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FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 28, 2014

MEMORANDUM

SENSITIVE

TO: The Commission

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SUBJECT: Request for Consideration of a Legal Question (LRA # 946)

I. Introduction

A. Factual Background and Brief Statement of Conclusion

On March 4, 2014, the Commission received a Request for Consideration of a Legal Question ("Request") from counsel on behalf of the Oakland County Democratic Party ("OCDP" or "Committee"), a local committee of a political party that the Commission voted to audit pursuant to 2 U.S.C. § 438(b).[1] *See* Attachment 1.

The Request addresses a proposed audit finding pertaining to the requirement in 2 U.S.C. § 432(c) and 11 C.F.R. § 102.9(a) that treasurers of political committees keep an account of all contributions received by or on behalf of such committees and, in particular, that they keep an account of the names and addresses of any person who makes any contribution in excess of $50, together with the date and amount of the contribution by that person.

The issue presented in the Request is how the requirement to keep particularized information for contributions received in excess of $50 applies to revenue the Committee received during twice-weekly bingo nights that the Committee held for the purpose of raising funds to influence Federal elections.

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[1] At least two Commissioners agreed to consider this Request pursuant to the Policy Statement Regarding a Program for Requesting Consideration of Legal Questions by the Commission, 78 *Fed. Reg.* 63203 (Oct. 23, 2013).

Because the Committee conducts three different kinds of gaming activity that are independently regulated by the state of Michigan during each bingo night, and contributors may choose the activities in which they wish to participate, the Committee asserts that each "bingo night" consists of three separate fundraising "events," rather than a single event, for the purpose of applying certain advisory opinions, discussed more fully below, interpreting the above-mentioned recordkeeping requirement. In particular, the Committee argues that the Commission should defer to the definition of "event" under Michigan's state gaming law for the purpose of applying its federal recordkeeping obligations.

The Committee's characterization of its bingo nights as consisting of three separate fundraising events affects the amount of information the Committee was required to preserve in its records. If the Committee's characterization were to be upheld, then the names and addresses of contributors whose contributions for each of the three events is below $50, but whose total contributions for the evening are above $50, would not be maintained in the Committee's records.[2]

The Commission recently addressed this subject in the context of a memorandum that our office and the Office of Compliance submitted under Commission Directive 69. We recommended that the Commission consider a bingo night to be a single fundraising event based on our analysis of the application of Advisory Opinions 1980-99 (Republican Roundup Committee) and 1981-48 (Muskegon County Republican Party) to the facts. On January 28, 2014, the Commission voted unanimously to conclude that the Committee's bingo nights did not constitute three separate fundraising events, and, instead, the Committee was required to itemize all contributions exceeding $50 received from contributors during each bingo night under the recordkeeping requirements. *Certification In the Matter of Request for Commission Directive 69 Guidance Involving the Oakland County Democratic Party*, LRA 946 (Jan. 30, 2014).

We have considered the arguments that the Committee raises in its Request, and we recommend that the Commission again conclude that the Committee was required to keep particularized records of all contributions in excess of $50 that it received from gaming participants during the course of a single bingo night. Thus, even if a gaming participant spent less than $50 on each of three possible gaming activities that typically took place during a bingo night, the Committee was required to keep a particularized record if the aggregate amount the participant spent on all activities in which he or she participated during the course of a bingo night exceeded $50.

B. Legal Background

The Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations implementing the Act require the treasurer of a political committee to keep an account of all contributions received by or on behalf of such committee. 2 U.S.C. § 432(c)(1); 11 C.F.R. § 102.9(a). For each contribution in excess of $50, a record of the name and address

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[2] Also, since there are no records of contributors maintained, it is possible that contributors could be making contributions for the same activity more than one time in an evening, causing those contributors to exceed the $50 recordkeeping threshold.

of the contributor, as well as the date and amount of the contribution must be retained. 2 U.S.C. § 432(c)(1)-(2); 11 C.F.R. § 102.9(a)(1). For contributions below $50, the treasurer must only keep an account "by any reasonable accounting procedure." 11 C.F.R. § 102.9(a). The Commission has interpreted the term "reasonable accounting procedure" in section 102.9(a) to allow committees to dispense with individual itemization of their records of contributions in cases where a single fundraising event involves the receipt of a large number of small (below $50) contributions. *See* Advisory Opinions 1980-99 (Republican Roundup Committee) and 1981-48 (Muskegon County Republican Party). In such cases, committees may simply keep a record of "the name of the event, the date(s) contributions were received for that event, and the total amount of contributions received on each day for that event." Advisory Opinion 1980-99 (Republican Roundup Committee). *See also* Advisory Opinion 1981-48 (Muskegon County Republican Party) (noting, in summarizing Advisory Opinion 1980-99, that "[t]he Commission did not require the political committee to record the names and addresses of individuals contributing less than $50 at a single event . . .").[3] Neither advisory opinion defines what constitutes a single fundraising "event," however, nor do the Act or Commission regulations include such a definition.

