

AGENDA ITEM

For meeting of December 7, 2017

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THE FEDERAL ELECTION COMMISSION  
Washington, DC 20463

November 14, 2017

MEMORANDUM

To: The Commission

Through: Alec Palmer *swt/fm*  
Staff Director

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

Thomas E. Hintermister *TH/PCO*  
Assistant Staff Director  
Audit Division

Nicole Burgess *CB* for NB  
Audit Manager

By: Tesfai Asmamaw  
Lead Auditor

Subject: Resubmission: Audit Division Recommendation Memorandum on the NY  
Republican Federal Campaign Committee (NYR) (A13-11)

This Office is resubmitting the subject Audit Division Recommendation Memorandum (ADRM). The original ADRM was circulated on October 20, 2017, and was withdrawn on November 6, 2017 to provide additional clarification in the presentation of Finding 4, Reporting of Apparent Independent Expenditures, which arose after a teleconference with NYR counsel on November 3, 2017.

Pursuant to Commission Directive No. 70 (FEC Directive on Processing Audit Reports), the Audit staff presented the Draft Final Audit Report (DFAR) to the NY Republican Federal Campaign Committee on August 10, 2017 (see attachment). In response to the DFAR, the committee provided additional information, as noted below. NYR did not request an audit hearing.

This memorandum provides the Audit staff's recommendation for each finding outlined in the DFAR. The Office of General Counsel has reviewed this memorandum and concurs with the recommendations.<sup>1</sup>

**Finding 1. Misstatement of Financial Activity**

In response to the Interim Audit Report (IAR), NYR stated that, it would be costly and perhaps impossible to reconstruct the records necessary to recreate its filings. Additionally, NYR stated that none of the non-federal funds were used for federal activities; these funds were not reported on its disclosure reports because they were not subject to FEC regulation. In response to the DFAR, NYR reiterated its IAR response, stating that the misstatements were predominantly driven by the processing of non-federal credit card contributions through the federal account. NYR stated that it no longer processes credit card receipts in this manner and further believes that by promptly transferring the non-federal contributions and not using these funds on federal activity, it remained compliant at all times and correctly omitted this activity from its FEC disclosure reports, again referring to Advisory Opinion 2001-17 (DNC Services) to support its position. NYR contended that although the advisory opinion refers to receipts of "composite" contributions made by a single check, its logic applies.

NYR did not file amended disclosure reports to correct the misstatements. As such, NYR's reported financial activity for 2011 and 2012 remains materially misstated for receipts and disbursements.

The Audit staff recommends that the Commission find that in 2011, NYR understated its receipts by \$204,900 and its disbursements by \$191,367; and in 2012, NYR understated its receipts by \$149,247 and its disbursements by \$151,593.

**Finding 2. Recordkeeping for Employees**

In response to the IAR, NYR concurred with the finding by stating that it was unable to provide time logs for its employees during the audit period and implemented procedures to ensure it maintains the payroll logs in the future. However, NYR stated in response to the DFAR that it disagreed with the Audit staff's assertion that it concurred with this finding. NYR believes it has established through sworn affidavits that its employees who spent a significant portion of their time with federal elections during the 2011-2012 election cycle were paid properly from its federal account, as the law requires. NYR stated the sworn affidavits should satisfy the Audit staff with respect to the employee recordkeeping requirement.

The Audit staff recommends that the Commission find that NYR failed to maintain monthly payroll logs totaling \$713,427, as required, to document the percentage of time each employee spent in connection with a federal election.

**Finding 3. Disclosure of Occupation/Name of Employer**

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<sup>1</sup> The Office of General Counsel forwarded formal comments in regards to the NYR DFAR response to Finding 1. Misstatement of Financial Activity.

In response to the IAR, NYR established “best efforts” by including memo entries in its most recent disclosure report specifically addressing 91 contributions totaling \$276,197. However, since this submission did not include all the contributions for which NYR had the contributor information, it did not materially correct the disclosure errors. In response to the DFAR, NYR stated that “the Committee satisfied the “best efforts” requirements of 11 C.F.R. § 104.7(b), and thus is in compliance with its reporting obligations under Federal Election Campaign Act. 52 U.S.C. § 30102(i).”

Of the 205 contributions totaling \$563,191:

- NYR did not provide documentation for 95 contributions showing it made follow-up best efforts for contributions totaling \$214,944.
- NYR had the required documentation for 110 contributions totaling \$348,247, however this information was not disclosed on its FEC reports.

The Audit staff recommends that the Commission find that NYR failed to materially disclose occupation/name of employer information for 205 contributions from individuals totaling \$563,191.

#### **Finding 4. Reporting of Apparent Independent Expenditures**

In response to the IAR, NYR provided five additional affidavits including four from its mail vendors and a second affidavit from the Executive Director during the audit period and two new direct mail pieces. NYR stated that these additional affidavits detail the active role volunteers played in the production and distribution of the mailers, in coordination with NYR and the former Executive Director. In response to the DFAR, NYR reemphasized that these disbursements are part of NYR’s non-allocable mail program. In addition, NYR reiterated that these disbursements were not independent expenditures thus 24/48- hour reports did not need to be filed. Finally, NYR challenged the express advocacy conclusion for 31 mailers attributed to 11 CFR §100.22(b).

The Audit staff recommends that the Commission find that NYR failed to report mailers containing express advocacy totaling \$236,476 (no records provided documenting the volunteer materials exemption) and failed to file 24/48-hour reports for these mailers.

For \$906,027 of apparent independent expenditures in which NYR provided affidavits to document the volunteer materials exemption, due to the lack of a clear standard for the exemption, the Audit staff recommends that the Commission make a final decision regarding this amount.

#### **Finding 5. Recordkeeping for Communications**

NYR did not address this finding in its response to the IAR. In response to the DFAR, NYR stated that it has been unable to locate the records at issue.

The Audit staff recommends that the Commission find that NYR failed to provide the necessary records for expenditures totaling \$77,354.

If this memorandum is approved, a Proposed Final Audit Report will be prepared within 30 days of the Commission's vote, which will reflect the changes above for Finding 4.

**In case of an objection, Directive No. 70 states that the Audit Division Recommendation Memorandum 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 Tesfai Asmamaw or Nicole Burgess at 694-1200.

**Attachments:**

- Draft Final Audit Report of the Audit Division on the NY Republican Federal Campaign Committee
- LRA 1038 (NY Republicans) – Draft Final Audit Report
- LRA 1038 (NY Republicans) – Audit Division Recommendation Memorandum

cc: Office of General Counsel



# Draft Final Audit Report of the Audit Division on the NY Republican Federal Campaign Committee

(January 1, 2011 - December 31, 2012)

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## 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.<sup>1</sup> 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 NY Republican Federal Campaign Committee is a state party committee headquartered in Albany, New York. For more information, see the chart on the Committee Organization, p. 2.

