**BEFORE THE FEDERAL ELECTION COMMISSION**

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| | ) | **Audit of Madison Project Inc.** |
| | ) | **(2019-2020)** |
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**<u>Madison Project Inc.'s Response to the Draft Final Audit Report</u>**

Madison Project Inc. ("MPI" or "the Committee") submits this response to the Audit Division's Draft Final Audit Report ("DFAR"). We urge the Commission to reject the DFAR's findings, which contains several misstatements of law and fact. We explain these errors in detail below.

## I. BACKGROUND

MPI is an unauthorized political action committee that relies on small dollar contributions, obtained mostly through direct mail solicitations. As is typical of such arrangements, a significant amount of the Committee's funding is spent on solicitations. Per the DFAR, MPI only had $29,054 cash-on-hand at the beginning of the 2019-2020 audit period. During the audit period, MPI raised $1,349,514, while spending $1,033,548 to do so. It received over 30,000 contributions during the 2019-2020 cycle, almost all of which were small contributions, as small as $20.

At least three-quarters of the contributions MPI received during the 2019-2020 cycle did not require itemization, and for those that did require itemization, it was usually the result of a series of smaller contributions aggregating over $200 at some point in a calendar year. In 2020, moreover, MPI regularly chose to over-disclose contributions, listing on Schedule A of its reports receipts that did not actually require itemization by law – *i.e.*, contributions that did not exceed $200 on their own or when aggregated with other calendar-year contributions.

The Committee began the 2019-2020 cycle with a professional FEC treasurer, PDS Compliance. It then shifted to an in-house treasurer during the cycle due to cash-flow issues. Subsequent to the audit exit conference, the Committee filed amended disclosure reports, which the DFAR acknowledges "materially corrected the public record."

This is not the first time the Commission has encountered this audit. Recall that earlier in the audit, the Audit Division and the Office of General Counsel ("OGC") took the position that the Committee's solicitations were reportable independent expenditures. MPI sought Commission review of this position, and the Commission did not adopt the staff's position. In fact, not only did the Commission not adopt the staff's recommendation in its first vote on the matter, but the Commission also had a second vote, where it explicitly rejected the staff's view.

Proving the adage that "if at first you don't succeed, try, try again," the Audit Division now presents a finding against the Committee regarding its contributor occupation/employer "best efforts" compliance. The DFAR divides the finding into three subparts: (1) untimely efforts made; (2) contributor information obtained but not disclosed; and (3) best efforts documentation not provided.[1] The Committee views all three subparts as flawed, but Subpart 3 especially misses the mark, as it ignores both the applicable statutory and regulatory text and past Commission enforcement matters defining what is required to show "best efforts." Additionally, the mathematical support for the DFAR's sub-findings is incorrect. The Audit Division appears to be "cooking the books" to reach a result by including several contributions that did not require itemization and thus did not trigger best efforts follow-up obligations. With OGC's backing, the

[1] The DFAR includes a fourth category, entitled "Additional Information." We read that as informational, and overlapping of the other subparts.

Audit Division is attempting to create some new law, and punish MPI for over-disclosure. The DFAR ought to be rejected.[2]

Disputes over "best efforts" are not a new phenomenon. Countless audits, MURs, RAD letters, RAD referrals, and ADR matters have addressed the question of how much "best efforts" are enough. In past audits and MURs, the staff always seems to want more documentation – or at least (conveniently) just a little more than the committee under the gun is able to provide. And the Commission has historically disagreed with the staff. This current dispute is simply more of the same.

## II. ANALYSIS

### A. The DFAR's Subpart 3 (Best Efforts Documentation Not Provided) is Wrong on the Law and Wrong on the Facts.

There is significant disagreement over the findings proposed in Subpart 3 of the DFAR. There, the DFAR incorrectly states that "MPI did not provide the Audit staff records to demonstrate timely 'best efforts'" for 222 contributions totaling $59,841. This is wrong on both the applicable law and the underlying facts.

