



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 22-30-A
AGENDA ITEM
For meeting of July 28, 2022

May 27, 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

Kendrick Smith *KDS*
Audit Manager

By: David P. Butler *DPB*
Lead Auditor

Subject: Resubmission - Audit Division Recommendation Memorandum on the Democratic Party of Arkansas (A19-15)

Pursuant to Commission Directive No. 70 (FEC Directive on Processing Audit Reports), the Audit staff presented the Draft Final Audit Report (DFAR) to the Democratic Party of Arkansas (DPA) on January 31, 2022 (see attachment). DPA did not request an audit hearing.

This office is resubmitting the subject Audit Division Recommendation Memorandum (ADRM). The original ADRM circulated to the Commission on March 2, 2022 and was withdrawn on March 21, 2022. Subsequently, on March 30, 2022, the Office of General Counsel (OGC) issued comments (LRA 1153, dated March 30, 2022, attached) revisiting its analysis of Finding 3, Reporting of Media Related Expenditures, pertaining to door hangers. On April 19, 2022, DPA responded to OGC's analysis of Finding 3. DPA's February 10, 2022 response to the DFAR and April 19, 2022 response to the Finding 3 analysis are noted below.

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

Finding 1. Reporting of Debts and Obligations

The Audit staff recommends that the Commission find that DPA failed to disclose debts and obligations to vendors totaling \$351,097.

Finding 2. Recordkeeping for Employees

In response to the DFAR, DPA reiterated that it “has instituted procedures to ensure that time records are maintained for all employees who are paid in part with non-federal funds and also plans to create a procedure for recordkeeping for employees paid exclusively with non-federal funds, pending the outcome of the Final Audit Report.” DPA also reiterated that, in its view, payroll records for the employees paid exclusively with non-federal funds should not be included in the finding. DPA further stated that some Commissioners previously determined, in other audits, that employees paid with exclusively non-federal funds was outside the scope of the Commission’s jurisdiction.¹ DPA acknowledged that those Commissioners who voted to determine that such recordkeeping is outside the scope of regulation are no longer members of the Commission. Additionally, DPA stated:

“In response to the lack of four Commissioners to determine that such recordkeeping is required, many party committees have been under the belief that such recordkeeping is not required. If the Commission decides to reverse course and determine by at least four votes that recordkeeping for non-federal payroll is, in fact, required, the DPA requests that the regulated community be given sufficient notice that there are now sufficient votes to require recordkeeping in such instances. In our view, a quiet vote to approve this finding as it is currently constituted is not sufficient notice.”

There have been audits in which the Commission did not have four or more affirmative votes to find that monthly payroll logs were required for employees paid with exclusively non-federal funds. The Audit staff notes, however, that in two recent audits which included non-federal payroll, the Commission approved the recordkeeping for employees finding. The Audit staff, therefore, believes DPA’s statement that the Commission has failed to notify the regulated community of its treatment of this issue is inaccurate. *See* Final Audit Report of the Connecticut Democratic State Central Committee (dated Feb. 23, 2022), pages 10 - 12 (approving a finding for payroll which was allocated with federal and non-federal funds and payroll paid exclusively with non-federal funds); and Final Audit Report of the Republican Party of Minnesota-Federal (dated Feb. 11, 2022), pages 8 - 10 (same).

The Commission also approved other recordkeeping for employees findings in which monthly payroll logs were not maintained for employees paid with exclusively non-federal funds; two of these audits were publicly available when DPA submitted its response to the DFAR. *See* Final Audit Report on Democratic Party of Hawaii (dated Feb. 16, 2018), pages 25-26 (same); and Final Audit Report on Illinois Republican Party (dated Oct. 24, 2017), pages 12-14 (same). It was in several earlier audits that the Commission did not have four or more affirmative

¹ In those audits, the Commission moved the finding to the Additional Issues section of the respective final audit report since there were not four affirmative votes.

votes to find that monthly payroll logs were required for employees who were paid exclusively with non-federal funds. *See* Final Audit Report on Utah Republican Party (dated Jan. 23, 2017), Final Audit Report on South Dakota Democratic Party (dated Apr. 27, 2015), Final Audit Report on Kentucky State Democratic Central Committee (dated Apr. 20, 2015), Final Audit Report on Democratic Party of Wisconsin (dated Apr. 6, 2015), Final Audit Report on Democratic Party of Illinois (dated Nov. 5, 2014), Final Audit Report on State Democratic Executive Committee of Alabama (dated May 12, 2014), and the Final Audit Report on the Republican Party of Iowa (dated Mar. 18, 2014).

As such, the Audit staff recommends that the Commission find that DPA did not maintain monthly payroll logs or equivalent records, totaling \$408,872, to document the percentage of time each employee spent in connection with a federal election for calendar years 2017 and 2018.

Finding 3. Reporting of Media Related Expenditures

In response to the DFAR, DPA reiterated its position that the expenditures totaling \$22,803, “were properly made as exempt activities and were fully coordinated with the candidate.” DPA stated that the declaration from its former Director of Operations supports its contention. DPA further stated, “In the recent consideration of the Draft Final Audit Report of the Connecticut Democratic State Central Committee (Agenda Document 21-44-A for Open Meeting of December 16, 2021), the Commission found that the state party had provided sufficient documentation related to volunteer mailings based solely upon the declarations provided by the committee. It must do so here as well.”

The Audit staff notes that in the December 16, 2021 consideration of the Audit Division Recommendation Memorandum on the Connecticut Democratic State Central Committee, the Commission voted 5-0 to reject the Reporting of Apparent Independent Expenditures finding, for which the committee provided a sworn declaration to document the volunteer materials exemption.

In LRA 1153, dated March 30, 2022, OGC revised its conclusion regarding whether the pledge cards and walking cards (referred to as “door hangers”² in this ADRM), are public communications. OGC stated 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. OGC recommends that the cost of the door hangers be included in Finding 3 as a party coordinated expenditure because if they are not within the volunteer materials exemption, the door hangers are likely public communications that otherwise meet the definition of “party coordinated communication” in 11 C.F.R. § 109.37.

In response to OGC’s LRA 1153, dated March 30, 2022, DPA maintained that the door hangers at issue qualify for the volunteer materials exemption, noting that “documentation beyond a sworn affidavit has never been required” to qualify for

² DPA’s former Director of Operations characterized the pledge cards and walking cards as “door hangers” in her declaration.

the exemption. DPA stated that the process of distributing door hangers is “very decentralized,” 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.

DPA further stated that the door hangers should not be included in Finding 3 because they are not “public communications” and therefore cannot qualify as coordinated party expenditures. This, DPA 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 hangers, the Audit staff has added the \$4,379 cost of the door hangers to the \$18,424 cost of the direct mailers, for a revised coordinated party expenditure total of \$22,803. DPA provided a sworn declaration to document the volunteer materials exemption for the door hangers and direct mailers, and the Audit staff recommends the Commission determine whether the declaration sufficiently documents volunteer involvement and satisfies the exemption, given the lack of clarity regarding how the exemption should be applied.

Should the Commission determine that the declaration does not sufficiently document the involvement of volunteers for the door hangers and direct mailers, and that the volunteer materials exemption does not apply to these expenditures, the Audit staff recommends that the Commission find that DPA exceeded the coordinated party expenditure limit by \$15,200.