## Financial Activity (p. 2)

• <b>Receipts</b>	
○ Contributions from Individuals	\$ 1,606,371
○ Contributions from Political Committees	257,350
○ Transfers from Affiliated and Other Political Committees	2,522,875
○ Transfers from Non-federal Accounts	1,682,587
○ Other Receipts	177,507
<b>Total Receipts</b>	<b>\$ 6,246,690</b>
• <b>Disbursements</b>	
○ Operating Expenditures	\$ 2,921,022
○ Refunds of Contributions	20,200
○ Federal Election Activity	2,716,291
○ Other Disbursements	350,929
<b>Total Disbursements</b>	<b>\$ 6,008,442</b>

## Findings and Recommendations (p. 3)

- Misstatement of Financial Activity (Finding 1)
- Recordkeeping for Employees (Finding 2)
- Disclosure of Occupation/Name of Employer (Finding 3)
- Reporting of Apparent Independent Expenditures (Finding 4)
- Recordkeeping for Communications (Finding 5)

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<sup>1</sup> 52 U.S.C. §30111(b).

**Draft Final Audit Report of the  
Audit Division on the  
NY Republican Federal Campaign  
Committee**

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(January 1, 2011 - December 31, 2012)



# Table of Contents

	<b>Page</b>
<b>Part I. Background</b>	
Authority for Audit	1
Scope of Audit	1
Commission Guidance	1
<b>Part II. Overview of Committee</b>	
Committee Organization	2
Overview of Financial Activity	2
<b>Part III. Summaries</b>	
Findings and Recommendations	3
<b>Part IV. Findings and Recommendations</b>	
Finding 1. Misstatement of Financial Activity	5
Finding 2. Recordkeeping for Employees	8
Finding 3. Disclosure of Occupation/Name of Employer	10
Finding 4. Reporting of Apparent Independent Expenditures	12
Finding 5. Recordkeeping for Communications	17

# Part I

## Background

### Authority for Audit

This report is based on an audit of the NY Republican Federal Campaign Committee<sup>2</sup> (NYR), 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 disclosure of individual contributors' occupation and name of employer;
2. the disclosure of disbursements, debts and obligations;
3. the disclosure of expenses allocated between federal and non-federal accounts;
4. the consistency between reported figures and bank records;
5. the completeness of records;
6. the disclosure of independent expenditures; and
7. other committee operations necessary to the review.

### Commission Guidance

#### Request for Early Commission Consideration of a Legal Question

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 NYR 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. The Audit staff informed NYR representatives of the payroll log requirement and of the Commission's decision not to pursue recordkeeping violations for failure to keep payroll logs for salaries paid and correctly reported as 100 percent federal. This audit report does not include any findings or recommendations with respect to NYR employees paid with 100 percent federal funds and reported as such.

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<sup>2</sup> On December 23, 2013, the Commission received a Statement of Organization from the New York Republican Federal Campaign Committee officially changing its name to NY Republican Federal Campaign Committee.



## Part II

### Overview of Committee

#### Committee Organization

<b>Important Dates</b>	
• Date of Registration	August 2, 1976
• Audit Coverage	January 1, 2011 - December 31, 2012
<b>Headquarters</b>	
Albany, New York	
<b>Bank Information</b>	
• Bank Depositories	Two
• Bank Accounts	Eight Federal, Two Non-federal
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	John Riedman (3/18/11 – Present)
• Treasurer During Period Covered by Audit	Jane Corwin (10/5/09 – 3/17/11)
<b>Management Information</b>	
• Attended Commission Campaign Finance Seminar	Yes
• Who Handled Accounting and Recordkeeping Tasks	Paid Staff

#### Overview of Financial Activity (Audited Amounts)

<b>Cash-on-hand @ January 1, 2011</b>	<b>\$ 59,732</b>
<b>Receipts</b>	
○ Contributions from Individuals	1,606,371
○ Contributions from Political Committees	257,350
○ Transfers from Affiliated and Other Political Committees	2,522,875
○ Transfers from Non-federal Accounts	1,682,587
○ Other Receipts	177,507
<b>Total Receipts</b>	<b>\$ 6,246,690</b>
<b>Disbursements</b>	
○ Operating Expenditures	2,921,022
○ Refunds of Contributions	20,200
○ Federal Election Activity	2,716,291
○ Other Disbursements	350,929
<b>Total Disbursements</b>	<b>\$ 6,008,442</b>
<b>Cash-on-hand @ December 31, 2012</b>	<b>\$ 297,980</b>

## **Part III**

### **Summaries**

#### **Findings and Recommendations**

##### **Finding 1. Misstatement of Financial Activity**

During audit fieldwork, a comparison of NYR's reported financial activity with bank records revealed material misstatements in both 2011 and 2012. In response to the Interim Audit Report recommendation, NYR stated that, it would be costly and perhaps impossible to reconstruct the records necessary to recreate its filings. NYR did not file amended disclosure reports to correct the misstatements. As such, NYR's reported financial activity for 2011 and 2012 remains materially misstated for receipts and disbursements. (For more detail, see p. 5.)

##### **Finding 2. Recordkeeping for Employees**

During audit fieldwork, the Audit staff determined that NYR 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 2011 and 2012, the Audit staff identified payments to NYR employees totaling \$713,427 for which NYR 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, NYR concurred with the finding by acknowledging the need to improve its system for keeping and maintaining monthly employee payroll logs, and has implemented procedures that will maintain the necessary documentation in the future. (For more detail, see p. 8.)

##### **Finding 3. Disclosure of Occupation/Name of Employer**

A review of contributions from individuals requiring itemization indicated that 205 contributions totaling \$563,191 lacked or had inadequate disclosure of occupation and/or name of employer. In addition, "best efforts" to obtain, maintain and submit the information had not been sufficiently documented for these contributions. In response to the Interim Audit Report recommendation, NYR included memo entries in its most recently filed disclosure report providing the missing contributor information. (For more detail, see p. 10.)

##### **Finding 4. Reporting of Apparent Independent Expenditures**

During audit fieldwork, the Audit staff reviewed expenditures totaling \$1,352,118, that NYR disclosed on Schedule B, Line 30(b), (Federal Election Activity Paid Entirely with Federal Funds), that appear to be apparent independent expenditures that should have been disclosed on Schedule E, Line 24, (Independent Expenditures). NYR maintained that these expenditures were part of its non-allocable mail program. NYR provided documentation supporting the use of volunteers, totaling \$209,615.

Additionally, NYR did not provide sufficient documentation pertaining to dissemination dates to verify whether 24/48-hour reports were required to be filed for the apparent independent expenditures totaling \$1,142,503.

In response to the Interim Audit Report recommendations, NYR submitted additional documentation and reiterated that the expenditures were part of its volunteer mail program. (For more detail, see p. 12.)

**Finding 5. Recordkeeping for Communications**

During audit fieldwork, the Audit staff reviewed disbursements to verify the accuracy of information and proper classification of transactions disclosed on reports. The Audit staff identified \$77,354 for which sufficient records were not provided. Without a copy of the invoices and the associated communications, the Audit staff is unable to determine how NYR should have reported these disbursements. NYR did not address this finding in its response to the Interim Audit Report. (For more detail, see p. 17.)

## Part IV

# Findings and Recommendations

### Finding 1. Misstatement of Financial Activity

#### Summary

During audit fieldwork, a comparison of NYR's reported financial activity with bank records revealed material misstatements in both 2011 and 2012. In response to the Interim Audit Report recommendation, NYR stated that, it would be costly and perhaps impossible to reconstruct the records necessary to recreate its filings. NYR did not file amended disclosure reports to correct the misstatements. As such, NYR's reported financial activity for 2011 and 2012 remains materially misstated for receipts and disbursements.

