



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

August 5, 2010

MEMORANDUM

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SUBJECT: Proposed Final Audit Report on the Kansas Republican Party (LRA 801)

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Final Audit Report ("proposed report" or "FAR") on the Kansas Republican Party ("the Committee"). We specifically address two issues in our legal analysis. First, the Audit Division has identified four corporate contributions used to defray national convention costs. Second, the Audit Division has identified two non-federal accounts that the Committee used for what appears to be federal or allocable activity. Because these issues affect all three findings, we have organized our analysis by issue rather than finding. We concur with any findings not specifically discussed in this memorandum. If you have any questions, please contact Allison T. Steinle, the attorney assigned to this audit.

II. FUNDS USED TO DEFRAY NATIONAL CONVENTION COSTS

Both Findings 1 and 2 involve four contributions totaling \$52,498 from three corporations and one LLC that filed its taxes as a corporation. These four contributions were deposited into a non-federal account that the Committee used for expenses associated with the Republican National Convention. Finding 1 concludes that the activity in the Republican National Convention account, as well as the activity in other non-federal accounts, should have been reported to the Commission as federal activity. Finding 2 concludes that the four contributions, which specifically were used to defray the cost of hotel rooms, breakfasts, and entertainment for the delegates at the Republican National Convention, were prohibited corporate contributions. In response to the Interim Audit Report ("IAR"), the Committee states it agrees with the findings and acknowledged that the four contributions should have been deposited in the Committee's non-federal account.

We concur with the Audit Division that the Republican National Convention costs should have been reported as federal activity, and that the four contributions were prohibited corporate contributions. The Commission's regulations explicitly state that disbursements by national convention delegates or by "delegate committees" for the purpose of delegate travel and subsistence costs associated with attending a national nominating convention are expenditures. 11 C.F.R. § 110.14(e)(1) and (h)(1). In a series of advisory opinions ("AOs"), the Commission has expanded the principle that national convention delegates' travel and subsistence costs are expenditures to disbursements by entities other than national convention delegates or delegate committees. First, in AO 1980-64 (National Education Association), the Commission held that direct donations by a labor organization for travel and subsistence expenses of delegates were expenditures and therefore prohibited by 2 U.S.C. § 441b.¹ Next, in three subsequent advisory opinions from the mid-1990s, it held that the authorized campaign committees of Members of Congress could permissibly pay for travel and subsistence costs incurred by the Members in their capacities as national convention delegates, because the payments would be "in connection with a Federal election." AO 1996-20 (Lucas for Congress); AO 1996-19 (Walsh for Congress); AO 1995-47 (Robert Underwood). Finally, and most relevant to this situation, it concluded that disbursements made by a party committee for the travel and subsistence expenses of national convention delegates were expenditures and, as a result, the previously unregistered party committee was required to register with the Commission as a political committee. AO 2000-38 (Democratic Party of Puerto Rico). Accordingly, this Committee's disbursements for delegate travel and subsistence costs at the Republican National Convention also were expenditures, and were required to be made from funds permissible under 2 U.S.C. § 441b.

¹ On January 21, 2010, *Citizens United v. FEC*, 130 S. Ct. 876 (2010), struck down section 441b's restrictions on corporate independent expenditures as unconstitutional. However, the *Citizens United* decision does not affect the restrictions of section 441b on direct corporate or union contributions to state party committees. *Republican National Committee v. FEC*, No. 08-1953 (D.D.C. Mar. 26, 2010), slip op. at 2. Nor does it affect the requirement that state party committees with federal and non-federal accounts pay for entirely federal expenditures using federally permissible funds.

III. OTHER PAYMENTS FOR FEDERAL ACTIVITY WITH NON-FEDERAL FUNDS

Finding 3 involves two other non-federal accounts, from which the Committee made \$104,859 in payments that the proposed report concludes should have been paid from a federal account. The breakdown of these payments is as follows: (1) \$6,000 for a mailer that mentioned a federal candidate; (2) \$1,639 for pins that the Audit Division believes may have been associated with the Republican National Convention; (3) \$5,000 for Republican National Convention lodging; (4) \$83,861 for postage, rent, travel, printing, and office services, for which the Committee has failed to provide any documentation showing that the payments were solely non-federal; and (5) \$8,359 for mailers, for which the Committee has not produced printed copies. In response to the IAR, the Committee has stated that, due to "scant records," it is unable to demonstrate that these payments were for non-federal purposes.