Any serious discussion of this issue must begin with an acknowledgment that the United States Court of Appeals for the D.C. Circuit has made clear that so-called "best efforts" information (*i.e.*, contributor occupation and employer) is aspirational, not mandatory. *Republican Nat'l Committee v. FEC*, 76 F.3d 400, 406 (1996). The Federal Election Campaign Act "only requires committees to use their best efforts to gather the information and then report to the Commission whatever information donors choose to provide."[3] *Id.* In other words,

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[2] The Committee did file a response to the Interim Audit Report, which we incorporate herein by reference.

[3] Remarkably, in its Legal Analysis accompanying the DFAR, OGC claims that the D.C. Circuit *upheld* the Commission's "best efforts" regulation. *See* LRA 1163 – DFAR Legal Analysis at 2. No, the FEC lost, and in the words of the D.C. Circuit: "Because the language of the mandatory statement is inaccurate and misleading, however,

contributors are not required to provide such information – and any requirement that they do so is unlawful. *Id*. Thus, despite the Audit Division's continued use of antiquated language, *see* DFAR at 4 (claiming "required" information), all that must occur is that a treasurer use "best efforts" to obtain certain information regarding certain contributions.

Accordingly, putting aside the vague and verbose dissembling of the issue in the DFAR and accompanying OGC legal analysis memo,[4] the question before the Commission is straightforward: *What is required for a committee to demonstrate "best efforts" regarding occupation and employer information of its contributors?*

Here, MPI included the requisite language on its solicitations,[5] provided to the Audit Division a sample follow-up letter asking for the requisite information, and represented to them that the letters were sent. This is enough to satisfy "best efforts" under the applicable regulation, as demonstrated by the Commission's past enforcement matters.

**1. Past enforcement matters squarely demand rejection of the DFAR, including but not limited to Subpart 3's findings.**

MUR 5840 (Simon) squarely resolves the issues presented here. In that MUR, the Commission found that the committee had sufficiently "provided documentation showing that it had exercised best efforts to obtain the missing contributor information shown" by submitting "sample letters that it state[d] were used throughout the campaign and were mailed on a monthly

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we conclude that this portion of the regulation is contrary to the statute." *Republican Nat'l Committee v. FEC*, 76 F.3d at 402.

[4] We note that all of this (the DFAR and the OGC memo) took months and months to prepare. This is odd, and creates the appearance that they needed the time to work toward a result, especially given that all that is at issue is a potential "best efforts" finding.

[5] *See* 11 C.F.R. §§ 104.7(b)(1)(i), (ii). Tellingly, the DFAR and OGC's legal analysis ignore that the solicitations themselves asked for, among other things, contributors' occupation and employer. The Commission knows that the solicitations contained such a request, as the Audit Division demanded that they all be produced, and then took the position that the solicitations were somehow independent expenditures. As referenced above, not only did the Commission not adopt that recommendation, but it also affirmatively voted to reject it, leaving no doubt.

basis to all contributors who gave more than $200 in an election cycle and failed to provide complete information." MUR 5840, Factual & Legal Analysis ("F&LA") at 2-3. The Commission concluded that the proffer of sample "letters show[ed] that the Committee exercised best efforts to obtain contributor information." *Id*. at 3. The sample was sufficient.

Yet, as in MUR 5840, here there is even more evidence establishing best efforts. Just as the Simon committee offered through its counsel,[6] MPI has represented to the Audit Division that follow-up letters were sent to contributors whose best efforts was lacking. *See* DFAR at 7 ("[I]n the event a contributor did not provide occupation and employer information…., the treasurer sent a follow-up letter seeking the omitted information"). While not an enforcement matter, the result in this audit ought to match the result in MUR 5840. Despite spilling much ink, neither the DFAR nor OGC can change what the Commission decided in MUR 5840: That "the Committee exercised best efforts…." MUR 5840 F&LA at 2-3. That determination is controlling here.

