



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Original Completion: September 22, 2021  
Revised: October 8, 2021

**MEMORANDUM**

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SUBJECT: Draft Final Audit Report on Democracy Engine, Inc., PAC (LRA 1110)

The Office of the General Counsel has reviewed the proposed Draft Final Audit Report (“Proposed DFAR”) on Democracy Engine, Inc., PAC (“DEI”). The DFAR contains three findings: Failure to Maintain a Bank Depository (Finding 1), Inaccurate Disclosure of Statement of Organization (Finding 2), and Recordkeeping for Receipts and Disbursements (Finding 3). We concur with the findings, and comment on Findings 1 and 3. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

**I. ALL POLITICAL COMMITTEES ARE REQUIRED TO MAINTAIN AND USE A DESIGNATED CAMPAIGN DEPOSITORY (FINDING 1).**

DEI failed to maintain and use a designated campaign depository during the audit period, as required under the Federal Election Campaign Act. 52 U.S.C. § 30102(h)(1); *see* proposed DFAR at 5-8. DEI instead received earmarked contributions and made disbursements through an account owned and controlled by DEI’s affiliated LLC, Democracy Engine, LLC (DELLC). *See* proposed DFAR at 6; *see also* Advisory Opinion 2011-06<sup>1</sup> (Democracy Engine) (affiliation of DEI and DELLC).

DEI acknowledges that it did not maintain and use a designated campaign depository, but argues that, “[a]lthough the Commission’s regulations at 11 C.F.R. § 103.2 appear to ‘require’ the maintenance of a campaign depository, such requirement should not be placed upon a dormant committee that has no receipts or disbursements and no cash on hand.” Correspondence from Jonathan Zucker, Treasurer, Democracy Engine, Inc., PAC to Thomas Hintermeister, [formerly] Assistant Staff Director, Audit Division, Federal Election Commission (March 1, 2021). Furthermore, DEI states: “After further reflection, DEI acknowledges that, since none of its conduit activities passed through a committee depository account, DEI should have disclosed all such activities during the 2018 election cycle as memo entries in accordance with 11 C.F.R. § 110.6(c)(1)(v). Therefore, DEI proposes to amend all reports for the 2018 cycle to reflect all activities as ‘memo entries.’ See IAR at p. 6.”

We disagree with DEI’s position. First, the requirement to maintain a designated depository is a statutory requirement of every political committee, including DEI, under the Federal Election Campaign Act. 52 U.S.C. § 30102(h)(1) (“Each political committee shall designate one or more State banks, federally chartered depository institutions, or depository institutions ... as its campaign depository or depositories”).<sup>2</sup> Section 103.2 does not provide a regulatory exception to this statutory requirement, but rather, restates this requirement. 11 C.F.R. § 103.2. (“Each political committee shall designate one or more State banks, federally chartered depository institutions (including a national bank), or depository institutions ... as its campaign depository or depositories”).

Second, each political committee must use its own designated depository for its financial activity. 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.3. A political committee must

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<sup>1</sup> Advisory Opinion 2011-06 (Democracy Engine), in which both DEI and DELLC were requestors, did not address the specific facts presented here, notably that DEI would not maintain a designated depository and that DEI would run all its receipts and disbursements through DELLC. Rather, Advisory Opinion 2011-06 addressed the vendor processor activities of DELLC on behalf of subscribers who choose to use DELLC as a vendor to make their contributions to recipient political committees. Advisory Opinion 2011-06. This advisory opinion also briefly addressed DEI as a political committee affiliated with DELLC, which, as a separate segregated fund, could be a recipient of earmarked contributions from subscribers within the restricted class of DEI’s connected organization. Advisory Opinion 2011-06 (Democracy Engine) at 2, 6, n. 5. Therefore, because the material facts in this audit are outside the confines of the facts as presented in Advisory Opinion 2011-06, DEI cannot rely on Advisory Opinion 2011-06 as a defense to the findings in this audit report. 11 C.F.R. § 112.5. We also note that Advisory Opinion Request 2009-28 (Democracy Engine, Inc., PAC) presented questions on the issue of earmarking contributions but that the Commission was unable to render an advisory opinion.

<sup>2</sup> All committees, even dormant committees, must designate and maintain a campaign depository. 52 U.S.C. § 30102(h)(1) (each political committee shall designate one or more state or federally insured national banks or credit unions as a campaign depository or depositories).

deposit all receipts into the campaign depository designated by the Committee, and all disbursements, except petty cash, must be made from its designated campaign depository.<sup>3</sup> *Id.* In part, this is so that each political committee's receipts and disbursements can be accounted for by the political committee in a third-party financial institution, which must be "State banks, federally chartered depository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation . . . or the National Credit Union Administration, as its campaign depository or depositories." 52 U.S.C. § 30102(h)(1); *see* 11 C.F.R. §§ 103.2, 103.3.<sup>4</sup>

Third, the regulations provide that a conduit must either deposit the earmarked contribution into its own designated account and then disburse funds to the recipient committee from the conduit's account, or the conduit must directly forward the contributor's check on to the recipient committee as designated by the contributor.<sup>5</sup> 11 C.F.R. § 110.6(c)(1)(v); *see* 11 C.F.R. § 110.6(c)(1)(iv)(A)-(C). Here, however, DEI did not deposit the earmarked contributions into its designated depository account.