We generally agree with the Audit Division's application of the law in the proposed report. We briefly address each type of expense below.

Mailer Mentioning a Federal Candidate

The expenditures for a mailer that mentioned a federal candidate should have been paid with 100 percent federal funds because they were made for Federal Election Activity ("FEA"). The definition of FEA includes any public communications that refer to a clearly identified candidate for federal office, and that promote or support a candidate for that office, or attack or oppose a candidate for that office ("PASO"). See 2 U.S.C. § 431(20); 11 C.F.R. § 100.24. The mailer at issue here was for a public communication that PASO-ed a federal candidate. Accordingly, these expenditures were required to be paid from 100 percent federal funds. 11 C.F.R. §§ 106.7(c), 300.30(b)(1).

National Convention Lodging

The analysis regarding the expenditures for national convention lodging is identical to that in Part II of our comments, and these disbursements also should have been paid from 100 percent federal funds for the reasons stated above.

National Convention Pins

With respect to the expenditures for pins, the Committee has been unable to produce copies of the pins or other evidence of the content of the pins, such as order forms or prototypes. The proposed report notes that the pins may have had some relation to the Republican National Convention because the disbursement was made in close temporal proximity to the convention and the Committee made other payments to the same vendor for convention gifts. In our view, these facts alone are not sufficient to support the conclusion that disbursements for the pins should have been paid with 100 percent federal funds. Depending on their content, the pins may have been payable with 100 percent federal funds, but they also may have been allocable, or payable with 100 percent non-federal funds. See 11 C.F.R. §§ 106.7, 300.30(b), 300.33. The auditors, however, have been unable to verify that this disbursement was properly made from a non-federal account

because the Committee has been unable to provide copies of the pins or otherwise demonstrate the non-federal nature of the pins in response to the IAR. As noted above, the Committee has acknowledged that it cannot demonstrate that the disbursement was properly made from a non-federal account, and has amended its reports to reflect that the activity was federal.

Postage, Rent, Travel, Printing, and Office Services

The expenditures for postage, rent, travel, printing, and office services should have been treated as 36/64 percent allocable administrative and non-get-out-the-vote ("non-GOTV") expenses. Commission regulations define ordinary non-GOTV expenses such as rent, utilities, and office equipment and supplies as administrative costs, and as such, they are subject to the administrative cost allocation rules. 11 C.F.R. § 106.7(c)(2). Specifically, in both a Presidential and Senatorial election year, state and local party committees must allocate at least 36 percent of non-GOTV administrative expenses to their federal accounts. 11 C.F.R. § 106.7(d)(2)(ii) and (3)(ii).

Undocumented Mailers

The treatment of the expenditures for the mailers that the Committee was unable to produce would depend on their content. For example, if the mailers were public communications that referred to a clearly identified candidate for federal office, and promoted, supported, attacked, or opposed a candidate for that office, they would be federal election activity that would be required to be paid with 100 percent federal funds. See 2 U.S.C. § 431(20); 11 C.F.R. § 100.24. If the mailers fell into one of several enumerated exemptions, such as generic campaign or GOTV activity, they could be paid with a combination of federal and non-federal Levin funds. 11 C.F.R. § 106.7(c). Only if the mailers were 100 percent non-federal could they be paid with 100 percent non-federal funds. 11 C.F.R. §§ 300.30(b), 300.33. As with the pins discussed above, however, the auditors have been unable to verify that these disbursements were properly made from a non-federal account because the Committee has been unable to provide copies of the mailers or otherwise demonstrate the non-federal nature of the mailers in response to the IAR. The Committee has acknowledged that it cannot demonstrate that these disbursements were properly made from a non-federal account, and has amended its reports to reflect that the activity was federal.