OGC also gives short shrift to MUR 6438 (Art Robinson for Congress). There, per the Commission's F&LA, the Commission dismissed the matter, relying on the committee's sample letters and statement of procedure in sending those letters in the regular course of the committee's operations. In support of dismissal, the F&LA specifically references the committee's representation that best-efforts letters were sent. OGC attempts to hide behind the dismissal being based on prosecutorial discretion, a distinction without a difference here. The relevant facts of Robinson and this audit are materially indistinguishable: Both committees included a request for best efforts information on their solicitations, both submitted a sample

[6] *See* MUR 5840, Response of Ellen Simon and Ellen Simon for Congress, filed by Perkins Coie Brown & Bain (December 1, 2006).

letter, and both represented that they had sent the letters. The bottom line is, Robinson was not found to have violated the law, and the same ought to be true here.

Undeterred, the Commission staff tries to gloss over the import of MUR 5840 and other past Commission enforcement efforts that reached similar results. They create a word fog that, once cleared away, seeks to impose an additional recordkeeping requirement beyond that required by either the applicable regulation or Commission enforcement actions. Yet the Commission also explicitly rejected this same tack in MUR 5840. In its First General Counsel Report in that MUR, OGC asserted that "the Committee ha[d] provided no documentation substantiating its efforts to comply with the law," and thus recommended a finding of "reason to believe" they broke the law.[7] Critically, later in the MUR, the Commission in its subsequent F&LA held that the Simon committee efforts satisfied "best efforts."

**2. The regulatory text requires rejection of Subpart 3's findings.**

If the Commission's decisions in past MURs were not enough, the relevant regulation also answers the question in favor of MPI, and rejects the view taken by Commission staff in the DFAR. Tellingly, Commission staff never quotes the best efforts regulation in full. The relevant portion of that regulation states that a committee will be "deemed to have exercised best efforts to obtain, maintain, and report the required information if:"

> For each contribution received aggregating in excess of $200 per calendar year … which lacks required contributor information, such as the contributor's full name, mailing address, occupation or name of employer, the treasurer makes at least one effort after the receipt of the contribution to obtain the missing information. Such effort shall consist of either a written request sent to the contributor or an oral request to the contributor documented in writing.

11 C.F.R. § 104.7(b).

[7] MUR 5840, First General Counsel's Report at 9-10.

Per the text of the regulation, there is no additional record-keeping requirement beyond making a single written request. It is only when a committee makes an oral request that there is an additional documentation requirement, where such oral requests need to be documented in writing. Audit Division and OGC efforts to graft this documentation requirement onto the written request option must be rejected. Asking for a log of letters,[8] memos to the file, silly references to "no evidence" or conclusory assertions about "MPI's failure" to create records, all miss the mark here. To the extent some feel such extra efforts ought to be required, they can certainly ask the Commission to undertake a rulemaking to require such additional requirements. But under the regulation as written, such extra efforts are not required.[9]

OGC's random invocation of 11 C.F.R. § 102.9 misses the mark as well. *See* OGC Legal Analysis at 7 & n.34. That is a general recordkeeping requirement that does not impose an obligation to create additional records beyond the specific requirement set out in 11 C.F.R. § 104.7. The most OGC can muster is a citation to a 2002 conciliation agreement in MURs 5239 & 5240 (oddly, cited with a "*cf.*" signal). OGC cites to paragraphs 7 and 8 of that conciliation agreement, which discuss a failure to keep records of disbursements.[10] But OGC omits any reference to paragraphs 9 through 11, which discuss the "best efforts" occupation and employer

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[8] From the early days of this audit, the Audit Division has asked whether MPI logged the sending of best efforts letters, kept copies of each letter, or otherwise created additional records related to best efforts. None of this is required. Moreover, simply because some committees may have such information, or auditors are instructed to ask for it per some non-regulatory process to deem it compliant, does make the opposite true. In other words, because a committee does not have additional documentation does not automatically make them non-compliant.

[9] That the regulation explicitly imposes a documentation requirement for oral follow-ups while not imposing a similar additional requirement regarding follow-up letters is significant. It is well established that the expression of one thing implies the exclusion of others. *See* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Text* at 107 (discussing the negative-implication canon, *expressio unius est exclusion alterius*). *See also United States v. Giordano*, 416 U.S. 505 (1974) (where a statute named two types of high-ranking officials, all others were excluded).