DEI deposited these earmarked contributions into its affiliated LLC's account (DELLC), and then disbursed funds from this same undesignated account to the recipient committees of these earmarked contributions.<sup>6</sup> Proposed DFAR at 6-8. DELLC's bank account, therefore, served as DEI's *de facto*, undesignated depository account. *Cf.* MUR 7126 (Michigan State Dem Committee), Factual & Legal Analysis at 12 (Aug. 25, 2016) (failure to

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<sup>3</sup> A political committee may transfer contributions received in the political committee's designated campaign depository account to another entity for investment purposes, but on the condition that the political committee must transfer the funds back to the political committee's designated campaign depository account before the disbursements may be made. 11 C.F.R. § 103.3(a); *see* Advisory Opinions 1997-06 (Hutchison) (transfer to and from investment account), 1986-18 (Bevill) (cash management account), 1999-08 (Specter) (mutual funds and stocks), 2014-02 (Make Your Laws, PAC) (Bitcoin), 1980-39 (Fluor PAC) (investment trust). If the investment account does not fall within any of the categories of institutions listed in 52 U.S.C. § 30102(h)(1) or 11 C.F.R. § 103.2, the political committee is not required to designate that account as an additional campaign depository. Advisory Opinion 1980-39 (Fluor PAC), at 2.

<sup>4</sup> As part of the accounting of a political committee's financial activity, at least one of the political committee's designated depository accounts must be a checking account or transaction account. 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.2. Moreover, limits, recordkeeping requirements, and conditions apply to a political committee's financial transactions that cannot be accounted for by a financial institution. *See* 52 U.S.C. § 30102(h)(2) (political committee may maintain a petty cash fund for disbursements for any single transaction of \$100 or less so long as records of each disbursement are kept).

<sup>5</sup> The Commission has recognized several ways that political committees may serve as conduits for earmarked contributions, but in doing so the Commission has never allowed a political committee conduit to avoid the statutory requirement of maintaining and using its designated campaign depository. *See e.g.*, Advisory Opinion 2014-19 (ActBlue); Advisory Opinion 2014-13 (ActBlue); Advisory Opinion 2014-07 (Crowdpac) (explicitly referencing conduit earmarking activities of DEI and DELLC); Advisory Opinion 2012-03 (ActRight); Advisory Opinion 2006-30 (ActBlue).

<sup>6</sup> DEI's treasurer also served in a role with DELLC which was material to the business of DELLC, and which enabled him to complete these transactions for DEI. DEI's treasurer is also the managing member of DELLC, and as such is responsible for establishing the procedures governing the interaction between DEI and DELLC. *See* Zucker aff. (May 27, 2020). DEI's treasurer's duties with DELLC also included inserting the coding information to generate the spreadsheets, in response to the audit, which indicate the amounts, as internally managed by DELLC, of the disbursements to recipient committees as well as the contributor information. Zucker aff. (May 27, 2020) at 1, para. 7.

deposit receipts in a designated campaign depository);<sup>7</sup> MUR 7127 (Sean Braddy), Factual & Legal Analysis at 5-6 (Nov. 28, 2017) (failure to use a proper campaign depository and commingling).<sup>8</sup> All of DEI's financial activity ran through this undesignated bank account, which processed a multitude of financial transactions encompassing DELLC's activities. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Interim Audit Report on Democracy Engine, Inc., PAC (LRA 1110) (Nov. 23, 2020) at 2, note 2. Because DEI received contributions and made disbursements from DELLC's account,<sup>9</sup> this account is, therefore, a campaign depository of DEI, albeit an undesignated one.<sup>10</sup> 52 U.S.C. § 30102(h)(1); 11 C.F.R. §§ 103.2, 103.3.

## **II. COMMITTEES MUST KEEP RECORDS OF ALL MATTERS REQUIRED TO BE DISCLOSED WITH THE COMMISSION (FINDING 3).**

Because DEI failed to maintain a designated depository and therefore did not run receipts and disbursements through its designated depository, the Audit Division concludes that it cannot verify any of the disclosed activity on DEI's campaign finance disclosure reports.<sup>11</sup> DEI maintains that "DEI objects to this finding and characterization that it failed to maintain sufficient records to verify reported activity. By filing the proposed amendments described in Finding 1, DEI believes that this finding is moot and that sufficient records have been provided by DELLC to verify the conduit activity as properly characterized above and in proposed amended reports."<sup>12</sup> Correspondence from Jonathan Zucker, Treasurer, Democracy Engine, Inc., PAC to Thomas Hintermeister, [formerly] Assistant Staff Director, Audit Division, Federal Election Commission (March 1, 2021).

