

1 **FEDERAL ELECTION COMMISSION**

2 **FIRST GENERAL COUNSEL'S REPORT**

3 **AR 19-04**

4 DATE OF REFERRAL: Sep. 18, 2019

5 DATE OF NOTIFICATION: Sep. 19, 2019

6 LAST RESPONSE RECEIVED: Oct. 21, 2019

7 DATE ACTIVATED: Nov. 12, 2019

8 EARLIEST SOL: Jan. 1, 2020

9 LATEST SOL: Dec. 8, 2021

10 ELECTION CYCLE: 2016

11 **SOURCE:**

Audit Referral

12 **RESPONDENTS:**

13 South Dakota Democratic Party and Marcia Bunger
14 in her official capacity as treasurer

15 **RELEVANT STATUTES
16 AND REGULATIONS:**

17 52 U.S.C. § 30104

18 11 C.F.R. § 103.3

19 11 C.F.R. § 104.3

20 11 C.F.R. § 104.9

21 **INTERNAL REPORTS CHECKED:**

22 Disclosure Reports

23 **FEDERAL AGENCIES CHECKED:**

24 None

25 **I. INTRODUCTION**

26
27 These matters arise from an audit of the South Dakota Democratic Party's ("SDDP" or
28 the "Committee") activity during the 2016 election cycle.¹ On September 3, 2019, the
29 Commission approved the Proposed Final Audit Report² regarding the Committee's 2016
30 activity and the Audit Division subsequently referred two findings to the Office of General
31 Counsel ("OGC") for possible enforcement action: (1) self-reported increased activity involving
32 \$2,500,147 in disbursements; and (2) accepting \$23,827 contributions from unregistered

¹ Memorandum from Patricia C. Orrock, Chief Compliance Officer, to Charles Kitcher, Acting Associate General Counsel for Enforcement, AR 19-04 (Sep. 16, 2019) (the "Audit Referral").

² Certification (Sep. 3, 2019).

1 organizations. In its Response, the Committee requests that no further action be taken in this
2 matter or, alternatively, that the matter be transferred to ADRO.⁴

3 For the reasons discussed below, we recommend that the Commission open a MUR as to
4 the Referral; find reason to believe that the Committee violated 52 U.S.C. § 30104(b) by
5 misreporting disbursements during the 2016 election cycle; and find reason to believe that the
6 Committee violated 11 C.F.R. § 103.3(b) by depositing funds into its federal account without
7 examining the contributions to ascertain whether they complied with the prohibitions and
8 limitations of the Federal Election Campaign Act of 1971, as amended (the "Act").
9 Additionally, we recommend that the Commission authorize pre-probable cause conciliation and
10 approve the attached conciliation agreement.

11 **II. FACTS**

12 The Committee is a state party committee of the Democratic Party.⁵ The Final Audit
13 Report on the Committee's 2016 election cycle activity included two findings which were
14 referred to OGC for possible enforcement action.

15 First, the audit found that the Committee misstated its financial activity by failing to
16 report disbursements totaling \$2,500,147 on its original reports during the 2016 election cycle.⁶
17 This amount includes 15 disbursements to the Democratic National Committee, as well as
18 \$6,147 in additional increased activity comprising an unknown number of additional

4 Resp. at 1 (Oct. 21, 2019).

5 SDDP Amend. Statement of Org. (Nov. 14, 2019).

6 Final Audit Report at 5.

1 disbursements reported on amended reports during 2015-2016.⁷ After the 2016 general election,
2 the Committee disclosed all of the increased activity on amended reports.⁸

3 Second, the audit found that the Committee accepted 31 contributions, totaling \$23,827,
4 from unregistered organizations without maintaining any records that the contributions were
5 made with funds subject to the prohibitions and limitations of the Act.⁹ The audit initially
6 identified \$67,182 in such contributions, but during the audit, the Committee sought, received,
7 and provided documentation from the contributors demonstrating that \$43,335 of the
8 contributions were made using permissible funds.¹⁰ The Final Audit Report notes that the
9 contributions for which the Committee submitted such documentation were excluded from the
10 amount in violation included in the Audit Referral.¹¹ The contributions appear to be from
11 various state PACs, state candidate committees, and local party committees. As noted in the
12 Final Audit Report, South Dakota law allows these types of organization to accept funds that
13 would be impermissible under the Act.¹²

⁷ Final Audit Report at 4. The Final Audit Report states that the total amount of understated disbursements included \$2,494,000 in transfers to the DNC, but did not include an itemized list of those transactions. After referring the allegations to OGC, Audit provided OGC with a spreadsheet itemizing the 15 disbursements to the DNC.

⁸ See SDDP Amend. 2016 Sept. Monthly Report at 224 (Jan. 31, 2017); SDDP Amend. 2016 Oct. Monthly Report at 296 (Jan. 31, 2017); SDDP Amend. 12-Day Pre-Gen. Report at 90 (Jan. 31, 2017); SDDP 30-Day Post-Gen. Report at 534-537 (Jan. 31, 2019) (disclosing the disbursements to the DNC listed in the table above). The additional \$6,147 in increased activity was identified by Audit based on comparing the disbursement summaries throughout the election cycle with the Committee's bank accounts, but neither Audit nor OGC has identified the itemized disbursements associated with this portion of the increased activity.

