



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

**MEMORANDUM**

**AUG 15 2016**

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**FROM:** Adav Noti *AD*  
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**SUBJECT:** Draft Final Audit Report on the Colorado Republican Committee (LRA 961)

**I. INTRODUCTION**

The Office of the General Counsel has reviewed the Draft Final Audit Report ("DFAR") on the Colorado Republican Committee ("the Committee"). The DFAR contains four findings: Misstatement of Financial Activity (Finding 1); Failure to File Notices and Properly Disclose Independent Expenditures (Finding 2); Recordkeeping for Communications (Finding 3); and Failure to Itemize Debts and Obligations (Finding 4). Our comments address Findings 1, 2, and 4. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

## II. MISSTATEMENT OF FINANCIAL ACTIVITY (Finding 1)

The DFAR addresses an apparent unreported bank account: Colorado State Republican Central Committee Republican National Convention Expense Account (“Convention Account”), and recommends that it be treated as a federal account owned or controlled by the Committee that is subject to this audit. According to Audit staff, the Convention Account was active for a period of time in 2012 and had receipts of approximately \$87,000 and disbursements of approximately \$86,000. The Audit Division believes that the vast majority of disbursements from the account paid for travel and other expenses of delegates from Colorado to the 2012 Republican National Convention in Tampa, Florida.

The Committee has consistently maintained that it was not required to report the activity of the Convention Account because the account did not belong to the Committee. The Committee claims that a separate entity established as a non-profit corporation pursuant to 26 U.S.C. § 501(c)(4), and called the “Colorado Chairman’s Host Committee for the Republican National Convention” (“Chairman’s Committee”),<sup>1</sup> owned and controlled the account. The Committee has stated that neither the Committee, nor any of its officers or agents, controlled the Chairman’s Committee’s activities.

Throughout the audit process, however, the Audit staff has noted evidence tending to suggest that, contrary to the Committee’s representation, the Committee may in fact have owned or controlled the Convention Account. First, the Audit staff notes that the name of the Convention Account refers to the Chairman of the Committee. Second, the Audit staff notes that the Committee itself possessed statements associated with the Convention Account and provided them to the Audit staff. Third, the Audit staff indicates that the Convention Account was active in January 2012 and that funds were first deposited into the account in April 2012. This last item is significant because the Chairman’s Committee did not receive an Employer Identification Number (“EIN”) from the Internal Revenue Service for tax identification purposes until June 2012.<sup>2</sup> The fact that the Chairman’s Committee did not acquire an EIN until at least six months after the Convention Account became active is noteworthy because banks and other financial institutions generally will not allow business entities to open accounts without providing their EINs.<sup>3</sup> This

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<sup>1</sup> Although this organization referred to itself as the “Host Committee,” it is not clear that the organization would have qualified as a “host committee” under Commission regulations. See 11 C.F.R. § 9008.50(b)(3).

<sup>2</sup> The Committee supplied a copy of the IRS’s letter assigning an EIN to the Chairman’s Committee. It is dated June 26, 2012. Also, the Chairman’s Committee’s application for an EIN indicates that the Chairman’s Committee was started or acquired in June 2012, and the organization’s articles of incorporation were apparently filed with the Colorado Secretary of State in June 2012.

<sup>3</sup> A United States Treasury Department regulation requires banks to design and implement customer identification programs (“CIPs”), which must contain procedures for opening an account that specify the identifying information that the bank will collect from customers. 31 C.F.R. § 1020.220(a)(2)(i)(A). At a minimum, the bank must obtain, from U.S. persons, a taxpayer identification number (“TIN”) in conjunction with the opening of an account. 31 C.F.R. § 1020.220(a)(2)(i)(A)(4)(i). The EIN is the TIN for a business entity. See <https://www.irs.gov/individuals/international-taxpayers/taxpayer-identification-numbers-tin> (“An [EIN] is also known as a federal tax identification number, and is used to identify a business entity.”) (last viewed July 19, 2016). A bank may allow customers who have applied for, but not yet received, a TIN to open an account so long as the CIP

timing therefore suggests that a preexisting entity such as the Committee — not the Chairman's Committee — opened the Convention Account.