Finding 4. Disclosure of Loans and Loan Repayments

The Audit staff recommends that the Commission find that DPA failed to correctly disclose transactions totaling \$32,500 on a line of credit, the correct terms and balances for outstanding loans totaling \$87,140 and loan repayments of \$3,563.

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

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

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

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact David Butler or Kendrick Smith at 694-1200.

Attachments:

- Draft Final Audit Report of the Audit Division on the Democratic Party of Arkansas
- Comments on Draft Final Audit Report on the Democratic Party of Arkansas, dated December 23, 2021 (LRA 1153)

- Comments on Audit Division Recommendation Memorandum on the Democratic Party of Arkansas, dated March 30, 2022 (LRA 1153)

cc: Office of General Counsel



Draft Final Audit Report of the Audit Division on the Democratic Party of Arkansas (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 Democratic Party of Arkansas is a state party committee headquartered in Little Rock, Arkansas. For more information, see the chart on the Committee Organization, p. 2.

Financial Activity (p. 2)

• Receipts	
○ Contributions from Individuals	\$ 460,817
○ Contributions from Political Party and Other Committees	16,430
○ Transfers from Affiliated/Other Party Committees	863,936
○ Loans Received	32,500
○ Other Receipts	40,596
○ Transfers from Non-Federal Account	567,237
Total Receipts	\$ 1,981,516
• Disbursements	
○ Operating Expenditures	\$ 299,148
○ Allocated Federal/Non-Federal Expenditures	1,198,302
○ Transfers to Affiliated/Other Party Committees	33,710
○ Coordinated Party Expenditures	6,797
○ Loan Repayments	82,202
○ Other Disbursements	29,875
○ Federal Election Activity	326,518
Total Disbursements	\$ 1,976,552

Findings and Recommendations (p. 3)

- Reporting of Debts and Obligations (Finding 1)
- Recordkeeping for Employees (Finding 2)
- Reporting of Media Related Expenditures (Finding 3)
- Disclosure of Loans and Loan Repayments (Finding 4)

¹ 52 U.S.C. §30111(b).



Draft Final Audit Report of the Audit Division on the Democratic Party of Arkansas

(January 1, 2017 - December 31, 2018)

DRAFT

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Part I

Background

Authority for Audit

This report is based on an audit of the Democratic Party of Arkansas (DPA), 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 and loans;
2. the receipt of contributions from prohibited sources;
3. the disclosure of contributions received;
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; and
8. 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 DPA 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 DPA representatives of the payroll requirement and 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 DPA employees paid with 100 percent federal funds and reported as such.

Part II

Overview of Committee

Committee Organization

Important Dates	
• Date of Registration	March 8, 1976
• Audit Coverage	January 1, 2017 – December 31, 2018
Headquarters	
Little Rock, Arkansas	
Bank Information	
• Bank Depositories	Two
• Bank Accounts	Three Federal, Two Non-Federal
Treasurer	
• Treasurer When Audit Was Conducted	Philip A. Hood (6/11/2021 – Present) John Unger (1/10/2019 – 6/10/2021)
• Treasurer During Period Covered by Audit	Dawne Vandiver (10/27/2017 – 1/9/2019) Tyler Clark (3/17/2014 – 10/26/2017)
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	\$ (2,431)
Receipts	
○ Contributions from Individuals	460,817
○ Contributions from Political Party and Other Committees	16,430
○ Transfers from Affiliated/Other Party Committees	863,936
○ Loans Received	32,500
○ Other Receipts	40,596
○ Transfers from Non-Federal Account	567,237
Total Receipts	\$1,981,516
Disbursements	
○ Operating Expenditures	299,148
○ Allocated Federal/Non-Federal Expenditures	1,198,302
○ Transfers to Affiliated/Other Party Committees	33,710
○ Coordinated Party Expenditures	6,797
○ Loan Repayments	82,202
○ Other Disbursements	29,875
○ Federal Election Activity	326,518
Total Disbursements	\$1,976,552
Cash on hand @ December 31, 2018	\$ 1,715²

² DPA disclosed its ending cash on hand on December 31, 2018 as \$1,715, however, based on its disclosed beginning cash on hand on January 1, 2017 of negative \$2,431, plus receipts of \$1,981,516, less disbursements of \$1,976,552, the audit-calculated cash on hand on December 31, 2018 should be \$2,533.

Part III

Summaries

Findings and Recommendations

Finding 1. Reporting of Debts and Obligations

During audit fieldwork, the Audit staff noted that DPA failed to disclose debts and obligations owed to 27 vendors totaling \$351,097. In response to the Interim Audit Report recommendation, DPA corrected the public record by filing a Form 99 (Miscellaneous Electronic Submission) which correctly disclosed its debts and obligations. (For more detail, see p. 6.)

Finding 2. Recordkeeping for Employees

During audit fieldwork, the Audit staff determined that DPA did not maintain any monthly 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 DPA employees totaling \$408,872 for which DPA did not maintain monthly logs. This consisted of payroll which was allocated with federal and non-federal funds and payroll paid exclusively with non-federal funds. In response to the Interim Audit Report recommendation, DPA stated it “has instituted procedures to ensure that time records are maintained for all employees who are paid in part with non-federal funds” and “employees who are paid exclusively with non-federal funds are outside the scope of the Commission’s jurisdiction and should not have been included in the finding.” The Audit staff acknowledges DPA implemented the recommendations outlined within the Interim Audit Report for allocated federal and non-federal payroll. (For more detail, see p. 7.)

Finding 3. Reporting of Media Related Expenditures

During audit fieldwork, the Audit staff reviewed expenditures totaling \$22,803, that DPA disclosed on Schedule B (Itemized Disbursements), Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds). These expenditures appeared to be independent expenditures containing express advocacy which should have been disclosed on Schedule E, Line 24 (Independent Expenditures). DPA may also have been required to file a 24-hour report for \$18,424, the amount DPA paid for direct mailers supporting a candidate for federal office.

In response to the Interim Audit Report recommendation, DPA disagreed with the characterization of these expenditures as independent expenditures and stated the expenditures were “properly made as exempt activities and were fully coordinated with the candidate.” DPA further indicated that the expenditures qualify for the volunteer materials exemption because the pledge cards and walking cards totaling \$4,379 (referred to as printed materials in DPA’s response to the Interim Audit Report), and the direct mailers, totaling \$18,424, were “distributed through the substantial use of volunteers.” A

declaration from DPA's former Director of Operations was also provided, attesting to the use of volunteers.

After consultation with our Office of General Counsel, the Audit staff concluded that the pledge cards, walking cards and direct mailers are not independent expenditures, given DPA's assertion that the activities were fully coordinated with the candidate. As such, the filing of a 24-hour report was not required for the direct mailers. In addition, whereas the pledge cards and walking cards are not coordinated expenditures because they are not public communications, the direct mailers are a coordinated expenditure. Given DPA's assertion that the direct mailers are subject to the volunteer materials exemption, and due to the lack of a clear standard for applying the volunteer materials exemption, the Commission will determine whether the declaration submitted by DPA suffices to document the involvement of volunteers. (For more detail, see p. 9.)

