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AGENDA ITEM

For meeting of July 28, 2022

May 25, 2022

MEMORANDUM

To: The Commission

Through: Alec Palmer *AP*
Staff Director

From: Patricia C. Orrock *PCO*
Chief Compliance Officer

Dayna C. Brown *DCB*
Assistant Staff Director
Audit Division

Nicole Burgess *NB*
Audit Manager

By: Terry O'Brien *TO'B*
Lead Auditor

Subject: Resubmission - Audit Division Recommendation Memorandum on the Kentucky State Democratic Central Executive Committee (A19-13)

Pursuant to Commission Directive No. 70 (FEC Directive on Processing Audit Reports), the Audit staff presented the Draft Final Audit Report (DFAR) to the Kentucky State Democratic Central Executive Committee (KSDCEC) on January 19, 2022 (attached). KSDCEC did not request an audit hearing.

This office is resubmitting the subject Audit Division Recommendation Memorandum (ADRM). The original ADRM, along with the Office of General Counsel's (OGC) comments on the DFAR and KSDCEC's response to the DFAR, were circulated to the Commission on February 28, 2022, and withdrawn on March 21, 2022. Subsequently, on March 30, 2022, OGC issued supplemental comments (LRA 1107, dated March 30, 2022, attached) revisiting its analysis of Finding 4, Excessive Coordinated Party Expenditures, pertaining to door hangers. On April 19, 2022, KSDCEC responded to OGC's analysis of Finding 4. KSDCEC's February 3, 2022, response to the DFAR and April 19, 2022, response to the Finding 4 analysis are noted below.

This memorandum provides the Audit staff's recommendation for each finding outlined in the DFAR.

Finding 1. Misstatement of Financial Activity

The Audit staff recommends that the Commission find that, in 2017, KSDCEC understated its receipts by \$15,838, disbursements by \$38,846, beginning cash by \$35,925, and ending cash by \$12,917; and in 2018, KSDCEC understated its receipts by \$116,641, disbursements by \$61,315, and ending cash by \$68,280.

Finding 2. Receipt of Contributions in Excess of the Limit

In response to the DFAR, KSDCEC maintained that the excessive contributions in the finding came from a small number of "institutional contributors" who make yearly contributions to KSDCEC. KSDCEC contends that these donors each gave with the understanding that their contribution would be split between KSDCEC's federal and non-federal accounts. KSDCEC also noted that the non-federal portions of these contributions were transferred to its non-federal account in a timely manner.

KSDCEC further stated that no responses were received from the letters it sent to its donors, in response to the Interim Audit Report (IAR), "confirm[ing] that their contribution was split between their federal account and non-federal account and offer[ing] a refund...." It was the understanding of KSDCEC that sending these letters satisfied the Audit Division's recommendation in the IAR.

Pursuant to OGC's DFAR comments (LRA 1107, dated December 14, 2021, attached) and Advisory Opinion 2001-17 (DNC Services), the Audit staff's DFAR recommended that KSDCEC submit evidence that its contributors intended or directed their contributions be split between federal and non-federal accounts. In its DFAR response, KSDCEC requests that this language either be deleted from the Final Audit Report or that more clarity be provided regarding what is considered sufficient documentation for purposes of compliance as it relates to Finding 2.

In its comments on KSDCEC's DFAR response (LRA 1107, dated February 15, 2022, attached) OGC elaborated that if KSDCEC was relying on Advisory Opinion 2001-17 (DNC Services) for its transfers of contributions intended to be split into federal and non-federal components, KSDCEC would need to provide evidence of contributor intent as discussed in the Advisory Opinion, *i.e.*, evidence that would conform to the time frames of 11 C.F.R. § 103.3. OGC also raises the question of whether Advisory Opinion 2001-17 (DNC Services) may be relied upon by a state party committee transferring funds from a federal to a non-federal account after the promulgation of 11 C.F.R. § 300.30(b)(3)(i) following the enactment of the Bipartisan Campaign Reform Act of 2002. As such, we raise this matter for the Commission's consideration.

Notwithstanding the applicability of Advisory Opinion 2001-17 (DNC Services), the Audit staff notes that KSDCEC was not able to provide evidence that its contributors intended their contributions to be split between federal and non-federal funds, as noted in its DFAR response. The Audit staff further notes that, in response to the IAR, KSDCEC instead provided letters to its contributors informing them that

their contributions were split between its federal and non-federal accounts, and offering the opportunity for a refund, which resolved their excessive contributions, albeit untimely. As such, the Audit staff recommends that the Commission find that KSDCEC received excessive contributions totaling \$78,043.

Finding 3. Recordkeeping for Employees

The Audit staff recommends that the Commission find that KSDCEC did not maintain monthly payroll logs or equivalent records, totaling \$443,976, to document the percentage of time each employee spent in connection with a federal election for calendar years 2017 and 2018.

Finding 4. Excessive Coordinated Party Expenditures

In response to the DFAR, KSDCEC noted that it previously provided sign-in sheets and photographs of volunteers, along with sworn declarations¹ from a volunteer, a KSDCEC staffer and a mail house employee. The Audit staff acknowledged that KSDCEC partially complied with the IAR recommendation with the provision of the sign-in sheets, photographs and affidavits associated with ten of its mailers and, as such, no longer attributed the cost of the ten mailers to KSDCEC's coordinated party expenditure limit. However, three mailers remained where the Audit staff concluded that KSDCEC did not provide additional information.

KSDCEC stated that the Audit staff accepted documentation for ten mailings undertaken by KSDCEC but rejected documentation for the remaining three mailings, although the declarations provided in response to the IAR were intended to be applied to all thirteen mailings found in the finding.

Given that KSDCEC also intended the affidavits from the volunteer, KSDCEC employee and mail house employee to document the volunteer materials exemption for the three mailers totaling \$210,120, and that there were no sign-in sheets or photographs to support these three mailers, the Audit staff recommends that the Commission determine whether these affidavits sufficiently document volunteer involvement and satisfy the exemption given the lack of clarity regarding how the exemption should be applied.

In LRA 1107, dated March 30, 2022, OGC revised its conclusion regarding the door hanger (see Finding 5) and whether a door hanger is a public communication. OGC stated that a door hanger that qualifies as exempt under the volunteer materials exemption should be excluded from being classified as a party coordinated expenditure, but a door hanger that does not qualify for the volunteer materials exemption likely is a public communication and, therefore in this case, also a party coordinated expenditure. OGC recommends that the cost of the door hanger be included in Finding 4 as a party coordinated expenditure because if it is not within the volunteer materials exemption, the door hanger is likely a public communication that otherwise meets the definition of "party coordinated communication" in 11 C.F.R. § 109.37.

¹ The Audit staff notes that KSDCEC's DFAR response refers to the three submissions as "sworn declarations"; however, three affidavits were submitted.

In its response to OGC's LRA 1107, dated March 30, 2022, KSDCEC maintained that the door hanger at issue qualifies for the volunteer materials exemption, noting that "documentation beyond a sworn affidavit has never been required" to qualify for the exemption. KSDCEC stated that the process of distributing a door hanger is "a very decentralized process" making it difficult to document such activity, in contrast to documenting the volunteer activity relative to exempt mail pieces which are generally handled in a closed environment.

KSDCEC further stated that the door hanger in question should not be included in the coordinated expenditure finding because the door hanger is not a public communication and therefore cannot qualify as a coordinated party expenditure. This, KSDCEC asserted, is due to the content standard which states that a communication must be a "public communication" to meet the definition of a coordinated party expenditure.

As a result of OGC's revised conclusion regarding the door hanger, the Audit staff has added the \$14,105 cost of the door hanger to the \$210,120 cost of the remaining three mailers, for a revised coordinated party expenditure total of \$224,225. Should the Commission determine that the affidavits do not sufficiently document the volunteers' involvement for the door hanger and the mailers, and that the volunteer materials exemption does not apply to these expenditures, the Audit staff recommends that the Commission find that KSDCEC exceeded the coordinated party expenditure limit by \$169,525.

Finding 5. Failure to File a 24-Hour Report

In response to the DFAR, KSDCEC stated that this finding should either be removed from the report or additional clarifying information should be provided due to the origin of the finding, which KSDCEC believes was the Audit staff's attempt "to address a purported lack of documentation" provided for the use of volunteers, as documented by a sworn declaration provided by its then-Executive Director. KSDCEC further stated that the Audit staff "chose to analyze this issue as a reporting matter and not one related to the issue at hand, which is whether the distribution of these materials resulted in an excessive coordinated expenditure on behalf of the candidate." Additionally, KSDCEC maintained that the activity in question was not a public communication and thus could not be considered a coordinated communication, which OGC agreed with in its DFAR legal analysis (LRA 1107, dated December 14, 2021, attached).

However, in its subsequent LRA 1107, dated March 30, 2022, OGC revised its conclusion that a door hanger cannot be a public communication, stating that if KSDCEC's documentation is insufficient to establish the volunteer materials exemption, then the door hanger likely is a public communication and would be considered a party coordinated expenditure. In its response, KSDCEC noted that "documentation beyond a sworn affidavit has never been required..." to show volunteer involvement and that "door hangers are not public communications, and therefore, cannot qualify as coordinated party expenditures."

Irrespective of whether the door hanger is a public communication, given KSDCEC's assertion that the expenditure was coordinated with a nominee, the door

hanger does not meet the definition of an independent expenditure and, therefore, did not require the filing of a 24-hour report, as determined in the DFAR. The Audit staff notes that KSDCEC first asserted that the expenditure in question was coordinated with a nominee in its response to the IAR and therefore the Audit staff did not analyze this issue until it was raised by KSDCEC. As such, the Audit staff therefore recommends that the Commission find that KSDCEC did not fail to file a 24-hour report.

The Office of General Counsel has reviewed this memorandum and concurs with the recommendations.

If this memorandum is approved, the Proposed Final Audit Report will be prepared and circulated within 30 days of the Commission's approval.

If this Audit Division Recommendation Memorandum is not approved on a tally vote, Directive No. 70 states that the matter will be placed on the next regularly scheduled open session agenda.

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Terry O'Brien or Nicole Burgess at 694-1200.

Attachments:

- Draft Final Audit Report of the Audit Division on the Kentucky State Democratic Central Executive Committee
- Comments on Draft Final Audit Report on the Kentucky State Democratic Central Executive Committee, dated December 14, 2021 (LRA 1107)
- Comments on Kentucky State Democratic Central Executive Committee Response to the Draft Final Audit Report, dated February 15, 2022 (LRA 1107)
- Comments on Audit Division Recommendation Memorandum on the Kentucky State Democratic Central Executive Committee, dated March 30, 2022 (LRA 1107)

cc: Office of General Counsel



Draft Final Audit Report of the Audit Division on the Kentucky State Democratic Central Executive Committee

(January 1, 2017 - December 31, 2018)

Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.¹ The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

About the Committee (p. 2)

The Kentucky State Democratic Central Executive Committee is a state party committee headquartered in Frankfort, Kentucky. For more information, see the chart on the Committee Organization, p. 2.

