



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

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For the meeting of September 29, 2022

September 8, 2022

MEMORANDUM

To: The Commission

Through: Alec Palmer *AP*
Staff Director

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

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

Nicole Burgess *NB*
Audit Manager

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

Subject: Proposed Final Audit Report on the Kentucky State Democratic Central Executive Committee (A19-13)

Attached for your approval is the subject report. The report has been written in accordance with Directive 70. Documents related to this audit report can be viewed in the Voting Ballot Matters folder.

This report is being circulated on a 72-hour no objection basis. Should an objection be received, it is recommended that the report be considered at the next regularly scheduled open session.

If you have any questions, please contact Nicole Burgess (x 1186) or Terry O'Brien at (x 1203).

Attachment:
Proposed Final Audit Report on the Kentucky State Democratic Central Executive Committee



Proposed Final Audit Report on the Kentucky State Democratic Central Executive Committee

(January 1, 2017 - December 31, 2018)

Why the Audit Was Done

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

Future Action

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

About the Committee (p. 2)

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

Financial Activity (p. 3)

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

Commission Findings (p. 4)

- Misstatement of Financial Activity (Finding 1)
- Recordkeeping for Employees (Finding 2)

Additional Issues (p. 5)

- Receipt of Contributions in Excess of the Limit (Issue 1)
- Excessive Coordinated Party Expenditures (Issue 2)
- Failure to File a 24-Hour Report (Issue 3)

¹ 52 U.S.C. §30111(b).



Proposed Final Audit Report on the Kentucky State Democratic Central Executive Committee

(January 1, 2017 - December 31, 2018)

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Part I

Background

Authority for Audit

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

Scope of Audit

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

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

Commission Guidance

Request for Legal Consideration by the Commission

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

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

Audit Hearing

KSDCEC declined the opportunity for a hearing before the Commission on the matters presented in this report.

Part II

Overview of Committee

Committee Organization

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

Overview of Financial Activity (Audited Amounts)

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

Part III

Summaries

Commission Findings

Finding 1. Misstatement of Financial Activity

During audit fieldwork, a comparison of KSDCEC's reported financial activity with its bank records revealed a misstatement of receipts, disbursements, and beginning and ending cash on hand for calendar year 2017, as well as receipts, disbursements, and ending cash on hand for calendar year 2018. Specifically, for 2017, KSDCEC understated receipts, disbursements, beginning and ending cash on hand by \$15,838, \$38,846, \$35,925 and \$12,917, respectively. For 2018, KSDCEC understated receipts, disbursements and ending cash on hand by \$116,641, \$61,315 and \$68,280, respectively. In response to the Interim Audit Report recommendation, KSDCEC filed a Form 99 (Miscellaneous Electronic Submission) correcting the receipt and disbursement misstatements. Additionally, subsequent to its response to the Interim Audit Report, on September 20, 2021, KSDCEC adjusted its beginning and ending cash on hand balances on its most recently filed disclosure report. KSDCEC did not address this finding in its response to the Draft Final Audit Report.

The Commission approved a finding that, in 2017, KSDCEC understated receipts by \$15,838, disbursements by \$38,846, beginning cash on hand by \$35,925, and ending cash on hand by \$12,917; and in 2018, KSDCEC understated its receipts by \$116,641, disbursements by \$61,315, and ending cash on hand by \$68,280. (For more detail, see p. 8.)

Finding 2. Recordkeeping for Employees

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

The Commission approved a finding that KSDCEC did not maintain monthly payroll logs or equivalent records, totaling \$443,976, to document the percentage of time each employee spent in connection with a federal election for calendar years 2017 and 2018. (For more detail, see p. 11.)

Additional Issues

Issue 1. Receipt of Contributions in Excess of the Limit

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

KSDCEC provided copies of letters to contributors, notifying them that the excessive portion of their contribution had been allocated to the non-federal account and offering a refund of the amount in excess of the \$10,000 limit, thus resolving the excessive portion, albeit untimely.

In response to the Draft Final Audit Report, KSDCEC stated that the finding related to a “small number of institutional contributors who make annual contributions” and that it was the intent of each donor to have their contributions split between KSDCEC’s federal and non-federal accounts. The response further stated that it was KSDCEC’s contention that no specific documentation is required to make such transfers and that the non-federal portions of the contributions were transferred to KSDCEC’s non-federal account in a timely manner.

The Commission did not approve, by the required four votes, the Audit staff’s recommendation to find that KSDCEC received excessive contributions totaling \$78,043. Pursuant to Commission Directive 70,² this matter is discussed in the “Additional Issues” section of this report. (For more detail, see p. 14.)