#### Legal Standard

**A. 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).

**B. Federal vs. Non-Federal Account.** The federal account may not accept funds that are not permissible under federal election law. 11 CFR §§102.5(a)(1)(i) and 11 CFR §§102.5(a)(2)(i)-(iii).

#### Facts and Analysis

##### A. Facts

During audit fieldwork, the Audit staff reconciled NYR's reported financial activity with its bank records for 2011 and 2012. The reconciliation identified that NYR misstated receipts and disbursements for 2011 and 2012. The following charts outline the discrepancies between NYR's disclosure reports and its bank records, and the succeeding paragraphs explain why the discrepancies occurred.

<b>2011 Committee Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Beginning Cash Balance @ January 1, 2011	\$57,528	\$59,732	\$2,204 Understated
Receipts	\$1,620,406	\$1,825,306	\$204,900 Understated
Disbursements	\$1,562,000	\$1,753,367	\$191,367 Understated
Ending Cash Balance @ December 31, 2011	\$115,934	\$131,671	\$15,737 Understated

The beginning cash balance was understated by \$2,204 and is unexplained, but likely resulted from prior-period discrepancies.

The understatement of receipts resulted from the following:

• Transfers from non-federal accounts for allocable activity, not reported	+	\$14,321
• Unreported deposit	+	975
• Non-federal contributions deposited in the federal account, not reported	+	190,000
• Unexplained differences	-	396
<b>Net Understatement of Receipts</b>	<b>+</b>	<b><u>\$204,900</u></b>

The understatement of disbursements resulted from the following:

• Transfer of non-federal contributions to the non-federal account, not reported	+	190,000
• Net credit card charges, not reported	+	1,563
• Unexplained differences	-	196
<b>Net Understatement of Disbursements</b>	<b>+</b>	<b><u>\$191,367</u></b>

The \$15,737 understatement of the ending cash balance resulted from the misstatements described above.

<b>2012 Committee Activity</b>			
	<b>Reported</b>	<b>Bank Records</b>	<b>Discrepancy</b>
Beginning Cash Balance @ January 1, 2012	\$115,934	\$131,671	\$15,737 Understated
Receipts	\$4,272,137	\$4,421,384	\$149,247 Understated
Disbursements	\$4,103,481	\$4,255,074	\$151,593 Understated
Ending Cash Balance @ December 31, 2012	\$284,590	\$297,981	\$13,391 Understated

The understatement of receipts resulted from the following:

• Transfers from non-federal accounts for allocable activity, not reported	+	\$11,750
• Non-federal contributions deposited in the federal account, not reported	+	157,447
• Unexplained differences	-	19,950
<b>Net Understatement of Receipts</b>	<b>+</b>	<b><u>\$149,247</u></b>

The understatement of disbursements resulted from the following:

• Transfer of non-federal contributions to the non-federal account, not reported	+	157,447
• Unexplained differences	-	5,854
<b>Net Understatement of Disbursements</b>	<b>+</b>	<b><u>\$151,593</u></b>

The \$13,391 understatement of the ending cash balance resulted from the misstatements described above.

For the \$347,447 (\$190,000 + \$157,447) not reported above, NYR stated it used a federal account as its merchant account, depositing federal and non-federal contributions. Subsequently, NYR would transfer "any contribution that was from federally impermissible funds<sup>3</sup> or that exceeded federal contribution limits" to the appropriate non-federal account. NYR stated that some of the discrepancies were due to the manner in which the credit cards contributions were processed.

The Audit staff confirmed there was one wire and three credit card deposits into the federal account totaling \$310,000, that were identified by NYR as non-federal contributions. The Audit staff was unable to identify the bank deposits for the remaining \$37,447, however, was able to verify \$347,447 was transferred to the non-federal account via 12 individual transactions. Finally, the Audit staff was able to verify \$321,647 of these non-federal transfers were reported as contributions on the state reports.

#### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed the misstatement of receipts and disbursements with the NYR representatives at the exit conference. NYR representatives asked questions for clarification and said they would respond after having time to review each issue. The Audit staff provided schedules detailing the misstatement of receipts and disbursements. In response to the exit conference, NYR stated all federal and non-federal credit card contributions were deposited in the federal account as a matter of administrative convenience.

Furthermore, the NYR representatives stated that the order to ensure greater compliance and avoid accepting impermissible funds in the federal account, they have implemented a

<sup>3</sup> In response to the exit conference, NYR representatives stated these contributions were federally permissible. Due to the lack of documentation, the Audit staff was unable to verify the permissibility of the contributions.

new system for processing credit card contributions. Through a new software vendor, NYR staff determines whether the contributions should be deposited in the federal or non-federal account based on the Commission and New York State Board of Elections regulations. Once identified, contributions are deposited directly into the appropriate NYR bank account.

The Interim Audit Report recommended that NYR amend its disclosure reports to correct the misstatements noted above and reconcile the cash balance on its most recent report to identify any subsequent discrepancies that could affect the recommended adjustments.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, NYR stated that, it would be costly and perhaps impossible to reconstruct the records necessary to recreate its filings. Additionally, NYR stated that none of the non-federal funds were used for federal activities; these funds were not reported on its disclosure reports because they were not subject to FEC regulation. NYR elaborated that the non-federal funds were reported on the public record as a part of its state reports. NYR also cited Advisory Opinion 2001-17 (DNC Services) in support of its position. However, in the Advisory Opinion, the Commission primarily addressed the question of how a national committee should report contributions intended to be split into federal and a non-federal component. Thus to the extent that the contributions routed through the federal account were composite contributions, containing both federal and non-federal components, its treatment of these would appear to be permissible under the reasoning set forth in the Advisory Opinion. However, in this case, the funds were deposited not because of the "composite" nature of the contributions, but for administrative convenience. Therefore, some of the contributions intended to be wholly non-federal and having no federal component could have been routed through the federal account.<sup>4</sup> The Audit staff requests that NYR clarify with respect to the contributions at issue whether and to what extent the contributions involved were "composite" contributions containing both a federal and a non-federal component, such as, a copy of the solicitation device for credit card contributions indicating that a federal/non-federal component was raised.

NYR did not file amended disclosure reports to correct the misstatements. As such, NYR's reported financial activity for 2011 and 2012 remains materially misstated for receipts and disbursements.

## **Finding 2. Recordkeeping for Employees**

### **Summary**

During audit fieldwork, the Audit staff determined that NYR 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 2011 and 2012, the Audit staff identified

<sup>4</sup> Absent clarification of the "composite" nature of these contributions, this could result in a violation of 11 CFR §102.5 (a)(2)(i)-(iii).

payments to NYR employees totaling \$713,427<sup>5</sup> for which NYR 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, NYR concurred with the finding by acknowledging the need to improve its system for keeping and maintaining monthly employee time logs, and has implemented procedures that will maintain the necessary documentation in the future.

### **Legal Standard**

**Maintenance of Monthly Logs.** Party 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 be allocated 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. NYR 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 2011 and 2012, NYR did not maintain monthly logs for \$713,427 in payroll. This amount includes payroll paid as follows to NYR employees:

Employees reported on Schedule H4 (Disbursements for Allocated Federal and Nonfederal Activity) and paid with allocated federal and non-federal funds during the same month (totaling \$713,427).

