



FEDERAL ELECTION COMMISSION
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MEMORANDUM

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SUBJECT: Legal Analysis – Draft Final Audit Report on Madison Project, Inc. (LRA 1163)

I. INTRODUCTION

The Office of the General Counsel has reviewed the Draft Final Audit Report (“DFAR”) on the Madison Project, Inc. (“MPI”). The DFAR contains one finding: Disclosure of Occupation and Name of Employer. The DFAR concludes that MPI has not demonstrated that it exercised its best efforts to obtain, maintain, and submit occupation, name of employer information, or both, for 558 contributions totaling \$188,852.

The proposed finding consists of three categories: (1) untimely efforts to obtain contributor information for 194 contributions totaling \$74,639; (2) contributor information obtained but not disclosed for 142 contributions totaling \$54,372; and (3) best efforts documentation not provided for 222 contributions totaling \$59,841. OGC concludes that MPI has not demonstrated best efforts to obtain, maintain, and submit required information on its disclosure reports for 558 contributions totaling \$188,852 and concurs with the finding.

II. LEGAL BACKGROUND

The Federal Election Campaign Act, 52 U.S.C. §§ 30101-45 (the “Act”), requires political committees to report “the identification” of certain individual contributors, including “the occupation of such individual, as well as the name of his or her employer.”¹ Notwithstanding this requirement, the Act specifies that “[w]hen the treasurer of a political committee shows that best efforts have been used to obtain, maintain, and submit the information required by this Act ... any report or any records of such committee shall be considered in compliance with this Act.”² In upholding the Commission’s best efforts regulation against a First Amendment challenge, the Court of Appeals for the D.C. Circuit explained that “because the ‘best efforts’ provision — added to the Act after the Court decided *Buckley* — essentially offers an optional safe harbor or affirmative defense for political committees unable to secure the identifying information, it actually makes the Act’s reporting requirements less stringent than the absolute disclosure requirements upheld in *Buckley*.”³

The Commission has clarified that “[w]hen treasurers make a sufficient showing of best efforts, the treasurers or committees shall be considered in compliance with” the Act.⁴ The Commission further explained that in audits, the “best efforts standard is an affirmative defense and the burden rests with the political committee and its treasurer to present evidence sufficient to demonstrate that best efforts were made.”⁵

The best efforts regulation specifies that “the treasurer and the political committee will only be deemed to have exercised best efforts to obtain, maintain and report the required information if,” for each contribution that lacks the required contributor information, “the treasurer makes at least one effort after the receipt of the contribution to obtain the missing information.”⁶ The regulation further specifies that “[s]uch effort shall consist of either a written request ... or an oral request ... documented in writing” and must be “made no later than thirty (30) days after receipt of the contribution.”⁷

¹ 52 U.S.C. §§ 30104(b)(3), 30101(13).

² 52 U.S.C. § 30102(i); *see also* 11 C.F.R. § 104.7(a).

³ *Republican Nat’l Comm. v. FEC*, 76 F.3d 400, 409 (D.C. Cir. 1996) (referencing *Buckley v. Valeo*, 424 U.S. 1 (1976)) (“*RNC v. FEC*”) (upholding 11 C.F.R. § 104.7(b) follow-up requirement against First Amendment, APA, and *Chevron* challenges, while also finding phrasing of mandatory follow-up language inconsistent with the Act); *see also* Recordkeeping and Reporting by Political Committees: Best Efforts, 62 Fed. Reg. 23,335, 23,336 (Apr. 30, 1997) (replacing mandatory statement with example statements).

⁴ Statement of Policy Regarding Treasurers’ Best Efforts to Obtain, Maintain, and Submit Information as Required by the Federal Election Campaign Act, 72 Fed. Reg. 31,438, 31,440 (June 7, 2007) (“Policy Statement”).

⁵ *Id.*

⁶ 11 C.F.R. § 104.7(b)(2).

⁷ *Id.*

The Commission has explained that it “will generally conclude that a committee has not met the best efforts standard if the committee’s failure to obtain, maintain, or submit information or reports is due to,” *inter alia*, “delays caused by committee vendors or contractors” or “failure to know or understand the recordkeeping and filing requirements of the Act.”⁸

III. LEGAL ANALYSIS

MPI, in its responses to the audit exit conference (“Exit Response”) and IAR (“IAR Response”) (collectively, “Responses”), argues that it made best efforts to obtain contributor information and those efforts should excuse its failure to report the occupation or name of employer for the 558 contributions in the proposed finding.⁹ For the reasons below, OGC concludes, for each of the three categories, that MPI has not presented evidence sufficient to demonstrate that it made best efforts.

