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November 1, 2021

Ms. Dayna C. Brown
Acting Assistant Staff Director
Audit Division
Federal Election Commission
1050 First Street, N.E.
Washington, D.C. 20463

Dear Ms. Brown:

I serve as counsel to Democracy Engine, Inc. PAC (“DEI”). By this, for the reasons stated below, DEI requests a hearing before the Commission to further provide and clarify its views pertaining to the issues raised by the Audit Division’s Draft Final Audit Report (“DFAR”).

It is believed that some time in 2012, DEI’s bank force closed its bank account due to inactivity and a zero bank balance. Between 2012 and 2019, DEI did not directly engage in any fundraising activities nor make any direct expenditures. In 2019, prior to the notification of this Audit, DEI opened a new depository account. As a general matter, DEI does not have any staff or other overhead costs. To the extent that DEI has even engaged in any activities between 2012 and 2019, DEI solicited contributions from individual donors to be earmarked to specific federal candidates. Rather than writing checks to these candidates or DEI, the individual donors contributed by credit card, which were processed by Democracy Engine, LLC (“DELLC”). DELLC is a for-profit company whose professional services include the processing and forwarding of political contributions.

DEI initially, and we believe incorrectly, disclosed all of the activities as passing through DEI as an earmarked contribution and a forwarded contribution to the designated candidate. Upon further reflection, and with consultation with Commission staff, DEI amended its reports in March 2021 to properly reflect the activities as memo entries since none of the earmarked contributions passed through a bank account of DEI. In hindsight, even this level of reporting may have been more than necessary since DEI never “handled” any of the contributions and donors used a for-profit vendor to process and forward the contributions to the candidates. See 11 C.F.R. § 110.6(c)(1)(v) (requiring any earmarked contribution that passes through a committee as a receipt and disbursement and any forwarded contributions made by check or other written instrument be disclosed as a memo entry). Finally, it should be noted that the process utilized by DELLC during the 2018 election cycle is substantially identical to those described and approved by the Commission in Advisory Opinion 2011-06.

Below, please find our comments related to the specific findings found in the DFAR. For purposes of our request for a hearing, the request is limited to issues related to Findings ## 1 & 3 of the DFAR related to recordkeeping and reporting of conduit activities.

Finding #1 (maintenance of a depository)

Although DEI acknowledges the Audit Division’s conclusion that Commission regulations appear to require that each political committee must maintain a depository account, the Commission should determine, in its discretion, that the maintenance of an account with no funds by a committee that has no receipts or disbursements is unnecessary and impractical. It has been our experience that banks are less willing to allow their clients to maintain dormant or empty accounts and will force close the account after a period of inactivity. That is what happened to DEI prior to the 2018 election cycle. It makes no sense to require DEI to reopen an account until and unless it has funds to deposit or spend. DEI did, in fact, reopen an account in 2019 and has been depositing funds into that account and making expenditures from that account.

Findings # 1 & 3 (recordkeeping and reporting related to conduit activity)

DEI objects to the DFAR’s assertions with respect to its failure to maintain accounts sufficient to verify reported activity. As stated above, DEI did not have any bank accounts during the reporting period and amended its reports to properly reflect this fact. Unsatisfied with this reality, the DFAR characterizes a scenario whereby DEI “uses” DELLC to conduct its business. DELLC is a for-profit entity that is in the industry of processing political contributions. During the 2018 election cycle, DEI did not undertake any activities that benefited the committee. The only activity undertaken by DEI, with no incremental costs, was to encourage donations directly to candidates. At the time the Commission earmarking regulations were promulgated (11 C.F.R. § 110.6), contributions were generally understood to be made by check or other written instrument. Thus, the Commission’s regulations make no reference as to the proper procedures related to earmarked contributions made by credit card. The Commission has, by Advisory Opinion, acknowledged that earmarked contributions can be made by credit card, but has only considered this issue with respect to contributions that pass through a political committee’s accounts. See e.g. Advisory Opinion 2019-15 (NORPAC); 2014-13 (ActBlue); 2008-8 (Jonathan Zucker); 2006-30 (ActBlue)