Finding 4. Disclosure of Loans and Loan Repayments

During audit fieldwork, the Audit staff determined that DPA failed to properly disclose transactions totaling \$32,500 on a line of credit, the correct terms and balances for outstanding loans totaling \$87,140, and loan repayments of \$3,563. DPA did not properly disclose the new loans and the terms and balances for outstanding loans on Schedules C (Loans) and/or C-1 (Loans and Line of Credit from Lending Institutions). In addition, some loan repayments were reported to the incorrect payee on Schedule B, Line 26 (Loan Repayments) and others were reported with disclosure errors on Schedule C. In response to the Interim Audit Report recommendation, DPA corrected the public record by filing a Form 99 (Miscellaneous Electronic Submission) which correctly disclosed the line of credit, the new and outstanding loans, and the loan repayments. (For more detail, see p. 19.)

Part IV

Findings and Recommendations

Finding 1. Reporting of Debts and Obligations

Summary

During audit fieldwork, the Audit staff noted that DPA failed to disclose debts and obligations owed to 27 vendors totaling \$351,097. In response to the Interim Audit Report recommendation, DPA corrected the public record by filing a Form 99 (Miscellaneous Electronic Submission) which correctly disclosed its debts and obligations.

Legal Standard

- A. Continuous Reporting Required.** A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 52 U.S.C. §30104(b)(8) and 11 CFR §§104.3(d) and 104.11(a).
- B. Separate Schedules.** A political committee must file separate schedules for debts owed by the committee and debts owed to the committee, together with a statement explaining the circumstances and conditions under which each debt and obligation was incurred or extinguished. 11 CFR §104.11(a).
- C. Itemizing Debts and Obligations.**
- A debt of \$500 or less must be reported once it has been outstanding 60 days from the date incurred (the date of the transaction); the committee reports it on the next regularly scheduled report.
 - A debt exceeding \$500 must be disclosed in the report that covers the date on which the debt was incurred, except that any obligation incurred for rent, salary or other regularly reoccurring administrative expense shall not be reported as a debt before the payment due date. 11 CFR §104.11(b).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed DPA's disbursement records and disclosure reports for proper reporting of debts and obligations. This review identified debts owed to 27 vendors totaling \$351,097³ that DPA failed to report on Schedule D during the audit period. Based on a review of the records, 26 of these vendors provided printing services, event rentals, video production, consulting, IT work, mailings, utility service, compliance, photography, finance director retainer, legal fees, fundraising, and cleaning services. The remaining vendor was a credit card vendor that DPA did not report on Schedule D during the audit period.

³ Each debt was counted only once, even if it was required to be disclosed over multiple periods.

DPA reported debt totaling \$32,984 on Schedule D during the audit period. The Audit staff calculated the debts owed to the vendors based on the invoice date and the subsequent payment date. Debts were outstanding for periods ranging from 15 days to 904 days.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with DPA representatives during the exit conference and provided a schedule detailing the transactions requiring disclosure on Schedule D. During the exit conference, DPA representatives questioned the inclusion of debts relating to recurring administrative expenses. The Audit staff responded that regularly recurring administrative expenses are subject to debt reporting requirements.⁴ In its response to the exit conference, DPA did not provide any further comments.

The Interim Audit Report recommended that DPA provide documentation demonstrating that the transactions totaling \$351,097 were not obligations which required reporting on Schedule D. Absent such documentation, the Interim Audit Report recommended that DPA amend its reports or file a Form 99 (Miscellaneous Electronic Submission)⁵ to correctly disclose these debts and obligations on Schedule D.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, DPA filed a Form 99 (Miscellaneous Electronic Submission) on November 2, 2021, which did not materially correct the public record. Subsequently, DPA filed another Form 99 on January 14, 2022 which corrected the public record by disclosing its debts and obligations.

Finding 2. Recordkeeping for Employees

Summary

During audit fieldwork, the Audit staff determined that DPA did not maintain any monthly 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 DPA employees totaling \$408,872 for which DPA did not maintain monthly logs. This consisted of payroll which was allocated with federal and non-federal funds and payroll paid exclusively with non-federal funds. In response to the Interim Audit Report recommendation, DPA stated it “has instituted procedures to ensure that time records are maintained for all employees who are paid in part with non-federal funds” and “employees who are paid exclusively with non-federal funds are outside the scope of the Commission’s jurisdiction and should not have been included in the finding.” The Audit staff acknowledges DPA implemented the recommendations outlined within the Interim Audit Report for allocated federal and non-federal payroll.

⁴ See 11 CFR §104.11(b).

⁵ DPA 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.

Legal Standard

A. 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 have their pay allocated as administrative costs between the federal and non-federal accounts;
- 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).

B. 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).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed disbursements for payroll. DPA did not maintain any monthly 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, DPA did not maintain monthly logs for \$408,872 in payroll.⁶ This amount includes:

- Payroll totaling \$373,961 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;
- Payroll totaling \$1,374 for employees reported on Schedule H4 and/or Schedule B (Itemized Disbursements) and also paid with 100 percent non-federal funds during the same month; and
- Payroll totaling \$33,537 for employees paid exclusively with non-federal funds in a given month.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with DPA representatives during the exit conference and provided a schedule of the payroll transactions. DPA representatives responded that DPA did not maintain monthly logs for employees during calendar years 2017 and 2018 and objected to the request for non-federal employee payroll records. The Audit staff has

⁶ This total does not include payroll for employees paid with 100 percent federal funds and reported as such (see Part I, Background, Commission Guidance, and Request for Early Commission Consideration of a Legal Question, Page 1). Payroll amounts are stated net of taxes and fringe benefits.

consistently requested these records and included these types of transactions as findings. Therefore, these transactions were included in the exit conference as a preliminary finding. In its response to the exit conference, DPA did not provide any further comments.

The Interim Audit Report recommended that DPA provide evidence that monthly logs were maintained to document the percentage of time employees spent in connection with a federal election. Absent the provision of monthly logs specific to employees paid with 100% non-federal funds, the Interim Audit Report recommended DPA provide evidence that records consistent with 11 CFR §104.14(b)(1) were maintained to document that certain employees were involved in exclusively non-federal activities. Additionally, the Interim Audit Report recommended that DPA provide and implement a plan to maintain monthly logs and other records consistent with 11 CFR §104.14(b)(1) in the future.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, DPA stated it “has instituted procedures to ensure that time records are maintained for all employees who are paid in part with non-federal funds.” DPA further noted that the “inclusion of payroll records for those employees who are paid exclusively with non-federal funds are outside the scope of the Commission’s jurisdiction and should not have been included in the finding.”

The Audit staff concludes that DPA did not provide monthly logs for the \$408,872 in payroll. However, DPA complied with the Interim Audit Report recommendation by implementing a plan to maintain monthly logs for all employees who are paid in part with non-federal funds in the future.

The Audit staff maintains that DPA was required to maintain monthly logs for its employees paid with exclusively non-federal funds, to verify that the employees were not engaged in federal activities. Absent the provision of monthly logs specific to employees paid with exclusively non-federal funds, DPA may provide evidence that records consistent with 11 CFR §104.14(b)(1) were maintained to document that certain employees were involved in exclusively non-federal activities. Additionally, for employees paid with exclusively non-federal funds, DPA may also implement and provide a plan to maintain monthly logs or other records consistent with 11 CFR §104.14(b)(1).