In our comments on the Interim Audit Report ("IAR"), we stated that the aforementioned evidence was circumstantial. *See* OGC Comments on Interim Audit Report on the Colorado Republican Committee (LRA 961), at 3 (received by Audit Division on Dec. 11, 2015). At the same time, however, we believed that the evidence raised questions that warranted further inquiry, and thus recommended that the Audit staff consider requesting from the Commission a subpoena and order for written answers to the bank or a voluntary release from the Committee for the Audit staff to ask the bank whether the Committee's EIN was associated with the Convention Account. *Id.*

The Committee declined to provide bank documentation or to provide the Audit staff with the authorization that it sought. The Audit staff has determined that the aforementioned evidence is sufficient to conclude that the Convention Account is a federal account of the Committee and, as such, should be included within the scope of the audit.

We reiterate our view in our comments on the IAR that this evidence, without information from the bank or the Committee that would resolve the question of ownership of the Convention Account, remains circumstantial. The evidence tends to suggest that the Committee may have opened the Convention Account, but it is also consistent with alternative explanations, such as, for example, that a third party opened the Convention Account and then transferred ownership and control of the Convention Account to the Chairman's Committee.

Because the evidence raises significant questions that warrant resolution, we renew our recommendation that the Audit staff consider requesting a subpoena and order for written answers to obtain information about the association, if any, of the Committee's EIN with the Convention Account.<sup>4</sup> Given the limited information required, the subpoena and order could be narrowly drawn so that it communicates a single request directed to the bank requiring that it provide the EINs associated with the Convention Account.

### **III. FAILURE TO FILE NOTICES AND PROPERLY DISCLOSE INDEPENDENT EXPENDITURES (Finding 2)**

The Committee made media-related expenditures totaling \$357,895 that it reported as operating expenditures, but which, upon evaluation of the underlying communications, appear to constitute independent expenditures according to the Audit staff. Of this amount, \$203,995 was

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contains procedures for confirming that the application was filed before the opening of the account and for obtaining the TIN within a reasonable period of time after the opening of the account. 31 C.F.R. § 1020.220(a)(2)(i)(B). Here, the evidence shows that the Chairman's Committee did not submit an application for a TIN until after the Convention Account was opened.

<sup>4</sup> Should the Audit Division decide not to seek a subpoena, we recommend that the Audit staff revise its recommendation in Finding 2 to indicate that it considers the status of the Convention Account to be unresolved.

spent on “direct mail”<sup>5</sup> and \$153,900 was spent on radio advertisements. Included in this finding are 77 mailings that cannot be associated with invoices. The Committee also reported the mailers as operating expenditures, but the Audit staff has classified these as apparent independent expenditures.

The Committee does not challenge the Audit staff’s classifications of the advertisements on the basis of whether they constitute express advocacy. *See* 11 C.F.R. §§ 100.16, 100.22 (independent expenditures defined in part as communications that expressly advocate, a term defined in section 100.22). Rather, the Committee argues that the communications are not properly regarded as expenditures because they were distributed by volunteers, invoking the “volunteer materials exception” (“VME”) to the definition of “expenditure.” *See* 52 U.S.C. § 30101(9)(B)(viii); 11 C.F.R. § 100.147. The Committee submitted some documents in support of this assertion: 22 forms containing individual volunteer names, site locations, and, in most cases, dates, accompanied by certifications from the individuals stating that they assisted with processing mail on behalf of the Committee on the property of the firm Wiz Bang Solutions, Inc. on the specified date as uncompensated volunteers. However, the vast majority of the forms do not identify the specific mailing or mailings on which the volunteer may have worked, although one form does identify the last name of a candidate. According to the Audit staff, the dates furnished on the forms show that most of the claimed volunteer activity occurred shortly before the 2012 general election date.

