FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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**MEMORANDUM**

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**SUBJECT:** Proposed Draft Final Audit Report on the Republican Party of Orange County (Federal) (LRA 909)

## I. INTRODUCTION

The Office of the General Counsel has reviewed the proposed Draft Final Audit Report ("DFAR") on the Republican County of Orange County (Federal) ("RPOC"). The DFAR contains four findings: Misstatement of Financial Activity (Finding 1); Reporting of Debts and Obligations (Finding 2); Recordkeeping for Employees (Finding 3); and Use of Levin Fund Transfers (Finding 4). We concur with the findings and comment only on the Use of Levin Fund Transfers (Finding 4) below. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

## II. A STATE PARTY MAY NOT USE LEVIN FUNDS TRANSFERRED FROM ANOTHER STATE PARTY

In Finding 4 of the proposed DFAR, the Audit Division determined that RPOC received $74,132 from the California Republican Party's (CRP's) Levin account for reimbursement of RPOC's voter registration expenses, and then transferred $73,465 from its Levin account to its federal accounts as reimbursement for the voter registration expenses.[1] Since the Federal Election Campaign Act, as amended (the "Act"), requires that state party committees raise all of the Levin funds that it expends, 2 U.S.C. § 441i(b)(2)(B)(iv), the Audit Division recommended that RPOC demonstrate that it solely raised the expended Levin funds, or refund to its Levin account $73,465 from its federal account. In response to the Interim Audit Report recommendation, RPOC added $73,465 in Levin fund transfers on Schedule D of its 2013 November monthly report as a debt to its Levin account, apparently because it did not have the cash reserves to make the refund.

Although the RPOC indicates its intent to refund its Levin account in accordance with the recommendation in the proposed DFAR, it "contends that the Commission should not accept [the Use of Levin Fund Transfers] Finding ... and instead should not penalize the Committee." Correspondence from the Republican Party of Orange County to Mr. Robert Morcomb, Federal Election Commission (Nov. 22, 2013) at 2. RPOC asserts two reasons in support of its position. First, RPOC states that it is the California Republican Party's "agent and vendor" for party building activities, asserting that "the Commission should allow the RPOC to accept and use Levin funds obtained in reimbursement under the 'Operation Bounty' contract between the RPOC and the California Republican Party as a matter of contract and agency law." *Id.* at 2-3. In support of its position, RPOC states that a committee may use non-federal funds transferred to it by another State, local or district committee of a political party for part of the expenses associated with voter registration, which are conducted outside the Federal election activity ("FEA") period in 11 CFR § 300.32(b)(1)(i), and that a State, local or district committee of a political party may pay vendors that are not a State, local or district committee of a political party with Levin funds for voter registration activity during the FEA period under 11 CFR § 300.32(b)(1)(i). *Id.* at 3. Second, RPOC states that the Commission should not enforce the statutory prohibition against using Levin funds from any other State, local or district committee of any State party because it would violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. *Id.* at 3.

We disagree with both of RPOC's arguments. First, while the RPOC may be an agent or vendor to the CRP, RPOC is itself also a State, district, or local party committee. The Act and Commission's regulations prohibit the use of Levin funds received from another state or local party.[2] The ability to use Levin funds is subject to a number of conditions described at 2 U.S.C. § 441i(b)(2)(B). Among these is a requirement that no person donate more than $10,000 in Levin funds to a State, district, or local committee of a political party in a calendar year.

[1] Voter registration activities conducted by a state or local political party committee within a period starting 120 days before the date of a scheduled federal election and ending on the date of the election are considered so-called "Type I" Federal election activity. *See* 2 U.S.C. § 431(20)(A)(i).

[2] There is no prohibition against a state or local party committee making or receiving transfers of Levin funds. The prohibition pertains to the use of such funds.