NYR provided the Audit staff with affidavits from the former Executive Director attesting to the fact that he was able to determine those employees who spent less than 25% of their time in federal activity. There was no payroll paid exclusively with non-federal funds.<sup>6</sup> The affidavits provided by NYR do not resolve the recordkeeping finding because they do not document the time that an employee spent in connection with a federal election and the documents were provided after notification of the audit.

<sup>5</sup> 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 Commission Consideration of a legal Question, Page 1.) Payroll amount does not include taxes and fringe benefits.

<sup>6</sup> This is based on the Audit staff's review of the available disbursement records and state reports.



### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed the recordkeeping requirement with NYR representatives during the audit fieldwork and at the exit conference. NYR representatives asked questions for clarification and said they would respond after reviewing each issue. Subsequently, NYR representatives stated that contemporaneous payroll logs were not kept; however, every effort was made to ensure that employees that spent significant time on federal elections were paid properly from the federal account. Further, NYR stated that a policy had been adopted and implemented to maintain monthly payroll logs.<sup>7</sup>

The Interim Audit Report recommended that NYR provide monthly payroll logs that indicated the time spent in connection with a federal election and provide a copy of the policy implemented in January 2014.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, NYR concurred with the finding by stating that it is unable to provide time logs for its employees during the audit period, most of whom no longer work for NYR. However, NYR stated it has implemented procedures to ensure it maintains the necessary documentation in the future. In addition, NYR submitted a copy of its policy and a sample monthly payroll log.

## **Finding 3. Disclosure of Occupation/Name of Employer**

### **Summary**

A review of contributions from individuals requiring itemization indicated that 205 contributions totaling \$563,191 lacked or had inadequate disclosure of occupation and/or name of employer. In addition, "best efforts" to obtain, maintain and submit the information had not been sufficiently documented for these contributions. In response to the Interim Audit Report recommendation, NYR included memo entries in its most recently filed disclosure report providing the missing contributor information.

### **Legal Standard**

**A. Itemization required for Contributions from Individuals.** A political committee other than an authorized committee must itemize any contribution from an individual if it exceeds \$200 per calendar year, either by itself or when combined with other contributions from the same contributor. 52 U.S.C §30104(b)(3)(A).

**B. Required Information for Contributions from Individuals.** For each itemized contribution from an individual, the committee must provide the following information:

- The contributor's full name and address (including zip code);
- The contributor's occupation and the name of his or her employer;
- The date of receipt (the date the committee received the contribution);
- The amount of the contribution; and

<sup>7</sup> The Audit staff did not receive a copy of the policy nor a sample timesheet as noted in the narrative supplied by NYR.

- The calendar year-to-date total of all contributions from the same individual. 11 CFR §§100.12 and 104.3(a)(4) and 52 U.S.C §30104(b)(3)(A).

**C. Best Efforts Ensures Compliance.** When the treasurer of a political committee shows that the committee used best efforts (see below) to obtain, maintain, and submit the information required by the Act, the committee's reports and records will be considered in compliance with the Act. 52 U.S.C. §30102(i).

**D. Definition of Best Efforts.** The treasurer and the committee will be considered to have used "best efforts" if the committee satisfied all of the following criteria:

- All written solicitations for contributions included:
  - A clear request for the contributor's full name, mailing address, occupation, and name of employer; and
  - The statement that such reporting is required by Federal law.
- Within 30 days after the receipt of the contribution, the treasurer made at least one effort to obtain the missing information, in either a written request or a documented oral request.

The treasurer reported any contributor information that, although not initially provided by the contributor, was obtained in a follow-up communication or was contained in the committee's records or in prior reports that the committee filed during the same two-year election cycle. 11 CFR §104.7(b).

## **Facts and Analysis**

### **A. Facts**

A review of itemized contributions indicated that 205 contributions totaling \$563,191, or 40 percent of the dollar value of individual contributions required to be itemized by NYR, lacked or had inadequate disclosure of occupation/name of employer.

A review of the Schedule A (Itemized Receipts) filed with the Commission determined the following: 120 errors totaling \$334,027 did not disclose the occupation or name of employer, 77 errors totaling \$191,764 disclosed the occupation or the name of employer as "Information Requested", and of the eight remaining errors totaling \$37,400, seven inadequately disclosed the occupation or name of employer as self-employed.

- NYR did not provide documentation for 95 contributions showing it made follow-up best efforts for contributions totaling \$214,944.
- NYR had the required documentation for 110 contributions totaling \$348,247, however this information was not disclosed on its FEC reports.

### **B. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff discussed this matter with the NYR representatives and they asked questions for clarification. Subsequent to the exit conference, NYR provided the Audit staff a list of individual contributors with occupation and name of employer information omitted. NYR representatives stated that since the 2012 cycle, NYR has made a point of sending and keeping records of follow-up correspondence.

NYR representatives further stated that NYR's record of demonstrating that best efforts have been made is supported by the fact that it has not received any Commission Requests for Additional Information letters on this issue in the 2013-2014 cycle.<sup>8</sup> Further, it has implemented a policy that when additional information arrives, the public record will be updated to reflect that information.

The Interim Audit Report recommended that, NYR establish "best efforts" by amending its reports to disclose the missing information relating to the 110 contributions for which it had the required documentation.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, NYR established "best efforts" by including memo entries in its most recent disclosure report specifically addressing 91 contributions totaling \$276,197. However, this submission did not materially correct the disclosure errors.

## **Finding 4. Reporting of Apparent Independent Expenditures**

### **Summary**

During audit fieldwork, the Audit staff reviewed expenditures totaling \$1,352,118, that NYR disclosed on Schedule B, Line 30(b), (Federal Election Activity Paid Entirely with Federal Funds), that appear to be apparent independent expenditures that should have been disclosed on Schedule E, Line 24, (Independent Expenditures). NYR maintained that these expenditures were part of its non-allocable mail program. NYR provided documentation supporting the use of volunteers, totaling \$209,615.

Additionally, NYR did not provide sufficient documentation pertaining to dissemination dates to verify whether 24/48-hour reports were required to be filed for the apparent independent expenditures totaling \$1,142,503.

In response to the Interim Audit Report recommendations, NYR submitted additional documentation and reiterated that the expenditures were part of its volunteer mail program.

### **Legal Standard**

**A. Definition of Independent Expenditures.** The term "independent expenditure" means an expenditure by a person for a communication expressly advocating the election or defeat of a clearly identified candidate that is not made in coordination with any candidate or authorized committee or agent of a candidate. No expenditure shall be considered independent if the person making the expenditure allows a candidate, a candidate's authorized committee or their agents, or a political party committee or its agents to become materially involved in decisions regarding the communication as described in 11 CFR 109.21(d)(2), or shares financial responsibility for the cost of production or dissemination with any such person. 11 CFR §100.16(a) & (c).

<sup>8</sup> The Audit staff has verified that the Commission has not sent Requests for Additional Information letters.