The Audit staff informs us that the disbursements made for mailings encompassed within Finding 2 appear to be associated with two commercial vendors: Majority Strategies,<sup>6</sup> sometimes alternately identified as Next Wave Communications in the pertinent documents, and Wiz Bang Solutions.<sup>7</sup> However, the statements submitted by the Committee specify that certain volunteers processed mailings only on the property of Wiz Bang Solutions – not in connection with the other commercial vendor receiving the Committee’s mailing-related disbursements. In spite of this, the Committee states in response to Audit staff inquiry that the volunteer statements apply to all of its disbursements on mailings to all vendors. Further, in response to the Audit staff’s recommendation in the IAR that the Committee furnish more detailed documentation, such as

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<sup>5</sup> While the DFAR uses the term “direct mail,” the Audit staff has clarified in discussion with us that the term is not being used here in its technical sense to signify mail distributed by a commercial firm or from a commercial list. *See* 11 C.F.R. § 100.147. The “volunteer materials exception,” with which this portion of our comments is concerned, does not apply to direct mail in this sense. *Id.*; 52 U.S.C. § 30101(9)(B)(viii)(1). We recommend revising the DFAR to refer to “mail” or “mailings” rather than to “direct mail” in order to avoid this ambiguity.

<sup>6</sup> The Audit staff includes within this category of disbursements associated with Majority Strategies the aforementioned 77 communications not positively associated with invoices. The Audit staff states that in response to the exit conference, the Committee provided a listing of Majority Strategies invoice numbers and invoice amounts that materially correlate with the total amount of disbursements paid to Majority Strategies. The Audit staff therefore concludes that these 77 mailings were associated with Majority Strategies. We conclude that this inference is reasonable, however the Audit staff should revise Finding 2 to invite the Committee to submit evidence to show that this inference is mistaken if the Committee deems it to be so.

<sup>7</sup> A third commercial vendor, Mentzner Media, appears to be associated with the radio advertisements.

timesheets or photographs, tending to substantiate its assertion that the VME applies, the Committee stated that it has provided all of the supporting documentation in its possession.

The Audit staff concludes that the documentation provided by the Committee is insufficient to support its assertion that the VME applies. It concludes that as a result of the absence of sufficient documentation, the Audit staff considers the communications to be independent expenditures.

The DFAR correctly observes that a lack of clarity exists, in the context of mailings, regarding how to apply the VME and what quantum and type(s) of documentation are necessary to substantiate a claim that the VME applies. *See, e.g.*, OGC Comments on Draft Final Audit Report - Arizona Republican Party (LRA 889), at 4-5 (Apr. 8, 2013). In recent audits addressing this issue, the Commission has approved findings that reported expenditures should not be attributed to a committee's coordinated expenditure limit where there was some evidence of volunteer activity.<sup>8</sup> We believe that the documentation submitted by the Committee here — i.e., detailed volunteer forms and certifications — is consistent with the documentation in those prior audits in which the Commission has approved proposed audit report findings not attributing the costs of mailings to the coordinated party expenditure limit. We, therefore, recommend that the DFAR be revised to conclude that the costs of mailings associated with Wiz Bang Solutions will not be counted as independent expenditures, based upon the Committee's submission of supporting documentation regarding the VME, due to the lack of clarity regarding the VME.

The Committee's supporting documentation, however, pertains only to the costs of mailings associated with Wiz Bang Solutions, and not to the costs of mailings attributable to Majority Strategies.<sup>9</sup> Even in recent audits in which the Commission has deadlocked on whether to apply the VME on the basis of unsworn written assertions regarding volunteer activity, the committees' assertions have related specifically to volunteer involvement in the spending at issue. *See Final Audit Report of the Commission on the Arizona Republican Party*, at 16-17 (committee furnished written description of mailing process and of volunteer involvement in that process); *Final Audit Report of the Commission on the Nebraska Democratic Party*, at 15 (committee furnished signed and dated declaration from executive director who oversaw political and