Issue 2. Excessive Coordinated Party Expenditures

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

² Available at https://www.fec.gov/resources/cms-content/documents/directive_70.pdf

limitation by \$155,420. After consultation with the Commission's Office of General Counsel (OGC), the Audit staff concluded that the door hanger was not an independent expenditure, given KSDCEC's assertion that the activity was fully coordinated with the candidate. As such, it did not require the filing of a 24-hour report (See Issue 3). Further, the Audit staff concluded the door hanger was not a coordinated expenditure because it was not a public communication.

In response to the Draft Final Audit Report, KSDCEC stated that the declarations it previously provided were intended to cover each of the 13 mailings undertaken by KSDCEC, and not just the mailings for which sign-in sheets and photographs of volunteers working at the mail house were provided. KSDCEC further stated that it trusted the Commission would treat this matter consistently with other audits and enforcement matters and find that KSDCEC did not exceed its coordinated limit.

Subsequent to the Draft Final Audit Report, OGC revised its conclusion regarding whether the door hanger is a public communication, stating that door hangers that qualify as exempt under the volunteer materials exemption should be excluded from being classified as party coordinated expenditures, but door hangers that do not qualify for the volunteer materials exemption likely are public communications and, therefore, also party coordinated expenditures.

KSDCEC maintained that the door hanger at issue qualifies for the volunteer materials exemption, noting that "documentation beyond a sworn affidavit has never been required" to qualify for the exemption. KSDCEC further stated that the door hangers should not be included because they are not "public communications" and therefore cannot qualify as coordinated party expenditures.

As a result of the OGC's revised conclusion regarding the door hanger, the Audit staff added the \$14,105 cost of the door hanger to the \$210,120 cost of the remaining three mailers, for a revised coordinated party expenditure total of \$224,225.

The Commission did not approve, by the required four votes, the Audit staff's recommendation that KSDCEC exceeded the coordinated party expenditure limit by \$169,525. Pursuant to Commission Directive 70,³ this matter is discussed in the "Additional Issues" section of this report. (For more detail, see p. 19.)

Issue 3. Failure to File a 24-Hour Report

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

³ See *supra* footnote 2.

In response to the Interim Audit Report recommendation, KSDCEC disagreed with the characterization of this expenditure as an independent expenditure. KSDCEC also asserted the door hanger was not a public communication, and therefore could not be considered a coordinated communication. KSDCEC stated that this was an exempt activity coordinated with the candidate and was distributed by volunteers. A declaration from KSDCEC's Executive Director was also provided.

Given KSDCEC's response to the Interim Audit Report, after consultation with OGC, the Audit staff concluded that the door hanger was not an independent expenditure and did not require the filing of a 24-hour report.

In response to the Draft Final Audit Report, KSDCEC acknowledged that, based on its Interim Audit Report response, the Audit staff concluded that the door hanger in question was not an independent expenditure, and stated that the apparent origin of this proposed finding was believed to be an attempt by the Audit Division to address a lack of volunteer documentation. Additionally, KSDCEC maintained that the door hanger in question was not a public communication and thus could not be considered a coordinated communication, which OGC agreed with in its DFAR legal analysis (LRA 1107, dated December 14, 2021).

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

Irrespective of whether the door hanger was a public communication, given KSDCEC's assertion that the expenditure was coordinated with a nominee, the door hanger did not meet the definition of an independent expenditure and, therefore, did not require the filing of a 24-hour report.

The Commission did not approve, by the required four votes, the Audit staff's recommendation that KSDCEC did not fail to file a 24-hour report. Pursuant to Commission Directive 70,⁴ this matter is discussed in the "Additional Issues" section of this report. (For more detail, see p. 27.)

⁴ See *supra* footnote 2.

Part IV

Commission Findings

Finding 1. Misstatement of Financial Activity

Summary

During audit fieldwork, a comparison of KSDCEC's reported financial activity with its bank records revealed a misstatement of receipts, disbursements, and beginning and ending cash on hand for calendar year 2017, as well as receipts, disbursements, and ending cash on hand for calendar year 2018. Specifically, for 2017, KSDCEC understated receipts, disbursements, beginning and ending cash on hand by \$15,838, \$38,846, \$35,925 and \$12,917, respectively. For 2018, KSDCEC understated receipts, disbursements and ending cash on hand by \$116,641, \$61,315 and \$68,280, respectively. In response to the Interim Audit Report recommendation, KSDCEC filed a Form 99 (Miscellaneous Electronic Submission) correcting the receipt and disbursement misstatements. Additionally, subsequent to its response to the Interim Audit Report, on September 20, 2021, KSDCEC adjusted its beginning and ending cash on hand balances on its most recently filed disclosure report. KSDCEC did not address this finding in its response to the Draft Final Audit Report.

The Commission approved a finding that, in 2017, KSDCEC understated receipts by \$15,838, disbursements by \$38,846, beginning cash on hand by \$35,925, and ending cash on hand by \$12,917; and in 2018, KSDCEC understated its receipts by \$116,641, disbursements by \$61,315, and ending cash on hand by \$68,280.