Financial Activity (p. 3)

• Receipts	
○ Contributions from Individuals	\$ 918,471
○ Contributions from Political Committees	802,802
○ Transfers from Affiliated/Other Party Committees	709,719
○ Offsets, Refunds, and Other Federal Receipts	286,747
○ Transfers from Non-federal Account	88,064
Total Receipts	\$ 2,805,803
• Disbursements	
○ Operating Expenditures	\$ 188,678
○ Allocated Federal/Non-federal Expenditures	813,027
○ Transfers to Affiliated/Other Party Committees	63,757
○ Refunds/Other Disbursements	385,724
○ Federal Election Activity	1,259,053
Total Disbursements	\$ 2,710,239

Findings and Recommendations (p. 4)

- Misstatement of Financial Activity (Finding 1)
- Receipt of Contributions in Excess of the Limit (Finding 2)
- Recordkeeping for Employees (Finding 3)
- Excessive Coordinated Party Expenditures (Finding 4)
- Failure to File a 24-Hour Report (Finding 5)

¹ 52 U.S.C. §30111(b).



Draft Final Audit Report of the Audit Division on the Kentucky State Democratic Central Executive Committee

(January 1, 2017 - December 31, 2018)

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Part I

Background

Authority for Audit

This report is based on an audit of the Kentucky State Democratic Central Executive Committee (KSDCEC), undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 52 U.S.C. §30111(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 52 U.S.C. §30104. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. 52 U.S.C. §30111(b).

Scope of Audit

Following Commission-approved procedures, the Audit staff evaluated various risk factors and as a result, this audit examined:

1. the receipt of excessive contributions;
2. the disclosure of contributions received;
3. the disclosure of individual contributors' occupation and name of employer;
4. the disclosure of disbursements, debts and obligations;
5. the disclosure of expenses allocated between federal and non-federal accounts;
6. the consistency between reported figures and bank records;
7. the completeness of records;
8. the disclosure of independent expenditures; and
9. other committee operations necessary to the review.

Commission Guidance

Request for Legal Consideration by the Commission

Pursuant to the Commission's "Policy Statement Establishing a Program for Requesting Consideration of Legal Questions by the Commission," several state party committees unaffiliated with KSDCEC requested early consideration of a legal question raised during audits covering the 2010 election cycle. Specifically, the Commission addressed whether monthly time logs under 11 CFR §106.7(d) (1) were required for employees paid with 100 percent federal funds.

The Commission concluded, by a vote of 5-1, that 11 CFR §106.7(d) (1) does require committees to keep a monthly log for employees paid exclusively with federal funds. Exercising its prosecutorial discretion, however, the Commission decided it will not pursue recordkeeping violations for the failure to keep time logs or to provide affidavits to account for employee salaries paid with 100 percent federal funds and reported as such. This audit report does not include any findings or recommendations with respect to KSDCEC employees paid with 100 percent federal funds and reported as such.

Part II

Overview of Committee

Committee Organization

Important Dates	
• Date of Registration	July 12, 1975
• Audit Coverage	January 1, 2017 - December 31, 2018
Headquarters	Frankfort, Kentucky
Bank Information	
• Bank Depositories	Three
• Bank Accounts	Four Federal; Three Non-Federal
Treasurer	
• Treasurer When Audit Was Conducted	M. Melinda Karns (4/12/2013 – Present)
• Treasurer During Period Covered by Audit	M. Melinda Karns (4/12/2013 – Present)
Management Information	
• Attended FEC Campaign Finance Seminar	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

Overview of Financial Activity (Audited Amounts)

Cash on hand @ January 1, 2017	\$ 47,671
Receipts	
○ Contributions from Individuals	918,471
○ Contributions from Political Committees	802,802
○ Transfers from Affiliated/Other Party Committees	709,719
○ Offsets, Refunds, and Other Federal Receipts	286,747
○ Transfers from Non-federal Account	88,064
Total Receipts	\$2,805,803
Disbursements	
○ Operating Expenditures	188,678
○ Allocated Federal/Non-federal Expenditures	813,027
○ Transfers to Affiliated/Other Party Committees	63,757
○ Refunds/Other Disbursements	385,724
○ Federal Election Activity	1,259,053
Total Disbursements	\$ 2,710,239
Cash on hand @ December 31, 2018	\$ 143,235

Part III

Summaries

Findings and Recommendations

Finding 1. Misstatement of Financial Activity

During audit fieldwork, a comparison of KSDCEC's reported financial activity with its bank records revealed a misstatement of receipts, disbursements, and beginning and ending cash for calendar year 2017, as well as receipts, disbursements, and ending cash for calendar year 2018. Specifically, for 2017 KSDCEC understated receipts, disbursements, beginning cash and ending cash by \$15,838, \$38,846, \$35,925 and \$12,917, respectively. For 2018, KSDCEC understated receipts, disbursements and ending cash by \$116,641, \$61,315 and \$68,280, respectively. In response to the Interim Audit Report recommendation, KSDCEC filed a Form 99 (Miscellaneous Electronic Submission) correcting the receipt and disbursement misstatements. Additionally, subsequent to its response to the Interim Audit Report, on September 20, 2021, KSDCEC adjusted its beginning and ending cash balances on its most recently filed disclosure report. (For more detail, see p. 5.)

Finding 2. Receipt of Contributions in Excess of the Limit

During audit fieldwork, the Audit staff reviewed contributions from individuals to determine if any exceeded the contribution limit. This review indicated that KSDCEC received apparent excessive contributions totaling \$78,043. The errors occurred as a result of KSDCEC not notifying contributors that the excessive portions of the contributions were transferred to the non-federal account. In response to the Interim Audit Report recommendation, KSDCEC stated that it "disagrees with the Commission's legal basis for this finding," noting that each donor who made a contribution did so "with the full understanding that the contribution was to be split between [KSDCEC's] federal account and non-federal account." KSDCEC stated that its solicitation materials provide clear notice that contributions are subject to the prohibitions and limitation of the Act and any portion in excess of the federal limit was timely transferred to its non-federal account.

KSDCEC provided copies of letters to contributors, notifying them that the excessive portion of their contribution had been allocated to the non-federal account and offering a refund of the amount in excess of the \$10,000 limit, thus resolving the excessive portion, albeit untimely. After consultation with the Office of General Counsel, the Audit staff recommends that KSDCEC provide further evidence that its contributors intended or directed their contributions to be split between KSDCEC's federal and non-federal accounts. (For more detail, see p. 7.)

Finding 3. Recordkeeping for Employees

During audit fieldwork, the Audit staff determined that KSDCEC did not maintain any monthly payroll logs, as required, to document the percentage of time each employee spent in connection with a federal election. For 2017 and 2018, the Audit staff identified payments to KSDCEC employees totaling \$443,976 for which KSDCEC did not maintain monthly payroll logs. This consisted of payroll which was allocated with federal and non-federal funds. There was no payroll paid exclusively with non-federal funds. In response to the Interim Audit Report recommendation, KSDCEC stated it “has instituted procedures to ensure that time records are maintained for all employees who are paid in part with non-federal funds[.]” (For more detail, see p. 12.)

Finding 4. Excessive Coordinated Party Expenditures

During audit fieldwork, the Audit staff identified apparent coordinated expenditures for one House candidate that exceeded the 2018 coordinated party expenditure limit by a total of \$558,320. In response to the Interim Audit Report recommendation, KSDCEC provided sign-in sheets and photographs of volunteers working at a mail house assisting with ten party mailings. KSDCEC also provided affidavits from a volunteer present at one of the mailings, a KSDCEC employee who coordinated volunteer recruitment and a mail house employee who coordinated volunteer activity with KSDCEC. There remain three mailings totaling \$210,120 for which KSDCEC did not provide additional documentation. As a result, KSDCEC exceeded its coordinated party expenditures limitation by \$155,420. (For more detail, see p. 13.)

Finding 5. Failure to File a 24-Hour Report

During audit fieldwork, the Audit staff reviewed expenditures that KSDCEC disclosed on Schedule B (Itemized Disbursements), Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds), one of which appeared to be an independent expenditure which should have been disclosed on Schedule E, Line 24 (Independent Expenditures). KSDCEC may have been required to file a 24-hour report for \$14,105, the amount KSDCEC paid for a door hanger supporting a candidate for federal office, depending upon the dissemination date.

In response to the Interim Audit Report recommendation, KSDCEC disagreed with the characterization of this expenditure as an independent expenditure. KSDCEC also asserted the door hanger is not a public communication, and therefore cannot be considered a coordinated communication. KSDCEC stated that this was an exempt activity coordinated with the candidate and distributed by volunteers. A declaration from KSDCEC’s Executive Director was also provided. Additionally, KSDCEC stated that while it mischaracterized the door hanger expense on its reports as a mailing activity, they were actually “printed material that were disseminated by volunteers by manually placing them on individual doors of voters.”

After consultation with the Office of General Counsel, the Audit staff concluded that the door hanger is not an independent expenditure, in agreement with KSDCEC. (For more detail, see p. 19.)

Part IV

Findings and Recommendations

Finding 1. Misstatement of Financial Activity

Summary

During audit fieldwork, a comparison of KSDCEC's reported financial activity with its bank records revealed a misstatement of receipts, disbursements, and beginning and ending cash for calendar year 2017, as well as receipts, disbursements, and ending cash for calendar year 2018. Specifically, for 2017 KSDCEC understated receipts, disbursements, beginning cash and ending cash by \$15,838, \$38,846, \$35,925 and \$12,917, respectively. For 2018, KSDCEC understated receipts, disbursements and ending cash by \$116,641, \$61,315 and \$68,280, respectively. In response to the Interim Audit Report recommendation, KSDCEC filed a Form 99 (Miscellaneous Electronic Submission) correcting the receipt and disbursement misstatements. Additionally, subsequent to its response to the Interim Audit Report, on September 20, 2021, KSDCEC adjusted its beginning and ending cash balances on its most recently filed disclosure report.

Legal Standard

Contents of Reports. Each report must disclose:

- The amount of cash on hand at the beginning and end of the reporting period;
- The total amount of receipts for the reporting period and for the calendar year;
- The total amount of disbursements for the reporting period and for the calendar year; and
- Certain transactions that require itemization on Schedule A (Itemized Receipts) or Schedule B (Itemized Disbursements). 52 U.S.C. §30104(b)(1), (2), (3), (4), and (5).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reconciled KSDCEC's reported financial activity with its bank records for calendar years 2017 and 2018. The reconciliation determined that KSDCEC misstated receipts, disbursements, and beginning and ending cash for 2017, as well as receipts, disbursements and ending cash for 2018. The following charts detail the discrepancies between KSDCEC's disclosure reports and its bank activity. The succeeding paragraphs explain why the discrepancies occurred.

2017 Committee Activity			
	Reported	Bank Records	Discrepancy
Beginning Cash on hand @ January 1, 2017	\$11,746	\$47,671	(\$35,925) Understated
Receipts	\$605,653	\$621,491	(\$15,838) Understated
Disbursements	\$484,147	\$522,993	(\$38,846) Understated
Ending Cash on hand @ December 31, 2017	\$133,253	\$146,170	(\$12,917) Understated

The beginning cash on hand was understated by \$35,925 and the discrepancy resulted from prior period discrepancies.

The net understatement of receipts resulted from the following:

• Contributions from individuals not reported	\$15,000
• Transfer from affiliated committee not reported	11,290
• Transfer from Non-federal account not supported by bank records	(10,586)
• Unexplained differences	134
Net Understatement of Receipts	<u>\$15,838</u>

The understatement of disbursements resulted from the following:

• Disbursements not reported or reported incorrectly	\$11,551
• Transfers to Non-federal not reported	15,000
• Transfer to affiliated committee not reported	11,290
• Unexplained differences	1,005
Understatement of Disbursements	<u>\$38,846</u>

The \$12,917 understatement of the ending cash on hand was a result of the reporting discrepancies described above.