We disagree with the amendments filed by DEI, and with DEI's explanation that the finding is moot because DEI filed amendments stating that the earmarked contributions were

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<sup>7</sup> <https://www.fec.gov/files/legal/murs/7126/17044416170.pdf>.

<sup>8</sup> <https://www.fec.gov/files/legal/murs/7127/17044435658.pdf>.

<sup>9</sup> According to the DELLC bank account statements provided to the Audit Division, this account is insured by the Federal Deposit Insurance Corporation. *See* 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.2.

<sup>10</sup> We do not recommend that the Commission conduct an audit of this account, given the multitude of transactions on behalf of other entities that are not subject to this audit.

<sup>11</sup> Because in this audit DEI and not DELLC served as a conduit for the earmarked contributions, the contributions and disbursements to recipient committees were not processed in the same manner as in Advisory Opinion 2011-06. There, DELLC and DEI represented that DELLC would serve as a vendor processor. In Advisory Opinion Request 2009-28 (Democracy Engine Inc., PAC), DEI's request included detailed plans to serve as a conduit earmarking contributions with an independent vendor; however, the Commission could not reach an agreement. *See* RE: AOR 2009-28 (Dec. 17, 2009); *see also* 11 C.F.R. § 112.5(a)(2) ("An advisory opinion rendered by the Commission ... may be relied on by ... any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.").

<sup>12</sup> When DEI amended its reports to disclose all the activity as memo entries, with no receipts or disbursement activity by DEI, the contribution amounts and disbursements to recipient committees were not consistent with the prior reporting amounts for both contributions and disbursements, and the amended report had a more significant discrepancy between the contributions disclosed as received and contributions disclosed as disbursed to recipient committees. *See* Proposed DFAR at 12.

never deposited. The amendments are not correct because the earmarked contributions were deposited and disbursed through an undesignated depository account, *see infra* pp. 2-4.

Therefore, DEI was required to itemize these transactions on the appropriate schedules of receipts and disbursements attached to conduit DEI's disclosure report.

11 C.F.R. § 110.6(c)(1)(v). DEI did not forward these earmarked contributions in the form of the contributors' checks or other written instruments of the contributors, because the contributor's contributions first passed through the undesignated depository account and then later were disbursed as separate transactions from this undesignated account. Had DEI forwarded the contributors' checks directly on to the recipient committees, it would not have deposited these contributions into an account. The purpose of reporting memo entries for forwarded contributor checks is to make clear for the public record that the contributor's check was deposited directly into the recipient committee's account after passing through the conduits' hands, but without being deposited by, or on behalf of, the conduit.

11 C.F.R. § 110.6(c)(1)(v) *see* 11 C.F.R. § 110.6(c)(1)(iv)(A)-(C).

A treasurer is required to maintain all records and accounts required to be kept under 11 C.F.R. § 102.9 for three years after the report to which such records and accounts relate is filed. 11 C.F.R. § 102.9(c). These include contributions received and disbursements made, and include earmarked contributions. *Id.*; *see* 11 C.F.R. §§ 102.8, 102.10. DEI was responsible for receiving and holding onto earmarked contributions for prospective candidates and eventual nominees. *See* Audit Materials, Screenshots of DEI/DELLC Webpages, 2018 Election Cycle; *See also* Advisory Opinion 2014-07 (Crowdpac) at 4, 7-8. During the period covered by this audit, DEI reported earmarked contributions, as itemized contributions on Schedule A, and itemized disbursements on Schedule B of its disclosure reports. *See* proposed DFAR at 7; *see e.g.*, Democracy Engine, Inc., PAC 2018 Year-End Report, FEC Form 3X, Schedules A and B, (Jan. 31, 2019).<sup>13</sup> As a part of its recordkeeping obligations, DEI was responsible for maintaining and preserving all records, including its bank records and statements, with respect to these earmarked contributions, so that the substance of these disclosure reports "may be verified, explained, clarified, and checked for accuracy and completeness."

11 C.F.R. § 104.14(b)(1); *see* 11 C.F.R. § 104.14(b)(2)-(3). This recordkeeping and reporting requirement includes earmarked contributions held by a conduit. 11 C.F.R. § 110.6(c) (conduit required to file reports); *see* Advisory Opinion 2006-30 (ActBlue) at 6.

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<sup>13</sup> <https://docquery.fec.gov/pdf/008/201901319144259008/201901319144259008.pdf>.