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VIA E-MAIL TO BWHEELER@FEC.GOV

Brenda Wheeler
Federal Election Commission
Audit Division
1050 First Street, NE
Washington. DC 20463

Re: Madison Project Inc. 2019-2020 Cycle Audit—Interim Audit Report

Dear Ms. Wheeler:

Madison Project Inc. ("the Committee") submits this response to the Audit Division's Interim Audit Report ("the IAR"), which you provided to the Committee on June 6, 2023. Following some back and forth over issues related to alleged "independent expenditures," and after the Committee filed amended disclosure reports that "materially corrected the public record," IAR at 7, only a single proposed finding remains. As this letter explains, that lone finding, concerning the Committee's demonstration of its treasurer's so-called "best efforts," is premised on Audit's faulty characterization of the record before it and should be corrected.

The IAR repeatedly misrepresents the Committee's showing of its use of "best efforts" to report occupation and employer information for certain contributors during the audit period—efforts which were sufficient under the law. For example, the IAR claims that "for 222 contributions, totaling $59,841, [the Committee] did not provide the Audit staff evidence of 'best efforts'" during the Audit Division's fieldwork. *Id.* at 4. At one point the IAR even asserts that there is "**no evidence**" of best efforts. *Id.* at 7 (emphasis added) ("no evidence of … follow-up requests or any other 'best efforts' attempt has been provided to the Audit staff."). Not true.

In reality, and as the IAR elsewhere concedes, the Committee, through counsel, represented that, "to the best of the treasurer's knowledge and belief, … (1) all solicitations included the requisite 'best efforts' language seeking the relevant information, and (2) in the event a contributor did not provide occupation and employer information, the treasurer sent a follow-up letter seeking the information" consistent with 11 C.F.R. § 104.7(b). *Id.* The Committee also provided a copy of the template letter it sent. Moreover, as the Commission is already aware, the Committee produced a mountain of solicitations that clearly informed potential contributors that the Committee was seeking their occupation and employer information. That alone demonstrates at

least some very real evidence of "best efforts"—and certainly undercuts the IAR's absolutist claim that the committee provided "no evidence."

Indeed, if the Committee's treasurer did not use "best efforts" to obtain missing contributor information in the regular course, as the IAR claims, how did the Committee come about the information for the majority of its receipts—including the 142 contributions discussed in the IAR, which the Committee disclosed by amendments that have "materially corrected the public record"? IAR at 5–7. Did those contributors spontaneously provide their occupation and employer? Of course not. The contributors obviously provided their identifying information because the Committee had asked for it, and not on a whim. As the IAR itself states, the record shows that "*the treasurer sent follow-up requests as soon as she was given notice that there was missing contributor information*," with the IAR only taking issue with the timing in certain circumstances. *Id.* at 7 (emphasis added).

Our fundamental objection to all of this is that the IAR appears to be trying to make new law here. Without citing to any authority, the IAR contends that "[w]hile [52 U.S.C. § 30102(i)] does not specify how a committee may show that it satisfied best efforts, something must be preserved which demonstrates a committee's attempt to satisfy the requirements." *Id.* (emphasis omitted). But no such requirement exists in the text of the barebones statutory provision itself:

> When the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act for the political committee, any report or any records of such committee shall be considered in compliance with this Act or chapter 95 or chapter 96 of title 26.

52 U.S.C. § 30102(i). And while there are implementing regulations that go far beyond the language of the statute, they too say nothing of the recordkeeping duties the IAR appears to seek to create. *See* 11 C.F.R. § 104.7. To the contrary, any such obligation runs counter to the text of the regulation, which only imposes a preservation requirement on oral requests—without imposing a similar requirement to maintain a copy of each and every letter sent, the maintenance of a log of letters, or whatever else IAR now seeks to impose.

Any such recordkeeping obligation would also contradict the purpose of the "best efforts" requirement. Congress first enacted the "best efforts" provision in 1976. Senator Packwood, the provision's sponsor, explained that it was an "anti-nit-picking amendment," which "merely says that if a finding is made that they tried in good faith to try to comply with the law they shall not be harassed." 122 Cong. Rec. 7,922-23 (1976) (statement of Sen. Packwood). Similarly, Senator Stevens, who apparently drafted the provision, emphasized that it was meant to lessen the "nit-picking that has been going on about these reports," which he attributed not to the Commission's

actions but to the "very, very rigid" requirements of the statute. *Id*. at 7,196 (statement of Sen. Stevens). Accordingly, when the Commission first issued a regulation interpreting "best efforts," it explained that "[i]n determining whether or not a committee has exercised 'best efforts,' … *[t]he main concern [is merely] whether the committee has in place a systemized method for complying with the Act's disclosure requirements.*" Explanation & Justification, *Amendments to Federal Election Campaign Act of 1971; Regulations Transmitted to Congress*, 45 Fed. Reg. 15,080, 15,086 (Mar. 7, 1980) (emphasis added).

Commission efforts to impose additional regulatory burdens in this area have flared up before, and not fared well. Indeed, in ruling against the Commission, the D.C. Circuit in *Republican National Committee v. FEC*, 76 F.3d 400 (1996), made clear that the "best efforts" obligation is minimal for purposes of reporting employer and occupation information. *Id.* at 406. In fact, the law "only requires committees to use their *best efforts* to gather the information and then report to the Commission whatever information donors choose to provide." *Id.*

Lastly, Commission MURs have directly addressed this issue and contradict the IAR. *See, e.g.*, MUR 6438 (Art Robinson for Congress), Factual & Legal Analysis at 15–16 (relying on committee's sample letters and statement of "procedure" in sending those letters in the regular course of operations as sufficiently showing "best efforts"); MUR 5840 (Simon), Factual & Legal Analysis at 2 (finding committee had shown "best efforts" by "submitt[ing] sample letters that it states were used throughout the campaign"). For example, in MURs 5957 & 6031 (Sekhon & Hagan), Vice Chairman Petersen and Commissioners Hunter and McGahn wrote:

> Where a committee uses and demonstrates its use of "best efforts," the committee will be considered in substantial compliance with the Act, even if the committee is unable to obtain "contributor information" as defined by [52 U.S.C. § 30101(13)]. Thus, under Commission regulations, when a committee receives a contribution without the required contributor information or a check is received as a result of an oral solicitation, and the contributor information is not otherwise in the committee's possession, the 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 the missing information.

MURs 5957 & 6031 (Sekhon & Hagan), Statement of Reasons of Vice Chairman Petersen and Comm'rs Hunter and McGahn at 9–10 (emphasis added and footnotes omitted). These MURs stand for the clear proposition that a sample letter—especially if also accompanied by representations concerning a committee's standard operating procedures, as is the case here—is sufficient to show "best efforts," and any requirement for a log applies only to oral follow-up

requests. "Neither the Act, Commission regulations, nor any Commission policy statement or other guidance requires committees to keep a record of *each* follow-up letter in order to 'demonstrate' best efforts." *Id*. at 10, n.43 (emphasis in original).

The Committee and its treasurer thus have adequately shown the existence of, and represented their adherence to, a system of compliance with its disclosure obligations, and the IAR's misguided findings to the contrary should be corrected.

Thank you for your attention to this response.

Respectfully,

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cc: Kedrick Smith, ksmith@fec.gov