**B. Expressly Advocating.** Expressly advocating means any communication that – (a) Uses phrases such as “vote for the president,” “re-elect your Congressman,” “support the Democratic nominee,” “cast your ballot for the Republican challenger for the Republican challenger for U.S. Senate in Georgia,” accompanied by a picture of one or more candidate(s), or communications of campaign slogan(s) or individual word(s), which in context can have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidate(s). (b) When taken as a whole and with limited reference to external events, such as the proximity to the election, could only be interpreted by a reasonable person as containing advocacy of the election or defeat of one or more clearly identified candidate(s). 11 CFR §100.22.

**C. Disclosure Requirements – General Guidelines.** An independent expenditure shall be reported on Schedule E (Itemized Independent Expenditures) 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.

**D. 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 20<sup>th</sup> 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 each time additional independent expenditures aggregate \$1,000 or more. 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).

**E. Independent Expenditure Reports (48-Hour Reports).** Any independent expenditures aggregating \$10,000 or more for an election in any calendar year up to and including the 20<sup>th</sup> day before an election, must be disclosed within 48 hours each time the expenditures aggregate \$10,000 or more. The reports must be filed with the Commission within 48 hours after the expenditure is made. 11 CFR §§104.4(f) and 104.5(g)(1).

**F. 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. CFR §104.14(b)(1).

**G. 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 conditions below are met.

1. 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.
2. 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.
3. Such payment is not made from contributions designated by the donor to be spent on behalf of a particular candidate for federal office.
4. Such materials are distributed by volunteers and not by commercial or for-profit operations.
5. 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.
6. 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. Reporting of Independent Expenditures**

#### **1. Facts**

During audit fieldwork, the Audit staff reviewed disbursements to ensure proper reporting. The Audit staff noted that NYR did not disclose any independent expenditures on Schedule E, however, made apparent media-related expenditures totaling \$1,142,503 and disclosed them as Federal Election Activity on Schedule B. NYR maintains that these expenditures are part of its non-allocable mail program. The breakdown analysis of these expenditures is as follows:

- a. Independent Expenditures Reported as Federal Election Activity (Associated Mailer and Invoice Provided under 11 CFR §100.22(a))**  
NYR made 88 disbursements for apparent independent expenditures for direct mail totaling \$866,372 for which it provided a copy of the mailer with an associated invoice. According to the Audit staff, each of these direct mailers contained language expressly advocating the election or defeat of a clearly identified candidate as defined under 11CFR §100.22(a).
- b. Independent Expenditures Reported as Federal Election Activity (Associated Mailer and Invoice Provided under 11 CFR 100.22(b))**  
NYR made 31 apparent independent expenditures for direct mail totaling \$276,131 for which it provided a copy of the mailer with an associated invoice. These communications encouraged the reader to vote for Republicans noting various reasons why the Democrats were bad for New York. Based on the definition of express advocacy under 11 CFR 100.22(b), the Audit staff

believes that these communications could only be interpreted by a reasonable person as advocating the election or defeat of clearly identified candidate(s).

**c. Volunteer Material Exemption**

To support the volunteer material exemption, NYR representatives provided seven affidavits with the associated invoices and mailers from vendors and campaign officials, totaling \$906,027. The affidavits detailed that the volunteers sorted, bundled, bagged and tagged the mail pieces by local zip code as part of the NYR “non-allocable volunteer program” during the audit period. NYR did not submit affidavits for the remaining \$236,476 in invoices and mailers. Based on the limited documentation provided, the Audit staff determined these disbursements totaling \$1,142,503 to be apparent independent expenditures.

In addition to the expenditures discussed above, one invoice totaling \$209,615 included pictures of a single volunteer working on each individual mail piece. NYR provided signed volunteer forms for eight mail pieces which reflected the volunteer’s name, address, the date and the title of the mail piece. The job performed was left blank on all of the forms. Based on the dates on the forms, it appeared most of this volunteer activity occurred immediately prior to the 2012 General Election. Due to the lack of clarity regarding the degree of volunteer involvement and the quantum and type(s) of evidence needed to qualify a given disbursement for an express advocacy communication as exempt under the volunteer materials exemption, the disbursement will not be deemed an independent expenditure.

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<sup>9</sup>, 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.

In view of the uncertainty regarding the amount of volunteer involvement needed to qualify for the volunteer materials exemption, as well as the amount of documentation required to support such an exemption, the Audit staff recommended that, NYR provide more detailed information and documentation for any volunteer involvement associated with each mailer.

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<sup>9</sup> Proposed Interim Enforcement Policy, Agenda Document No. 10-16.

## **2. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff presented a schedule detailing these expenditures to NYR representatives. In response to the exit conference, the NYR representatives provided invoices, mailers, photographs, signed volunteer forms and signed affidavits specifically addressing the volunteer component in processing the direct mailers. Further, NYR representatives stated that as a result of the audit process, NYR was developing a policy that documents the volunteer component of the NYR non-allocable mail program.

The Interim Audit Report recommended that NYR provide documentation and evidence that apparent independent expenditures totaling \$1,142,503 did not require reporting as independent expenditures. Evidence should have included any documentation such as volunteer timesheets and photographs to support the involvement of volunteers in the processing or distribution of the communications noted above. Absent such evidence, the Interim Audit Report recommended that NYR amend its reports to disclose these disbursements as independent expenditures on Schedule E and submit revised procedures for reporting independent expenditures.

## **3. Committee Response to the Interim Audit Report**

In response to the Interim Audit Report recommendation, NYR submitted five additional affidavits, including four from its mail vendors and a second affidavit from the Executive Director during the audit period and two new direct mail pieces<sup>10</sup>. NYR stated that these additional affidavits detail the active role volunteers played in the production and distribution of the mailers, in coordination with NYR and the former Executive Director. Further, the affidavit from the former Executive Director attested that “[a]ll of the express advocacy mailings reported as federal election activity on Line 30(b) of the Committee’s FEC disclosure reports during the 2012 Election Cycle were part of the Committee’s Volunteer Mail Program,” and that he “followed the same procedures described in [his earlier affidavit] to ensure there was substantial volunteer participation in all of the mailings’ production and distribution.” NYR maintains that these additional affidavits along with the previously submitted materials more than sufficiently established that the expenditures were properly reported as non-allocable mailers under the volunteer materials exemption. Due to the lack of a clear standard for applying the volunteer materials exemption, the Audit staff is unable to determine whether sworn affidavits of the nature submitted by NYR suffice to document the involvement of volunteers.

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<sup>10</sup> NYR associated two new direct mail pieces with two invoices previously provided. Although both of the new direct mail pieces still contain express advocacy, the characteristics of one piece have requalified its classification from 11 CFR §100.22(a) to 11 CFR §100.22(b), revising the totals to \$854,557 and \$287,947, respectively.

## **B. Failure to File 24/48-Hour Reports for Independent Expenditures**

### **1. Facts**

In addition to not reporting any independent expenditures during the audit period, NYR also did not file 24 or 48-hour reports for any independent expenditures. Therefore, the apparent independent expenditures identified above by the Audit staff may also have required such filings.

### **2. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff discussed with NYR representatives the requirements for filing 24/48-hour reports. NYR representatives did not offer any comments regarding this matter.

The Interim Audit Report recommended that, absent documentation and evidence that apparent independent expenditures totaling \$1,142,503 did not require reporting as independent expenditures (per Part A above), NYR provide documentation to support the date of public dissemination for each communication to determine whether a 24/48-hour report was required.