<sup>8</sup> *See, e.g. Final Audit Report of the Commission on the Arizona Republican Party*, at 13, 17 (approved Nov. 14, 2013) (Commission does not count mailings made on behalf of candidate David Schweikert against committee's coordinated expenditure limit where committee provided written description of process and photographs of volunteers working on mailers to support claim of VME, but did not approve recommendation by four votes to find similarly regarding mailings on behalf of two other candidates, where committee provided only written description of process); *Final Audit Report of the Commission on the Nebraska Democratic Party*, at 16-17, 19-20 (approved Oct. 23, 2014) (Commission does not count cost of mailings against coordinated expenditure limit where committee provided vendor statements and invoices along with photographs of volunteers participating in various duties, but did not approve recommendation to find similarly by four votes where committee submitted unsworn written assertions without documentation of nature and extent of volunteer involvement); *Final Audit Report of the Commission on the South Dakota Democratic Party*, at 14-15 (approved Apr. 17, 2015) (Commission does not count cost of mailings against coordinated expenditure limit where committee provided photographs of volunteers working on mailers and signed declaration that that type of mailing generally performed by volunteers).

<sup>9</sup> This would include any ascertainable costs attributable to the 77 mailings that lack invoices which the Audit staff has ascribed by inference to Majority Strategies, provided that the Committee also be invited in the DFAR to submit evidence to show that this inference is erroneous, as discussed in footnote 7, *supra*.

administrative operations containing recollections of nature of volunteer involvement for mailing at issue). Here, in contrast, the only statement that the Committee has provided regarding the Majority Strategy mailings is a general, conclusory assertion from the Committee's counsel that the VME applies. The Commission has never approved application of the VME based solely on an assertion of this nature. Therefore, we recommend that the Audit Division conclude in the DFAR that the question of whether the costs of the mailings attributable to Majority Strategies should be counted as independent expenditures is unresolved because of the lack of clarity involving the VME. We also recommend that the Audit Division raise this issue in the cover memorandum accompanying the transmission of the DFAR to the Commission for the Commission's consideration.

Finally, we note that the VME does not apply to radio advertisements. See 52 U.S.C. § 30101(9)(viii); 11 C.F.R. § 100.147 (excluding broadcast advertising from VME). Consequently, even though the Committee's response appears to argue that the VME applies to all communications in Finding 2 without distinction, we agree that the radio advertisements identified as apparent independent expenditures in that finding, and costing \$153,900, should be deemed reportable independent expenditures.

#### **IV. FAILURE TO ITEMIZE DEBTS AND OBLIGATIONS (Finding 4)**

The DFAR concludes that the Committee did not properly report certain items of debt owed to three vendors totaling \$235,968 in Schedule D of its disclosure reports. The Committee agreed to amend its reports to disclose indebtedness to two of the three vendors.

The Committee contends, however, that it is not required to disclose the debt to its third vendor because it terminated its contract with that vendor. According to the Audit staff, the Committee has an outstanding debt of \$133,487, representing the unpaid balance of a contract with this vendor, a provider of get-out-the-vote ("GOTV") services.

Even assuming that the Committee did effectively terminate its contract with the GOTV vendor, that fact might reduce the amount of the debt to be reported, but would not abrogate the Committee's responsibility to continuously report any indebtedness that it may have incurred for services the GOTV vendor rendered before the effective date of the termination. Commission regulations require the continuous reporting of outstanding debt from the date on which the debt is incurred until the debt is extinguished. 11 C.F.R. § 104.11(b) (debt or obligation, including written contract, to make expenditure over \$500 to be reported as of date of incurrence of obligation in most circumstances). The Committee's statement that it terminated the contract before the vendor provided all of the contracted services suggests that some of the contracted services may have been provided before the termination became effective. Further, the Committee's contract with the vendor provides that successful termination of the contract does not release the client from the obligation to make pro rata payments of fees for the services the vendor

actually provided under the contract.<sup>10</sup> See Get Out The Vote Program Agreement, Par. 6 (Sept. 17, 2012). The Committee, therefore, must report this outstanding debt.

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<sup>10</sup> To the extent that a dispute may exist between the Committee and the GOTV vendor arising out of this provision, or regarding whether the Committee owes any payment to the vendor for one or more services, disputed debt too must be continuously reported. 11 C.F.R. 116.10(a).