Finding 3. Reporting of Media Related Expenditures

Summary

During audit fieldwork, the Audit staff reviewed expenditures totaling \$22,803, that DPA disclosed on Schedule B (Itemized Disbursements), Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds). These expenditures appeared to be independent expenditures containing express advocacy which should have been disclosed on Schedule E, Line 24 (Independent Expenditures). DPA may also have been required to file a 24-hour report for \$18,424, the amount DPA paid for direct mailers supporting a candidate for federal office.

In response to the Interim Audit Report recommendation, DPA disagreed with the characterization of these expenditures as independent expenditures and stated the expenditures were “properly made as exempt activities and were fully coordinated with the candidate.” DPA further indicated that the expenditures qualify for the volunteer materials exemption because the pledge cards and walking cards totaling \$4,379 (referred to as printed materials in DPA’s response to the Interim Audit Report), and the direct mailers, totaling \$18,424, were “distributed through the substantial use of volunteers.” A declaration from DPA’s former Director of Operations was also provided, attesting to the use of volunteers.

After consultation with our Office of General Counsel, the Audit staff concluded that the pledge cards, walking cards and direct mailers are not independent expenditures, given DPA’s assertion that the activities were fully coordinated with the candidate. As such, the filing of a 24-hour report was not required for the direct mailers. In addition, whereas the pledge cards and walking cards are not coordinated expenditures because they are not public communications, the direct mailers are a coordinated expenditure. Given DPA’s assertion that the direct mailers are subject to the volunteer materials exemption, and due to the lack of a clear standard for applying the volunteer materials exemption, the Commission will determine whether the declaration submitted by DPA suffices to document the involvement of volunteers.

Legal Standard

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

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

Expressly advocating means any communication that:

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

B. Disclosure Requirements – General Guidelines. An independent expenditure shall be reported on Schedule E if, when added to other independent expenditures made to the same payee during the same calendar year, it exceeds \$200. Independent

expenditures made (i.e., publicly disseminated) prior to payment should be disclosed as memo entries on Schedule E and as a debt on Schedule D. Independent expenditures of \$200 or less need not be itemized, though the committee must report the total of those expenditures on Schedule E, Line (b). 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. Allocation of Expenses between Candidates.** Expenditures made on behalf of more than one clearly identified federal candidate shall be attributed to each such candidate according to the benefit expected to be derived. In the case of a publication or broadcast communication, the attribution shall be determined by the proportion of space or time devoted to all candidates. This method shall be used to allocate payments involving both clearly identified federal candidates and one or more clearly identified non-federal candidates. 11 CFR §106.1(a).
- 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 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).

G. 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.

H. 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).

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

- (1) The communication is paid for by a political party committee or its agent.
- (2) The communication is a public communication that satisfies at least one of the following content standards.
 - Expressly advocates a candidate’s election or defeat 11 CFR §100.22(a) and (b).
 - Involves the dissemination, distribution or republication of a candidate’s campaign materials.
 - Refers to a federal candidate, is directed to the candidate’s constituents and is distributed within certain time frame before an election.

- (3) The communication satisfies at least one of the conduct standards in 11 CFR §109.21(d)(1) through (d)(6), subject to the provisions of 11 CFR §109.21(e), (g), and (h).
- Must have been created, produced or distributed at the request of the candidate or its agent.
 - Developed with a “material involvement” of the candidate.
 - Created, produced or distributed after “substantial discussion” with the candidate or his agents.

The use of a common vendor in the creation, production or distribution of a communication. 11 CFR §109.37.

J. 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).

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

Facts and Analysis

A. Reporting of Apparent Independent Expenditures

1. Facts

During audit fieldwork, the Audit staff reviewed disbursements to ensure proper reporting. The Audit staff noted that DPA did not disclose any independent expenditures on Schedule E, however, it appeared to make apparent independent expenditures totaling \$22,803 and disclosed them on Schedule B, Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds). These expenditures were for pledge cards, walking cards, and direct mail pieces, which all contained express advocacy. A breakdown analysis for these expenditures is as follows:

Apparent Independent Expenditures Reported as Federal Election Activity (FEA) Paid Entirely with Federal Funds (Associated Mailer Provided under 11 CFR §100.22(a))

- a. DPA made one disbursement for pledge cards totaling \$1,128 for which it provided a copy of the piece and associated invoice. The pledge card, disclosed as “Volunteer Exempt/Printing of Canvass Materials – Tucker for Congress” on DPA’s disclosure reports, contained the following phrase: “Pledge to vote early for Clarke Tucker.” DPA did not provide evidence of volunteer involvement to support the volunteer materials exemption for this activity. This communication

- contained language expressly advocating for the election or defeat of a clearly identified candidate, as defined under 11 CFR §100.22(a).
- b. DPA made one disbursement for walking cards totaling \$3,251 for which it provided a copy of the piece and associated invoice. The walking card, disclosed as “Volunteer Exempt/Printing of Canvass Materials – Tucker for Congress” on DPA’s disclosure reports, contained the following phrase: “2 Ways to vote for Clarke Tucker.” DPA did not provide evidence of volunteer involvement to support the volunteer materials exemption for this activity. This communication contained language expressly advocating for the election or defeat of a clearly identified candidate, as defined under 11 CFR §100.22(a).
 - c. DPA made one disbursement for direct mail pieces totaling \$18,424 for which it provided a copy of the pieces and associated invoice. The direct mail pieces, disclosed as “Printing & Postage/Volunteer Exempt Mailing/Clarke Tucker for Congress” on DPA’s disclosure reports, contained the following phrase: “Vote Clarke Tucker for Congress.” DPA did not provide evidence of volunteer involvement to support the volunteer materials exemption for this activity. This communication contained language expressly advocating for the election or defeat of a clearly identified candidate, as defined under 11 CFR §100.22(a).

2. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with DPA representatives during the exit conference and provided a schedule detailing these expenditures. DPA representatives stated that “these were not independent expenditures,” that “no state party committee has volunteer support for canvassing materials,” and that “canvassing materials don’t qualify as public communications.” DPA representatives stated they would “work on obtaining volunteer involvement support for the Resonance Campaigns expenditure [identified in 1(c) above]... but not for the Print for Progress canvassing expenditures [identified in 1(a) and 1(b) above]” because those “two items are not public communications.” In response to the exit conference, no additional supporting documentation and no further comment was provided.

The payment by a state or local party committee for 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 an expenditure provided that such materials are distributed by volunteers and not by commercial or for-profit operations. 11 CFR § 100.147(d). The Audit staff contends, therefore, that whether the volunteer materials exemption applies does not hinge on the type of campaign material a committee uses, but, instead, on how the campaign materials are distributed. In particular, the Commission draws a distinction between campaign materials distributed by volunteers, which qualify for the exemption, and those that are distributed by paid workers of commercial entities or for-profit operations, which do not qualify for the exemption. *Id.* To determine whether the volunteer materials exemption applies, the Commission must evaluate whether a committee, in fact, used volunteers to distribute campaign materials.

The Interim Audit Report recommended that DPA:

- Provide documentation that apparent independent expenditures, totaling \$22,803, did not require reporting as independent expenditures; and/or
- Provide evidence to support the volunteer materials exemption application for apparent independent expenditures, totaling \$22,803. Such evidence will assist the Commission in determining if the volunteer materials exemption is applicable to these expenditures.

