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AGENDA ITEM
For Meeting of 07-01-10
SUBMITTED LATE

FEC Directive on Processing Audit Reports

The Federal Election Campaign Act of 1971, as amended, 2 U.S.C. § 431 *et seq.*, (“the Act”) provides that the Commission “may conduct audits and field investigations of any political committee required to file a report under section 434” of the Act (“Title 2 matters”).¹ Prior to conducting such audit the Commission is required to “perform an internal review of reports filed by the committee that may be audited, to determine if the committee’s reports meet the threshold requirements for substantial compliance” with the Act.² The review is conducted by the Commission’s Reports Analysis Division, and compliance thresholds are established by the Commission for each election cycle. Under the Presidential Election Campaign Fund Act, 26 U.S.C. § 9001 *et seq.*, the Commission is also required to conduct an audit of the qualified campaign expenses of the candidates of each political party for President and Vice President who receive public funds, as well as an audit of receipts and disbursements by presidential nominating conventions and host committees (“Title 26 matters”).³

A. Interim Audit Reports

Once the Audit Division completes its fieldwork on an audit, it conducts an exit conference with representatives of the audited committee. During the exit conference, preliminary findings and recommendations are presented to the committee being audited. Based on the fieldwork and the committee’s response to discussions with the Audit Division at, or following, the exit conference, the Audit Division prepares an Interim Audit Report (“IAR”) in Title 2 matters, or a Preliminary Audit Report (“PAR”) in Title 26 matters.⁴

All Title 26 PARs are circulated to the Commission for a vote.⁵ In general, for Title 2 IARs, only IARs that present complex, novel, or unsettled questions of law, as

¹ 2 U.S.C. § 438(b). The Commission also has the statutory authority to conduct an audit in instances which, based on a complaint, “the Commission determines by an affirmative vote of 4 of its members, that it has reason to believe that a person has committed, or is about to commit, a violation” of the Act (including chapter 95 or 96 of Title 26 of the United States Code). 2 U.S.C. § 437g.

² 2 U.S.C. § 438(b).

³ 26 U.S.C. §§ 9007, 9008; 11 C.F.R. Parts 9007 and 9008.

⁴ However, in the case of a Title 2 audit in which the Audit Division concludes that there are no material findings, no IAR is prepared and the Audit Division proceeds directly to the final stage of the audit process.

⁵ 11 C.F.R. § 9007.1(c)(1).

well as all audits of state party committees, are circulated to the Commission for vote on a 72-hour no-objection ballot.⁶ The committee being audited does not receive a copy of the IAR or PAR prior to Commission consideration. Approval of an audit report at the interim or preliminary stage does not commit the Commission or individual Commissioners to that or any other position at a later stage of the audit process.⁷

To facilitate more thorough Commission consideration of IARs and PARs, the Audit Division will include in the IAR or PAR a list of any prior audits of the same entity. The notice of prior audits shall provide the date of the prior audit and a brief summary of the Commission's findings and conclusions.

Once an IAR or PAR has completed the process described above, a copy of the report is provided to the committee being audited and the committee is provided with an opportunity to respond in writing to the report. For Title 2 IARs, committees are provided with 30 days to respond; for Title 26 PARs, committees are provided with 60 days to respond.

B. Draft Final Audit Report & Commission Consideration of Recommendations of the Audit Division As Set Forth in the Draft Final Audit Report

Once a committee being audited has been given an opportunity to respond in writing to the IAR or PAR, the Audit Division prepares a Draft Final Audit Report ("DFAR") setting forth the Audit Division's proposed findings after the Division's evaluation of the committee's response to the recommendations in the IAR or PAR and any new information presented by the committee. The DFAR (and any analysis of it provided by the Office of General Counsel) is then sent to the committee being audited. Within 15 days of receiving the DFAR, the committee may respond directly to the Commission with respect to any legal or factual issues raised by the Audit Division in the DFAR, by written response, may request participation in an audit hearing,⁸ or both.⁹

1. Content and Format of the Draft Final Audit Report

To facilitate efficient Commission consideration of the proposed findings set forth by the Audit Division in the DFAR, each proposed finding to the extent possible shall be broken down into separate and severable sub-findings that each address one provision of

⁶ IARs with proposed findings that do *not* present complex, novel, or unsettled questions of law are provided to the Commission on an informational basis at the time that they are sent to the committee being audited. *Id.*

⁷ *Id.*

⁸ For Title 26 repayment issues, the Commission's regulations provide for a separate hearing process. See 11 C.F.R. §§ 9007.2(c)(2)(i), 3038.(c)(2)(i).

⁹ See Procedural Rules for Audit Hearings, 74 Fed. Reg. 33140 (Jul. 10, 2009). Although this procedure provides an opportunity for the audited committee to address the Commission directly, the Office of General Counsel and the Audit Division are provided copies of any written response to the DFAR, and are represented at any audit hearing conducted by the Commission.

the Act or implementing regulation and can be considered by the Commission individually.¹⁰

2. Report Processing

The Commission is establishing a new report processing procedure for Commission consideration of audit reports at the post-DFAR stage of the process. The Audit Division shall make its recommendations to the Commission within 30 days of any of the following events (whichever occurs later):

- (a) the Commission's receipt of an audited committee's response to a DFAR;
- (b) an audit hearing;
- (c) the end of any period the Commission provides for the submission of materials after an audit hearing; or
- (d) the audited committee's written confirmation that it declines to respond to the DFAR and does not seek a hearing.