2018 Committee Activity			
	Reported	Bank Records	Discrepancy
Beginning Cash on hand @ January 1, 2018	\$132,996	\$146,170	(\$13,174) Understated
Receipts	\$2,067,670	\$2,184,311	(\$116,641) Understated
Disbursements	\$2,125,931	\$2,187,246	(\$61,315) Understated
Ending Cash on hand @ December 31, 2018	\$ 74,956 ²	\$ 143,236	(\$68,280) Understated

² The reported 2018 ending cash on hand does not equal beginning cash on hand plus reported receipts minus reported disbursements. This was due to a mathematical discrepancy in which the reported beginning cash on hand for 2018 did not equal the ending cash on hand reported for 2017.

The understatement of receipts resulted from the following:

• Contributions from individuals not reported or reported incorrectly	\$28,980
• Contributions from political committees not reported	28,187
• Transfers from Non-federal account not reported	53,190
• Unexplained differences	<u>6,284</u>
Understatement of Receipts	<u>\$116,641</u>

The net understatement of disbursements resulted from the following:

• Disbursements not reported or reported incorrectly	\$20,428
• Disbursements reported but did not clear the bank	(7,454)
• Disbursements reported twice	(35,171)
• Transfers to Non-federal account not reported	64,636
• Payments for salaries and wages not reported	20,204
• Unexplained differences	<u>(1,328)</u>
Net Understatement of Disbursements	<u>\$ 61,315</u>

The \$68,280 understatement of the ending cash on hand was a result of the reporting discrepancies described above.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with the KSDCEC representatives during the exit conference and provided schedules detailing the misstatements of financial activity. The Audit staff explained each reporting error to the KSDCEC representatives and answered several questions regarding the details of the misstatement. The KSDCEC representatives acknowledged their understanding of the differences. In its response to the exit conference, KSDCEC did not provide any comments on this finding.

The Interim Audit Report recommended that KSDCEC amend its disclosure reports or file a Form 99 (Miscellaneous Electronic Submission)³ to correct the misstatements. In addition, the Interim Audit Report recommended that KSDCEC reconcile the cash balance on its most recently filed report and correct any subsequent discrepancies.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, KSDCEC filed a Form 99 correcting the receipt and disbursement misstatements for the 2017 and 2018 calendar years. Additionally, KSDCEC adjusted its beginning and ending cash balances on its most recent report, filed September 20, 2021.

Finding 2. Receipt of Contributions in Excess of the Limit

Summary

During audit fieldwork, the Audit staff reviewed contributions from individuals to determine if any exceeded the contribution limit. This review indicated that KSDCEC

³ KSDCEC was advised by the Audit staff that if it chose to file a Form 99 instead of amending its disclosure reports, the form must contain all pertinent information that is required on each schedule.

received apparent excessive contributions totaling \$78,043. The errors occurred as a result of KSDCEC not notifying contributors that the excessive portions of the contributions were transferred to the non-federal account. In response to the Interim Audit Report recommendation, KSDCEC stated that it “disagrees with the Commission’s legal basis for this finding,” noting that each donor who made a contribution did so with a full understanding that the contribution was to be split between KSDCEC’s federal and non-federal account. KSDCEC stated that its solicitation materials provide clear notice that contributions are subject to the prohibitions and limitation of the Act and any portion in excess of the federal limit was timely transferred to its non-federal account.

KSDCEC provided copies of letters to contributors, notifying them that the excessive portion of their contribution had been allocated to the non-federal account and offering a refund of the amount in excess of the \$10,000 limit, thus resolving the excessive portion, albeit untimely. After consultation with the Office of General Counsel, the Audit staff recommends that KSDCEC provide further evidence that its contributors intended or directed their contributions to be split between KSDCEC’s federal and non-federal accounts.

Legal Standard

- A. Party Committee Limits.** A party committee may not receive more than a total of \$10,000 per year from any one individual. This limit is shared by the state, district, & local party committees. 52 U.S.C. §30116 (a)(1)(D) and 11 CFR §§110.1(c)(5) and 110.9.
- B. Handling Contributions That Appear Excessive.** If a committee receives a contribution that appears to be excessive, the committee must either:
- Return the questionable check to the donor; or
 - Deposit the check into its federal account and:
 - Keep enough money in the account to cover all potential refunds;
 - Keep a written record explaining why the contribution may be illegal;
 - Include this explanation on Schedule A if the contribution has to be itemized before its legality is established;
 - Seek a reattribution or a redesignation of the excessive portion, following the instructions provided in the Commission regulations (see below for explanations of reattribution and redesignation); and
 - If the committee does not receive a proper reattribution or redesignation within 60 days after receiving the excessive contribution, refund the excessive portion to the donor. 11 CFR §§103.3(b)(3), (4) and (5) and 110.1(k)(3)(ii)(B).
- C. Joint Contributions.** Any contribution made by more than one person (except for a contribution made by a partnership) must include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A joint contribution is attributed equally to each donor unless a statement indicates that the funds should be divided differently. 11 CFR §110.1(k)(1) and (2).

D. Reattribution of Excessive Contributions. The Commission regulations permit committees to ask donors of excessive contributions (or contributions that exceed the committee's net debts outstanding) whether they had intended their contribution to be a joint contribution from more than one person and whether they would like to reattribute the excess amount to the other contributor. The committee must inform the contributor that:

- The reattribution must be signed by both contributors;
- The reattribution must be received by the committee within 60 days after the committee received the original contribution; and
- The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3).

Within 60 days after receiving the excessive contribution, the committee must either receive the proper reattribution or refund the excessive portion to the donor. 11 CFR §§103.3(b)(3) and 110.1(k)(3)(ii)(B). Further, a political committee must retain written records concerning the reattribution in order for it to be effective. 11 CFR §110.1(l)(5).

Notwithstanding the above, any excessive contribution that was made on a written instrument that is imprinted with the names of more than one individual may be attributed among the individuals listed unless instructed otherwise by the contributor(s). The committee must inform each contributor:

- How the contribution was attributed; and
- The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3)(B).

Facts and Analysis

A. Facts

The Audit staff utilized sample testing and a review of high dollar contributions not included in the sample population to identify apparent excessive contributions from individuals, as noted below.

Excessive Contributions – Testing Method	
Sample Projection Amount ⁴	\$28,798
High Dollar Review Contribution Error Amount	\$49,245
Total Amount of Excessive Contributions	\$78,043
Reasons for Excessive Contributions	
Contributions transferred to the Non-federal account without prior notification	\$78,043
Total Amount of Excessive Contributions	\$78,043

B. Additional Information

KSDCEC did not maintain a separate account for questionable contributions. However, based on its cash on hand at the end of the audit period (\$143,236), it appears that KSDCEC did maintain sufficient funds to refund the apparent excessive contributions. The Audit staff notes that the excessive portions of the contributions reviewed were timely transferred to KSDCEC's non-federal account.

C. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with the KSDCEC representatives during the exit conference and provided a schedule of the apparent excessive contributions. The Audit staff noted that the contributors may not have been made aware that the excessive portions of their contributions were transferred to the non-federal account because KSDCEC has not provided supporting documentation such as letters or solicitations cards. In its response to the exit conference, KSDCEC stated that it would provide the Audit staff "acknowledgments from donors who donated in excess of the federal limits that the funds were to be used for state expenditures." To date, the Audit staff has not received the "acknowledgements" from KSDCEC.

The Interim Audit Report recommended that KSDCEC:

- Provide evidence demonstrating that the contributions in question were not excessive, or if excessive, were resolved in a timely manner. This evidence should have included documentation that was not made available to the Audit staff during the audit, including copies of solicitation cards completed by the contributors at the time of their contribution that clearly informed the contributors of the limitations; timely letters sent to contributors eligible for presumptive reattribution; or timely refunds (copies of the front and back of negotiated refund checks) or reattributions for excessive contributions.

⁴ The sample error amount (\$28,798) was projected using a Monetary Unit Sample with a 95 percent confidence level. The sample estimate could be as low as \$13,913 or as high as \$55,427.

- Absent such demonstration, KSDCEC should have reviewed its contributions to determine which were excessive and how each can be resolved. For any excessive contributions that KSDCEC could have resolved by sending a presumptive reattribution letter, it may now send letters to inform the contributors how the committee reattributed the contribution and/or offer a refund for any remaining excessive amounts that have not been previously transferred to the non-federal account. KSDCEC must provide evidence of such refunds (copies of the front and back of negotiated checks). For a reattribution, both the contributor and the individual to whom a contribution was reattributed must be notified.
- If funds are not available to make the necessary refunds, KSDCEC should have disclosed the contributions requiring refunds on Schedule D (Debts and Obligations) until funds become available to make such refunds.

D. Committee Response to Interim Audit Report

In its response to the Interim Audit Report recommendation, KSDCEC stated that it “disagrees with the Commission’s legal basis for this finding.” KSDCEC asserted that each contribution to KSDCEC was made by a donor who had a full understanding that their contribution would be split between its federal and non-federal accounts. KSDCEC further stated that the Commission’s regulations do not “directly address the process whereby a political party committee must notify a donor that their contribution is excessive and offer a refund in lieu of the splitting of their contribution.” KSDCEC noted it provides clear notice in its solicitation materials that contributions are subject to the limitations and prohibitions of the Act and that any excessive contributions above the federal limit were timely transferred to its non-federal account.

KSDCEC provided the following in response to the Interim Audit Report:

Corrective Action Taken in Response to the Interim Audit Report	
Letters sent notifying contributors of transfer to the non-federal account – <i>Untimely</i>	\$69,245

After reviewing KSDCEC’s response to the Interim Audit Report and consultation with the Office of General Counsel, the Audit staff recommends KSDCEC submit evidence that its contributors intended or directed their contributions be split between federal and non-federal accounts.

Finding 3. Recordkeeping for Employees

Summary

During audit fieldwork, the Audit staff determined that KSDCEC did not maintain any monthly payroll logs, as required, to document the percentage of time each employee spent in connection with a federal election. For 2017 and 2018, the Audit staff identified payments to KSDCEC employees totaling \$443,976 for which KSDCEC did not maintain monthly payroll logs. This consisted of payroll which was allocated with federal and non-federal funds. There was no payroll paid exclusively with non-federal funds. In response to the Interim Audit Report recommendation, KSDCEC stated it “has instituted procedures to ensure that time records are maintained for all employees who are paid in part with non-federal funds[.]”

Legal Standard

- A. Maintenance of Monthly Logs.** Committees must keep a monthly log of the percentage of time each employee spends in connection with a federal election. Allocations of salaries, wages, and fringe benefits are to be undertaken as follows:
- Employees who spend 25 percent or less of their compensated time in a given month on federal election activities must be paid either from the federal account or have their pay allocated between federal and non-federal accounts as administrative costs;
 - Employees who spend more than 25 percent of their compensated time in a given month on federal election activities must be paid only from a federal account; and
 - Employees who spend none of their compensated time in a given month on federal election activities may be paid entirely with funds that comply with state law. 11 CFR §106.7(d)(1).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed disbursements for payroll. KSDCEC did not maintain any monthly payroll logs or equivalent records to document the percentage of time each employee spent in connection with a federal election. These logs are required to document the proper allocation of federal and non-federal funds used to pay employee salaries and wages. For 2017 and 2018, KSDCEC did not maintain monthly logs for \$443,976⁵ in payroll. This amount consists solely of payroll for employees reported on Schedule H4 (Disbursements for Allocated Federal and Non-Federal Activity) and paid with an allocation of federal and non-federal funds during the same month. There was no payroll paid exclusively with non-federal funds.

