FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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MEMORANDUM

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SUBJECT: Draft Final Audit Report on the Maine Republican Party (LRA 817)

I. INTRODUCTION AND BACKGROUND

The Office of the General Counsel has reviewed the proposed Draft Final Audit Report ("DFAR") on the Maine Republican Party ("the Committee"). We generally concur with the findings in the DFAR and have three specific comments on Finding 3 – Disclosure of Disbursements. First, we concur that the Committee has taken the appropriate corrective action by amending its reports to disclose some of the expenses identified by the auditors. Second, however, we do not agree that the Audit Division has sufficient information to be able to conclude that the undocumented payroll expenses paid with non-federal funds were properly paid or withheld from the Committee's reports. Third, although the Committee took corrective action to disclose a number of expenses, the available documentation remains inadequate to determine the nature of those expenses and there is no basis for the Audit Division to conclude that the amended reports are more correct than the Committee's original reports. If you have any questions, please contact Delanie DeWitt Painter, the attorney assigned to this audit.

Finding 3 of the DFAR concludes that the Committee incorrectly disclosed different categories of disbursements totaling $625,824. First, it concludes that the Committee failed to disclose $94,019 in disbursements paid from non-federal accounts but which the auditors conclude should have been paid from the federal account.[1] Second, it concludes that the Committee may have failed to properly disclose $519,305 in disbursements from the federal account that the Committee reported as federal operating expenses but which may have been Federal Election Activity ("FEA") paid entirely with federal funds that potentially should have been reported on a different line of the Committee's reports. Third, it concludes that the Committee failed to properly disclose a coordinated party expenditure of $12,500 for a television advertisement, which it incorrectly reported as a federal operating expense.[2]

The Committee amended its reports in response to the Interim Audit Report ("IAR"). The Committee disclosed the payments identified by the auditors from its non-federal accounts as allocable administrative expenses or federal expenses (voter identification and printed materials), but did not amend its reports to disclose $14,999 for payroll and associated expenses paid from the non-federal accounts that the Committee asserts was non-federal. The Committee amended its reports to disclose as FEA the $519,305 originally reported as federal operating expenses and to disclose the $12,500 coordinated party expenditure. The DFAR states that for payments from the federal account, the Committee filed amended reports "to materially correct the disclosure as FEA or coordinated party expenditures."

II. APPROPRIATE CORRECTIVE ACTION

We concur that the Committee has taken the appropriate corrective action by amending its reports to disclose payments from its non-federal accounts for administrative costs, printed materials and possible voter identification expenses and payments from its federal account that appear to be FEA for GOTV/public communications, payroll, consulting, travel and per diem, equipment and miscellaneous expenses. We agree that, in the absence of documentation indicating that these expenses were directly attributable to a clearly identified federal candidate or were for entirely non-federal purposes, the $48,520 in costs for postage, consulting, travel reimbursements, printing and accounting fees appear to be the type of ordinary overhead expenses that can

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[1] The auditors calculated that at the end of the two year audit period, the Committee did not as an overall matter fund federal activity with non-federal funds.

[2] We concur that the Committee's payment of $12,500 for a television advertisement appears to be a coordinated party expenditure because it appears to be a public communication that refers to a clearly identified House candidate and that was publicly disseminated in the candidate's jurisdiction within 90 days of the election. We note as well that the candidate appears in the advertisement and the advertisement's disclaimer says it was authorized by the candidate. *See* 11 C.F.R. § 109.37. Our analysis below does not address this issue further.

be considered administrative expenses.[3] 11 C.F.R. § 106.7(c)(2). The Committee stated that it did not have documentation indicating that the administrative costs paid from the non-federal account were solely non-federal expenses. Response at 1.

We note, however, that a similar issue arose in the audit of the Kansas Republican Party ("KRP"). In KRP, the Commission considered the issue of disbursements paid from non-federal accounts for, among other things, postage, consulting, travel and printing where records were not adequate to establish whether the expenses were federal, non-federal or allocable. *See* Final Audit Report of the Commission on the Kansas Republican Party, (June 8, 2011) ("KRP FAR"). KRP did not have records to demonstrate the expenses were solely non-federal and amended its reports to disclose the disbursements as allocable. Our views were the same as we have expressed here. But the Commission was unable to reach agreement on the Audit Division's recommendation by four votes and moved the issue to the Additional Issues section of the report.[4] *See* KRP FAR; Statement of Reasons of Chair Bauerly and Commissioner Weintraub, (May 26, 2011). Some Commissioners "agreed that KRP was required to report the disbursements in question" but other Commissioners "concluded that absent evidence that the expenses were in fact federal, the recommendation improperly shifts the burden to audited committees to disprove a negative." KRP FAR at 17. In a Statement of Reasons, Chair Bauerly and Commissioner Weintraub expanded on their view that reporting was required, writing that to determine otherwise would "create perverse incentives for committees to avoid keeping appropriate records." *See* Statement of Reasons of Chair Bauerly and Commissioner Weintraub at 3.