Legal Standard

Contents of Reports. Each report must disclose:

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

Facts and Analysis

A. Facts

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

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

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

The net understatement of receipts resulted from the following:

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

The understatement of disbursements resulted from the following:

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

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

2018 Committee Activity			
	Reported	Bank Records	Discrepancy
Beginning Cash on hand @ January 1, 2018	\$132,996	\$146,170	(\$13,174) Understated
Receipts	\$2,067,670	\$2,184,311	(\$116,641) Understated
Disbursements	\$2,125,931	\$2,187,246	(\$61,315) Understated
Ending Cash on hand @ December 31, 2018	\$74,956 ⁵	\$143,236	(\$68,280) Understated

⁵ The reported 2018 ending cash on hand does not equal beginning cash on hand plus reported receipts minus reported disbursements. This was due to a mathematical discrepancy in which the reported beginning cash on hand for 2018 did not equal the ending cash on hand reported for 2017.

The understatement of receipts resulted from the following:

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

The net understatement of disbursements resulted from the following:

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

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

B. Interim Audit Report & Audit Division Recommendation

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

The Interim Audit Report recommended that KSDCEC amend its disclosure reports or file a Form 99 (Miscellaneous Electronic Submission)⁶ to correct the misstatements. In addition, the Interim Audit Report recommended that KSDCEC reconcile the cash balance on its most recently filed report and correct any subsequent discrepancies.

C. Committee Response to Interim Audit Report

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

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged that KSDCEC filed amended disclosure reports that corrected the misstatement of receipts and disbursements and adjusted its cash on hand balances on its most recently filed report.

⁶ KSDCEC was advised by the Audit staff that if it chose to file a Form 99 instead of amending its disclosure reports, the form must contain all pertinent information that is required on each schedule.

E. Committee Response to the Draft Final Audit Report

KSDCEC did not address this finding in its response to the Draft Final Audit Report.

Commission Conclusion

On July 28, 2022, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that, in 2017, KSDCEC understated its receipts by \$15,838, disbursements by \$38,846, beginning cash on hand by \$35,925, and ending cash on hand by \$12,917; and in 2018, KSDCEC understated its receipts by \$116,641, disbursements by \$61,315, and ending cash on hand by \$68,280.

The Commission approved the Audit staff's recommendation.

Finding 2. Recordkeeping for Employees

Summary

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

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

Legal Standard

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

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed disbursements for payroll. KSDCEC did not maintain any monthly payroll logs or equivalent records to document the percentage of time each employee spent in connection with a federal election. These logs are required to document the proper allocation of federal and non-federal funds used to pay employee salaries and wages. For 2017 and 2018, KSDCEC did not maintain monthly logs for \$443,976⁷ in payroll. This amount consists solely of payroll for employees reported on Schedule H4 (Disbursements for Allocated Federal and Non-Federal Activity) and paid with an allocation of federal and non-federal funds during the same month. There was no payroll paid exclusively with non-federal funds.

B. Interim Audit Report & Audit Division Recommendation

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

The Interim Audit Report recommended that KSDCEC:

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

C. Committee Response to Interim Audit Report

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

D. Draft Final Audit Report

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

E. Committee Response to the Draft Final Audit Report

KSDCEC did not address this finding in its response to the Draft Final Audit Report.

Commission Conclusion

On July 28, 2022, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that KSDCEC did not maintain monthly payroll logs or equivalent records, totaling \$443,976,

⁷ This total does not include payroll for employees paid with 100 percent federal funds and reported as such (see Part I, Background, Commission Guidance, Request for Early Consideration of a Legal Question – Recordkeeping for Employees, Page 1). Payroll amounts are stated net of taxes and benefits.

to document the percentage of time each employee spent in connection with a federal election for calendar years 2017 and 2018.

The Commission approved the Audit staff's recommendation.

Part V

Additional Issues

Issue 1. Receipt of Contributions in Excess of the Limit

Summary

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

KSDCEC provided copies of letters to contributors, notifying them that the excessive portion of their contribution had been allocated to the non-federal account and offering a refund of the amount in excess of the \$10,000 limit, thus resolving the excessive portion, albeit untimely.

In response to the Draft Final Audit Report, KSDCEC stated that the finding related to a “small number of institutional contributors who make annual contributions” and that it was the intent of each donor to have their contributions split between KSDCEC’s federal and non-federal accounts. The response further stated that it was KSDCEC’s contention that no specific documentation is required to make such transfers and that the non-federal portions of the contributions were transferred to KSDCEC’s non-federal account in a timely manner.

The Commission did not approve, by the required four votes, the Audit staff’s recommendation to find that KSDCEC received excessive contributions totaling \$78,043. Pursuant to Commission Directive 70,⁸ this matter is discussed in the “Additional Issues” section of this report.

