FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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

I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Interim Audit Report ("proposed report" or "IAR") on the Kansas Republican Party ("the Committee"). The Audit Division has requested that 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 a non-federal account that the Committee used for state level caucus activity, as well as several other 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.[1]

[redacted]

II. CORPORATE 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 failed to affirm its tax filing status with the Committee. 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 elaborates on these contributions, and notes that they specifically were used to defray the cost of hotel rooms, breakfasts for the delegates, and entertainment at the Republican National Convention. Finding 2 concludes that the four contributions were prohibited corporate contributions.

We first recommend that Finding 1 elaborate on the receipts and disbursements from the Republican National Convention account —namely, it should explain that they were used to defray the cost of hotel rooms, breakfasts for the delegates, and entertainment. While Finding 2 does this, Finding 1 does not. Finding 1 also should include this information given that it is relevant to its legal conclusion and Finding 1 precedes Finding 2.

Substantively, however, we agree 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. Commission 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 applied to disbursements by entities other than national convention delegates or delegate committees the principle that national convention delegates' travel and subsistence costs are expenditures. 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.[2] 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

[2] On January 21, 2010, *Citizens United v. FEC*, 558 U.S. ___ (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.

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.

III. PAYMENT OF 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. $12,639 of this was for a mailer that mentioned a federal candidate, and national party convention pins and lodging. $92,220 was identified as being for postage, rent, travel, printing, and office services, but the Committee failed to provide any documentation showing these payments were solely non-federal. $10,925 was identified as being for mailers, for which the Committee was not able to produce printed copies. Finally, in its cover memorandum, the Audit Division notes that it did not consider disbursements the Committee made from a non-federal account it used for expenses associated with a state level caucus to be FEA that was required to be reported as such and paid with federal funds. We generally agree with the Audit Division's application of the law in the proposed report, but we have comments and recommendations about how the Audit Division should frame each type of expense in the IAR. We also recommend that the Audit Division revise the proposed report to remove language that suggests that the Committee did not use non-federal funds to finance federal activity.

We suggest that if possible, the $12,639 be further broken down by type of expense, because the analysis is different with respect to each of the expenses identified for this amount.

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. *See* 2 U.S.C. § 431(20); 11 C.F.R. § 100.24. Accordingly, these expenditures were required to be paid from 100 percent federal funds. 11 C.F.R. §§ 106.7(c), 300.30(b)(1).

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.

With respect to the expenditures for national convention pins, we understand that 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, and that the Audit Division has assumed that the pins had some relation to the national convention because the disbursement was made in close temporal proximity to the convention. In our view, however, this fact is 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. We suggest that the IAR describe the facts and state that the auditors are unable to verify that this disbursement was properly made from a non-federal account. The

Committee should be given the opportunity to submit copies of the pins or otherwise demonstrate the non-federal nature of the pins in response to the IAR.

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).

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. Because the Committee has been unable to produce the content of the mailers, we again suggest that the IAR state that the auditors are unable to verify that the expenditures were properly from a non-federal account and were not required to be reported to the Commission. As the proposed report states, the Committee will have the opportunity to submit samples of the mailers or otherwise demonstrate the non-federal nature of the expenditures in response to the IAR.

We also agree with the Audit Division that expenses associated with a state level caucus are not FEA that must be paid from federal funds. BCRA and Commission regulations specifically exclude the costs of state, district, or local political conventions, meetings, or conferences from the definition of FEA. The Commission has stated that they may be paid with entirely non-federal funds. *See* 2 U.S.C. § 431(20)(B); 11 C.F.R. § 100.24(c)(3); *Explanation and Justification for 11 C.F.R § 100.24*, 67 Fed. Reg. 49,070 (July 29, 2002).

Moreover, while this Office agrees that some portion of the $104,859 in payments should have been paid from a federal account, the proposed report states that "there was no funding of federal activity by the non-federal accounts" because "the non-federal account could have reimbursed [the federal account] an additional amount that is in excess of the amounts at issue." *See* Proposed Report at 10. It is our understanding that this statement means that while in the Audit Division's view the payments should have been made from a federal or allocation account, the Committee also used an equal or greater amount of 100 percent federal funds to pay for other expenses that it could have allocated or paid with 100 percent non-federal funds. The Audit Division has concluded that under these circumstances, the Committee did not need to make a reimbursement transfer from the federal to the non-federal accounts, which in turn brought the payment issue under the threshold for inclusion in the IAR as a finding that the Committee may not

have complied with 11 C.F.R § 102.5. However, the statement that "there was no funding of federal activity by the non-federal accounts" is not legally or factually accurate. As discussed above, the Committee did fund federal activity using non-federal accounts on several occasions. Accordingly, we recommend the Audit Division revise the finding to remove this language, and more clearly explain, to the extent possible while retaining the confidentiality of the audit thresholds, why the finding is purely a disclosure finding and the proposed report does not require the Committee to take any remedial action aside from amending its disclosure reports.