[10] Paragraph 7 states: "Among the items that the treasurer of a political committee must keep are records of disbursements, such as receipts, cancelled checks, and statements of purpose," citing to 2 U.S.C. § 432(c) (now 52 U.S.C. § 30102(c)) and 11 C.F.R. § 102.9(a), (b). Paragraph 8 is a conclusion, without any citations.

issues. The regulation cited in those paragraphs is 11 C.F.R. § 104.7, not § 102.9. OGC's own citation thus establishes that 11 C.F.R. § 104.7, and not § 102.9, governs here.

Moreover, OGC begs the question in its reliance on 11 C.F.R. § 102.9, as the regulation's text speaks of "required" information – meaning, it presupposes that there is required information of the sort demanded by the DFAR. But per 11 C.F.R. § 104.7, there is not. In fact, despite OGC's footnote reference to a 2007 Commission policy statement[11] (which does not appear to have been cited by the Commission since), that statement destroys OGC's sudden fondness with 11 C.F.R. § 102.9. Indeed, that policy statement only cites to 11 C.F.R. § 104.7, and never references 11 C.F.R. § 102.9.[12] The same is true of the Audit Division Materiality Thresholds – the threshold concerning "Omission of Occupation and Name of Employer" does not cite to 11 C.F.R. § 102.9. *See* Audit Division 2017-2018 Cycle Materiality Thresholds at 27.[13]

This is not to say that 11 C.F.R. § 102.9 does not apply at all. No one is questioning that there are generalized obligations to maintain records for certain items – check copies, receipts, an account of disbursements, credit card statements, and the like, as specified in the regulation – and that whatever records are required to be kept must be done so for three years. None of that is at issue here. But the general language of 11 C.F.R. § 102.9 does not supplant the particularized

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[11] *See* OGC Legal Analysis at 2, n.4.

[12] The same is true of materials posted to the Commission's website. For example, on a FEC page entitled "Fundraising Notices for Campaigns," the Commission provides guidance on best efforts. At the bottom of the page, the Commission only cites to 11 C.F.R. § 104.7(b) – without any citation to or mention of 11 C.F.R. § 102.9. *See* https://www.fec.gov/help-candidates-and-committees/making-disbursements/fundraising-notices-campaigns/#:~:text=To%20satisfy%20the%20%22best%20efforts,certain%20information%20from%20the%20contributor. And when clicking through the various hyperlinks, those also cite to 104.7(b). One web page also notes the distinction between written and oral follow up requests, highlighting that an oral follow up must be documented in a memorandum.

[13] As discussed *infra*, there appears to be no specific 2019-2020 Materiality Thresholds.

language found at 11 C.F.R. § 104.7.[14] That section is very clear on this point, stating that a committee will be "deemed to have exercised best efforts to obtain, ***maintain***, and report the required information if…the treasurer makes at least one effort after the receipt of the contribution to obtain the missing information … consist[ing] of … a written request sent to the contributor …." 11 C.F.R. § 104.7 (emphasis added). It thus answers the recordkeeping question – including what needs to be maintained – and there is no need to rely on (or otherwise look to) 11 C.F.R. § 102.9.

By its own language, 11 C.F.R. § 104.7 speaks to what needs to be maintained by a committee for best efforts purposes, and MPI has met that obligation here. Bootstrapping other, non-specific, generalized (real or imagined) requirements must be rejected. And in all events, such newfangled requirements cannot suddenly be imposed *via* a finding in an audit.

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For all these reasons, Subpart 3 of the DFAR's recommended finding ought to be rejected by the Commission.[15]

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[14] On their face, these regulations are not in conflict. But even if they were, it is well established that if there is a conflict between a general provision and a specific provision, the specific governs. *See* Antonin Scalia & Bryan A. Gardner, *Reading Law: The Interpretation of Legal Text* at 183 (discussing the general/specific canon, *generalia specialibus non derogsant*). *See also*, *e.g.*, *Radzanower v. Touche Ross & Co.,* 426 U.S. 148, 153 (1976) ("It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statue covering a more generalized spectrum."); *Morton v. Mancari*, 417 U.S. 535, 550-551 (1974) ("Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment).