2 U.S.C. § 441i(b)(2)(B)(iii); *see* 11 C.F.R. § 300.31(d)(1)-(2). Additionally, and to prevent circumvention of the $10,000 contribution limitation, another requirement is that "the amounts expended or disbursed are made solely from funds raised by the State, local, or district committee which makes such expenditure or disbursement, and do not include any funds provided to such committee from ... any other State, local, or district committee of any State party[.]" 2 U.S.C. § 441i(b)(2)(B)(iv)(I). The RPOC, therefore, may not spend Levin funds transferred to it from the CRP. *Id; see* 11 C.F.R. § 300.31(a) (Levin fund expended or disbursed by any State, district, or local committee must be raised solely by the committee that expends or disburses them); *Explanation and Justification for 11 CFR 300.31 Receipt of Levin Funds*, 67 Fed. Reg. 49064, 49094 (Jul. 29, 2002) ("Paragraph (a) states as a general proposition a key point in the statute: a State, district, or local political party committee that spends Levin funds must raise those funds solely by itself."); *see* 11 C.F.R. § 300.34(b) (Levin funds must be raised solely by the State, district or local committee of a political party that expends or disburses the funds. A State, district, or local committee of a political party must not use as Levin funds any funds transferred or otherwise provided to the committee by ... [a]ny other State, district, or local committee of any political party, any officer or agent acting on behalf of such a committee, or any entity directly or indirectly established, financed, maintained or controlled by such a committee").

Congress generally intended to prevent circumvention of the soft money ban when it passed restrictions prohibiting national party committees from soliciting, receiving, directing or spending any funds not subject to the limitations, prohibitions, and reporting requirements of the Act. *See McConnell v. FEC*, 540 U.S. 93, 95-96 (2003); 2 U.S.C. § 441i(a)(1). Congress predicted that the ban on the national committees' receipt and use of soft money could shift the focus to state party committees. *Id.* at 97-98. Therefore, Congress also placed a restriction on state party committees' ability to use of soft money contributions to influence Federal elections. 2 U.S.C. § 441i(b)(1). There is an exception to this restriction: the Levin Account. The Levin Account allows state party committees to pay for Federal election activity with a mix Federal and nonfederal funds, but there is a $10,000 contribution limitation to the Levin Account. 2 U.S.C. §§ 441i(b)(1)(A) and (B). "Without the ban on transfers of Levin funds among state committees, donors could readily circumvent the $10,000 limit on contributions to a committee's Levin account by making multiple $10,000 donations to various committees that could then transfer the donations to the committee of choice." *McConnell v. FEC*, 540 U.S. at 171-172. Therefore, the RPOC must only use Levin funds it raises itself, in order to comply with the overall statutory scheme, as intended by Congress, to prevent circumvention of the soft money ban.

Second, the RPOC also asserts that enforcement of this statutory provision would violate the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. The RPOC's argument rests on the proposition that enforcement of the Levin fund restrictions would discriminate "against a political party and its members for engaging in voter registration political activity using Levin funds received in connection with its contract with the California Republican Party that is not applied to other vendors that contract to engage in voter registration activity that is payable with Levin funds, without constitutional justification." Correspondence from the Republican Party of Orange County at 3. RPOC, therefore, urges the Commission not to enforce this statutory prohibition.

Even if RPOC's constitutional argument had merit, which it does not, the Commission is not authorized to disregard a statutory provision simply because a committee contends that the statute is unconstitutional. *Johnson v. Robison*, 415 U.S. 361, 368 (1974) (noting that adjudication of constitutionality is generally outside administrative agency's authority); *Robertson v. FEC*, 45 F.3d 486, 489 (D.C. Cir. 1995) ("It was hardly open to the Commission, an administrative agency, to entertain a claim that the statute which created it was in some respect unconstitutional."); *Meredith Corp. v. FCC*, 809 F.2d 863, 872 (D.C. Cir. 1987) (noting the "well known principle that regulatory agencies are not free to declare an act of Congress unconstitutional").

Even if the Commission had such authority to determine the constitutionality of a statutory provision, the statute at issue here is plainly constitutional.[3] The RPOC maintains that the statute violates the Equal Protection Clause because it discriminates against state, district, or local political parties who are vendors, and who engage in voter registration activity using Levin funds. Correspondence from the Republican Party of Orange County at 3. Yet, contrary to RPOC's argument, the statute applies equally to all state, district, or local political parties and serves the reasonable and legitimate government interest of preventing circumvention of the soft money ban, discussed *supra*.

[3] In the context of the First Amendment, the U.S. Supreme Court has recognized the constitutionality of the transfer restrictions involving Levin Funds as "justifiable anticircumvention measures," even though these restrictions created some burdens on associational freedoms. *McConnell v. FEC*, 540 U.S. 93, 171 (2003).