II. Deference to the State Law Definition of a Fundraising "Event" Would Be Inappropriate.

The Committee proposes that the Commission adopt Michigan's definition of "event" under its gaming law for the purpose of applying the Act's recordkeeping requirements, and cites Advisory Opinion 2001-19 (Oakland Democratic Campaign Committee), as well as 11 C.F.R. §§ 114.5(b)(2), 100.33, and 114.7(d) as support for this proposition. An "event" under Michigan's gaming law is defined as "each occasion of a bingo, millionaire party, raffle, charity game, or numeral game licensed under this act." Michigan Compiled Laws ("MCL") § 432.103a(2). An "occasion" is defined as "the hours of the day for which a license is issued." MCL § 432.103a(11).

The Commission has previously relied upon State law in other contexts to supply the meaning of terms not explicitly defined in the Act or Commission regulations. *See* Advisory Opinion 2013-07 (Winslow II) (deferring to state law definition of "spouse"). As the Committee notes, the Commission by regulation defines "assets" with reference to state law in 11 C.F.R. § 100.33(a), and, also by regulation, it determines whether a professional association is a corporation[4] with reference to State law in 11 C.F.R. § 114.7(d).[5] The Commission has also

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[3] If a committee chooses this approach, it is still required to comply with 2 U.S.C. § 432(c)(1)-(2) and 11 C.F.R. § 102.9(a)(1) with respect to contributions in excess of $50. *See* Advisory Opinion 1980-99 (Republican Roundup Committee) at 2.

[4] The Commission has also used state law to generally determine the corporate status of an entity. Advisory Opinion 1995-27 (NAREIT). One exception to this policy is embodied in 11 C.F.R. § 110.1(g), which classifies limited liability companies according to their treatment under IRS tax rules rather than under state law. The Commission noted that these rules should be viewed as a narrow exception to its general practice of looking to state law to determine corporate status. *See Explanation and Justification for Final Rules Regarding Treatment of Limited Liability Companies Under the Federal Election Campaign Act*, 64 Fed. Reg. 37397, 37398 (July 12, 1999).

deferred to state law in the advisory opinions context. *See, e.g.*, Advisory Opinion 2013-07 (Winslow II) (deferring to state law definition of "spouse"); Advisory Opinion 1995-07 (Key Bank of Alaska) (noting long history of Commission applying state law to determine amount and existence of debts); Advisory Opinion 1995-27 (NAREIT) (noting use of state law to determine corporate status generally).

The advisory opinions and Commission regulations cited by the Committee, however, provide no support for the proposition that the Commission must or should defer to state law on the question of what constitutes a fundraising event for Federal recordkeeping purposes.

Advisory Opinion 2001-19 (Oakland Democratic Campaign Committee) was solely concerned with the overall ability of a committee to use bingo as a legal method of fundraising, and concluded that nothing in the Act or the Commission's regulations precluded the state from making this determination, since this is a matter historically associated with state jurisdiction and no Federal law or policy purports to make a contrary determination.[6] The Commission concluded in Advisory Opinion 2001-19 that the fact that the requesting committee was a federally registered political committee did not generally exempt it from its obligation to comply with the state's gaming law.

In contrast, the recordkeeping obligations at issue in this matter support the Commission's ability to monitor the accuracy of the Committee's disclosure and reporting of its contributions and expenditures, which, as the advisory opinion notes, is a matter specifically committed by Congress to exclusive Federal jurisdiction.[7] Advisory Opinion 2001-19 (Oakland Democratic Campaign Committee), at 3. The fact that the Commission conditions a political committee's right to engage in a particular mode of fundraising upon the legality of that mode of fundraising in the applicable state, as section 114.5(b)(2) provides, in no way implies that the Commission automatically should defer to all terms and provisions of state law when defining and determining a political committee's core recordkeeping responsibilities under the Act.

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[5] In the case of section 100.33(a), Congress has also mandated this deference. *See* 2 U.S.C. § 431(26)(A). With respect to section 114.7(d), the Commission has also identified legislative history indicating the Committee on House Administration's view that "[w]hether or not a professional association is a corporation is a matter determined under State law." *See* Advisory Opinion 2008-05 (Holland & Knight) (citing H.R. Rep. 93-1239, 93d Cong., 2d Sess., at 21 (1974), *reprinted in Legislative History of the Federal Election Campaign Act Amendments of 1974*, at 655 (1977) (additional citations omitted).