### **3. Committee Response to the Interim Audit Report**

In response to the Interim Audit Report recommendation, NYR submitted additional documentation addressed in Part A above. The Audit staff maintains that NYR failed to file 24/48-hour reports.

## **Finding 5. Recordkeeping for Communications**

### **Summary**

During audit fieldwork, the Audit staff reviewed disbursements to verify the accuracy of information and proper classification of transactions disclosed on reports. The Audit staff identified \$77,354 for which sufficient records were not provided. Without a copy of the invoices and the associated communications, the Audit staff is unable to determine how NYR should have reported these disbursements. NYR did not address this finding in its response to the Interim Audit Report.

### **Legal Standard**

**A. 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, and checked for accuracy and completeness. 11 CFR §104.14(b)(1).

**B. Preserving Records and Copies of Reports.** The treasurer of a political committee must preserve all records and copies of reports for 3 years after the report is filed. 52 U.S.C. §30102(d).



## **Facts and Analysis**

### **A. Facts**

During the fieldwork, the Audit staff reviewed disbursements to verify the accuracy of the information and proper classification of transactions disclosed on reports. NYR made seven expenditures totaling \$77,354 for which documentation was insufficient to make a determination pertaining to whether these disbursements were correctly reported on Schedule B, Line 30(b).

The Audit staff's analysis resulted in the following:

#### **1. Disbursement- Invoice Provided –No Copy of the Communication Provided (\$11,747)**

A disbursement totaling \$11,747 was paid to a vendor and was disclosed on Schedule B, Line 30(b) with purpose FEA - Mail Production with a candidate identification number, but no mailer associated with the disbursement was provided. The Audit staff requested copies of the associated mailers for this disbursement. To date, the mailer or other documentation to associate the payment to a particular mail production has not been provided.

#### **2. Disbursements- No Copies of Communications or Invoices Provided (\$65,607)**

Disbursements totaling \$65,607 were paid to three vendors and reported on Schedule B, Line 30(b) with purposes FEA – Exempt Mail Postage – candidate name, FEA – Postage – candidate name/district, FEA Mail Postage – candidate identification number, FEA – 100% Federal: FEA Mailing and FEA – Mail Production – candidate name. However, documentation was not provided by NYR. Without sufficient details, the Audit staff is unable to verify NYR's reporting of these amounts as Federal Election Activity. The Audit staff requested documentation for each of these disbursements. To date, this documentation has not been provided.

### **B. Interim Audit Report & Audit Division Recommendation**

At the exit conference, the Audit staff presented NYR with schedules of the invoices and associated mail pieces for which records were necessary to verify the accuracy of reporting. The Interim Audit Report recommended that, NYR provide the invoices and the associated mail pieces for disbursements totaling \$77,354.

### **C. Committee Response to Interim Audit Report**

NYR did not address this finding nor did it provide any additional documentation in its response to the Interim Audit Report. The Audit staff considers the matter a violation of the recordkeeping requirements at 11 CFR §104.14(b)(1).



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

July 7, 2017

**MEMORANDUM**

**TO:** Patricia C. Orrock  
Chief Compliance Officer

Thomas E. Hintermister  
Assistant Staff Director  
Audit Division

**FROM:** Lisa J. Stevenson *LJS* for LJS  
Acting General Counsel

Lorenzo Holloway *LH*  
Assistant General Counsel  
Compliance Advice

Joshua Blume *JB*  
Attorney

**SUBJECT:** Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038)

**I. INTRODUCTION**

The Office of the General Counsel has reviewed the Draft Final Audit Report (“DFAR”) on the New York Republican Federal Campaign Committee (“the Committee”). The DFAR contains five findings: Misstatement of Financial Activity (Finding 1); Recordkeeping for Employees (Finding 2); Disclosure of Occupation/Name of Employer (Finding 3); Reporting of Apparent Independent Expenditures (Finding 4); and Recordkeeping for Communications (Finding 5). Our comments address certain aspects of Findings 1, 2, and 4. We concur with all other findings and with other aspects of Findings 1, 2, and 4 that we do not discuss in this memorandum. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.

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

The principal cause of the misstatements of receipts and disbursements identified in this finding appears to have been unreported receipts and disbursements of non-federal contributions by the Committee's federal account. The Committee stated that it had used its federal account as a general purpose merchant account to process both non-federal and federal credit card contributions for administrative convenience.

We recommend that the Audit Division revise the DFAR to address whether the Committee's use of its federal account in this manner complied with 11 C.F.R. § 102.5. The DFAR recites the prohibition imposed by section 102.5, but the DFAR does not address whether the Committee complied with this provision.

The analysis of whether the Committee complied with section 102.5 should address the Committee's contention that the credit card company it employed allowed only one Committee account to serve as the merchant account and that the Committee promptly transferred any contributions intended for the non-federal accounts to those accounts. The Committee cites Advisory Opinion 2001-17 (DNC Services) in support of its position. In that advisory opinion, the Commission primarily addressed the question of how a national committee should report contributions intended to be split into a federal and a non-federal component, but also endorsed the requestor's stated intention to deposit the total amount of such a 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). The Commission also deemed it permissible for the requestor to report a receipt of the federal component of the contribution by the federal account and, through itemization on Schedule A, a receipt of the non-federal component of the overall contribution by the non-federal account. *Id.*

Thus, to the extent that the contributions routed through the federal account were composite contributions, containing both federal and non-federal components, the Committee's treatment of these would appear to be permissible under the reasoning set forth in Advisory Opinion 2001-17 (DNC Services). However, given the Committee's statement that it was required to use its federal account as a global merchant account for the processing of all credit card contributions, it is conceivable that some contributions intended to be wholly non-federal, and having no federal component, were also routed through the federal account. The depositing of these non-federal contributions into the federal account would violate 11 C.F.R. § 102.5(a)(2)(i)-(iii). Accordingly, we recommend that the Audit Division revise the DFAR to include a request that the Committee clarify, with respect to the contributions at issue in the discussion of this aspect of the finding, whether and to what extent the contributions involved were "composite" contributions containing both a federal and a non-federal component.

## **III. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 4)**

The DFAR concludes that disbursements the Committee incurred for communications totaling approximately \$1.35 million contain express advocacy as that term is defined in 11 C.F.R. § 100.22, and therefore should have been reported as independent expenditures. The Committee contends, however, that all of the direct mail advertisements at issue were processed and

distributed by volunteers. Consequently, the Committee argues that the costs of the advertisements should be considered exempt under the Commission's volunteer materials exemption ("VME"). *See* 11 C.F.R. § 100.147.

We have two comments on this finding. First, we address the DFAR's conclusions about the application of the VME. Second, we comment on the express advocacy content of a new communication that the Committee submitted in response to the IAR, which was not previously among the communications reviewed by the Audit Division or by this office.

#### **A. Conclusions Regarding Application of the VME**

The DFAR divides the disbursements into three categories based upon whether, and to what extent, the Committee submitted information or documentation to support its assertion that the VME applies as follows:

- \$209,615, for which the Committee submitted affidavits, volunteer statements and photographs;
- \$906,027, for which the Committee submitted affidavits alone;<sup>1</sup> and
- \$236,476, for which the Committee did not submit any information.