The Audit Division shall, in consultation with the Office of General Counsel, prepare a brief cover memorandum ("Audit Division Recommendation Memorandum") presenting the Audit Division's recommendations to the Commission regarding any new legal issues or significant factual issues that were raised after the DFAR was prepared and served on the audited committee, or advising that there are none. In the event that the Audit Division identifies any new legal issues or significant factual issues that were not addressed in the DFAR, the Audit Division Recommendation Memorandum shall identify such factual or legal issues, and make recommendations regarding the impact of such on the proposed findings in the DFAR. The Audit Division Recommendation Memorandum will be circulated to the Commission as a cover memorandum to the DFAR.

The DFAR and Audit Division Recommendation Memorandum will be circulated to the Commission for a tally vote. If the recommendations of the Audit Division are approved by the Commission on a tally vote, the Audit Division shall proceed to the Final Audit Report stage. If the recommendations of the Audit Division are not approved in their entirety, the matter shall be automatically placed on the next open meeting agenda, and the Audit Division Recommendation Memorandum and DFAR shall then be made public as agenda documents. The committee will be provided a copy of the Audit Division Recommendation Memorandum at least 72 hours prior to it becoming a public document. At the open meeting, the Commission will consider the issues and take appropriate action on the findings.

¹⁰ For example, a proposed finding may raise the issue of whether a state party committee properly treated three payments (for polls, phone banks, and advertising) as allocable, or whether those disbursements were for non-allocable federal election activity: in that case, each type of payment (for polls, phone banks, and advertising) would be a separate sub-finding under the proposed finding addressing allocable versus non-allocable federal election activity. The finding would set forth the applicable legal standard, which would be applied to the facts in each sub-finding.

C. Final Audit Report

All final audit reports issued by the Commission will reflect both (1) the conclusions of the Commission, and (2) the legal standards enunciated by the Commission and applied to the particular circumstances presented by the audit.

Within 30 days of the Commission's vote on the DFAR, the Audit Division will revise the DFAR consistent with the vote of the Commission, and circulate the report ("the Proposed Final Audit Report") to the Commission for its approval on a 72-Hour no objection basis.

1. Format and Content of the Proposed Final Audit Report

- A. For any recommended finding that receives the affirmative vote of four or more Commissioners, the Audit Division will revise the text of the finding to reflect that it is a finding made by the Commission.
- B. For any recommended finding for which there are four or more affirmative votes to make a different finding from that which was recommended by the Audit Division, the Audit Division will replace its recommended finding with a discussion of the finding made by the Commission. The finding discussion will indicate that the Commission's finding differs from that recommended by the Division.
- C. For any recommended finding that does not receive four or more votes either approving or rejecting the recommendation, the Audit Division will move the discussion to an "Additional Issues" section. Each "Additional Issue" will contain a brief summary of the facts, any applicable legal standards, a brief recitation of the Audit Division's recommendation, and a statement describing the Commission's discussion of the issue and a recitation of the vote on the recommended finding.¹¹
- D. For any finding that relates to an issue that was not raised by a recommendation by the Audit Division but for which there are four or more affirmative votes, the Audit Division will include the finding made by the Commission and will also include a footnote indicating that the Commission's finding was made independent of any recommendations made by the Division.

2. Approval of the Final Audit Report of the Commission

If the Proposed Final Audit Report is approved by tally vote, the title shall be changed to the "Final Audit Report of the Commission,"¹² and no further Commission action is required.

¹¹ "Applicable legal standards" will generally consist of a restatement of the relevant statutory or regulatory provisions. If the Commission is unable to agree on the applicable legal standard, the report will so state.

¹² The Audit Report of the Commission is the Commission's document and shall reflect the views of the Commission on the recommendations of the Audit Division. See 2 U.S.C. § 438(b) ("The Commission may conduct audits and field investigations of any political committee required to file a report under

If the Proposed Final Audit Report is not approved by tally vote, the matter will be automatically placed on the agenda of the next open meeting of the Commission and the Proposed Final Audit Report shall be made public as an agenda document.

D. Public Disclosure

Once the Commission approves a Final Audit Report of the Commission, the documents enumerated below will be placed on the public record, accessible *via* the Commission's website. The Commission will place these documents, if available, on the public record as soon as practicable, and will endeavor to do so within 30 days after the Commission approves a Final Audit Report of the Commission:

- Final Audit Report of the Commission and Vote Certification(s);
- Any written statements of any Commissioner(s);
- Audit Division Recommendation Memorandum and Vote Certification;
- Draft Final Audit Report (and any legal guidance provided thereon by the Office of General Counsel);
- Committee's Response to the Draft Final Audit Report (if any);
- Preliminary or Interim Audit Report (and any legal guidance provided thereon by the Office of General Counsel);
- Committee's Response to the Preliminary or Interim Audit Report;
- Link(s) to Open Meeting Agenda(s), Meeting(s), and Audit Hearing on the website (if any); and
- Links to audio or video of any Commission meetings related to the audit as well as any transcripts of hearing related to the audit.

section 434 of this title.... The Commission may, upon an affirmative vote of 4 of its members, conduct an audit and field investigation of any committee which does meet the threshold requirements established by the Commission.”).