⁵ This total does not include payroll for employees paid with 100 percent federal funds and reported as such (see Part I, Background, Commission Guidance, Request for Early Consideration of a Legal Question – Recordkeeping for Employees, Page 1). Payroll amounts are stated net of taxes and benefits.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with the KSDCEC representatives during the exit conference and provided a schedule of the payroll transactions. In its response to the exit conference, KSDCEC did not provide any comment on this finding.

The Interim Audit Report recommended that KSDCEC:

- Provide evidence that monthly time logs were maintained to document the percentage of time an employee spent in connection with a federal election; or
- Provide and implement a plan to maintain monthly payroll logs in the future.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, KSDCEC stated it has “instituted procedures to ensure time records are maintained for all employees who are paid in part with non-federal funds[.]”

The Audit staff maintains that KSDCEC was required to maintain payroll logs for its employees paid with a combination of federal and non-federal funds. The Audit staff concludes that KSDCEC did not maintain monthly logs for payroll totaling \$443,976, however, KSDCEC complied with the Interim Audit Report recommendation by instituting procedures to maintain future time records for employees who are paid in part with non-federal funds.

Finding 4. Excessive Coordinated Party Expenditures

Summary

During audit fieldwork, the Audit staff identified apparent coordinated expenditures for one House candidate that exceeded the 2018 coordinated party expenditure limit by a total of \$558,320. In response to the Interim Audit Report recommendation, KSDCEC provided sign-in sheets and photographs of volunteers working at a mail house assisting with ten party mailings. KSDCEC also provided affidavits from a volunteer present at one of the mailings, a KSDCEC employee who coordinated volunteer recruitment and a mail house employee who coordinated volunteer activity with KSDCEC. There remain three mailings totaling \$210,120 for which KSDCEC did not provide additional documentation. As a result, KSDCEC exceeded its coordinated party expenditures limitation by \$155,420.

Legal Standard

A. Coordinated Party Expenditures. National party committees and state party committees are permitted to purchase goods and services on behalf of candidates in the general election—over and above the contributions that are subject to contribution limits. Such purchases are referred to as “coordinated party expenditures.” They are subject to the following rules:

- The amount spent on “coordinated party expenditures” is limited by statutory formulas that are based on the Cost of Living Adjustment (COLA) and the voting age population;

- Party committees are permitted to coordinate the spending with the candidate committees;
- The parties may make these expenditures only in connection with the general election;
- The party committees—not the candidates—are responsible for reporting these expenditures; and
- If the party committee exceeds the limits on coordinated party expenditures, the excess amount is considered an in-kind contribution, subject to the contribution limits described above. 52 U.S.C. §30116(d) and 11 CFR §§109.30 and 109.32.

B. Assignment of Coordinated Party Expenditure Limit. A political party may assign its authority to make coordinated party expenditures to another political party committee. Such an assignment must be made in writing, state the amount of the authority assigned, and be received by the assignee before any coordinated party expenditure is made pursuant to the assignment. The political party committee that is assigned authority to make coordinated party expenditures must maintain the written assignment for at least three years. 11 CFR §§104.14 and 109.33(a) and (c).

C. Volunteer Activity. The payment by a state committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids or newsletters, and yard signs) used by such committee in connection with volunteer activities on behalf of any nominee(s) of such party is not a contribution, provided that the following conditions are met:

- Such payment is not for cost incurred in connection with any broadcasting, newspaper, magazine, bill board, direct mail, or similar type of general public communication or political advertising. The term direct mail means any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists;
- The portion of the cost of such materials allocable to Federal candidates must be paid from contributions subject to the limitations and prohibitions of the Act;
- Such payment is not made from contributions designated by the donor to be spent on behalf of a particular candidate for federal office;
- Such materials are distributed by volunteers and not by commercial or for-profit operations;
- If made by a political committee such payments shall be reported by the political committee as a disbursement in accordance with 11 CFR §104.3 but need not be allocated to specific candidates in committee reports; and
- The exemption is not applicable to campaign materials purchased by the national party committees. 11 CFR §100.87 (a), (b), (c), (d), (e) and (g) and 11 CFR §100.147 (a), (b), (c), (d), (e) and (g).

D. Coordinated Party Communication. A political party communication is coordinated with a candidate, a candidate's authorized committee, or agent of any of the foregoing, when the communication satisfies the following conditions:

- (1) The communication is paid for by a political party committee or its agent.

- (2) The communication is a public communication that satisfies at least one of the following content standards.
- Expressly advocates a candidate's election or defeat 11 CFR §100.22(a) and (b).
 - Involves the dissemination, distribution or republication of a candidate's campaign materials.
 - Refers to a federal candidate, is directed to the candidate's constituents and is distributed within certain time frame before an election.
- (3) The communication satisfies at least one of the conduct standards in 11 CFR §109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR §109.21(e), (g), and (h).
- Must have been created, produced or distributed at the request of the candidate or its agent.
 - Developed with a "material involvement" of the candidate.
 - Created, produced or distributed after "substantial discussion" with the candidate or his agents.
 - The use of a common vendor in the creation, production or distribution of a communication. 11 CFR §109.37.

E. Reporting Coordinated Party Expenditures. Each political committee shall report the full name of each person who receives any expenditure from the reporting committee during the reporting period in connection with an expenditure under 11 CFR Part 109, Subpart D (52 U.S.C. §30116(d)), together with the date, amount and purpose of any such expenditure as well as the name of, and office sought by the candidate on whose behalf the expenditure is made. 11 CFR §104.3 (b)(1)(viii).

F. Public Communication (52 U.S.C. § 30101(22)). *Public communication* means a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising. The term *general public political advertising* shall not include communications over the Internet, except for communications placed for a fee on another person's Web site.

G. Limits on Contributions Made by State and Local Party Committees.

State and local party committees must comply with the contribution limits below:

- \$5,000 per election to a Federal campaign if the contributing committee has qualified as a multicandidate committee.
- \$2,700 per election to a Federal campaign if the contributing committee has not qualified as a multicandidate committee.
- \$5,000 per year to a separate segregated fund (corporate or labor PAC) or a nonconnected committee.
- Unlimited transfers to other party committees. 52 U.S.C. §30116(a).

Facts and Analysis

A. Facts

The coordinated expenditure limit during the 2018 election cycle for a House candidate in the state of Kentucky was \$49,700 each, for the state and national party committees. A review of the Democratic Congressional Campaign Committee's (DCCC) disclosure reports indicated that the DCCC made coordinated expenditures of \$99,400 on behalf of Amy McGrath for Congress (Kentucky, District 6). KSDCEC did not transfer any of its coordinated spending authority to the DCCC.

During audit fieldwork, the Audit staff's review of disbursements identified apparent coordinated expenditures made on behalf of Amy McGrath for Congress consisting of 13 mail pieces totaling \$613,020 that were reported on Schedule B, Line 30(b).⁶ Of this amount, \$558,320 in expenditures were in excess of the authorized coordinated spending limit for the candidate and resulted in an apparent excessive in-kind contribution to the candidate.

The Audit staff's analysis was based on a three-pronged test to determine whether a communication is a party coordinated communication. A communication must satisfy all three prongs of the test to be considered a party coordinated expenditure. The three-prong test consists of payment prong, content prong and conduct prong.

- **Payment Prong** means the communication is paid for, in whole or in part, by a person other than the candidate. All communications in this finding were paid by KSDCEC and traced to its federal account.
- **Content Prong** means the communication must be a public communication that also meets any one of these three standards to meet the content prong:
 - Expressly advocates the election or defeat of a clearly identified candidate for federal office per 11 CFR §100.22(a) or (b); or

⁶ As discussed in Finding 5 below, KSDCEC also reported the cost of a door hanger, \$14,105, on Schedule B, Line 30(b). The Audit staff previously included the cost of this door hanger in Finding 5 in the Interim Audit Report, based on it being considered an independent expenditure. However, KSDCEC indicated in its response to the Interim Audit Report that the door hanger was fully coordinated with the candidate and, in consultation with the Office of General Counsel, the Audit staff therefore determined that the door hanger could not be classified as an independent expenditure. Further, although KSDCEC had reported the door hanger as having been mailed, KSDCEC asserts that this was a reporting error and that copies of the door hanger were distributed by hand by volunteers. The invoice associated with the door hanger, submitted to Audit staff, appears to corroborate KSDCEC's assertion that the door hangers were distributed by hand, though they do not show that the door hangers were distributed by volunteers. The Office of General Counsel has concluded that, based on this method of distribution, the door hanger is not a public communication and therefore does not meet the threshold criteria for satisfying the content prong of the coordinated expenditure standard (See LRA 1107). Because the Commission has been inconsistent on this issue, however, the Office of General Counsel recommended referral of this question to the Commission. The Audit staff therefore mentions the door hanger here, although the cost of the door hanger is not included in the total dollar amount of the coordinated expenditure finding.

- Involves the dissemination, distribution or republication of a candidate’s campaign materials; or
- Refers to a clearly identified federal candidate and is publicly distributed in the identified candidate’s jurisdiction within 90 days of the candidate’s general election.

All communications in this finding contained express advocacy for a clearly identified federal candidate per 11 CFR §100.22(a) or (b).

- **Conduct Prong** means the communication must have been one of the following:
 - Created, produced or distributed at the request of the candidate or its agents; or
 - Developed with a material involvement of the candidate; or
 - Created, produced or distributed after substantial discussion with the candidate or its agents; or
 - Involved the use of a common vendor by the candidate committee and the party committee in the creation, production or distribution of a communication; or
 - A former employee/independent contractor used or conveyed information about the plans, projects, activities or needs of the candidate to create the communication.

All the communications, including the door hanger, in this finding contained the following disclaimers: “Paid for by the Kentucky Democratic Party and Authorized by the Amy McGrath for Congress Committee,” or “Paid for by the Kentucky Democratic Party.” In addition, the Amy McGrath for Congress committee and KSDCEC employed a common vendor in the creation, production or distribution of communications, as evidenced by reports filed with the Commission by the Amy McGrath for Congress Committee and KSDCEC, in addition to invoices provided to Audit staff by KSDCEC.

The following chart details the total amount of apparent coordinated expenditures and the resulting apparent excessive in-kind contributions.

KSDCEC Coordinated Expenditures	Amy McGrath for Congress
Reported Expenditures	\$613,020
Less: KSDCEC Spending Limit	(\$49,700)
Over Limit (In-Kind Contribution)	\$563,320
Less: Allowable Contribution to Candidate	(\$5,000)
Excessive Coordinated Party Expenditures	\$558,320

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with the KSDCEC representatives during the exit conference and provided a schedule of the apparent excessive in-kind contributions. In response to the exit conference, a KSDCEC representative stated “the wrong disclaimer for the McGrath piece was used, but the mail was run volunteer exempt.” Further the

KSDCEC representative stated that KSDCEC was in the process of obtaining affidavits from its volunteers and would submit them when complete. To date KSDCEC has not provided any affidavits to the Audit staff.