[6] The Commission noted that control of gaming activity is a central feature of a state's regulatory authority and that Commission regulations permit the separate segregated funds of corporations and labor unions to conduct gaming activity as a fundraising device so long as the applicable state law allows it. Advisory Opinion 2001-19 (Oakland Democratic Campaign Committee), at 4; 11 C.F.R. § 114.5(b)(2).

[7] The Commission noted that in enacting 2 U.S.C. § 453, which provides that the Act and Commission regulations pre-empt provisions of state law with respect to elections to Federal office, Congress had identified certain subjects that it intended to relegate exclusively to Federal jurisdiction. Advisory Opinion 2001-19 (Oakland Democratic Campaign Committee), at 3. Notably, among these, Congress intended that Federal law occupy the field "with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees." *Id, citing H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69(1974)*, at 100-01. *See also* 11 C.F.R. § 108.7(a).

III. The Need for Practical Accommodation Does Not Relieve the Committee of Its Obligation to Comply With the Law

The Committee also argues that the Commission has recognized the need to accommodate political committees when it would be impractical to comply strictly with the requirements of the Act. In this context, the Committee identifies advisory opinions the Commission has issued on a committee's obligation to comply with the recordkeeping requirement at issue in this case, as well as other advisory opinions that address the need for practical accommodation in different contexts.[8] These advisory opinions are not applicable to the Committee's circumstances here, and the Committee presents no compelling reasons why it should be excused from complying with the Act's recordkeeping obligations.[9]

As we previously noted in our memorandum supporting our Request for Directive 69 Guidance, the advisory opinions addressing the recordkeeping requirement upon which the Committee relies contemplated factual situations that differed from the situation presented in this audit in one important respect – there were strong assurances in those advisory opinions that a substantial number of the contributors would not reach or exceed the $50 itemization threshold. In Advisory Opinion 1980-99 (Republican Roundup Committee), the requesting committee represented that it intended to host several fundraising events. The cost range to attend each event was well below the $50 itemization threshold, and, further, while hundreds of people were expected to attend each event, few people were expected to attend more than one. Advisory Opinion 1980-99 (Republican Roundup Committee). Similarly, in Advisory Opinion 1981-48 (Muskegon County Republican Party),[10] the requesting committee held weekly bingo games.

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[8] The Committee also cites Advisory Opinions 2004-10 (Metro Networks) and 1980-147 (Yearout) as examples of other situations in which the Commission has considered impracticality and made accommodations, but these examples are inapposite. In Advisory Opinion 2004-10 (Metro Networks), the Commission was guided in its impracticality analysis by a regulation specifically requiring it to consider impracticality when interpreting the requirements of the disclaimer obligation, and the accommodation was narrow, not involving exemption from the requirement entirely. *See* Advisory Opinion 2004-10 (Metro Networks), at 3, *citing* 11 C.F.R. § 110.11(f)(1)(ii). In Advisory Opinion 1980-147 (Yearout), the Commission did not have to make an accommodation, but found that the authorized committee's plan to pay the candidate a sum of money remaining in its account would not be a conversion of campaign funds to the candidate's personal use under the Act. *See* 2 U.S.C. § 439a. The amount the committee proposed to pay the candidate was less than an amount the candidate had loaned the committee and subsequently forgiven to enable the committee to terminate, and amounts the candidate had donated after the committee's debts were paid were donated several months after the election and for the sole purpose of refunding contributions.

[9] The Commission has issued advisory opinions to requestors excusing them from strict compliance with legal requirements where the circumstances affecting the requestors' ability to comply were either wholly or partially controlled by the actions of third parties. *See, e.g.*, Advisory Opinion 1998-25 (Mason Tenders District Council) (timely compliance blocked by court order); Advisory Opinion 1996-36 (Frost et al.) (contribution limitations adjusted because of court order); Advisory Opinion 2010-17 (Stutzman for Congress) (modified method of treatment of undesignated contributions where two elections held on same day); Advisory Opinion 1991-39 (D'Amato) (alternatives to contribution refund because of criminal activity and inability to identify contributor). No such factors are present here.

[10] While the Committee states that Advisory Opinion 1981-48 (Muskegon County Republican Party) represents an accommodation of the recordkeeping requirements to the unique circumstances of Michigan bingo, the

Contributors purchased bingo cards on entering and paid a minimum $1 admission charge. The average bingo card holder was expected to spend about $12 in an evening, and one particular person would occasionally spend more than $20 for bingo cards. Advisory Opinion 1981-48 (Muskegon County Republican Party).