[15] Included in the DFAR are a handful of contributions where it appears the Committee did report best efforts information. For example, Don Ware contributed $1,000 on March 17, 2020, listing "self" as employer, and "small business owner" as his occupation. He contributed another $1,000 on November 23, 2020, with the same best efforts information. Charles White contributed $40 on September 30, 2020, with N/A listed as employer and occupation – presumably, that means retired or unemployed. Similarly, Paul Messinger listed N/A as his employer, and funeral director as his occupation. These descriptions ought to be deemed adequate. *See* ADR 885 (Sinema for Arizona)(complaint-generated matter dismissed, despite 10,000 entries with "N/A" and "Not Employed" in the employer and occupation field, mirroring descriptions used by ActBlue and Emily's List). As the D.C. Circuit recognized in *Republican National Committee*, the best efforts requirement "only requires committees to use their best efforts to gather the information and then report to the Commission *whatever information donors choose to provide*." 76 F.3d at 406. If a donor provided "inadequate" employer or occupation information in response to the committee's follow-up letter, there is no further obligation on the committee to keep on repeating the cycle until the

## B. All Subparts in the DFAR Contain Common Math Errors That Demand Commission Scrutiny and Rejection of The Findings.

### 1. More issues with DFAR Subpart 3.

There is an additional reason to reject the DFAR's handiwork: Erroneous math. Focusing on Subpart 3, the DFAR claims that MPI did not provide records to demonstrate timely "best efforts" for 222 contributions, totaling $59,841. The DFAR incorrectly includes numerous contributions in these amounts that did not require "best efforts" at all. "Best efforts" requirements apply to a contribution that alone exceeds $200 or, when added to all other contributions made by the same donor in the calendar year, aggregates in excess of $200. *See* 52 U.S.C. § 30104(b)(3)(A) (tying reporting obligations to contribution amounts); 11 C.F.R. § 104.7(b). Nowhere in the law does it demand best efforts just because a committee voluntarily chooses to itemize on a report contributions that do not surpass the $200 threshold. But hidden within its calculations,[16] the DFAR includes numerous contributions that are $200 or less, even when aggregated with other contributions from the contributor. Here are just some examples:

- The DFAR's calculations include a $40 contribution from Jo Ann K. Scharf on November 7, 2019. At the time of this contribution, Ms. Scharf's total 2019 contributions did not aggregate in excess of $200 – rather, they aggregated only $165. (Scharf subsequently gave another $60 in December 2019, triggering best efforts.) Thus, there was no best efforts obligation regarding the November 7, 2019 contribution – *i.e.*, the sending of a follow up letter was not required – but the DFAR includes this contribution among its finding in Subpart 3. Ms. Scharf also made several contributions in 2020, including a contribution of $20.20 on May 31 that the Audit staff has included among the contributions reflecting failed best efforts, even though it did not trigger the best efforts obligation. Instead, a separate contribution of $120 Scharff made that same day triggered the obligation. It is wrong to include the lesser contribution as a violation, but the DFAR does so.

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donor offers information considered "adequate" by the Commission. Such a rule would do exactly what the D.C. Circuit said the FEC could not, and require far more than "best efforts."

[16] For whatever reason, the Audit Division does not ordinarily provide schedules that support its conclusion in its reports. Here, the DFAR splashes around numbers (for example, 222 contributions, $59,841), but on the face of the DFAR, there is no way to know which contributions are being included. Here, we requested that the Audit Division provide supporting schedules after delivery of the DFAR, which they eventually did.

- The same is true of contributor Rosie F. Macadangdang. She contributed $100 on March 16, 2020; another $100 on March 18; and yet another $100 on March 20. All three were itemized by MPI on its report, but the first two did not need to be and did not trigger best efforts. Yet the DFAR includes those first two contributions, even though they totaled just $200, below the threshold.