Legal Standard

A. Party Committee Limits. A party committee may not receive more than a total of \$10,000 per year from any one individual. This limit is shared by the state, district, & local party committees. 52 U.S.C. §30116 (a)(1)(D) and 11 CFR §§110.1(c)(5) and 110.9.

⁸ See *supra* footnote 2.

- B. Handling Contributions That Appear Excessive.** If a committee receives a contribution that appears to be excessive, the committee must either:
- Return the questionable check to the donor; or
 - Deposit the check into its federal account and:
 - Keep enough money in the account to cover all potential refunds;
 - Keep a written record explaining why the contribution may be illegal;
 - Include this explanation on Schedule A if the contribution has to be itemized before its legality is established;
 - Seek a reattribution or a redesignation of the excessive portion, following the instructions provided in the Commission regulations (see below for explanations of reattribution and redesignation); and
 - If the committee does not receive a proper reattribution or redesignation within 60 days after receiving the excessive contribution, refund the excessive portion to the donor. 11 CFR §§103.3(b)(3), (4) and (5) and 110.1(k)(3)(ii)(B).
- C. Joint Contributions.** Any contribution made by more than one person (except for a contribution made by a partnership) must include the signature of each contributor on the check, money order, or other negotiable instrument or in a separate writing. A joint contribution is attributed equally to each donor unless a statement indicates that the funds should be divided differently. 11 CFR §110.1(k)(1) and (2).
- D. Reattribution of Excessive Contributions.** The Commission regulations permit committees to ask donors of excessive contributions (or contributions that exceed the committee's net debts outstanding) whether they had intended their contribution to be a joint contribution from more than one person and whether they would like to reattribute the excess amount to the other contributor. The committee must inform the contributor that:
- The reattribution must be signed by both contributors;
 - The reattribution must be received by the committee within 60 days after the committee received the original contribution; and
 - The contributor may instead request a refund of the excessive amount. 11 CFR §110.1(k)(3).

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

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

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

Facts and Analysis

A. Facts

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

Excessive Contributions – Testing Method	
Sample Projection Amount ⁹	\$28,798
High Dollar Review Contribution Error Amount	\$49,245
Total Amount of Excessive Contributions	\$78,043
Reasons for Excessive Contributions	
Contributions transferred to the Non-federal account without prior notification	\$78,043
Total Amount of Excessive Contributions	\$78,043

B. Additional Information

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

C. Interim Audit Report & Audit Division Recommendation

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

The Interim Audit Report recommended that KSDCEC:

- Provide evidence demonstrating that the contributions in question were not excessive, or if excessive, were resolved in a timely manner. This evidence could have included documentation that was not made available to the Audit staff during the audit, including copies of solicitation cards completed by the

⁹ The sample error amount (\$28,798) was projected using a Monetary Unit Sample with a 95 percent confidence level. The sample estimate could be as low as \$13,913 or as high as \$55,427.

contributors at the time of their contribution that clearly informed the contributors of the limitations; timely letters sent to contributors eligible for presumptive reattribution; or timely refunds (copies of the front and back of negotiated refund checks) or reattributions for excessive contributions.

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

D. Committee Response to Interim Audit Report

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

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

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

E. Draft Final Audit Report

The Draft Final Audit Report acknowledged that KSDCEC disagreed with the Commission’s legal basis for this finding. The Draft Final Audit Report further acknowledged that KSDCEC resolved the excessive contributions, albeit untimely, by sending letters to its contributors notifying them of the transfers of excessive amounts to KSDCEC’s non-federal account and offering the opportunity for a refund. The Audit staff, in consultation with OGC, recommended that KSDCEC submit evidence that its contributors intended or directed their contributions be split between federal and non-federal accounts.

F. Committee Response to Draft Final Audit Report

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

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

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

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

Notwithstanding the applicability of Advisory Opinion 2001-17 (DNC Services), the Audit staff noted that KSDCEC was not able to provide evidence that its contributors intended their contributions to be split between federal and non-federal funds, as noted in its Draft Final Audit Report response. The Audit staff further noted that, in response to the Interim Audit Report recommendation, KSDCEC instead provided letters to its contributors informing them that their contributions were split between its federal and non-federal accounts, and offering the opportunity for a refund, which resolved their excessive contributions, albeit untimely. As such, the Audit staff recommended that the Commission find that KSDCEC received excessive contributions totaling \$78,043.

Commission Conclusion

On July 28, 2022, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that KSDCEC received excessive contributions totaling \$78,043.

The Commission did not approve, by the required four votes, the Audit staff's recommendation. Commission Directive 70 directs that each "Additional Issue" will contain a statement describing the Commission's discussion of the issue. The Audit staff notes that the Commission did not discuss this issue.