We also agree that the $183,747 in printed materials paid from the federal account were FEA.[5] Our review of the printed materials indicated that they were GOTV (Type II FEA) or public communications on behalf of a clearly identified candidate (Type III FEA), and some of the expenses were coded on the Committee's database as FEA. The Committee stated it could not determine why some expenses for GOTV/public

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[3] Administrative costs include rent, utilities, office equipment and supplies, postage for other than mass mailings, and routine building maintenance, unless those costs are directly attributable to a clearly identified candidate. 11 C.F.R. § 106.7(c)(2).

[4] The Commission was, however, able to reach agreement on $20,123 in payments from non-federal accounts for allocable administrative expenses such as rent, telephone and office supplies that appeared to be related to federal expenses and that the committee amended its reports to disclose as federal or allocated expenses. KRP FAR, Finding 3.

[5] FEA means four types of federal expenses that meet certain requirements: 1) voter registration activity within 120 days of the federal election ("Type I FEA"); 2) voter identification, generic campaign activity or get-out-the-vote ("GOTV") activity in connection with an election where a federal candidate is on the ballot ("Type II FEA"); 3) a public communication that refers to a clearly identified federal candidate and promotes or supports or attacks or opposes ("PASO") a federal candidate ("Type III FEA"); or 4) services of a state or local party committee employee who spends more than 25% of compensated time during a month on activities in connection with a federal election ("Type IV FEA"). *See* 2 U.S.C. § 431(20); 11 C.F.R. § 100.24.

communications were classified as operating expenditures rather than FEA and it may have been a data entry error or some other cause. Response at 2. Moreover, we concur that the Committee properly amended its reports to disclose $142,941 in payroll paid from its federal accounts as FRA (Type IV FEA). In response to the IAR, the Committee stated that it cannot confirm that the individuals did not perform work related to federal elections because there is no documentation showing what amount of time, if any, the individuals spent on federal elections, and none of the individuals still work for the Committee. Response at 2. However, the DFAR states that the Committee previously submitted affidavits indicating that the individuals worked solely in connection with federal elections during 2008, and the individuals received at least one payment that the Committee coded on its database as FEA. We believe the affidavits are sufficient documentation that the payroll expenses were FEA.

Further, we agree that there is sufficient information to conclude that costs of consulting, travel and per diem, equipment and miscellaneous expenses that were paid for with federal funds but reported as operating expenses should be reported as FEA. The Committee stated that the consulting expenses were FEA because they were for a consultant to the Committee's "Victory 2008" campaign, which was "primarily concerned with federal elections." Response at 3. The Committee explained that travel and per diem expenses were also related to the "Victory 2008" campaign and were FEA. *Id.* The Committee states that there is no documentation describing the use of equipment and miscellaneous costs, but discussion with party employees and officers from that time period indicates the equipment costs were "almost certainly" for outfitting satellite "Victory" offices. *Id.* Additional information could clarify the nature of these expenses since activity that is "primarily concerned with federal elections" is not necessarily FEA. However, unlike with some of the other expenses discussed in part IV below, the Committee's database coded *all* of these expenses as FEA. Thus, the Committee's amendments concerning these expenses are consistent with the small amount of available documentation.

We also concur with the Audit Division's decision to accept, as materially correcting the Committee's reports, amendments disclosing payments from the Committee's non-federal accounts of $11,500 for printed materials that are not available for review and $19,000 for possible voter identification expenses where the invoice stated "volunteer connect" and the Committee's database coded the payment as "Voter ID." The Committee stated that it was unable to locate documents to clarify that the printed materials were solely non-federal, and, while the vendor "has historically provided services to state campaigns, there have been occasions where the vendor has provided services that were not solely non-federal." Response at 2. It provided no additional information concerning the possible voter identification expenses but stated that it amended its reports to disclose them. *Id.* The Committee has not provided sufficient documentation for the Audit Division to conclude that these expenses were properly paid with non-federal funds or properly withheld from the Committee's reports. We believe the DFAR should make that point explicitly. However, we note with respect to the printed materials not available for review that similar undocumented printed materials

were also the subject of the Commission's split vote in the Kansas Republican Party audit, discussed above.