- Wanda A.S. Mullholland is another example. She gave three contributions in April 2020: $100, $60 and $60. The DFAR takes issue with all three, even though the first two did not exceed $200, standing alone or in the aggregate.

- Same for Shelia Palandjian. She contributed three times in April 2020: $200, $200, and $50. But the DFAR takes issue with all three, even though one of them necessarily could not have triggered best efforts obligation (even though MPI chose to itemize it on its report).

- Same for Harriet Yarbrough. She contributed twice in April 2020: $150 and $250. But the DFAR includes the first $150 contribution as yet another best-efforts violation.

Indeed, the schedules provided in support of the DFAR appear to have several errors like these, and those errors add up. They reveal dozens and dozens of contributions that did not exceed $200 on their own or result in aggregation over $200. Those are not best-efforts violations, since best efforts obligations only attach to those contributions that tip the calendar-year aggregate over $200. There is no duty to collect such information for contributions below the $200 threshold,[17] even if the reporting committee elects to itemize them on its reports. And

[17] Best efforts obligations are not tied to whether a contribution is itemized or not – no statute or regulation says that. In other words, over-disclosure *via* optional itemization does not automatically trigger the need to pursue best efforts follow-up *via* letter – instead, best efforts is tied to the $200 threshold. Here, MPI over-disclosed, and itemized numerous small contributions that did not require itemization. But merely because MPI over-disclosed does not mean all those contributions require additional best efforts work and can be declared violations. To agree with the DFAR is to unnecessarily punish a small committee that raises small contributions and goes above and beyond when it comes to disclosing those contributions *via* itemization. Otherwise, MPI will amend its reports to remove the optional itemizations, and moot the issue.

once the $200 threshold is surpassed, the committee has no obligation to go back in time to send letters for each of the past (below threshold) contributions.[18]

The DFAR thus takes a possible single potential violation and attempts to morph it into several, by going back in time and imposing a best-efforts follow-up obligation on contributions that did not exceed $200 alone or in the aggregate. This is not the first time Commission staff has tried to take one alleged mistake and turn it into several. *See* MURs 5957 & 6031 (Sekhon & Hagan), Statement of Reasons of Vice Chairman Petersen and Commissioners Hunter and McGahn, supporting dismissal of the matter.[19] The DFAR ought not be able to "cook the books" like this, making a relatively minor issue look like a major series of violations.

**2. Related problems with DFAR Subparts 1 & 2.**

This sleight of hand is not limited to Subpart 3 in the DFAR but is also baked into Subpart 1, concerning the alleged sending of "untimely" letters. The DFAR takes issue with

[18] This is supported by the Commission's reporting forms. Those merely ask for a contribution amount, and the total amount from that contributor when aggregated with previous contributions. There is no obligation to go back and amend previous reports to itemize initial small contributions so as to include occupation and employer.

[19] As if their citation to the conciliation agreement in MURs 5239 & 5240 was not bad enough, OGC's treatment of MURs 5957 & 6031 displays a breathtaking lack of candor to the Commission. These MURs were dismissed, and the Statement of Reasons was issued by the controlling group Commissioners. *See Citizens for Responsibility & Ethics in Washington* v. FEC, 892 F.3d 434, 437-38 (D.C. Cir. 2018) (*citing Common Cause v. FEC*, 842 F.2d 436, 449 (D.C. Cir. 1988) (discussing who is the controlling group). Thus, and contrary to OGC's claim, it does represent the conclusions of the Commission. Worse, OGC fails to mention that in another matter, it had sought *Chevron* deference for the views of three Commissioners after a 3-3 split on an advisory opinion request, initially claiming that such views were entitled to deference as the final word of the agency. *See generally* AO 2012-19 (American Future Fund); Dft. # 14, Def. FEC Mem. In Opp. To Plfs' Mot. For Prelim. Inj. At 7, 7 n,2, 9-10, *Hispanic Leadership Fund, Inc. v. FEC*, 1:12-cv-00893-TSE-TRJ (E.D. Va. Aug. 15, 2012)(where OGC claimed "[t]he Commission's statutory interpretation is entitled to deference," when in reality it was a 3-3 vote on an advisory opinion). And OGC also does not mention the FEC's recent loss over attempts to hide 3-3 votes in enforcement cases from the public. *Heritage Action for America v. FEC*, No. 1:22-cv-01422, 2023 WL 4560875 (D.D.C. July 17,2023). Ultimately, a disagreement over a best efforts finding in an audit is not the time or place for OGC to plant its selective flag on the meaning of 3-3 votes – particularly given the recently unmasked efforts to hide such votes from those accused of wrongdoing. *Id*. What OGC does not do here, because it cannot, is attack the Statement of Reasons' statement of the law in MURs 5957 & 6031: "[T]he committee may demonstrate the use of "best efforts" by providing a copy of the solicitation (containing the clear and conspicuous request and statement), and a sample letter *or* phone log showing at least one effort to obtain missing information." MURs 5957 & 6031 SOR at 10. *Accord*, MUR 5840 (Simon), F&LA at 2.