Pursuant to Commission Directive 70,¹⁰ this matter is presented as an "Additional Issue."

Issue 2. Excessive Coordinated Party Expenditures

Summary

During audit fieldwork, the Audit staff identified apparent coordinated expenditures for one House candidate that exceeded the 2018 coordinated party expenditure limit by a total of \$558,320. In response to the Interim Audit Report recommendation, KSDCEC provided sign-in sheets and photographs of volunteers working at a mail house assisting with ten party mailings. KSDCEC also provided affidavits from a volunteer present at one of the mailings, a KSDCEC employee who coordinated volunteer recruitment and a mail house employee who coordinated volunteer activity with KSDCEC. There remained three mailings totaling \$210,120 for which KSDCEC did not provide additional documentation. As a result, KSDCEC exceeded its coordinated party expenditures limitation by \$155,420. After consultation with the Commission's Office of General Counsel (OGC), the Audit staff concluded that the door hanger was not an independent expenditure, given KSDCEC's assertion that the activity was fully coordinated with the candidate. As such, it did not require the filing of a 24-hour report (See Issue 3). Further, the Audit staff concluded the door hanger was not a coordinated expenditure because it was not a public communication.

In response to the Draft Final Audit Report, KSDCEC stated that the declarations it previously provided were intended to cover each of the 13 mailings undertaken by KSDCEC, and not just the mailings for which sign-in sheets and photographs of volunteers working at the mail house were provided. KSDCEC further stated that it trusted the Commission would treat this matter consistently with other audits and enforcement matters and find that KSDCEC did not exceed its coordinated limit.

Subsequent to the Draft Final Audit Report, OGC revised its conclusion regarding whether the door hanger is a public communication, stating that door hangers that qualify as exempt under the volunteer materials exemption should be excluded from being classified as party coordinated expenditures, but door hangers that do not qualify for the volunteer materials exemption likely are public communications and, therefore, also party coordinated expenditures.

KSDCEC maintained that the door hanger at issue qualifies for the volunteer materials exemption, noting that "documentation beyond a sworn affidavit has never been required" to qualify for the exemption. KSDCEC further stated that the door hangers should not be

¹⁰ See *supra* footnote 2.

included because they are not “public communications” and therefore cannot qualify as coordinated party expenditures.

As a result of the OGC’s revised conclusion regarding the door hanger, the Audit staff added the \$14,105 cost of the door hanger to the \$210,120 cost of the remaining three mailers, for a revised coordinated party expenditure total of \$224,225.

The Commission did not approve, by the required four votes, the Audit staff’s recommendation that KSDCEC exceeded the coordinated party expenditure limit by \$169,525. Pursuant to Commission Directive 70,¹¹ this matter is discussed in the “Additional Issues” section of this report.

Legal Standard

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

- The amount spent on “coordinated party expenditures” is limited by statutory formulas that are based on the Cost of Living Adjustment (COLA) and the voting age population;
- Party committees are permitted to coordinate the spending with the candidate committees;
- The parties may make these expenditures only in connection with the general election;
- The party committees—not the candidates—are responsible for reporting these expenditures; and
- If the party committee exceeds the limits on coordinated party expenditures, the excess amount is considered an in-kind contribution, subject to the contribution limits described above. 52 U.S.C. §30116(d) and 11 CFR §§109.30 and 109.32.

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

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

¹¹ See *supra* footnote 2.

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

- D. Coordinated Party Communication.** A political party communication is coordinated with a candidate, a candidate's authorized committee, or agent of any of the foregoing, when the communication satisfies the following conditions:
- (1) The communication is paid for by a political party committee or its agent.
 - (2) The communication satisfies at least one of the content standards.
 - Must expressly advocate a candidate's election or defeat 11 CFR §100.22(a) and (b).
 - Involve the dissemination, distribution or republication of a candidate's campaign materials.
 - Refers to a federal candidate, is directed to the candidate's constituents and is distributed within certain time frame before an election.
 - (3) The communication satisfies at least one of the conduct standards in 11 CFR §109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR §109.21(e), (g), and (h).
 - Must have been created, produced or distributed at the request of the candidate or its agent.
 - Developed with a "material involvement" of the candidate.
 - Created, produced or distributed after "substantial discussion" with the candidate or his agents.
 - The use of a common vendor in the creation, production or distribution of a communication. 11 CFR §109.37.

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

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

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

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

Facts and Analysis

A. Facts

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

During audit fieldwork, the Audit staff's review of disbursements identified apparent coordinated expenditures made on behalf of Amy McGrath for Congress consisting of 13 mail pieces totaling \$613,020 that were reported on Schedule B, Line 30(b).¹² Of this amount, \$558,320 in expenditures were in excess of the authorized coordinated spending limit for the candidate and resulted in an apparent excessive in-kind contribution to the candidate.

