9 (Sept. 29, 2011). Therefore, any credit card contribution deposited into the Committee's bank account more than ten days from the date the credit card holder authorized the credit card to be charged is untimely deposited for the purpose of 11 C.F.R. § 103.3(a). *See* Advisory Opinions 2012-35 (Global Transaction Services Group), 2012-17 (Red Blue T *et al.*), 1995-34 (Politechs) and 1990-04 (American Veterinary Medical Association); *Final Audit Report on the Democratic Party of Orange County FED PAC,* at 7-9 (Sept. 29, 2011).

Although we concur with the proposed IAR, we believe that the Committee should have an opportunity to provide information that could have an impact on the finding. We recommend that the Audit Division seek additional information from the Committee about whether the credit card holding account was a depository of the Committee. This credit card holding account was maintained by Aristotle, the Committee's compliance consultant. Advisory Opinion 1999-22 (Aristotle) references a statement that participating committees will designate the vendor's joint merchant account as a depository in its Statement of Organization. *See* Advisory Opinion 1999-22 (Aristotle), at 3, 7. The Commission, however, has recognized the concept of holding a vendor's merchant account as a committee depository in Advisory Opinion 1995-34 (Politechs), and relied upon provisions of the Act and Commission regulations mandating that all receipts of a political committee be deposited in a qualified bank or credit union depository. *See* Advisory Opinion 1999-22 (Aristotle), at 3. It is our understanding that the Committee did not designate the vendor's merchant account as a depository in this matter. *But see* NPRM on Technological Modernization, 81 Fed. Reg. 76,416, 76,427-28 (Nov. 2, 2016) (Commission considers whether to abolish the Aristotle Advisory Opinion disclosure requirement).