Absent such documentation or evidence, the Interim Audit Report recommended that DPA amend its reports to disclose these disbursements as independent expenditures on Schedule E (Itemized Independent Expenditures) and provide documentation to support the date of public dissemination for each communication to determine whether a 24-hour report was required to be filed.

3. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, the DPA objected to the characterization of these expenditures as independent expenditures. DPA stated that “[t]hese expenditures were properly made as exempt activities and were fully coordinated with the candidate.” DPA further stated “[t]hese activities fall into two categories.” It “sent a volunteer exempt mailing through Resonance Campaigns at a cost of \$18,423.97” and “paid for printing in the amount of \$4,378.53 for printed materials that were distributed by hand by volunteers.”

Regarding DPA’s assertion that the expenditures were “fully coordinated with the candidate,” the Audit staff notes that DPA did not amend its disclosure reports to disclose these expenditures as coordinated party expenditures on Schedule F (Coordinated Party Expenditures). The expenditures remain disclosed on Schedule B, Line 30(b) (Federal Election Activity Paid Entirely with Federal Funds).

Regarding the mailing through Resonance Campaigns of \$18,424 [identified in 1(c) above], the former Director of Operations stated in the declaration submitted in response to the Interim Audit Report recommendation, that “the production and preparation of this mailing included substantial participation by volunteers including sorting, bundling and other tasks in accordance with 11 C.F.R. §100.87 and Commission precedents related to volunteer exempt mail.” DPA also noted that the declaration “complies with the formatting requirements of 28 U.S.C. §1746” and, as such, cannot be characterized as “unsworn.”

Regarding the pledge cards and walking cards (characterized by DPA’s former Director of Operations as “door hangers” in her declaration and as “printed materials” in DPA’s Interim Audit Report response), DPA stated it was its understanding that “since these activities were not public communications, they cannot be considered coordinated communications and no further action would be necessary regarding these expenditures.” DPA further stated, “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 too voluminous and difficult for a state party to document. In addition, since

such activities are not public communications, and cannot be considered coordinated communications, the need to create and maintain such documentation is unnecessary.” The declaration from its former Director of Operations states the door hangers were “distributed exclusively by volunteers.”

After consideration of DPA’s response and in consultation with the Office of General Counsel, the Audit staff determined that the disbursement for the pledge cards and walking cards did not meet the definition of an independent expenditures.⁷

Regarding the direct mailers, the Audit staff agrees with DPA that these expenditures are not independent expenditures, given their coordination with the candidate. However, they are considered coordinated expenditures, as direct mailers are considered public communications. In addition, these expenditures may be subject to the volunteer materials exemption given the declaration from DPA’s former Director of Operations.

Due to the lack of a clear standard for applying the volunteer materials exemption, the Audit staff is unable to determine whether the declaration submitted by DPA suffices to document the involvement of volunteers. As such, the Commission will make a determination at the appropriate phase of the audit process.

The Audit staff notes that, if the Commission determines these expenditures to be coordinated expenditures, DPA will exceed its coordinated spending limit by \$10,821⁸ for Clarke Tucker for Congress.

B. Volunteer Materials Exemption

1. Facts

DPA reported three disbursements totaling \$22,803 on Schedule B as Federal Election Activity. Two of these disbursements were reported as made to “Print for Progress” and the third was reported as made to “Resonance Campaigns, LLC.” DPA reported the purposes of the two disbursements made to Print for Progress as “Volunteer Exempt/Printing of Canvass Materials – Tucker for Congress,” and the

⁷ The Audit staff previously considered the cost of the pledge cards and walking cards to be an independent expenditure. However, DPA indicated in its response to the Interim Audit Report that the expenditures were fully coordinated with the candidate and, in consultation with the Office of General Counsel, the Audit staff therefore determined that the pledge cards and walking cards could not be classified as an independent expenditure. Further, DPA asserts that the pledge cards and walking cards (characterized by DPA’s former Director of Operations as “door hangers” in her declaration and as “printed materials” in DPA’s Interim Audit Report response) were distributed by volunteers. The Office of General Counsel has concluded that, based on this method of distribution, the pledge cards and walking cards are not public communications and therefore do not meet the threshold criteria for satisfying the content prong of the coordinated expenditure standard (See LRA 1153). Because the Commission has been inconsistent on this issue, however, the Office of General Counsel recommended referral of this question to the Commission. The Audit staff therefore mentions the pledge cards and walking cards here, although their costs is not included in the total dollar amount of this finding.

⁸ This is less DPA’s allowable contribution to the candidate of \$5,000 ($\$15,821 - \$5,000 = \$10,821$).

third disbursement made to Resonance Campaigns, LLC, as “Printing & Postage/Volunteer Exempt Mailing/Clarke Tucker for Congress.” The invoices for the two disbursements made to Print for Progress were annotated as “AR-02 Pledge Cards” and “AR-02 Walk Cards,” while the third invoice for the disbursement made to Resonance Campaigns, LLC, was annotated as “Production and Design DCC1815 (Qty. 60,969) 8.5x11.” DPA, however, did not provide any volunteer documentation or evidence of volunteer involvement to support these disbursements.

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 exemption⁹, 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.

2. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with DPA representatives during the exit conference and provided a schedule detailing these expenditures. DPA representatives stated that “these were not independent expenditures,” that “no state party committee has volunteer support for canvassing materials,” and that “canvassing materials don’t qualify as public communications.” DPA representatives stated they would “work on obtaining volunteer involvement support for the Resonance Campaigns expenditure ... but not for the Print for Progress canvassing expenditures” because those “two items are not public communications.” In response to the exit conference, no additional supporting documentation and no further comment was provided.

As previously discussed in section A.2 above, the Audit staff contends that whether the volunteer materials exemption applies does not hinge on the type of campaign material a committee uses, but, instead, on how the campaign materials are distributed. DPA had not provided evidence of volunteer involvement for these expenditures. Prior to determining whether the volunteer materials exemption applies to the expenditures, DPA must provide evidence of volunteer involvement.

The Interim Audit Report recommended that DPA provide documentation and evidence that apparent independent expenditures totaling \$22,803 did not require reporting as independent expenditures. Evidence should have included documentation such as volunteer sign in sheets, photographs of volunteers

⁹ Proposed Interim Enforcement Policy, Agenda document No. 10-16.
<https://www.fec.gov/resources/updates/agendas/2010/mtgdoc1016.pdf>

participating in various duties such as reviewing, sorting and packing the direct mail pieces, etc., to support the involvement of volunteer processing or distributing the communication. Absent such evidence, the Interim Audit Report recommended that DPA amend its reports to disclose the disbursements as independent expenditures on Schedule E.

3. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, DPA submitted a declaration from its former Director of Operations, as addressed in Part A above. Due to the lack of a clear standard for applying the volunteer materials exemption, the Audit staff is unable to determine whether the declaration submitted by DPA suffices to document the involvement of volunteers for the direct mailers¹⁰. As such, the Commission will make a determination at the appropriate phase of the audit process.

C. Failure to File 24-Hour Reports for Apparent Independent Expenditures

1. Facts

In addition to not reporting the apparent independent expenditures totaling \$22,803 identified above, DPA did not file any 24-hour reports¹¹, which may have been required.

2. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with DPA representatives during the exit conference and presented a schedule detailing these expenditures. DPA representatives stated that “these were not independent expenditures,” that “no state party committee has volunteer support for canvassing materials,” and that “canvassing materials don’t qualify as public communications.” DPA representatives stated they would “work on obtaining volunteer involvement support for the Resonance Campaigns expenditure ... but not for the Print for Progress canvassing expenditures” because those “two items are not public communications.” In response to the exit conference, no additional supporting documentation and no further comment was provided.

As previously discussed in section A.2 above, the Audit staff contends that whether the volunteer materials exemption applies does not hinge on the type of campaign material a committee uses, but, instead, on how the campaign materials are distributed. DPA had not provided evidence of volunteer involvement for these expenditures. Prior to determining whether the volunteer materials exemption applies to the expenditures, DPA must provide evidence of volunteer involvement.

¹⁰ See footnote 7 above for discussion of the current treatment of the pledge cards and walking cards.

¹¹ The date the expenditure is publicly distributed serves as the date that the independent expenditure is made for purposes of the additional 24-hour report filing requirement. In the absence of a known date for public dissemination, the Audit staff used the invoice date of incurrence to determine if a 24-hour report was required.

The Interim Audit Report recommended that, absent documentation that the apparent independent expenditures, totaling \$22,803, did not require reporting as independent expenditures (per Part A above), DPA provide documentation to support the date of public dissemination for each mailer to determine whether a 24-hour report was required to be filed.

3. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, DPA objected to the characterization of the expenditures in question as independent expenditures and stated that the expenditures were “exempt activities and were fully coordinated with the candidate,” which would negate the requirement to file 24-hour reports. DPA also submitted a declaration from its Director of Operations, as addressed in Part A above.

After reviewing DPA’s response to the Interim Audit Report recommendation, and in consultation with the Office of General Counsel, the Audit staff agrees that the pledge cards, walking cards, and direct mailers are not independent expenditures. As such, DPA was not required to file 24-hour reports for these expenditures.

Finding 4. Disclosure of Loans and Loan Repayments

Summary

During audit fieldwork, the Audit staff determined that DPA failed to properly disclose transactions totaling \$32,500 on a line of credit, the correct terms and balances for outstanding loans totaling \$87,140, and loan repayments of \$3,563. DPA did not properly disclose the new loans and the terms and balances for outstanding loans on Schedules C (Loans) and/or C-1 (Loans and Line of Credit from Lending Institutions). In addition, some loan repayments were reported to the incorrect payee on Schedule B, Line 26 (Loan Repayments) and others were reported with disclosure errors on Schedule C. In response to the Interim Audit Report recommendation, DPA corrected the public record by filing a Form 99 (Miscellaneous Electronic Submission) which correctly disclosed the line of credit, the new and outstanding loans, and the loan repayments.

Legal Standard

- A. Reporting Loans.** All loans received by a committee must be itemized and continuously reported until repaid. All repayments made on a loan must also be itemized. 11 CFR §§104.3(a)(4)(iv), (b)(4)(iii) and §104.11.
- B. Schedule C.** Both the original loan and payments to reduce principal must be reported each reporting period until the loan is repaid. The committee must report the following:
- The source of the loan; and
 - The type of loan the candidate received (i.e. bank loan, brokerage account, credit card, or home equity line of credit) either in the first box for endorsers and guarantors with a notation for loan type or in the box for “Loan Source” after the

candidate's name. 11 CFR §104.3(d) and §104.11.

C. Schedule C-1.

1. **Loans to Committees.** When a committee obtains a loan from a bank or other permissible lending institution it must also file Schedule C-1 with the first report due after a new loan or line of credit has been established. The committee must disclose the following information on Schedule C-1:
 - The date and amount of the loan;
 - The interest rate and repayment schedule of the loan, or on each draw of line of credit;
 - The type and value of collateral or other sources of repayment that secure the loan or the line of credit, and whether that security interest was perfected; and
 - An explanation of the basis upon which the loan was made, if not made on the basis of either collateral or other sources of repayment.
2. **Loan Agreement/Line of Credit.** The committee must also attach a copy of the loan agreement. In the case of a committee that has obtained a line of credit, a new Schedule C-1 must be filed with the next report whenever the committee draws on the line of credit. An authorized representative of the lending institution must sign the statement on Line I. 11 CFR §104.3(d)(1) and (3).

D. Continuous Reporting Required. A political committee must disclose the amount and nature of outstanding debts and obligations until those debts are extinguished. 52 U.S.C. §30104(b).

Facts and Analysis

A. Facts

During audit fieldwork, the Audit staff reviewed bank loans and a line of credit from Simmons Bank and First National Bank. Based upon a detailed review, the Audit staff determined the following:

- For the line of credit received from Simmons Bank, DPA made three draws on the line of credit totaling \$32,500 but did not disclose these draws on Schedules C (Loans) and/or C-1 (Loans and Line of Credit from Lending Institutions). In addition, DPA reported incorrect payment terms (due date and interest rate) and an incorrect outstanding balance for this line of credit, which resulted in the under-reporting of its 2018 year-end line of credit balance by \$77,447.¹²
- For the loan received from First National Bank, the incorrect balance was disclosed on Schedule C throughout the audit period. The loan was paid off on

¹² For this line of credit, DPA carried an outstanding balance on January 1, 2017 of \$60,766. In 2017, DPA made three draws on the line of credit totaling \$32,500, plus an additional draw adding \$557 to the principal in 2018. DPA made payments of \$985 in 2017 and \$72,815 in 2018, and this resulted in an outstanding balance for the line of credit on December 31, 2018 of \$20,023. However, DPA disclosed the ending balance for this line of credit to be negative \$57,424, which resulted in the under-reporting of its 2018 year-end line of credit balance by \$77,447 (calculated as \$20,023 minus negative \$57,424).

March 13, 2017, but DPA continued to incorrectly disclose an outstanding balance of \$9,693 from July 1, 2017 through December 31, 2018.

- Loan repayments totaling \$1,036 to Simmons Bank were reported to the incorrect payee (“Simmons First National Bank”) on Schedule B, Line 26, of the 2017 February Monthly, March Monthly, May Monthly, and July Monthly Reports. These loan repayments were also reported on Schedule C to the incorrect payee (“First National Bank”) of the 2017 February Monthly, March Monthly, and May Monthly Reports, and were not reported on Schedule C of the 2017 July Monthly Report. In addition, loan repayments totaling \$2,527 to First National Bank were reported to the correct payee on Schedule B, Line 26, of the 2017 February Monthly and March Monthly Reports, but not reported on Schedule C.

B. Interim Audit Report & Audit Division Recommendation

The Audit staff discussed this matter with DPA representatives during the exit conference and provided a schedule detailing the disclosure errors. DPA representatives stated that they were aware of the disclosure problems and indicated they would amend reports to correctly disclose the loans and line of credit.

The Interim Audit Report recommended that DPA provide documentation demonstrating that the identified draws on the line of credit, as well as the terms and balances for outstanding loans, and loan repayments were correctly disclosed. Absent such demonstration, the Interim Audit Report recommended that DPA amend its disclosure reports or file a Form 99 (Miscellaneous Electronic Submission)⁵ to disclose the correct information on Schedule B, Line 26 (Loan Repayments), Schedule C, and Schedule C-1.