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

¹² As discussed in Issue 3 below, KSDCEC also reported the cost of a door hanger, \$14,105, on Schedule B, Line 30(b). The Audit staff previously included the cost of this door hanger in Issue 3 in the Interim Audit Report, based on it being considered an independent expenditure. However, KSDCEC indicated in its response to the Interim Audit Report that the door hanger was fully coordinated with the candidate and, in consultation with the Office of General Counsel, the Audit staff therefore determined that the door hanger could not be classified as an independent expenditure. Further, although KSDCEC had reported the door hanger as having been mailed, KSDCEC asserts that this was a reporting error and that copies of the door hanger were distributed by hand by volunteers. The invoice associated with the door hanger, submitted to Audit staff, appears to corroborate KSDCEC's assertion that the door hangers were distributed by hand, though they do not show that the door hangers were distributed by volunteers. The Office of General Counsel has concluded that, based on this method of distribution, the door hanger is not a public communication and therefore does not meet the threshold criteria for satisfying the content prong of the coordinated expenditure standard (See LRA 1107). Because the Commission has been inconsistent on this issue, however, the Office of General Counsel recommended referral of this question to the Commission. The Audit staff therefore mentioned the door hanger here, although the cost of the door hanger is not included in the total dollar amount of the coordinated expenditure finding.

- **Payment Prong** means the communication is paid for, in whole or in part, by a person other than the candidate. All communications in this finding were paid by KSDCEC and traced to its federal account.
- **Content Prong** means the communication must meet any one of these three standards to meet the content prong:
 - Expressly advocates the election or defeat of a clearly identified candidate for federal office per 11 CFR §100.22(a) or (b); or
 - Involves the dissemination, distribution or republication of a candidate’s campaign materials; or
 - Refers to a clearly identified federal candidate and is publicly distributed in the identified candidate’s jurisdiction within 90 days of the candidate’s general election.

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

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

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

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

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

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with the KSDCEC representatives during the exit conference and provided a schedule of the apparent excessive in-kind contributions. In response to the exit conference, one KSDCEC representative stated “the wrong disclaimer for the McGrath piece was used, but the mail was run volunteer exempt.” Further, the KSDCEC representative stated that KSDCEC was in the process of obtaining affidavits from its volunteers and would submit them when complete. As of the date of the Interim Audit Report, KSDCEC had not provided any affidavits to the Audit staff.

The Commission has addressed the applicability of the volunteer materials exemption in the Final Audit Reports of the Arizona Republican Party, the Democratic Executive Committee of Florida, and the Tennessee Republican Party. In these reports, the Commission recognized a lack of clarity regarding the application of the volunteer materials exemption. The Commission had attempted to formulate a consensus policy regarding what constitutes substantial volunteer involvement for the purpose of applying the exemption,¹³ but this was never achieved. Since a lack of clarity exists concerning the application of the volunteer materials exemption, it follows that the type and amount of documentation needed to support volunteer involvement is also unclear.

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

C. Committee Response to Interim Audit Report

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

¹³ Proposed Interim Enforcement Policy, Agenda document No. 10-16.
<https://www.fec.gov/resources/updates/agendas/2010/mtgdoc1016.pdf>

volunteer's affidavit also stated she appeared in pictures submitted along with the affidavit.

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

A third affidavit provided was from a mail house employee who coordinated volunteer participation with KSDCEC. KSDCEC stated that this person was "personally familiar with volunteer activity undertaken in connection with these mailings." The affidavit stated that as part of their duties, the mail house employee routinely ensured "compliance with volunteer exempt mail pieces for state and local parties." The affidavit further stated the mail house employee worked with the party and the mail house to coordinate volunteer participation, discussed with the mail house how many volunteers were need for a given project, and communicated this to the party. The affidavit went on to state the employee "routinely asked the mail house to keep a log of volunteers and take pictures of volunteer activity."¹⁴

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged that KSDCEC partially complied with the Interim Audit Report recommendation by providing evidence of volunteer involvement with its mail pieces, including volunteer sign-in sheets, pictures of volunteers handling the mailers, and affidavits from individuals familiar with the mailings and related volunteer involvement. While underscoring the absence of a clear standard related to the volunteer materials exemption, the Audit staff determined that the affidavits, pictures, and sign-in sheets sufficiently demonstrated volunteer involvement for the ten mailers totaling \$402,900. There were three remaining mailers, totaling \$210,120 included in the finding for which KSDCEC did not provide any additional documentation. Absent further documentation, the Audit staff maintained that KSDCEC exceeded the coordinated party expenditure limit by \$155,420.¹⁵

¹⁴ In regard to the door hanger, discussed in footnote 12 above, KSDCEC provided a declaration from its Executive Director stating that the door hanger was distributed by hand and left on doorknobs of individual homes and that, although the reports filed with the Commission indicated the door hanger was mailed, this notation was a reporting error by KSDCEC. The Executive Director's declaration further stated that the door hanger was distributed exclusively by volunteers and "the distribution of the door hanger, in all respects, complied with the requirements set forth at 11 CFR § 100.87." As noted above, the cost of the door hanger is not presently included in the total dollar amount for the finding. However, the Office of General Counsel has recommended that the question of the exemption's application be referred to the Commission for its consideration, along with the question of whether the door hanger is a public communication. The Audit staff mentions this here because if the Commission concludes that the door hanger is a public communication, and therefore a coordinated expenditure, the question of the sufficiency of the Executive Director's declaration may be relevant.