Contrary to the DFAR’s assertion, DELLC was not acting as some type of “project” of DEI but rather, as a commercial vendor in the business of processing and forwarding contributions. DELLC processed and deducted a usual and normal charge for each contribution and instructed committees in receipt of such funds to report the deducted amounts as an operating cost to DELLC. The Commission has previously permitted for profit operations to process earmarked contributions and such activities were not subject to any additional conduit disclosure. See Advisory Opinion 2004-8 (allowing for profit corporation to forward earmarked contributions without further disclosure under commercial vendor exception of 11 C.F.R. § 110.6(b)(2)). See also e.g. Advisory Opinions 2012-22 (skimmerhat); 2015-15 (WeSupportThat.com); 2016-08 (eBundler.com, LLC).

Even more on point, the Commission determined that individuals may create and operate a data processing service that identified suggested campaigns to support and facilitated the collection and forwarding of contributions through a for-profit LLC created to support the project. Advisory Opinion 2017-06 (Stein and Gottlieb). Essentially DELLC and DEI operated its activities in the 2018 cycle on substantially similar terms, allowing donors with interests in candidates holding certain political positions to find and contribute to them. Thus, DEI merely advised donors on campaigns to support and DELLC helped facilitate the collection and remittal of those contributions on commercial terms with the donors. DELLC withheld a sufficient amount of funds from each remittal to cover its costs and earned a reasonable profit on these activities. DELLC's activities are not subject to disclosure requirements because "their services are "akin to 'delivery services, bill-paying services, or check writing services.'" Advisory Opinion 2021-07 (PACMS), p.11.

Out of an abundance of caution, and a misunderstanding of Commission rules related to the definition of "conduit,"¹ DEI, albeit incorrectly, included this activity as reportable bundling activity on its initial reports PAC reports. Since DEI did not actually collect and forward contributions, it could not be considered a "conduit" under the Commission's regulations.

During the audit process, DEI realized that this activity should not have been included in its reports and recharacterized this activity as memo entries since the donations made through these projects did not pass-through DEI. In further hindsight, based upon the precedents cited above, it does not appear that DEI was even required to provide the memo entries in its amended reports. Commission precedents do not require that a for profit entity have a contractual relationship and determined that a for profit entity will be considered a commercial vendor and not a conduit if it collects and forwards contributions on behalf of a donor. Advisory Opinion 2017-06, pp. 6-7.

Faced with the obvious conclusions described above, the Audit Division, in an attempt to justify its finding, has attempted to make a novel argument that DEI and DELLC are one in the same and thus DELLC, a for profit entity is somehow merely a bank account of DEI.² The General Counsel's memorandum attached to the DFAR attempts to characterize DELLC as a *de facto*, undesignated depository account. General Counsel Memorandum, DFAR for Democracy Engine, Inc. PAC, Page 3-4. The two matters cited by the memorandum do not appear to have any similarities to the relationship between DEI and DELLC and do not provide any principled explanation as to how a for-profit entity could serve as an undesignated depository account of a PAC. Since DELLC was neither a political committee, nor a conduit of earmarked contributions it cannot be subject to the recordkeeping requirements of the Act nor be required to disclose (albeit through DEI) its contribution processing activities. Thus, the DFAR and attached analysis from the General Counsel's office appear to be nothing more than a tortured effort to justify their initial legal position in the Interim Audit Report.

¹ "conduit" is defined as "any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee..." 11 C.F.R. § 110.6(b)(2).

² It should be noted that DELLC has provided the Audit Division with substantial documentation to document the transactions that have been disclosed as conduit activity by DEI on its original and amended reports.

If you require any further information, or have any other questions, please call me at (202) 479-1111.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Reiff". The signature is fluid and cursive, with the first name "Neil" being more prominent than the last name "Reiff".

Neil Reiff
Counsel to Democracy Engine Inc. PAC