Thus, the factual context for the Commission's conclusion that keeping a record of the aggregate amount of contributions was acceptable for the requesting political committees was: 1) all or the majority of contributions those committees would receive would not reach or exceed the $50 itemization threshold and 2) in the case of Advisory Opinion 1980-99 (Republican Roundup Committee), contributors were not likely to attend more than one event.[11] The Commission had reasonable assurance that the $50 itemization threshold would not be exceeded. Here, the facts present no assurance that people attending the OCDP's twice-weekly bingo nights will spend less than $50 during the course of an evening. To the contrary, as disclosed by the Committee's records, the average cost per attendee at a bingo night exceeded $50, and averaged approximately $87 for the 2012 election cycle.[12]

We also noted in our memorandum supporting our Request for Directive 69 Guidance that in Advisory Opinion 1991-20 (Call Interactive), the Commission decided not to permit use of the recordkeeping methodology set forth in Advisory Opinions 1980-99 (Republican Roundup Committee) and 1981-48 (Muskegon County Republican Party) for a 900-line fundraising program. The Commission based its conclusion primarily on the fact that the 900-line technology allowed for obtaining the names and addresses of most of the contributors. By contrast, the committees in the previous advisory opinions did not automatically have access to identifying information for bingo participants, particularly those paying by cash. Advisory Opinion 1991-20 (Call Interactive). The Commission also noted, however, that its interest in requiring that the names and addresses of small contributors be recorded was heightened because the callers were able to make repetitive calls and calls from prohibited sources. *Id.* Here, while contributors participating in bingo nights are not easily identifiable, unlike the contributors in Advisory Opinion 1991-20 (Call Interactive), potential contributors do have a similar ability to make repetitive contributions at each of the activities sponsored by the Committee during a bingo night.

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advisory opinion merely applies the same rule it developed in Advisory Opinion 1980-99 (Republican Roundup Committee) in a different context to the factual situation presented by the requestor.

[11] Indeed, this advisory opinion suggests that whether a fundraising occasion consists of single or multiple events may in fact be less significant than the opportunities contributors may have to exceed the $50 itemization threshold. Thus, even if three activities conducted during a single bingo night would constitute three separate fundraising events, Advisory Opinion 1980-99 (Republican Roundup Committee) would arguably still not permit use of the alternative recordkeeping method in this case because contributors appearing during bingo nights are likely to attend more than one event.

[12] While the average contribution per attendee was $87, this does not necessarily indicate that all attendees likely bought $50 or more of bingo cards per night.

We understand the Committee's concern for committing resources to maintain more detailed records of small contributions,[13] but interpreting the above advisory opinions in the manner suggested by the Committee would effectively vest committees with unilateral discretion to determine the extent of their recordkeeping obligations through the manner in which they characterize activities closely related in time and subject matter as single or separate fundraising events. We do not believe that the Commission intended this consequence when it issued the advisory opinions. Rather, the Commission provided an alternate means of recordkeeping to committees receiving a large number of contributions under $50 in factual situations where there was little likelihood that such contributors would exceed the $50 itemization threshold. Advisory Opinions 1980-99 (Republican Roundup Committee) and Advisory Opinion 1981-48 (Muskegon County Republican Party).

For the above reasons, we recommend that the Commission again conclude that the Committee was required to itemize all contributions exceeding $50 in aggregate from contributors during a single bingo night under 2 U.S.C. § 432(c)(1)-(2); 11 C.F.R. § 102.9(a) and Advisory Opinions 1980-99 (Republican Roundup Committee) and 1981-48 (Muskegon County Republican Party). Although the Committee was legally required to maintain such records, the Commission may wish to consider as a matter of policy whether it should pursue a recordkeeping finding against this Committee where it may not have been clear to the Committee that it was required to treat the three gaming activities as a single fundraising event under the prior advisory opinions or the Campaign Guide for Party Committees.

IV. Recommendation

Conclude that OCDP's bingo nights did not constitute three separate fundraising events, and, instead, OCDP was required to itemize all contributions exceeding $50 received from contributors during each bingo night under the provisions addressing the recordkeeping requirements at 2 U.S.C. § 432(c)(1)-(2); 11 C.F.R. § 102.9(a).

Attachment 1 – Request for Legal Consideration from the Oakland County Democratic Party, dated March 4, 2014.

[13] In the Request, the Committee argues that the purposes of the Act are not served by requiring characterization of its bingo nights as single events where the vast majority of its prize payouts amount to $2 or less. Attachment 1, at 5. At issue here, however, is not the Committee's recordkeeping of its disbursements of prize money, but rather its recordkeeping of receipts in the form of contributions from bingo patrons.