¹⁵ \$155,420 = \$558,320 - \$402,900

E. Committee Response to Draft Final Audit Report

In response to the Draft Final Audit Report, KSDCEC noted that it previously provided sign-in sheets and photographs of volunteers, along with sworn declarations¹⁶ from a volunteer, a KSDCEC staffer and a mail house employee. The Audit staff acknowledged that KSDCEC partially complied with the Interim Audit Report recommendation with the provision of the sign-in sheets, photographs and affidavits associated with ten of its mailers and, as such, no longer attributed the cost of the ten mailers to KSDCEC's coordinated party expenditure limit. However, three mailers remained where the Audit staff concluded that KSDCEC did not provide additional information.

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

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

In LRA 1107, dated March 30, 2022, OGC revised its conclusion regarding the door hanger (see Issue 3) and whether a door hanger is a public communication. OGC stated that a door hanger that qualifies as exempt under the volunteer materials exemption should be excluded from being classified as a party coordinated expenditure, but a door hanger that does not qualify for the volunteer materials exemption likely is a public communication and, therefore in this case, also a party coordinated expenditure. OGC recommended that the cost of the door hanger be included as a party coordinated expenditure because if it is not within the volunteer materials exemption, the door hanger is likely a public communication that otherwise meets the definition of "party coordinated communication" in 11 C.F.R. § 109.37.

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

KSDCEC further stated that the door hanger in question should not be included in the coordinated expenditure finding because the door hanger is not a public communication and therefore cannot qualify as a coordinated party expenditure. This, KSDCEC

¹⁶ The Audit staff noted that KSDCEC's DFAR response refers to the three submissions as "sworn declarations"; however, three affidavits were submitted.

asserted, is due to the content standard which states that a communication must be a “public communication” to meet the definition of a coordinated party expenditure.

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

Commission Conclusion

On July 28, 2022, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission find that KSDCEC exceeded the coordinated party expenditure limit by \$169,525.

The Commission did not approve, by the required four votes, the Audit staff’s recommendation, with a Commissioner noting that the affidavits and supporting documentation submitted by KSDCEC were consistent with the materials the Commission has accepted as documenting volunteer activity in previous Commission matters.

Pursuant to Commission Directive 70,¹⁷ this matter is presented as an “Additional Issue.”

Issue 3. Failure to File a 24-Hour Report

Summary

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

In response to the Interim Audit Report recommendation, KSDCEC disagreed with the characterization of this expenditure as an independent expenditure. KSDCEC also asserted the door hanger was not a public communication, and therefore could not be considered a coordinated communication. KSDCEC stated that this was an exempt activity coordinated with the candidate and was distributed by volunteers. A declaration from KSDCEC’s Executive Director was also provided.

¹⁷ See *supra* footnote 2.

Given KSDCEC's response to the Interim Audit Report, after consultation with OGC, the Audit staff concluded that the door hanger was not an independent expenditure and did not require the filing of a 24-hour report.

In response to the Draft Final Audit Report, KSDCEC acknowledged that, based on its Interim Audit Report response, the Audit staff concluded that the door hanger in question was not an independent expenditure, and stated that the apparent origin of this proposed finding was believed to be an attempt by the Audit Division to address a lack of volunteer documentation. Additionally, KSDCEC maintained that the door hanger in question was not a public communication and thus could not be considered a coordinated communication, which OGC agreed with in its DFAR legal analysis (LRA 1107, dated December 14, 2021).

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

Irrespective of whether the door hanger was a public communication, given KSDCEC's assertion that the expenditure was coordinated with a nominee, the door hanger did not meet the definition of an independent expenditure and, therefore, did not require the filing of a 24-hour report.

The Commission did not approve, by the required four votes, the Audit staff's recommendation that KSDCEC did not fail to file a 24-hour report. Pursuant to Commission Directive 70,¹⁸ this matter is discussed in the "Additional Issues" section of this report.

Legal Standard

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

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

Expressly advocating means any communication that:

¹⁸ See *supra* footnote 2.