III. NON-FEDERAL ACCOUNTS -- PAYROLL EXPENSES

We do not agree, however, that the Committee has demonstrated that $14,999 in payroll and associated expenses paid from its non-federal accounts were solely non-federal. The Committee has taken no corrective action to disclose these expenses and provided no further documentation. It asserted in response to the IAR that these expenses were non-federal because they were incurred in 2007 when there were no identified federal candidates on the ballot in Maine and Committee employees "did not spend any time on FEA activity" in 2007. Response at 2. There are two problems with the Committee's assertions. First, while the Committee states that employees spent no time on *FEA* during 2007, it does not address whether any employees spent time on the broader category of "activity in connection with a Federal election." Employee compensation is FEA if the employee spends more than 25% of their time in a given month on FEA *"or activity in connection with a Federal election."* 11 C.F.R. §§ 106.7(d)(1)(ii), 300.33(d)(1) (emphasis added). FEA means only the four specific types of activities described at 2 U.S.C. § 431(20), but "activity in connection with a Federal election" is a broader term encompassing all federal activity, not only FEA. It could include, for instance, planning for the next year's federal elections, or deciding about off-year contributions to specific federal candidates. Second, we note that neither logs, affidavits nor any other documentation has been provided in support of the Committee's assertion. *But see* Commission Agenda Document No. 11-10-B (Motion on Audit Division Recommendation Memorandum on the Georgia Federal Elections Committee, *considered in Open Session* Mar. 3, 2011). (Commission split on issue of whether committee should keep records of staff time for staff who spent no time on federal activity, with three Commissioners asserting (in a motion that failed on a 3-3 split) that "the Commission does not have jurisdiction to impose recordkeeping and documentation requirements on employee activity that a State party committee claims is solely non-Federal."). Therefore, it does not appear to us that the Audit Division has sufficient information to be able to conclude that the undocumented payroll expenses paid with entirely non-federal funds were properly paid in that fashion or properly withheld from the Committee's reports. We recommend that you raise this issue for the Commission's consideration when the Audit Division Recommendation Memorandum and DFAR are submitted to the Commission.

IV. DOCUMENTATION INADEQUATE TO DETERMINE NATURE OF EXPENSES

For a number of the disbursements originally reported as federal operating expenses, the available documentation remains inadequate to determine conclusively the nature of a number of expenses. There is no basis for the Audit Division to conclude that the amended reports are more correct than the Committee's original reports.

The Committee conceded that expenses of $67,711 for printed materials that are not available for review and $23,029 for telemarketing expenses whose scripts are not available for review appear to be FEA and amended its reports accordingly, but it did not provide copies of the printed materials or telemarketing scripts and did not state why it thought the expenses are FEA. *See* Response at 3. The Committee stated that it could not locate the telemarketing scripts but that its database descriptions of four of the telemarketing transactions indicates they should have been reported as FEA, the descriptions of five others "provide no guidance as to the nature of the expenditure," and one description appears to be a state expense. Response at 3.

We do not think there is sufficient information to categorize these expenses as FEA. FEA is only one of several types of expenses, even within the broad category of federal expenses, which these materials could have been. With respect to communications that are paid for with federal funds, it is particularly difficult to determine without knowing the content of the communications the precise line on the Detailed Summary Page on which the expenses should have been reported, because of the many different types of activity they could have been.[6] If the printed materials 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 Type III FEA. *See* 2 U.S.C. § 431(20); 11 C.F.R. § 100.24. But since the printed materials are not available for review, it is not possible to examine their form or content to determine whether they were public communications, or if so, whether they PASO-ed a clearly identified federal candidate. Without reviewing the printed materials it would also be difficult to determine whether they constituted Type II FEA for voter identification, generic campaign activity or GOTV, or whether any exemptions apply to them. Similarly, the Committee's database descriptions of some of the telemarketing transactions cannot adequately substitute for a review of the telemarketing scripts to determine the nature of these expenses. If one transaction was indeed a state expense, as the Committee contends, it could not be FEA. Therefore, we conclude that without reviewing copies of the printed materials and the telemarketing scripts, the Audit Division cannot determine that either the original or amended reporting of these expenses is accurate.

Therefore, we recommend that the DFAR state that although the Committee has amended its reports, the nature of some expenses remains unknown because of lack of documentation. The DFAR should further state that because of the lack of documentation, the Audit Division does not have a basis for determining whether either the Committee's original or amended reports are correct.

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[6] Depending on the content of the communications and other factors, these materials might have been operating expenses, as originally disclosed; or FEA, as disclosed on the amended reports; or independent expenditures; or coordinated party expenditures; or exempt activity. Indeed, our review of certain other printed materials in response to your query after our IAR comments concluded that they were FEA, but two of the mailers were also independent expenditures, and we also addressed the slate card exemption with respect to those two mailers.