⁹ Final Audit Report at 4. With respect to the remaining \$23,827 in contributions included in the Audit Referral, the Committee asserts that it is "is committed to demonstrating that these contributions derived from permissible funds and will continue to pursue certifications from those donors." Resp. at 2.

¹⁰ Final Audit Report at 5-9.

¹¹ Final Audit Report at 8.

¹² Final Audit Report at 7. Although South Dakota law prohibits direct contributions to state candidates from corporations and labor organizations, this state's law places no limits on contributions to candidate committees from state PACs, and it allows corporations and labor organizations to make unlimited contributions to state PACs. See S.D. CODIFIED LAWS § 12-27.

1 The Committee admits that it failed to report the \$2,500,147 in disbursements on its
2 original reports, citing accounting errors and other “procedural issues” with its disclosure report
3 preparation.¹³ The Committee notes that it disclosed the increased activity on amended reports
4 and asserts that all reporting omissions were corrected by January 31, 2017.¹⁴ The Committee
5 also acknowledged accepting the \$23,827 in contributions from unregistered organizations
6 without confirming that they were made using permissible funds, but notes that it provided
7 documentation during the audit process demonstrating that many similar contributions identified
8 during the audit were in fact made using permissible funds.¹⁵ The Committee asserts that it is
9 continuing to seek similar documentation for the remaining contributions included in the Audit
10 Referral and states that it “is confident that, once the process is completed, that it will be able to
11 demonstrate that most, if not all of these contributions, were made with permissible funds.”¹⁶

12 **III. LEGAL ANALYSIS**

13 The Act requires committee treasurers to file reports of receipts and disbursements in
14 accordance with the provisions of 52 U.S.C. § 30104(a). The available information indicates,
15 and the Committee acknowledges, that the Committee misreported disbursements totaling
16 \$2,500,147 on its original reports during the 2016 election cycle. Accordingly, we recommend
17 that the Commission find reason to believe that the Committee violated 52 U.S.C. § 30104(b).

18 The Act also prohibits political committees from accepting contributions that are not
19 subject to the prohibitions and limitations of the Act.¹⁷ Commission regulations require

¹³ Resp. at 1-2; Final Audit Report at 4-5.

¹⁴ Resp. at 1.

¹⁵ Resp. at 2.

¹⁶ Resp. at 2.

¹⁷ See 52 U.S.C. § 30116(f), 30118(a).

1 committee treasurers to ensure that all contributions the committee receives are from permissible
2 sources and do not exceed contribution limits, and prohibited or excessive contributions must be
3 returned or refunded.¹⁸ Contributions which “present genuine questions as to whether they were
4 made by corporations, labor organizations, foreign nationals, or Federal contractors” must,
5 within 10 days, be either deposited into a campaign account or returned to the contributor.¹⁹ If
6 any such contribution is deposited, the treasurer “shall make his or her best efforts to determine
7 the legality of the contribution.”²⁰ The available information indicates, and the Committee
8 acknowledges, that at the time the Committee received and deposited these contributions, the
9 contributions were from unregistered organizations that may have raised impermissible funds,
10 and the Committee did not have any records available to show that these contributions from
11 unregistered organizations were made with permissible funds.²¹ Accordingly, we recommend
12 that the Commission find reason to believe that the Committee violated 11 C.F.R. § 103.3(b).²²

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¹⁸ 11 C.F.R. § 103.3(b).

¹⁹ 11 C.F.R. § 103.3(b)(1).

²⁰ *Id.*

²¹ As noted above, the Committee asserts that it is seeking such documentation, but as of the date of this report, none had been provided to the Commission. *See supra* note 16.

²² Because the available information does not indicate that the contributions were, in fact, made using impermissible funds, we are not making recommendations as to whether the Committee may have violated 52 U.S.C. §§ 30116(f) or 30118(a) by accepting excessive or prohibited contributions.

AR 19-04 (South Dakota Democratic Party)
First General Counsel's Report
Page 6 of 8

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AR 19-04 (South Dakota Democratic Party)
First General Counsel's Report
Page 7 of 8

V. RECOMMENDATIONS

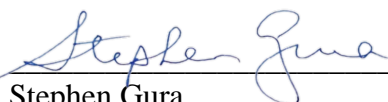
1. Open a MUR in AR 19-04;
2. Find reason to believe that the South Dakota Democratic Party and Marcia Bunger in her official capacity as treasurer violated 52 U.S.C. § 30104(b);
3. Find reason to believe that the South Dakota Democratic Party and Marcia Bunger in her official capacity as treasurer violated 11 C.F.R. § 103.3(b);
4. Approve the attached Factual and Legal Analysis;
5. Authorize pre-probable cause conciliation with the South Dakota Democratic Party and Marcia Bunger in her official capacity as treasurer;
6. Approve the attached proposed conciliation agreement; and
7. Approve the appropriate letters.

Lisa J. Stevenson
Acting General Counsel

Charles Kitcher
Acting Associate General Counsel for Enforcement

12.11.19

Date



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Deputy Associate General Counsel for Enforcement



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