The DFAR states that the disbursement for the advertisements in the first category, totaling \$209,615, was not determined to be an independent expenditure, and that the Committee did not sufficiently document the involvement of volunteers with respect to the remaining two categories of disbursements. We comment below on these three categories of disbursements.

With respect to the first disbursement category, totaling \$209,615, the DFAR notes that the Committee submitted pictures of a single volunteer working on each individual mail piece, as well as signed volunteer forms, and states that this disbursement was not determined to be an independent expenditure. Because the DFAR's statement could be read to suggest that the Audit Division concluded that the documentation the Committee submitted sufficed to warrant the application of the VME, we recommend that the conclusion of the DFAR be modified to indicate that in light of the lack of clarity regarding the degree of volunteer involvement and the quantum and type(s) of evidence needed to qualify a given disbursement for an express advocacy communication as exempt under the VME, the disbursement will not be deemed an independent expenditure. *See, e.g.*, Final Audit Report on Nebraska Democratic Party, at 16-17 (approved Oct. 23, 2014); Final Audit Report on South Dakota Democratic Party, at 15 (approved Apr. 17, 2015); Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Colorado Republican Committee (LRA 961), at 5 (Aug. 15, 2016). The lack of clarity regarding the VME

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<sup>1</sup> To be precise, the Committee submitted seven affidavits dated in 2015 that relate to both the \$209,615 mail piece group and to the \$906,027 mail piece group, for a total amount of approximately \$1.128 million. Of this total, the Committee submitted additional documentation with respect to \$209,615 in mail pieces that was added as an attachment to one of the seven affidavits: the affidavit of Brett Buerck of Majority Strategies. The remaining \$906,027 in mail pieces were supported by the seven affidavits alone. The Committee submitted five additional affidavits dated in 2017 as an attachment to its response to the IAR. Thus, the Committee has submitted a total of 12 affidavits.

indicates that definite positive or negative conclusions about the adequacy of submitted evidence to meet the VME would not be appropriate.

The DFAR also states that the second category of disbursements lacked sufficient documentation to qualify for the VME and that the Audit staff considers the question unresolved. In this category, the Committee submitted affidavits from individuals involved in supervising or coordinating aspects of the volunteer mailing process, but no other evidence or documents. These affidavits were executed by individuals claiming to have personal knowledge of, and responsibility for administering, the Committee's volunteer mailing program, including the former counsel to the Committee during the relevant period of time, campaign managers for two campaigns assisted by the Committee's efforts, and the heads of businesses, including campaign consulting firms and print or mail vendors, involved with these efforts. Several affidavits, including that of the former counsel to the Committee, provide fairly detailed descriptions of the types of volunteer mailing activities that they recommended the volunteers perform in order to qualify the mailings for the VME.

We recommend that the DFAR be revised to remove the conclusion that the Committee did not sufficiently document the involvement of volunteers. A definite conclusion on this question would not be consistent with the DFAR's acknowledgement elsewhere of the lack of a clear standard for applying the VME.<sup>2</sup> We recommend that the DFAR state instead that because of the lack of a clear standard for applying the VME, the Audit staff is unable to determine whether sworn affidavits of the nature submitted by the Committee suffice to document the involvement of volunteers and is therefore referring this question to the Commission for decision. We also recommend that the Audit Division raise the issue of the qualification of the second category of disbursements for the VME in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

Finally, the DFAR concludes that the third category of disbursements lacked adequate documentary support to meet the VME. We agree with this conclusion in spite of our general concerns regarding the drawing of definite conclusions on the applicability of the VME, as discussed above. The Commission has not approved application of the VME based solely on a general, conclusory assertion made by the committee's representative. *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). Given the uncertainty in this area, however, we recommend that the Audit Division raise this issue in the memorandum accompanying the transmission of the DFAR to the Commission. *Id.*

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<sup>2</sup> In comments on the DFAR on the Illinois Republican Party, we stated that in light of the lack of clarity regarding the application of the VME, we could not draw a conclusion about whether the sworn affidavits in that matter, similar to the sworn affidavits in this matter, sufficed to document the applicability of the VME. *See* 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).

**B. Communication Classified as Express Advocacy Under Section 100.22(a)  
That Should Be Deemed Express Advocacy Under Section 100.22(b).**

Included in the Committee's response to the IAR were copies of mail pieces that were previously reviewed by the Audit Division and by this office. However, two of the mail pieces appear to be new in the sense that they were not previously submitted by the Committee. The Committee associates the two new mail pieces with two invoices in its response. However, the Committee had previously associated these same invoices with two different mail pieces. The Audit Division had determined that the two mail pieces previously associated with the invoices contained express advocacy according to the standard set forth in 11 C.F.R. § 100.22(a), and has not changed this classification in light of the submission of the new mail pieces partly because it considers the new mail pieces to contain express advocacy according to the standard set forth in 11 C.F.R. § 100.22(a). We believe it is appropriate to substitute the two new mail pieces for the prior mail pieces associated with the invoices, because the most reasonable interpretation of the Committee's action is consistent with that intent.

Regarding the content of the new mail pieces, we agree that both of them contain express advocacy. However, we comment on the classification of one of the communications because we believe that its characteristics qualify it as containing express advocacy according to the standard set forth in 11 C.F.R. § 100.22(b), rather than subsection (a).<sup>3</sup>

The communication in question criticizes candidate Dan Maffei for using tax dollars to award \$200,000 in bonuses to his staff following his defeat in a 2010 election for his Congressional seat. It also contains images of Mr. Maffei and states, "Don't let Dan Maffei get his hands on your tax dollars again!" The communication observes that "[i]n 2010, we fired Dan Maffei for bankrupting our economy and voting for one of the largest tax increases in American history." It further states, "We fired Maffei from Congress for wasting our money once before. Let's not let him do it again." While this communication qualifies as express advocacy, it does not contain words or phrases exhorting the reader to vote for or against a candidate of the kind listed in section 100.22(a). Rather, the advertisement contains express advocacy as that term is defined in section 100.22(b) because the exhortation in the advertisement, "[l]et's not let him do it again" immediately following a statement that Mr. Maffei had been fired from Congress before for wasting money constitute a clear and unmistakable reference to an impending election. 11 C.F.R. § 100.22(b)(1). Further, the same phrases constitute a criticism of Mr. Maffei's character, qualifications and accomplishments, and this criticism has no reasonable meaning other than that the reader should vote against Maffei, because it is by preventing him from regaining his Congressional position that the reader would ensure that he will not be in a position to waste taxpayer funds again. 11 C.F.R. § 100.22(b)(2); Express Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures, 60 Fed. Reg. 35292, 35295 (July 6, 1995) ("Communications discussing or commenting on a candidate's character, qualifications or accomplishments are considered express advocacy under new section 100.22(b) if, in context, they

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<sup>3</sup> We believe that substituting this mail piece for the previous mail piece is particularly appropriate for the additional reason that the description of the mail piece on the invoice, "Hands on Money," appears to reflect more closely the content of the new mail piece than it does the content of the older one.

have no other reasonable meaning than to encourage actions to elect or defeat the candidate in question.”).