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

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

C. Last-Minute Independent Expenditure Reports (24-Hour Reports). Any independent expenditures aggregating \$1,000 or more, with respect to any given election, and made after the 20th day but more than 24 hours before the day of an election must be reported and the report must be received by the Commission within 24 hours after the expenditure is made. A 24-hour report is required for each additional \$1,000 that aggregates. The 24-hour report must be filed on a Schedule E. The date that a communication is publicly disseminated serves as the date that the Committee must use to determine whether the total amount of independent expenditures has, in the aggregate, reached or exceeded the threshold reporting amount of \$1,000. 11 CFR §§104.4(f) and 104.5(g)(2).

D. Formal Requirements Regarding Reports and Statements. Each political committee shall maintain records with respect to the matters required to be reported which shall provide in sufficient detail the necessary information and data from which the filed reports may be verified, explained, clarified, and checked for accuracy and completeness. 11 CFR §104.14(b)(1).

E. The Get-Out-the-Vote Activity. Informing potential voters, whether by mail (including direct mail), e-mail, in person, by telephone (including pre-recorded telephone calls, phone banks and messaging such as SMS and MMS), or by other means; the location of particular polling places. 11 CFR §100.24(a)(3)(i)(B)(2).

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

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

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff identified one disbursement for a door hanger totaling \$14,105 that required a 24-hour report to be filed. KSDCEC disclosed this expenditure on Schedule B, Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds). However, it appears that this is an independent expenditure containing express advocacy and should have been disclosed on Schedule E, Line 24 (Itemized Independent Expenditures). One side of the door hanger contained the phrase “Vote for Amy McGrath” expressly advocating for the election of Amy McGrath. The disclaimer noted on the printed materials was “Paid for by the Kentucky Democratic Party.”

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

B. Interim Audit Report & Audit Division Recommendation

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

The Commission has addressed the applicability of the volunteer materials exemption in the Final Audit Reports of the Arizona Republican Party, the Democratic Executive

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

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

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, KSDCEC stated that while it mischaracterized the door hanger expense on its reports as a mailing activity, they were actually “printed material that were disseminated by volunteers by manually placing them on individual doors of voters.” KSDCEC further stated that it objected to the characterization of this expenditure as an independent expenditure during audit fieldwork, and that the expenditure was properly made as an exempt expenditure “fully coordinated with its nominee.” KSDCEC explained that it believed the door hanger could not be considered a coordinated communication since the door hanger itself was not a public communication and the door hanger was distributed by volunteers. KSDCEC also noted that, “it is quite uncommon for state party committees to create and maintain documentation relating to the volunteer component of such daily canvassing activities. They are much to[o] voluminous and difficult for a state party to document.”

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

D. Draft Final Audit Report

The Draft Final Audit Report acknowledged, after consideration of KSDCEC’s Interim Audit Report response and in consultation with OGC, that the door hanger did not meet the definition of an independent expenditure and, therefore, did not require the filing of a 24-hour report.

E. Committee Response to the Draft Final Audit Report

In response to the Draft Final Audit Report, KSDCEC stated that this finding should either be removed from the report or additional clarifying information should be provided due to the origin of the finding, which KSDCEC believed was the Audit staff's attempt "to address the purported lack of documentation" provided for the use of volunteers, as documented by a sworn declaration provided by its then-Executive Director. KSDCEC further stated that the Audit staff "chose to analyze this issue as a reporting matter and not one related to [the] issue at hand, which is whether the distribution of these materials resulted in an excessive coordinated expenditure on behalf of the candidate."

Additionally, KSDCEC maintained that the activity in question was not a public communication and thus could not be considered a coordinated communication, which OGC agreed with in its Draft Final Audit Report legal analysis (LRA 1107, dated December 14, 2021).

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

Irrespective of whether the door hanger is a public communication, given KSDCEC's assertion that the expenditure was coordinated with a nominee, the door hanger did not meet the definition of an independent expenditure and, therefore, did not require the filing of a 24-hour report, as determined in the Draft Final Audit Report. The Audit staff noted that KSDCEC first asserted that the expenditure in question was coordinated with a nominee in its response to the Interim Audit Report recommendation and, therefore, the Audit staff did not analyze this issue until it was raised by KSDCEC. As such, the Audit staff recommended that the Commission find that KSDCEC did not fail to file a 24-hour report.

Commission Conclusion

On July 28, 2022, the Commission considered the Audit Division Recommendation Memorandum in which the Audit staff recommended that the Commission determine that KSDCEC did not fail to file a 24-hour report.

The Commission did not approve, by the required four votes, the Audit staff's recommendation. Commission Directive 70 directs that each "Additional Issue" will contain a statement describing the Commission's discussion of the issue. The Audit staff notes that the Commission did not discuss this issue.

Pursuant to Commission Directive 70,¹⁹ this matter is presented as an "Additional Issue."

¹⁹ See *supra* footnote 2.