supposed untimely best-efforts letters that either never had to be sent at all, or alternatively, should be applied to other contributions received from the same contributor in the same month. For example:

- Ms. Mullholland is relevant here as well. As noted above, she made three contributions in April 2020, two for $60 and one for $100. For one of them, the DFAR declares that an untimely letter was sent, and for the other two, it claims there is a lack of best-efforts documentation due to no letter being sent. So all agree that a letter was sent at some point – but yet some of these contributions are lumped into the no-letter-at-all bucket, and are essentially double-counted.

- Similarly, Colonel Frank Harris III gave two $50 contributions in May 2020, which took him over the $200 aggregate threshold. For one of those contributions, the DFAR says a best-efforts letter was sent but untimely, yet for the other contribution it asserts that no letter was sent. Only one letter needed to be sent to the same contributor, but the DFAR includes each contribution as a separate violation.

- Same with Katherine Collins, and her two contributions of $150 and $90 in May 2020, and Nancy Daggett and her contributions of $50, $80, $90 at issue in the DFAR. The DFAR claims no letters for some of these contributions, but untimely letters for others. Which is it?

The staff's over-inclusive math even infects Subpart 2 of the DFAR, where the Committee has already amended in accordance with Audit Division recommendations. This subpart concerns best efforts information that the Committee obtained but allegedly did not include on its reports. To be clear, those amendments included information that was not legally required (due to the size of the contribution), but the Committee nonetheless followed the recommendations of Commission staff. But now there are supposed violations regarding best efforts for small contributions. For example, Kenneth K. Powers made a $200 contribution in November 2019, and a $150 contribution in December 2019. Only the second triggered mandatory itemization and best efforts, but the Audit Division has included the first contribution as requiring amendment in Subpart 2, and included it in the grand total of alleged violations. Powers also made two contributions in June 2020 – one of $100 and one of $50 – that did not

bring his aggregate total over the $200 threshold (he had contributed only $30 before then). He made a third contribution received that same month, for $80, which did exceed the threshold, and alone triggered any best-efforts obligation. Thus, the DFAR wrongly includes an extra violation, and $70 too much in its dollar calculations. The same is true for Bradley Flynn. He made two $200 contributions in September 2020 – his only contributions of the year. As a matter of simple math, only one of these contributions could have triggered a best-efforts obligation, yet the DFAR counts them both against the Committee.

So why does this matter? The first reason is self-evident: Audit reports ought to be accurate, and when the Commission brands someone as a lawbreaker, the details need to be correct. But there is a more subtle and perhaps sinister reason why this matters. As the Commission knows, audits can be referred for further enforcement action. This is public knowledge, and is reflected in the publicly available Materiality Thresholds for audits. In what we assume to be Commission-approved thresholds,[20] omissions of occupation and employer information will be referred to ADR if: "(1) the aggregate amount of itemized contributions having missing or inadequate occupation/name of employer is greater that [REDACTED] of all itemized contributions requiring such disclosure, and (2) the aggregate amount exceeds [REDACTED]." Audit Division 2017-2018 Materiality Thresholds at 27.