The Commission has addressed the applicability of the volunteer materials exemption in the Final Audit Reports of the Arizona Republican Party, the Democratic Executive Committee of Florida, and the Tennessee Republican Party. In these reports, the Commission recognized a lack of clarity regarding the application of the volunteer materials exemption. The Commission had attempted to formulate a consensus policy regarding what constitutes substantial volunteer involvement for the purpose of applying the exemption,⁷ but this was never achieved. Since a lack of clarity exists concerning the application of the volunteer materials exemption, it follows that the type and amount of documentation needed to support volunteer involvement is also unclear.

The Interim Audit Report recommended that KSDCEC demonstrate that it did not exceed its coordinated spending limit on behalf of Amy McGrath for Congress. Evidence could include sign-in sheets and pictures of volunteers sorting and bundling the identified mail pieces. Absent such evidence, the Interim Audit Report recommended that KSDCEC seek reimbursement from the Amy McGrath for Congress committee in the amount of \$558,320.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, KSDCEC provided volunteer sign-in sheets (dated 10/18/2018 – 11/1/2018), and photographs of volunteers at a mail house handling mail pieces for ten separate mailings totaling \$402,900. KSDCEC also provided an affidavit from a volunteer present at one of the mailings stating that the volunteer went to a mail house in Lexington, KY to assist with mailers, signed a volunteer sheet to document attendance, and, while at the mail house, helped remove mail pieces from a printing press and helped sort mail pieces to prepare them for mailing. The volunteer's affidavit also stated she appears in pictures submitted along with the affidavit.

KSDCEC also provided an affidavit from a KSDCEC employee who coordinated volunteer recruitment. The affidavit stated that the employee “organized volunteers to assist with volunteer exempt mail pieces,” “instructed employees to send volunteers to the mail house,” and “ensured that there was at least one volunteer assisting with each mail piece.” The affidavit further stated that “volunteer duties ranged from sorting the mail, packaging the mail, and placing paper or other materials in the printer.”

A third affidavit provided was from a mail house employee who coordinated volunteer participation with KSDCEC. KSDCEC stated that this person was “personally familiar with volunteer activity undertaken in connection with these mailings.” The affidavit stated that as part of their duties, the mail house employee routinely ensured “compliance with volunteer exempt mail pieces for state and local parties.” The affidavit further

⁷ Proposed Interim Enforcement Policy, Agenda document No. 10-16.
<https://www.fec.gov/resources/updates/agendas/2010/mtgdoc1016.pdf>

stated the mail house employee worked with the party and the mail house to coordinate volunteer participation, discussed with the mail house how many volunteers were need for a given project, and communicated this to the party. The affidavit goes on to state the employee “routinely asked the mail house to keep a log of volunteers and take pictures of volunteer activity.”⁸

The Audit staff acknowledges that KSDCEC partially complied with the Interim Audit Report recommendation by providing evidence of volunteer involvement with its mail pieces, including volunteer sign-in sheets, pictures of volunteers handling the mailers, and affidavits from individuals familiar with the mailings and related volunteer involvement. While underscoring the absence of a clear standard related to volunteer materials exemption, given the various types and specificity of the documentation provided by KSDCEC, the Audit staff no longer attributes the cost of 10 mailers totaling \$402,900 to KSDCEC’s coordinated party expenditure limit. There are three remaining mailers, totaling \$210,120, included in the finding for which KSDCEC did not provide any additional documentation. Absent further documentation, the Audit staff maintains that KSDCEC exceeded the coordinated party expenditure limit by \$155,420.⁹

Finding 5. Failure to File a 24-Hour Report

Summary

During audit fieldwork, the Audit staff reviewed expenditures that KSDCEC disclosed on Schedule B (Itemized Disbursements), Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds), one of which appeared to be an independent expenditure which should have been disclosed on Schedule E, Line 24 (Independent Expenditures). KSDCEC may have been required to file a 24-hour report for \$14,105, the amount KSDCEC paid for a door hanger supporting a candidate for federal office, depending upon the dissemination date.

In response to the Interim Audit Report recommendation, KSDCEC disagreed with the characterization of this expenditure as an independent expenditure. KSDCEC also asserted the door hanger is not a public communication, and therefore cannot be considered a coordinated communication. KSDCEC stated that this was an exempt

⁸ In regard to the door hanger, discussed in footnote 6 above, KSDCEC provided a declaration from its Executive Director stating that the door hanger was distributed by hand and left on doorknobs of individual homes and that, although the reports filed with the Commission indicated the door hanger was mailed, this notation was a reporting error by KSDCEC. The Executive Director’s declaration further stated that the door hanger was distributed exclusively by volunteers and “the distribution of the door hanger, in all respects, complied with the requirements set forth at 11 CFR §§ 100.87.” As noted above, the cost of the door hanger is not presently included in the total dollar amount for the finding. However, the Office of General Counsel has recommended that the question of the exemption’s application be referred to the Commission for its consideration, along with the question of whether the door hanger is a public communication. The Audit staff mentions this here because if the Commission concludes that the door hanger is a public communication, and therefore a coordinated expenditure, the question of the sufficiency of the Executive Director’s declaration may be relevant.

⁹ \$155,420 = \$558,320 - \$402,900

activity coordinated with the candidate and distributed by volunteers. A declaration from KSDCEC's Executive Director was also provided.

After consultation with our Office of General Counsel, the Audit staff concluded that the door hanger is not an independent expenditure, in agreement with KSDCEC.¹⁰

Legal Standard

A. Definition of Independent Expenditures. An independent expenditure is an expenditure made for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or their agents, or a political party or its agents.

A clearly identified candidate is one whose name, nickname, photograph or drawing appears, or whose identity is apparent through unambiguous reference, such as "your Congressman," or through an unambiguous reference to his or her status as a candidate, such as "the Democratic presidential nominee" or "Republican candidate for Senate in this state."

Expressly advocating means any communication that:

- Uses phrases such as "vote for the President" or "re-elect your Congressman" or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge election or defeat of one or more clearly identified candidates; or
- When taken as a whole and with limited references to external events, such as proximity to the election, could be interpreted by a reasonable person only as advocating the election or defeat of one or more clearly identified candidates. 11 CFR §§100.16(a), 100.17 and 100.22.

B. Disclosure Requirements – General Guidelines. An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same payee during the same calendar year, it exceeds \$200. Independent expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as memo entries on Schedule E and as a debt on Schedule D. Independent expenditures of \$200 or less need not be itemized, though the committee must report the total of those expenditures on line (b) on Schedule E. 11 CFR §§104.3(b)(3)(vii), 104.4(a) and 104.11.

C. Last-Minute Independent Expenditure Reports (24-Hour Reports). Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20th day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour report is required for each

¹⁰ See footnotes 6 and 8, above, in Finding 4, for further discussion of the current treatment of the door hanger.

additional \$1,000 that aggregates. The 24-hour report must be filed on a Schedule E. The date that a communication is publicly disseminated serves as the date that the Committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).

- D. Formal Requirements Regarding Reports and Statements.** Each political committee shall maintain records with respect to the matters required to be reported which shall provide in sufficient detail the necessary information and data from which the filed reports may be verified, explained, clarified, and checked for accuracy and completeness. 11 CFR §104.14(b)(1).
- E. The Get-Out-the-Vote Activity.** Informing potential voters, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by other means; the location of particular polling places. 11 CFR §100.24(a)(3)(i)(B)(2).
- F. Volunteer Activity.** The payment by a state committee of a political party of the costs of campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids or newsletters, and yard signs) used by such committee in connection with volunteer activities on behalf of any nominee(s) of such party is not a contribution, provided that the following conditions are met:
- Such payment is not for costs incurred in connection with any broadcasting, newspaper, magazine, bill board, direct mail, or similar type of general public communication or political advertising. The term direct mail means any mailing(s) by a commercial vendor or any mailing(s) made from commercial lists.
 - The portion of the cost of such materials allocable to Federal candidates must be paid from contributions subject to the limitations and prohibitions of the Act.
 - Such payment is not made from contributions designated by the donor to be spent on behalf of a particular candidate for federal office.
 - Such materials are distributed by volunteers and not by commercial or for-profit operations.
 - If made by a political committee, such payments shall be reported by the political committee as a disbursement in accordance with 11 CFR §104.3 but need not be allocated to specific candidates in committee reports.
 - The exemption is not applicable to campaign materials purchased by the national party committees. 11 CFR §100.87 (a), (b), (c), (d), (e) and (g) and 11 CFR §100.147 (a), (b), (c), (d), (e) and (g).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff identified one disbursement for a door hanger totaling \$14,105 that required a 24-hour report to be filed. KSDCEC disclosed this expenditure on Schedule B, Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds). However, it appears that this is an independent expenditure containing

express advocacy and should have been disclosed on Schedule E, Line 24 (Itemized Independent Expenditures). One side of the door hanger contained the phrase “Vote for Amy McGrath” expressly advocating for the election of Amy McGrath. The disclaimer noted on the printed materials was “Paid for by the Kentucky Democratic Party.”

As a result, the Audit staff concluded that this printed door hanger was an independent expenditure which should have been reported as such and that a 24-hour report may have been required.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff presented this matter at the exit conference and provided KSDCEC representatives a supporting schedule. Further, the Audit staff requested information regarding the door hanger, including its method and date of distribution. In response, a KSDCEC representative stated that the door hanger was not a public communication and should not be presumed to be an independent expenditure. The KSDCEC representative also stated that the door hanger was “placed on the doors of voters by volunteers in accordance with the FEC’s volunteer exempt activity rules,” was “not sent by mail,” and was “designed to be distributed close to the election, or shortly before the day of the election.”

The Commission has addressed the applicability of the volunteer materials exemption in the Final Audit Reports of the Arizona Republican Party, the Democratic Executive Committee of Florida, and the Tennessee Republican Party. In these reports, the Commission recognized a lack of clarity regarding the application of the volunteer materials exemption. The Commission had attempted to formulate a consensus policy regarding what constitutes substantial volunteer involvement for the purpose of applying the exemption,⁶ but this was never achieved. Since a lack of clarity exists concerning the application of the volunteer materials exemption, it follows that the type and amount of documentation needed to support volunteer involvement is also unclear.

The Interim Audit Report recommended that KSDCEC provide documentation and evidence that the apparent independent expenditure in the amount of \$14,105 did not require reporting as an independent expenditure. Evidence should have included documentation such as volunteer sign-in sheets, photographs of volunteers participating in various duties, etc., to support the involvement of volunteer processing or distribution. Alternatively, the Interim Audit Report recommended that KSDCEC provide documentation to support the date of public dissemination for the door hanger to determine whether a 24-hour report was required to be filed.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, KSDCEC stated that while it mischaracterized the door hanger expense on its reports as a mailing activity, they were actually “printed material that were disseminated by volunteers by manually placing them on individual doors of voters.” KSDCEC further stated that it objected to the characterization of this expenditure as an independent expenditure during audit fieldwork, and that the expenditure was properly made as an exempt expenditure “fully

coordinated with its nominee.” KSDCEC explained that it believes the door hanger cannot be considered a coordinated communication since the door hanger itself is not a public communication and the door hanger was distributed by volunteers. KSDCEC also noted that, “it is quite uncommon for state party committees to create and maintain documentation relating to the volunteer component of such daily canvassing activities. They are much to[o] voluminous and difficult for a state party to document.”