C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, DPA filed a Form 99 on November 2, 2021, which correctly disclosed the terms and transactions on a line of credit received from Simmons Bank totaling \$32,500, in addition to the correct terms and balances for outstanding loans totaling \$77,447. The Form 99 correctly disclosed the terms that appear on Schedule C and Schedule C-1, the cumulative payment and the outstanding amount at the close of the period that corrected the public record for both Schedule C and Schedule C1. DPA’s Form 99 did not correct an outstanding balance discrepancy of \$9,693 for the loan received from First National Bank and did not address the loan repayments totaling \$1,036 to Simmons Bank or the loan repayments totaling \$2,527 to First National Bank. Subsequently, on January 14, 2022, DPA filed a revised Form 99 which correctly disclosed the line of credit, the new and outstanding loans, and the loan repayments.



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MEMORANDUM

December 23, 2021

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna C. Brown
Assistant Staff Director
Audit Division

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

Lorenzo Holloway *LH*
Assistant General Counsel
Compliance Advice

Danita Alberico *DA*
Attorney

SUBJECT: Draft Final Audit Report on the Democratic Party of Arkansas (LRA 1153)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report (“DFAR”) on the Democratic Party of Arkansas (“Committee”). The DFAR contains four findings: (1) Reporting of Debts and Obligations; (2) Recordkeeping for Employees; (3) Reporting of Apparent Independent Expenditures; and (4) Disclosure of Loans and Loan Repayments. We comment on Finding 3, and otherwise concur with the findings. If you have any questions, please contact Danita Alberico, the attorney assigned to this audit.

II. REPORTING OF APPARENT INDEPENDENT EXPENDITURES (Finding 3)

The DFAR concludes that disbursements totaling \$22,803, reported by the Committee as Federal Election Activity¹ paid entirely with federal funds, should have been reported instead as

¹ “Federal Election Activity” includes specific types of activities engaged in by a state party committee during specific time frames, public communications containing specific content, or activities consuming more than a

independent expenditures because the communications expressly urged the election of a clearly identified federal candidate. 11 C.F.R. §§ 100.16, 100.22(a). These disbursements were for direct mail pieces through Resonance Campaigns totaling \$18,423.97 and printed materials (characterized by the Committee as door hangers) totaling \$4,378.53.

In response to the Interim Audit Report (“IAR”), which contained the same conclusion, the Committee disagrees with the classification of both the Resonance Campaign direct mailer and the door hangers as independent expenditures, asserting that it fully coordinated its activities with respect to these expenditures with the candidate. Despite this conceded coordinated activity, and specifically with respect to the door hangers, the Committee also contends that the door hangers nevertheless do not qualify as coordinated party expenditures because door hangers are not a “public communication” as that term is defined in 11 C.F.R. § 100.26.² Finally, the Committee states that in any event the door hangers were distributed by volunteers, that the production and preparation of the Resonance Campaign direct mailers included substantial volunteer participation, and therefore that both qualify for the volunteer materials exemption (“VME”). The Committee submitted a declaration from its executive director, in which she recalls that the door hangers and Resonance Campaign direct mailers involved volunteer activity in accordance with the pertinent regulatory requirements. The declaration is submitted “under penalty of perjury.”

Commission regulations define an “independent expenditure,” in pertinent part, as an expenditure for a communication that expressly advocates the election or defeat of one or more candidates for federal office that is not made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate. 11 C.F.R. § 100.16(a). A communication is “made in cooperation, consultation, or concert with, or at the request or suggestion of, a candidate” if it is a coordinated communication under 11 C.F.R. § 109.21 or a party coordinated communication under 11 C.F.R. § 109.37. *Id.* In no event, however, may a communication be an independent expenditure “if the person making the expenditure allows a candidate, a candidate’s authorized committee, or their agents . . . to become materially involved in decisions regarding the communication . . . or [to share] financial responsibility for the costs of production or dissemination with any such person.” *Id.* § 100.16(c).

Given the Committee’s assertion that it fully coordinated the distribution of the door hangers and the Resonance Campaign direct mailers with the candidate, we do not believe that the door hangers and direct mailers may continue to be classified as independent expenditures. Although the Committee does not elaborate on the nature of the coordination involved, its statement that the door hangers and direct mailers were “fully coordinated” with the candidate implies that the candidate was materially involved in the decision-making process regarding the

specific percentage of an employee’s time in a given month. 52 U.S.C. § 30101(20); 11 C.F.R. § 100.24. A state party committee must pay for the costs of such activities exclusively with federal funds, subject to certain exceptions. 52 U.S.C. § 30125(b); 11 C.F.R. § 300.32(a)(2).

² A “public communication”, in pertinent part, means “a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any form of general public political advertising.” 11 C.F.R. § 100.26. *See also* 52 U.S.C. § 30101(22).

door hangers and direct mailers. 11 C.F.R. § 100.16(c). We therefore recommend that the Audit Division revise Finding 3 to state that the disbursements for the door hangers and Resonance Campaign direct mailers should not be classified as independent expenditures. *See*

[REDACTED] (arriving at identical conclusion).

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

With respect to the question of whether door hangers may be a public communication, we previously concluded in the negative and we reiterate the rationale and conclusion from that previous audit here. *See* [REDACTED]

[REDACTED] (palm cards and door hangers). In those comments, we noted that the subject palm cards and door hangers were not distributed by any of the means set forth in 11 C.F.R. § 100.26. *Id.* Further, the Commission has explained that the various means of mass communication encompassed by the public communication definition all lend themselves to the distribution of content through an entity ordinarily owned or controlled by another person. *See Internet Communications*, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006) (“Thus, for an individual to communicate with the public using any of the forms of media listed by Congress, he or she must ordinarily pay an intermediary (generally a facility owner) for access to the public through that form of media each time he or she wishes to make a communication.”). Distribution of a door hanger by hand does not require payment to an intermediate facility owner each time communication with an audience is sought (though payment to a printer for the creation of the door hanger may be required), but rather may be accomplished independently by the communicator. A door hanger is therefore more akin to a printed slate card, handbill, brochure, or bumper sticker than it is to any of the communication modalities enumerated in the definition of public communication.³

At the same time, we note that the Commission has been inconsistent in its treatment of door hangers in previous enforcement matters. In several matters, the Commission concluded that door hangers should be treated as public communications. *See* MUR 6778 (David Hale for Congress), Factual and Legal Analysis, at 3 (undated, *circa* Nov. 5, 2015); MUR 6924 (Andrew Winer), Factual and Legal Analysis, at 5 n.26 (Aug. 21, 2017). *See also* MUR 4643 (Democratic

³ *See, e.g.*, 11 C.F.R. §§ 100.140 (slate card exemption), 100.147 (VME for party committees), which expressly distinguish communications covered by the exemption from modes of public communication that are not. 11 C.F.R. §§ 100.140 (exception shall not apply to costs incurred respecting listings made on broadcasting stations, newspapers, magazines, and similar types of general public political advertising), 100.147(a) (exemption not applicable to broadcasting, newspaper, magazine, billboard, direct mail, or similar type of general public communication or political advertising).