The key phrase here is "requiring such disclosure," which refers to whether or not a contribution must be itemized. Contributions that are not required to be itemized do not count in this calculation. To do otherwise would punish MPI for voluntarily over-disclosure. Yet the DFAR includes numerous contributions that are not required to be itemized. For example, the

[20] It appears that the Commission has not approved materiality thresholds for the 2019-2020 election cycle. If so, there can be no findings in an audit, as there are no pre-established criteria for what is and what is not material. The Commission's website indicates that 2019-2020 audits will use the criteria from 2017-2018. This is abnormal.

DFAR claims in its initial summary chart, that of "Contributions **Requiring** Itemization," there is "Missing or Inadequate Occupation and/or Name of Employer Disclosure" for 558 contributions, totaling $188,852. DFAR at 6 (emphasis added). The summary also claims that this is 52% of contributions – without clarifying how that percentage was calculated. The auditors subsequently explained:

> We determined the total number of contributions from individuals requiring itemization to be $360,617, so when you divide the total number of the errors ($188,852) by the total number of contributions from individuals requiring itemization ($360,617), you get the 52%.

Email exchange with Audit Division (October 16, 2023).

This paints an extremely misleading picture of MPI. The percent brandished about in the DFAR is in reality of percentage of a small subset of the Committee's activity. Per the DFAR, the Committee raised $1,349,514 during the 2019-2020 cycle. So even taking the DFAR's $188,852 number, the amount of contributions at issue in the DFAR is less than 14 percent of the Committee's contributions.[21] And the Committee had 28,945 contributions in 2020 alone, with over 30,000 for the cycle. The DFAR takes issue with 558 contributions, or less than 2%. One would never know this from the face of the DFAR; instead, it is made to look like there were significant issues a majority of the time.[22]

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[21] This raises a second question related to whether there are Commission-approved materiality thresholds. Given the low percentage, it is fair to ask whether this finding is material at all. Percentages that low are generally seen as non-material and usually do not result in audit findings. This becomes even more bizarre when one realizes the $188,852 number is artificially high, and a more accurate number would probably drop this percentage down below 10%.

[22] That all potential best efforts violations, big and small, are treated the same also leads to an overly sinister portrayal of MPI and any other similarly situated committees. If a committee completely blows of best efforts – for example, it does not include a request for the information on its solicitations, does not do any follow-up, and otherwise undertakes no efforts – that is treated the same as a committee that at least undertakes some best efforts. This is a result of an over-reading of the Materiality Thresholds, which treats missing information and inadequate information as the same. That may be acceptable for determining whether something ought to appear in an audit at all; but it ought not prevent the audit report itself from being drafted in a way that separates the wheat from the chaff and presents the facts in way that is more neutral and thus fairer to a committee. And to reiterate, there are no materiality thresholds for the 2019-2020 cycle, rendering all of this suspect.

But even worse, the DFAR's numbers are simply (and obviously) wrong. Within the 558 contributions, there are dozens and dozens of contributions that did not require itemization, as they did not exceed $200 standing alone or when aggregated with other contributions. Yet these are included in a chart that claims to be "Contributions Requiring Itemization." The same is true of the $188,852. That amount includes contributions that did not need to be itemized, so there can be no finding that these contributions were "Contributions Requiring Itemization" due to "Missing or Inadequate Occupation and/or Name of Employer Disclosure."

Given the over-inclusion and double counting, the $188,852 figure is wrong, and to the extent there is a correct number, it is significantly lower. Dropping that number to be more accurate in turn drops the percentage well below 52%. And to be clear, even that is a misleading percentage, as it is a percent of a subset of the Committee's activity.

## III. CONCLUSION

For all the foregoing reasons, we respectfully request that the Commission give appropriate scrutiny to the staff's work in the DFAR, and reject the DFAR's flawed and incorrect findings.

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Respectfully submitted,

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