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

September 27, 2017

**MEMORANDUM**

**TO:** Patricia C. Orrock  
Chief Compliance Officer

Thomas E. Hintermister  
Assistant Staff Director  
Audit Division

**FROM:** Erin Chlopak *EC*  
Acting Associate General Counsel  
Policy Division

Lorenzo Holloway *job for LH*  
Assistant General Counsel  
Compliance Advice

Joshua Blume *job*  
Attorney

**SUBJECT:** Audit Division Recommendation Memorandum on the New York Republican Federal Campaign Committee (LRA 1038)

**I. INTRODUCTION**

The Office of the General Counsel has reviewed the Audit Division Recommendation Memorandum (“ADRM”) on the New York Republican Federal Campaign Committee (“the Committee”). The ADRM discusses five findings in the Draft Final Audit Report (“DFAR”): Misstatement of Financial Activity (Finding 1); Recordkeeping for Employees (Finding 2); Disclosure of Occupation/Name of Employer (Finding 3); Reporting of Apparent Independent Expenditures (Finding 4); and Recordkeeping for Communications (Finding 5).

We concur with the Audit Division’s conclusions on all findings. We comment on Finding 1 in order to address legal arguments the Committee raised in its response to the DFAR. If you have any questions, please contact Joshua Blume, the attorney assigned to this audit.



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

### **A. The Committee's Deposit of Wholly Non-Federal Contributions in its Federal Account Violated 11 C.F.R. § 102.5(a).**

Except under certain narrowly defined circumstances, political committees may not deposit funds that exceed the limitations or contravene the prohibitions of the Federal Campaign Act of 1971, as amended ("FECA") in a federal account. 11 C.F.R. § 102.5(a). In this matter, the Committee utilized its federal account as a general merchant account to process non-federal credit card contributions. The Committee deposited the non-federal contributions in the federal account and then transferred them to its non-federal account. In the majority of instances, the Committee transferred the contributions shortly after having deposited them.

The Committee argues that its use of the federal account in this manner was warranted by Advisory Opinion 2001-17 (DNC Services). In that opinion, a national political committee proposed to deposit single contributions containing both a federal and a non-federal component ("composite contributions") in its federal account and then to transfer the non-federal components of those contributions to its non-federal account.

The Commission concluded that this proposed treatment of the composite contributions<sup>1</sup> would not contravene 11 C.F.R. § 102.5(a). Advisory Opinion 2001-17 (DNC Services), at 3. To the extent that the Committee in this case used its federal account to process composite credit card contributions resembling those described in the opinion, therefore, such a use would be permitted under the authority of the opinion, although the Committee must at the same time disclose its handling of the composite contributions in its federal reports.<sup>2</sup>

The Committee argues that although Advisory Opinion 2001-17 (DNC Services) applies by its terms to the treatment of composite contributions, its underlying logic applies equally to the use of a federal account to process non-federal contributions in general.

We disagree. In the advisory opinion, the national committee had represented that it would deposit contributions clearly intended to be non-federal ("wholly non-federal contributions") directly into its non-federal account. Advisory Opinion 2001-17 (DNC Services), at 2. This fact materially distinguishes the activity described in the advisory opinion from activity in which wholly non-federal contributions are involved. *See* 52 U.S.C. § 30108(c)(2). Contributions clearly intended by the donors to be non-federal are distinguishable from composite contributions and excessive contributions otherwise intended to be federal contributions. These contributions cannot be deposited into a Federal account. 11 C.F.R. § 102.5(a).

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<sup>1</sup> The Commission stated that the national committee's proposed treatment of its composite contributions was not the only permissible treatment of such contributions, but that another advisory opinion would be needed in order to assess the legitimacy of any proposed alternate treatment. *See* Advisory Opinion 2001-17 (DNC Services), at 3.

<sup>2</sup> We address the manner in which the Committee must report its handling of composite contributions in section B, below.

**B. The Committee Was Required to Disclose the Receipt and Transfer of Its Non-Federal Contributions in its Federal Reports.**

The Committee must disclose the receipt and transfer of the non-Federal contributions. The FECA and the Commission's implementing regulations require political committees to disclose "the total amount of all receipts" and "the total amount of all disbursements" of their federal accounts. 52 U.S.C. § 30104(b)(2), (4); 11 C.F.R. § 104.3(a), (b). The Committee argues that it was not required to disclose its federal account's receipt and subsequent transfer of the non-federal contributions discussed in Finding 1 in its federal reports.

The Committee cites Advisory Opinion 2001-17 (DNC Services) in support of its position. That opinion established a reporting regime that requires a national committee to report the Federal portion of "composite" contributions, containing both federal and non-federal components. This reporting regime, however, does not require the national committee to disclose the non-federal portion of the deposit. The Committee, therefore, argues that it too is not required to disclose its non-federal contributions as federal receipts.

To the extent that composite contributions are involved here, we agree that the Committee need not report the non-federal portions of such contributions as federal receipts.<sup>3</sup> However, we disagree with the Committee's argument that the deposit and transfer of the non-federal portions of the contributions need not be reflected in the Committee's federal disclosure reports at all.

In support of this conclusion, we note that Advisory Opinion 2001-17 (DNC Services) addressed the reporting by a national committee rather than a state committee. This distinction is legally significant because at the time the advisory opinion was issued, Commission regulations required national committees to disclose both federal receipts and disbursements and certain non-federal receipts and disbursements in their federal reports. *See* 11 C.F.R. §§ 104.8(e), 104.9(c). Because of this, all aspects of the national committee's transactions would be captured in the committee's federal reports and would thus be "clear on the public record." Advisory Opinion 2001-17, at 4.<sup>4</sup>

Here, the Committee is a state party committee that, unlike the national committee at issue in Advisory Opinion 2001-17 (DNC Services), is not required to disclose its receipts of

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<sup>3</sup> To the extent that the contributions at issue here were wholly non-federal contributions, however, the Committee would have been required to disclose such contributions, which are beyond the scope of the questions addressed in Advisory Opinion 2001-17 (DNC Services). The Reports Analysis Division ("RAD") informs us that these contributions should be disclosed on line 17 of Schedule A as "Other Receipts". RAD also advises that the Committee provide clarifying text, such as "mis-deposit of non-federal contributions". For the subsequent transfer of funds to the non-federal account, RAD advises the use of line 22 of Schedule B, "Transfers to Affiliated Committees", with a clear cross-reference to the Schedule A, line 17 receipts, such as "see line 17". Both the Schedule A and Schedule B entries would be non-memos.

<sup>4</sup> "Commission regulations do not specifically address the reporting of the receipt of contribution checks where the proceeds are intended to be split between Federal and non-Federal accounts. Because the DNC will initially receive a check in excess of the § 441a(a)(1) [now § 30116(a)(1)] limit, it is essential that the contribution and the division of funds be disclosed in a manner that is clear on the public record." Advisory Opinion 2001-17, at 4.

non-federal contributions from its non-federal accounts. As a consequence, the details of the Committee's transactions would not be "clear on the public record" if the Committee were to report only the federal portion of a composite contribution as a federal receipt. These circumstances are thus distinct from those presented in Advisory Opinion 2001-17 (DNC Services), rendering that opinion inapposite here. Thus, we conclude that the Committee was required to disclose the entire amount of the contributions it received, including both the federal and the non-federal portions.