KSDCEC provided a declaration from its Executive Director stating that the door hanger was distributed by hand and left on doorknobs of individual homes and that, although the reports filed with the Commission indicated the door hanger was mailed, this notation was a reporting error by KSDCEC. The Executive Director’s declaration further stated that the door hanger was distributed exclusively by volunteers and “the distribution of the door hanger, in all respects, complied with the requirements set forth at 11 CFR §§ 100.87.”

After consideration of KSDCEC’s response and in consultation with the Office of General Counsel, the Audit staff determined that the disbursement for the door hanger did not meet the definition of an independent expenditure and, therefore, did not require the filing of a 24-hour report.¹¹

¹¹ See footnotes 6 and 8 above, in Finding 4, for further discussion of the current treatment of the door hanger.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

December 14, 2021

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna C. Brown
Assistant Staff Director
Audit Division

FROM: Neven Stipanovic *NFS*
Associate General Counsel
Policy Division

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Joshua Blume *JB*
Attorney

SUBJECT: Draft Final Audit Report on the Kentucky State Democratic Central Executive Committee (LRA 1107)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report (“DFAR”) on the Kentucky State Democratic Central Executive Committee (“Committee”). The DFAR contains five findings: (1) Misstatement of Financial Activity; (2) Receipt of Contributions in Excess of the Limit; (3) Recordkeeping for Employees; (4) Excessive Coordinated Party Expenditures; and (5) Failure to File 24-Hour Report. We comment on Findings 2, 4 and 5, and otherwise concur with the findings. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

II. RECEIPT OF CONTRIBUTIONS IN EXCESS OF THE LIMIT (Finding 2).

The DFAR concludes that the Committee received apparent excessive contributions totaling \$78,043. The Committee transferred these excessive contributions to its non-federal account; however, the DFAR finds that the Committee did not provide timely notice to the contributors of its plan to do so. We commented on the legal basis for this finding in our comments on the Interim Audit Report (“IAR”), *see* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Interim Audit Report on the Kentucky State Democratic Central Executive Committee (LRA 1107), at 1-2 (May 27, 2021). Our view has not changed since that time and we therefore do not reiterate it here.

In its response to the IAR, the Committee states that each contributor fully understood at the time of providing the contribution that the amount provided was to be split between the Committee’s federal and non-federal accounts. It observes that nothing in the Commission’s regulations requires a political committee to notify a contributor that a contribution is excessive and to offer a refund in lieu of splitting the contribution. Finally, it notes that it nevertheless notified the contributors and that none of them objected to the splitting of the contributions.

In asserting that the contributors fully understood that their contributions were to be split between the Committee’s federal and non-federal accounts, the Committee appears to be arguing that the contributors intended the total sums contributed to include both a federal and a non-federal component. In a 2001 advisory opinion, the Commission endorsed a national party committee’s stated intention to deposit the total amount of a contribution intended to be split into a federal and a non-federal component (hereafter “composite contribution”) in its federal account and to transfer the non-federal component of the contribution to its non-federal account. Advisory Opinion 2001-17 (DNC Services).¹ That endorsement was accompanied by the endorsement of a specific reporting regime for composite contributions proposed by the national party committee, with some modifications. *Id.*

Thus, to the extent that contributions deposited in the federal account and partly transferred to the non-federal account were composite contributions, the Committee’s treatment of these would appear to be permissible under the reasoning set forth in Advisory Opinion 2001-17 (DNC Services). This would entail the conclusion that such contributions were not excessive federal contributions.

However, there does not currently appear to be evidence to support the Committee’s

¹ The requestor in that advisory opinion was a national party committee. Although national party committees were able at that time to maintain separate federal and non-federal accounts, this is no longer the case. *See* 52 U.S.C. § 30125(a). State party committees are, however, permitted to maintain separate federal and non-federal accounts, and we therefore believe that the reasoning of the advisory opinion would permit state party committees to receive composite contributions. *See* Memorandum from Lisa J. Stevenson to Patricia C. Orrock, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 2 (July 7, 2017) (accepting committee’s argument that treatment of composite contributions acceptable under reasoning of Advisory Opinion 2001-17 (DNC Services)).

factual premise that the contributions at issue in this finding *were* composite.² In the advisory opinion, the national party committee proposed to use a donor card that solicited contributions to either the committee's federal or non-federal account, that advised the donor of the relevant limitations on federal contributions, and that informed the donor of the Committee's intent to allocate amounts exceeding the federal contribution limit to the non-federal account. Advisory Opinion 2001-17 (DNC Services), at 2. The donor card asked the donor to designate either the entire contribution, or such amount as would not exceed the federal limit, to the federal account, or to designate the entire contribution to the non-federal account. *Id.* Thus, the donor's signature on the donor card would constitute the donor's express permission to split the contribution between the federal and the non-federal account. *Id.*

We recommend therefore that the DFAR be revised to solicit evidence from the Committee that would show that the contributors intended or directed that their contributions be split between the Committee's federal and non-federal accounts.

III. EXCESSIVE COORDINATED PARTY EXPENDITURES (Finding 4)

The DFAR finds that the Committee spent \$155,420 more on communications supporting then-House of Representatives candidate, Amy McGrath, than it was entitled to spend when considering both its coordinated party expenditure limit for the 2017-18 election cycle (\$49,700)³ and its contribution limit for that cycle (\$5,000). This represents a deduction of \$402,900 from the amount of \$558,320 deemed excessive in the IAR.

The Audit Division reduced the amount of excessive expenditures in the finding as a result of its evaluation of evidence submitted in tandem with the Committee's response to the IAR. The Committee asserted in the response that none of the 13 mailings at issue in the finding should be deemed coordinated party expenditures because volunteers prepared them for dissemination, thus invoking the "volunteer material exemption" ("VME"), which would exempt the communications from being considered expenditures. *See* 52 U.S.C. § 30101(9)(B)(viii); 11 C.F.R. § 100.147.

The Committee submitted evidence to support its assertion that the VME applies with respect to 10 of the 13 mailings.⁴ This evidence consists of photographs, sign-in sheets and affidavits submitted by persons who coordinated the volunteering exercises, or who were

² According to the Audit Division, the Committee has provided bank statements, a contributor check, and a merchant account statement for contributions given via "Stripe", but no documents showing that the donors intended or directed that their donations be split between federal and non-federal accounts.

³ The DFAR notes that the Democratic Congressional Campaign Committee apparently spent twice the applicable party coordinated expenditure limit, or \$99,400, to support Amy McGrath's House campaign. The auditors have no evidence that the Committee transferred its authority to make coordinated expenditures to the DCCC, however, and therefore credit the Committee with an independent \$49,700 limit.

⁴ We agree with the Audit Division's decision to maintain the finding with respect to the cost of the three mailings for which the Committee submitted no VME documentation. *See* Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Colorado Republican Committee (LRA 961), at 6 (Aug. 15, 2016) (Commission has never approved application of VME based solely on general, conclusory assertion that VME applies).

otherwise personally familiar with the activities involved. We agree with the Audit Division's discussion and analysis of this evidence, as well as its ultimate disposition of the finding. We comment only to recommend that the language in which the conclusion is stated be rephrased so that it is consistent with the absence of a clear standard for determining the degree and type(s) of volunteer involvement necessary to qualify a mailing for the VME. Specifically, the DFAR states that the Audit staff "determined that the affidavits, pictures and sign-in sheets sufficiently demonstrated volunteer involvement for the ten mailers totaling \$402,900". Given the absence of a clear standard, however, we do not believe it would be possible to make a firm positive or negative determination regarding the VME. Rather, we recommend that the DFAR state that the Audit staff decided not to attribute the cost of the 10 mailers to the Committee's coordinated party expenditure limit. *See, e.g.*, Final Audit Report on the Arizona Republican Party, at 13 (Nov. 25, 2013). *See also* Memorandum from Lisa J. Stevenson to Patricia C. Orrock, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 3-4 (July 7, 2017).

IV. FAILURE TO FILE A 24 HOUR REPORT (Finding 5)

The DFAR concludes that the costs of a door hanger, reported by the Committee as Federal Election Activity⁵ paid entirely with federal funds, should have been reported instead as an independent expenditure because the door hanger expressly urged the election of then-House of Representatives candidate, Amy McGrath. 11 C.F.R. §§ 100.16, 100.22(a). In response to the IAR, which contained the same conclusion, the Committee disagrees with the classification of the door hangers as independent expenditures, asserting that it fully coordinated its activities with respect to the door hangers with the candidate. Despite this conceded coordinated activity, the Committee argues that the door hangers nevertheless do not qualify as coordinated party expenditures because door hangers are not "public communications" as that term is defined in 11 C.F.R. § 100.26.⁶ Finally, the Committee states that in any event the door hangers were distributed by volunteers and therefore qualify for the VME. The Committee submitted a declaration from its executive director, in which she recalls that the door hanger was distributed by volunteers in accordance with the pertinent regulatory requirements. The declaration is submitted "under penalty of perjury".

Commission regulations define an "independent expenditure", in pertinent part, as an expenditure for a communication that expressly advocates the election or defeat of one or more candidates for federal office that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate. 11 C.F.R. § 100.16(a). A communication is "made in

⁵ "Federal Election Activity" includes specific types of activities engaged in by a state party committee during specific time frames, public communications containing specific content, or activities consuming more than a specific percentage of an employee's time in a given month. 52 U.S.C. § 30101(20); 11 C.F.R. § 100.24. A state party committee must pay for the costs of such activities exclusively with federal funds, subject to certain exceptions. 52 U.S.C. § 30125(b); 11 C.F.R. § 300.32(a)(2).

⁶ A "public communication", in pertinent part, means "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any form of general public political advertising." 11 C.F.R. § 100.26. *See also* 52 U.S.C. § 30101(22).

cooperation, consultation, or concert with, or at the request or suggestion of, a candidate” if it is a coordinated communication under 11 C.F.R. § 109.21 or a party coordinated communication under 11 C.F.R. § 109.37. *Id.* In no event, however, may a communication be an independent expenditure “if the person making the expenditure allows a candidate, a candidate’s authorized committee, or their agents . . . to become materially involved in decisions regarding the communication . . . or [to share] financial responsibility for the costs of production or dissemination with any such person.” *Id.* § 100.16(c).

Given the Committee’s assertion that it fully coordinated the distribution of the door hangers with the candidate, we do not believe that the door hanger may continue to be classified as an independent expenditure. Although the Committee does not elaborate upon the nature of the coordination involved, its statement that the door hanger was “fully coordinated” with the candidate implies that the candidate was materially involved in the decision-making process regarding the door hanger. 11 C.F.R. § 100.16(c). We therefore recommend that the Audit Division revise Finding 5 to state that the disbursement for the door hanger should not be classified as an independent expenditure. *See* [REDACTED]

[REDACTED] (arriving at identical conclusion).

We also agree with the Committee that the door hanger at issue in the finding cannot be classified as a coordinated communication under 11 C.F.R. § 109.21 or as a party coordinated communication under 11 C.F.R. § 109.37. To qualify as a coordinated communication or a party coordinated communication, a communication must, among other things, be either an electioneering communication or a public communication as that term is defined in 11 C.F.R. § 100.26. 11 C.F.R. §§ 109.21(c)(1), 109.37(a)(2). The door hanger is not an electioneering communication because it is not a broadcast, cable, or satellite communication. 52 U.S.C. § 30104(f)(3)(A); 11 C.F.R. § 100.29(a).