Party of New Mexico), Letter to Allen Weh from Jonathan Bernstein (June 23, 2005) (advising of Commission’s entry into Consent Judgment with respondent and enclosing Order and Judgment, United States District Court of New Mexico, Civil No. 02-0372 MCA/RHS (Apr. 29, 2005), Paragraph A of which notes disbursements from non-federal account for “public communications;” communications at issue in enforcement matter included some door hangers). In another enforcement matter, however, the Commission concluded that a door hanger was not a public communication because it qualified as a handbill subject to the “coattails exemption” (11 C.F.R. § 100.148). *See* MUR 6673 (Lee), Factual and Legal Analysis, at 5 (Sept. 13, 2013).⁴

Considering the above history, we recommend that the Audit Division raise the question of whether the door hangers are a public communication in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

Regarding the VME and the sufficiency of the declaration, we note that the Commission has divided over the question of whether unsworn written assertions suffice in the absence of documentation of the nature and extent of volunteer involvement. *See* Final Audit Report on Nebraska Democratic Party, at 19-20 (approved Oct. 23, 2014). Here, as noted above, the declaration of the director of operations was submitted under penalty of perjury. It is therefore somewhat stronger insofar as it may carry the same weight as a sworn statement. 28 U.S.C. § 1746 (unsworn declaration subscribed as true under penalty of perjury supports matter “with like force and effect” as sworn declaration or affidavit). However, in that the declaration is not accompanied by documentation of the nature and extent of volunteer involvement, it is arguably akin to the unsworn statement at issue in the Nebraska Democratic Party audit. Further, the basis upon which the director of operations’ recollection is premised, whether upon personal knowledge or not, is not clear. We have recommended in the past that even affidavits bearing such uncertainties be raised for Commission consideration. *See* Memorandum from Lisa J. Stevenson to Patricia C. Orrock, Draft Final Audit Report on the New York Republican Federal Campaign Committee (LRA 1038), at 4 (July 7, 2017); Memorandum from Adav Noti to Patricia C. Orrock, Draft Final Audit Report on the Illinois Republican Party (LRA 1006), at 4-5 (Jan. 31, 2017). We therefore do so again here, recommending that the question be raised in the cover memorandum that will accompany the transmission of the DFAR to the Commission.

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



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

March 30, 2022

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Officer

Dayna C. Brown
Assistant Staff Director
Audit Division

FROM: Neven F. Stipanovic *NFS*
Associate General Counsel
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Acting Assistant General Counsel
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SUBJECT: Audit Division Recommendation Memorandum on the Democratic Party of
Arkansas (LRA 1153)

I. INTRODUCTION

The Office of General Counsel (“OGC”) did not initially comment on the Audit Division Recommendation Memorandum (“ADRM”). We now, however, provide ADRM comments upon revisiting our analysis of the Draft Final Audit Report (“DFAR”) regarding whether door hangers that the Democratic Party of Arkansas (“the Committee”) distributed should be classified as coordinated party expenditures in Finding 3, Reporting of Media Related Expenditures.¹ In OGC’s DFAR comments, we concluded that the door hangers cannot be

¹ See Memorandum from Neven Stipanovic to Patricia C. Orrock, Draft Final Audit Report on the Democratic Party of Arkansas (LRA 1153) (Dec. 23, 2021) (“DFAR Comments”).

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

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

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

II. REPORTING OF MEDIA RELATED EXPENDITURES (Finding 3)

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

The VME exempts from the definitions of “contribution” and “expenditure” payments for “campaign materials (such as pins, bumper stickers, handbills, brochures, posters, party tabloids or newspapers, and yard signs)” distributed by a state or local party committee in connection with volunteer activities on behalf of a federal candidate of that party, provided other requirements are met.⁴ Although the Commission does not appear to have specifically analyzed whether door hangers are “campaign materials” within the meaning of the VME,⁵ it has determined that door hangers may be included within another exemption in 11 C.F.R. part 100,

² DFAR Comments at 2-4.

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

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

⁵ *But cf.* Advisory Opinion 2008-06 (Democratic Party of Virginia) at 4, 5 (concluding, without further analysis, that “[t]he types of campaign materials covered by this [VME] exemption include all manner of publications, including the publications proposed by the Committee,” which, as noted in an analysis of a different exemption, for slate cards, might possibly include a door hanger version of a slate card).

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

Thus, if the Committee otherwise satisfies the requirements of the VME (*e.g.*, by sufficient documentation of volunteer dissemination of the door hangers), we further conclude that, under 11 C.F.R. § 109.37, the VME-qualified door hangers cannot be classified as a party coordinated expenditure and the amount of that payment should not be included in Finding 3. Assuming, *arguendo*, that the Committee’s documentation is insufficient to establish that the door hangers are exempt under the VME, the determination of whether the door hangers should be included in Finding 3, Reporting of Media Related Expenditures, will depend upon whether the door hangers are public communications.⁸ We conclude that, if the door hangers are not exempt under the VME, they likely are public communications and party coordinated expenditures.

The Commission’s conclusion in MUR 6673 that a door hanger within the coattails exemption is not a “public communication” was limited to the facts at issue in that MUR; the Commission did not determine that no door hanger is a public communication as a matter of law.⁹ In fact, as OGC explained in its DFAR comments, the Commission, after deciding MUR 6673, concluded in two enforcement matters not implicating exempt activity under 11 C.F.R.

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

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

⁸ *See* DFAR Comments at 4 (discussing VME evidence); *see also id.* at 2-3 (describing payment, express advocacy content, and representation of coordination conduct that appear to adequately address other requirements of 11 C.F.R. § 109.37).

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

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

Thus, we recommend that the Audit Division include the cost of the door hangers in Finding 3, Reporting of Media Related Expenditures, because the door hangers, if not within the VME, are likely public communications that otherwise meet the definition of “party coordinated communication” in 11 C.F.R. § 109.37.¹³

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

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

¹² Factual and Legal Analysis, at 4-5, MUR 4741 (Bono) (Jan. 19, 1999). OGC, at the time of its DFAR comments, was not aware of and did not cite MUR 4741. In the DFAR comments, without benefit of specific precedent analyzing non-VME door hangers as “general public political advertising,” OGC reached its conclusion that door hangers are not “public communications,” in part, on the basis of the Commission’s explanation of revisions to the “public communication” definition to include some internet communications. See DFAR Comments at 3 (citing Internet Communications, 71 Fed. Reg. 18,589, 18,594 (Apr. 12, 2006) (“Internet E&J”). In the DFAR comments, OGC focused on the Internet E&J’s explanation of the relation between the “catch-all” category of “general public political advertising” and the enumerated communications included in the statutory “public communication” definition now codified at 52 U.S.C. 30101(22). See *id.*; see also Internet E&J, 71 Fed. Reg. at 18,592, 18,594 (referring to the “catch-all”). In light of the more specific analysis regarding door hangers in MUR 4741, OGC finds the couching language in the Internet E&J on which we previously relied — *e.g.*, that each of the enumerated communication forms “lends itself to distribution . . . through an entity *ordinarily* owned or controlled by another person” and that a person “must *ordinarily* pay an intermediary (*generally* a facility owner) for access to the public” — less persuasive in this context. See Internet E&J, 71 Fed. Reg. at 18,594 (emphasis added).

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