With respect to the question of whether a door hanger may be a public communication, we previously concluded in the negative and we reiterate the rationale and conclusion from that previous audit here. *See* [REDACTED] (palm cards and door hangers). In those comments, we noted that the subject palm cards and door hangers were not distributed by any of the means set forth in 11 C.F.R. § 100.26. *Id.* Further, the Commission has explained that the various means of mass communication encompassed by the public communication definition all lend themselves to the distribution of content through an entity ordinarily owned or controlled by another person. *See Internet Communications*, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006) (“Thus, for an individual to communicate with the public using any of the forms of media listed by Congress, he or she must ordinarily pay an intermediary (generally a facility owner) for access to the public through that form of media each time he or she wishes to make a communication.”). Distribution of a door hanger by hand does not require payment to an intermediate facility owner each time communication with an audience is sought (though payment to a printer for the creation of the door hanger may be required), but rather may be accomplished independently by the communicator. A door hanger is therefore more akin to a printed slate card, handbill, brochure, or bumper sticker than it is to any of the

communication modalities enumerated in the definition of public communication.⁷

At the same time, we note that the Commission has been inconsistent in its treatment of door hangers in previous enforcement matters. In several matters, the Commission concluded that door hangers should be treated as public communications. *See* MUR 6778 (David Hale for Congress), Factual and Legal Analysis, at 3 (undated, *circa* Nov. 5, 2015); MUR 6924 (Andrew Winer), Factual and Legal Analysis, at 5 n.26 (Aug. 21, 2017). *See also* MUR 4643 (Democratic Party of New Mexico), Letter to Allen Weh from Jonathan Bernstein (June 23, 2005) (advising of Commission’s entry into Consent Judgment with respondent and enclosing Order and Judgment, United States District Court of New Mexico, Civil No. 02-0372 MCA/RHS (Apr. 29, 2005), Paragraph A of which notes disbursements from non-federal account for “public communications”; communications at issue in enforcement matter included some door hangers). In another enforcement matter, however, the Commission concluded that a door hanger was not a public communication because it qualified as a handbill subject to the “coattails exemption” (11 C.F.R. § 100.148). *See* MUR 6673 (Lee), Factual and Legal Analysis, at 5 (Sept. 13, 2013).⁸

In light of the above history, we recommend that the Audit Division raise the question of whether the door hanger is a public communication in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

Regarding the VME and the sufficiency of the declaration, we note that the Commission has divided over the question of whether unsworn written assertions suffice in the absence of documentation of the nature and extent of volunteer involvement. *See* Final Audit Report on Nebraska Democratic Party, at 19-20 (approved Oct. 23, 2014). Here, as noted above, the declaration of the executive director was submitted under penalty of perjury. It is therefore somewhat stronger insofar as it may carry the same weight as a sworn statement. 28 U.S.C. § 1746 (unsworn declaration subscribed as true under penalty of perjury supports matter “with like force and effect” as sworn declaration or affidavit). However, in that the declaration is not accompanied by documentation of the nature and extent of volunteer involvement, it is arguably akin to the unsworn statement at issue in the Nebraska Democratic Party audit. Further, the basis upon which the executive director’s recollection is premised, whether upon personal knowledge

⁷ *See, e.g.*, 11 C.F.R. §§ 100.140 (slate card exemption), 100.147 (VME for party committees), which expressly distinguish communications covered by the exemption from modes of public communication that are not. 11 C.F.R. §§ 100.140 (exception shall not apply to costs incurred respecting listings made on broadcasting stations, newspapers, magazines and similar types of general public political advertising), 100.147(a) (exemption not applicable to broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising).

⁸ The Commission has also divided over the question of whether the broader category of “door to door canvassing” constitutes a public communication. *See, e.g.*, MUR 5564 (Alaska Democratic Party), Statement of Reasons of Chairman Robert D. Lenhard, at 3-4 (Dec. 31, 2007) and Statement of Reasons of Vice Chairman David M. Mason and Commissioner Hans A. von Spakovsky, at 8-10 (Dec. 21, 2007); Advisory Opinion 2016-21 (Great America PAC), at 4 n.3 (Commission could not agree on whether door to door canvassing is public communication); Advisory Opinion 2016-21 (Great America PAC), Concurring Statement of Vice Chair Caroline C. Hunter and Commissioners Lee E. Goodman and Matthew S. Petersen (concluding door to door canvassing not public communication). *See also* MUR 7521 (Swing Left), Factual and Legal Analysis, at 7 n.34 (Oct. 6, 2021) (unnecessary to decide whether door to door canvassing is public communication in light of minimal cost of communication at issue).

or not, is not clear. We have recommended in the past that even affidavits bearing such uncertainties be raised for Commission consideration. *See* Memorandum from Lisa J. Stevenson to Patricia C. Orrock, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 4 (July 7, 2017); Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Illinois Republican Party (LRA 1006), at 4-5 (Jan. 31, 2017). We therefore do so again here, recommending that the question be raised in the cover memorandum that will accompany the transmission of the DFAR to the Commission.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

February 15, 2022

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna Brown
Assistant Staff Director
Audit Division

FROM: Neven F. Stipanovic *NFS*
Associate General Counsel
Policy Division

Jessica Selinkoff *\$*
Acting Assistant General Counsel
Compliance Advice

Joshua Blume *jb*
Attorney

SUBJECT: Comments on Kentucky State Democratic Central Executive Committee
Response to the Draft Final Audit Report (LRA 1107)

I. INTRODUCTION

The Office of General Counsel has reviewed the response from the Kentucky State Democratic Central Executive Committee (“the Committee”) to the Draft Final Audit Report. We comment here on certain legal issues raised by the Committees’ response to Finding 2, Receipt of Excessive Contributions.

II. RECEIPT OF EXCESSIVE CONTRIBUTIONS (Finding 2)

The DFAR concludes that the Committee received into its federal account apparent excessive contributions totaling \$78,043. The Committee transferred these excessive contributions to its non-federal account; however, the DFAR finds that the Committee did not provide timely notice to the contributors of its plan to do so. In our comments on the Interim Audit Report (“IAR”), we observed that while Commission regulations require political party committees to resolve excessive contributions either by refunding or, with the contributor’s

permission, reattributing them,¹ 11 C.F.R. §§ 103.3(b)(3), (4); 110.1(k)(3), those regulations do not cover the transfer of excessive contributions from the federal to the non-federal account. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Interim Audit Report on Kentucky State Democratic Central Executive Committee (LRA 1107), at 2 (May 27, 2021) (citing Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Proposed Interim Audit Report on Tennessee Democratic Party (LRA 1073), at 2 (Nov. 29, 2018)). We recommended that the question be presented to the Commission for its consideration. *Id.*

The Committee responded to the IAR by asserting that in fact the contributions at issue in the finding were intended by the contributors to be split between the Committee's federal and non-federal accounts. In our comments on the DFAR, we addressed this contention, noting that the Commission has addressed a committee's receipt of contributions intended to be split into a federal and non-federal component in Advisory Opinion 2001-17 (DNC Services). While that advisory opinion primarily concerned how such split contributions should be reported, the Commission also approved the requestor's proposal to obtain the contributors' consent to splitting, either through designations or subsequent confirmation.²

In our comments on the DFAR, we indicated that if the Committee's contention were true, then its treatment of the contributions could be in accord with Advisory Opinion 2001-17 provided that the Committee present evidence of contributor intent. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Draft Final Audit Report on Kentucky State Democratic Central Executive Committee (LRA 1107), at 2-3 (Dec. 14, 2021). We elaborate here that evidence of contributor's intent for the transferred deposits would need to conform to the time frames of section 103.3. *See* Advisory Opinion 2001-17 (DNC Services), at 3 (citing 11 C.F.R. §§ 102.5 and 103.3, which allow temporary deposit of apparently excessive contributions in federal account pending resolution of their legality by treasurer). Having timely evidence of intent would ensure the ability of the Commission to verify that such contributions were both handled correctly and reported accurately.³ 11 C.F.R. § 104.14(b)(1). *See also* Advisory Opinion 2001-17 (DNC Services), at 4 ("Because the DNC will initially receive a check in excess of the [52 U.S.C. § 30116](a)(1) limit, it is essential that the contribution and the division of the funds be disclosed in a manner that is clear on the public record."), 6.

We comment additionally upon a question we did not adequately address in our comments on the DFAR: Whether Advisory Opinion 2001-17 (DNC Services) may be relied on by a state party committee transferring funds from a federal to non-federal account after the

¹ Contributions to state party committees, such as the Committee, may not be redesignated, as this is an option available only to candidates and their authorized committees. *See* 11 C.F.R. § 110.1(b)(5).

² The Commission also noted that approaches other than the one specifically proposed by DNC Services might also be acceptable. Advisory Opinion 2001-17 (DNC Services), at 3.

³ The Audit Division has informed us that in seven out of ten receipts to the federal account that were transferred, the Committee did not report the transfer of the excessive portion to the non-federal account. This failure to report the transfers would undermine the Committee's ability to rely on Advisory Opinion 2001-17 (DNC Services) regardless of whether the evidence of contributor intent was timely. *See* Final Audit Report on Missouri Democratic State Committee, at 8-12 (approved Oct. 31, 2003).

promulgation of 11 C.F.R. § 300.30(b)(3)(i) following the enactment of the Bipartisan Campaign Reform Act of 2002 (“BCRA”), Pub. L. No. 107-155, 116 Stat. 81 (Mar. 27, 2002).⁴ This regulation prohibits state party committees from depositing funds exceeding the contribution limits or received from prohibited sources into their federal accounts “regardless of whether such contributions are for use in connection with Federal or non-Federal elections.” 11 C.F.R. § 300.30(b)(3)(i).⁵ The Commission’s final rule promulgating this and other regulations in 11 C.F.R. Part 300 does not expressly supersede Advisory Opinion 2001-17 (DNC Services).⁶ However, the Commission explained generally that “[o]ther advisory opinions may no longer be relied upon to the extent that they conflict with BCRA.” Prohibited and Excessive Contributions: Non-Federal Funds or Soft Money, 67 Fed. Reg. 49064, 49065 (July 29, 2002).

In our view, 11 C.F.R. § 300.30(b)(3)(i) effectively did supersede Advisory Opinion 2001-17 (DNC Services). As such, we believe that the Committee may not rely upon this advisory opinion, even if the facts in this audit – *e.g.*, regarding timely evidence of contributor intent for non-federal funds received into its federal account and reporting of the transfers to the non-federal account – were not materially distinguishable from those in the advisory opinion. We recommend that this question be referred to the Commission in the cover memorandum accompanying the DFAR.

⁴ In the comments on the DFAR, this Office observed that the BCRA provision codified at 52 U.S.C. § 30125(a) rendered national party committees unable to engage in the activity addressed in Advisory Opinion 2001-17 because they could no longer have non-federal accounts. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Draft Final Audit Report on Kentucky State Democratic Central Executive Committee (LRA 1107), at n. 1. The same footnote observed a post-BCRA application of Advisory Opinion 2001-17 in a state party committee audit but did not analyze such application in light of section 300.30. *Id.*; *see also infra* note 6.

⁵ This provision contains a cross reference to § 103.3, thereby implying that a treasurer’s temporary deposit of apparently impermissible funds in accordance with § 103.3 is still permitted. *Id.* (“*See* 11 CFR [§] 103.3 regarding impermissible funds”).

⁶ This Office has cited Advisory Opinion 2001-17 in post-BCRA matters. *See, e.g.*, Memorandum from Lisa J. Stevenson to Thomas Hintermister, Draft Final Audit Report – Arizona Republican Party (LRA 889), at 2 n.2 (Apr. 8, 2013); Memorandum from Lisa J. Stevenson to Thomas Hintermister, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 2 (July 7, 2017); MUR 7877 (Tennessee Democratic Party), First General Counsel’s Report, at 7 n.24 (July 27, 2020) (citing concurring opinion of Commissioner Thomas). As noted above, in note 3, the Commission also discussed the advisory opinion in its Final Audit Report on the Missouri Democratic State Committee, at 8-12 (approved Oct. 31, 2003). Whereas the Commission’s approval of the final report occurred following BCRA, the audit was of the party committee’s activities during the 1999-2000 election cycle, and the Commission explained that it was applying the laws in effect at that time. *Id.*, at 1.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 30, 2022

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna C. Brown
Assistant Staff Director
Audit Division

FROM: Neven F. Stipanovic *NFS*
Associate General Counsel
Policy Division

Jessica Selinkoff *JS*
Acting Assistant General Counsel
Compliance Advice

Joshua Blume *JB*
Attorney

SUBJECT: Audit Division Recommendation Memorandum on the Kentucky State Democratic Central Executive Committee (LRA 1107)

I. INTRODUCTION

The Office of General Counsel (“OGC”) did not initially comment on the Audit Division Recommendation Memorandum (“ADRM”), but we now comment to revisit the analysis in OGC’s comments on the Draft Final Audit Report (“DFAR”) regarding whether door hangers that the Kentucky State Democratic Central Executive Committee (“the Committee”) distributed should be classified as coordinated party expenditures in Finding 4, Excessive Coordinated Party Expenditures.¹ In OGC’s DFAR comments, we concluded that the door hangers cannot be

¹ See Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Draft Final Audit Report on the Kentucky State Democratic Central Executive Committee (LRA 1107), at 4-7 (Dec. 14, 2021) (“DFAR Comments”). On February 15, 2022, OGC commented on the Committee’s Response to the DFAR; those comments were limited to a discussion of another issue. See Memorandum from Neven F. Stipanovic to Patricia C.

classified as party coordinated communications under 11 C.F.R. § 109.37 because they are not “public communications” under 11 C.F.R. § 100.26.²

For the reasons discussed below, we are revising this conclusion. We now conclude that door hangers that qualify as exempt under the volunteer materials exemption (“VME”)³ should be excluded from classification as party coordinated expenditures, but that door hangers that are not exempt VME likely are public communications and, therefore, party coordinated expenditures. We therefore recommend that the Audit Division include the cost of the door hangers in Finding 4, Excessive Coordinated Party Expenditures, pending the Commission’s resolution of the question of whether the Committee’s documentation suffices to meet the VME.

Because we are revising our conclusion, we further recommend that the Audit Division notify the Committee of this changed analysis and provide an opportunity for the Committee to submit written comments if it wishes to do so.

II. EXCESSIVE COORDINATED PARTY EXPENDITURES (Finding 4)

A payment by a political party committee for a communication that is coordinated with a candidate, *i.e.*, a party coordinated communication, must be treated as an in-kind contribution to that candidate or as a party coordinated expenditure, unless that payment is “otherwise exempted under 11 C.F.R. part 100, subpart C or E.” 11 C.F.R. § 109.37(b). Payments for campaign materials within the VME are such “otherwise exempted” payments in 11 C.F.R. part 100, subparts C and E. Thus, if the door hangers, which the Committee asserts were “fully coordinated” with a candidate, qualify for the VME, they cannot be party coordinated expenditures.

The VME exempts from the definitions of “contribution” and “expenditure” payments for “campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids or newspapers, and yard signs)” distributed by a state or local party committee in connection with volunteer activities on behalf of a federal candidate of that party, provided other requirements are met.⁴ Although the Commission does not appear to have specifically analyzed whether door hangers are “campaign materials” within the meaning of the VME,⁵ it has

Orrock, Comments on Kentucky State Democratic Central Executive Committee Response to the Draft Final Audit Report (LRA 1107) (Feb. 15, 2022) (discussing DFAR Finding 2, Receipt of Excessive Contributions).

² DFAR Comments at 5-6.

³ *See* 52 U.S.C. § 30101(8)(B)(ix), (9)(B)(viii); 11 C.F.R. §§ 100.87, 100.147.

⁴ 11 C.F.R. §§ 100.87, 100.147. The VME does not apply for the “cost incurred in connection with any broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public political advertising.” 11 C.F.R. §§ 100.87, 100.147.

⁵ *But cf.* Advisory Opinion 2008-06 (Democratic Party of Virginia) at 4, 5 (concluding, without further analysis, that “[t]he types of campaign materials covered by this [VME] exemption include all manner of

determined that door hangers may be included within another exemption in 11 C.F.R. part 100, subparts C and E, for payments for campaign materials. In MUR 6673 (David Lee for Supervisor 2012), the Commission concluded that a door hanger paid for by a local candidate and distributed by volunteers qualified for an exemption similar to the VME, the “coattails exemption.”⁶ The coattails exemption and the VME use identical language to describe the “campaign materials” within the scope of the respective exemptions.⁷ For this reason and because the exemptions operate similarly, we conclude that it is appropriate to extend the Commission’s determination, in MUR 6673, that door hangers can be campaign materials within the coattails exemption to include door hangers within the meaning of “campaign materials” in the VME.

Thus, if the Committee otherwise satisfies the requirements of the VME (*e.g.*, by sufficient documentation of volunteer dissemination of the door hangers), we further conclude that, under 11 C.F.R. § 109.37, the VME-qualified door hangers cannot be classified as a party coordinated expenditure and the amount of that payment should not be included in Finding 4. Assuming, *arguendo*, that the Committee’s documentation is insufficient to establish that the door hangers are exempt under the VME, the determination of whether the door hangers should be included in Finding 4, Excessive Coordinated Party Expenditures, will depend upon whether the door hangers are public communications.⁸ We conclude that, if the door hangers are not exempt under the VME, they likely are public communications and party coordinated expenditures.

The Commission’s conclusion in MUR 6673 that a door hanger within the coattails exemption is not a “public communication” was limited to the facts at issue in that MUR; the Commission did not determine that no door hanger is a public communication as a matter of law.⁹ In fact, as OGC explained in its DFAR comments, the Commission, after deciding MUR

publications, including the publications proposed by the Committee,” which, as noted in an analysis of a different exemption, for slate cards, might possibly include a door hanger version of a slate card).

⁶ Factual and Legal Analysis at 5-6, MUR 6673 (David Lee for Supervisor 2012) (Sept. 13, 2013) (“Lee F&LA”) (concluding that, because the door hanger was a type of “handbill” meeting the requirements of the coattail exemption, it was not a public communication subject to soft money restrictions in the statutory provision now codified at 52 U.S.C. § 30125(f)); *see also* 11 C.F.R. §§ 100.88, 100.148 (coattails exemptions, exempting from definitions of “contribution” and “expenditure” certain payments by candidates for campaign materials used in connection with volunteer activity).

⁷ *Compare* 11 C.F.R. §§ 100.87, 100.147 (VME use of “campaign materials”) *with* 11 C.F.R. §§ 100.88, 100.148 (coattails exemption use of “campaign materials”).

⁸ *See* DFAR Comments at 6-7 (discussing VME evidence); *see also id.* at 5-6 (describing payment, express advocacy content, and representation of coordination conduct that appear to adequately address other requirements of 11 C.F.R. § 109.37).

⁹ *See* Lee F&LA at 5 (explaining that a handbill is not a public communication if “at the least” it qualifies for the coattails exemption); *id.* at 5 n. 5 (acknowledging an earlier enforcement matter, MUR 5604 (Friends of William D. Mason), in which three Commissioners concluded that handbills that qualify for coattails exemption are not public communications and three Commissioners concluded that no handbills are public communications).

6673, concluded in two enforcement matters not implicating exempt activity under 11 C.F.R. part 100, subpart C or E, that door hangers are public communications.¹⁰ Although the Commission did not analyze the regulatory definition of “public communication” and that definition’s use of the phrase “general public political advertising”¹¹ in reaching those conclusions, the Commission has analyzed the treatment of door hangers as “general public political advertising” in an enforcement matter, MUR 4741 (Bono), that pre-dates the “public communication” definition. In MUR 4741, which concerned door hangers not claimed to be exempt activity under 11 C.F.R. part 100, subpart C or E, the Commission concluded that a door hanger is a form of general public political advertising, as that phrase was then used (and is still used) in the statutory disclaimer provision now codified at 52 U.S.C. § 30120(a), in part because “the doorhanger was distributed to the general public at their place of residence, . . . just as if they had received it in the mail.”¹²

Thus, we recommend that the Audit Division include the cost of the door hangers in Finding 4, Excessive Coordinated Party Expenditures, because the door hangers, if not within the VME, are likely public communications that otherwise meet the definition of “party coordinated communication” in 11 C.F.R. § 109.37.¹³

¹⁰ DFAR Comments at 6 (citing Factual and Legal Analysis at 3, MUR 6778 (David Hale for Congress) and Factual and Legal Analysis, at 5 n.26, MUR 6924 (Andrew Winer)).

¹¹ See 11 C.F.R. § 100.26 (defining “public communication”, in pertinent part, as “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general public political advertising”); see also 52 U.S.C. § 30101(22) (defining “public communication” and including same “general public political advertising” phrase).

¹² Factual and Legal Analysis, at 4-5, MUR 4741 (Bono) (Jan. 19, 1999). OGC, at the time of its DFAR comments, was not aware of and did not cite MUR 4741. In the DFAR comments, without benefit of specific precedent analyzing non-VME door hangers as “general public political advertising,” OGC reached its conclusion that door hangers are not “public communications,” in part, on the basis of the Commission’s explanation of revisions to the “public communication” definition to include some internet communications. See DFAR Comments at 5 (citing Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006) (“Internet E&J”). In the DFAR comments, OGC focused on the Internet E&J’s explanation of the relation between the “catch-all” category of “general public political advertising” and the enumerated communications included in the statutory “public communication” definition now codified at 52 U.S.C. 30101(22). See *id.*; see also Internet E&J, 71 Fed. Reg. at 18,592, 18,594 (referring to the “catch-all”). In light of the more specific analysis regarding door hangers in MUR 4741, OGC finds the couching language in the Internet E&J on which we previously relied — *e.g.*, that each of the enumerated communication forms “*lends* itself to distribution . . . through an entity *ordinarily* owned or controlled by another person” and that a person “*must ordinarily* pay an intermediary (*generally* a facility owner) for access to the public” — less persuasive in this context. See Internet E&J, 71 Fed. Reg. at 18,594 (emphasis added).

¹³ We recommend further that the determination that the door hangers likely are public communications if they do not qualify as exempt under the VME be referred to the Commission for its consideration.