A. Untimely Efforts Made to Obtain Contributor Information

The first category addressed in the DFAR concerns the 30-day time frame within which section 104.7(b)(2) specifies a committee must “make at least one effort after the receipt of the contribution” to obtain information required to be reported in order to satisfy the best efforts defense.¹⁰ For 194 contributions totaling \$74,639, the DFAR recounts that: (1) MPI provided auditors a list indicating that it had sent “best efforts” letters to these contributors; (2) the list did not specify the dates MPI sent the letters; and (3) the treasurer indicated the letters “were generally not mailed within 30 days.” The unsworn Exit Response asserted, without supporting documentation, that “the treasurer did send follow-up letters within thirty days *of being made aware*” of missing information.¹¹ The Exit Response further explained, without supporting documentation, that MPI’s vendor responsible for receiving contributions “only provided [MPI] with contributor information every thirty days. As soon as the treasurer received notice of omitted contributor information, she would send the requisite letter to the contributor within thirty days.”¹²

Commission regulations provide that the “date of receipt” of a contribution is the date a person “obtains possession of the contribution.”¹³ Even assuming, *arguendo*, that the unsworn

⁸ Policy Statement, 72 Fed. Reg. at 31,440.

⁹ See Exit Response at 1 (Dec. 5, 2022) (stating “all that is required is that a treasurer use her “best efforts ...”); IAR Response at 1 (Jul. 10, 2023) (stating that Committee’s best efforts “were sufficient under the law.”).

¹⁰ 11 C.F.R. § 104.7(b)(2).

¹¹ Exit Response at 2 (emphasis added). The IAR Response does not address the timing of these letters.

¹² *Id.*

¹³ 11 C.F.R. 102.8(b)(2) (also specifying the time within which such person, if not the treasurer, must forward the contribution to the treasurer); *cf.* 11 CFR 102.17(c)(3)(iii) (providing that political committee receives contribution through joint fundraising committee on date contribution is received by committee’s joint fundraising representative).

Exit Response satisfied MPI’s burden for presenting sufficient evidence of best efforts, MPI’s efforts were untimely and do not meet the regulatory requirements for the best efforts standard. Because MPI represents that its vendor “receive[d]” the contributions, the follow up letter requirement at section 104.7(b)(2), which hinges on the date of receipt, must be sent no later than 30 days after the vendor’s receipt. According to MPI’s own response, it failed to do so. MPI explains that it sent follow up letters within 30 days of *being made aware* of missing information, which followed the vendor’s *forwarding* of the contributions, rather than within 30 days after the vendor’s receipt of the contributions. Because MPI explains that the vendor forwarded the contributions to MPI every 30 days, the follow up letters appeared to have been sent more than 30 days after the vendor’s receipt. The letters thus were untimely and do not meet the 30-day period specified in 11 C.F.R. § 104.7(b)(2). Moreover, to the extent that MPI’s failure to timely send letters to obtain information was due to delays caused by its vendor, such a reason does not satisfy the best efforts standard.¹⁴ OGC concludes that MPI has not met its burden to present evidence sufficient to demonstrate that it made best efforts for 194 contributions totaling \$74,639.¹⁵

B. Contributor Information Obtained but Not Disclosed

The second category concerns the requirement that committees claiming the best efforts defense must demonstrate best efforts to submit the information they do obtain in accurate reports.¹⁶ For 142 contributions totaling \$54,372, MPI had obtained the information required to be reported but had not, as of the date it was notified of this audit, submitted such information on its reports. The Exit Response acknowledged that MPI obtained the information and stated that it “will file amendments with the information at the appropriate time.”¹⁷ On May 18, 2023, almost six months after the exit conference at which Audit staff provided MPI a list of contributions in this category, MPI filed amended reports to disclose the missing occupation or name of employer information it obtained for 139 of the 142 contributions.

To satisfy the best efforts standard, a committee must not only present evidence sufficient to demonstrate that it made best efforts to obtain the required information but also that it made best efforts to submit such information on its disclosure reports.¹⁸ MPI submitted

¹⁴ See Policy Statement, 72 Fed. Reg. at 31,440.

¹⁵ See *id.*

¹⁶ See 52 U.S.C. § 30102(i); 11 C.F.R. § 104.7(a); Policy Statement, 72 Fed. Reg. at 31,440 (“With respect to 11 CFR 104.7(a), the Commission intends to consider a committee’s affirmative steps to keep adequate records and make accurate reports, as well as the reasons for its failure to obtain, maintain, or submit information properly.”)

¹⁷ Exit Response at 1.

¹⁸ See 52 U.S.C. § 30102(i) (when treasurer “shows that best efforts have been used to obtain, maintain, *and submit* the information required by this Act for the political committee, any reports . . . shall be considered in compliance” (emphasis added)); 11 C.F.R. § 104.7(a) (same); *id.* § 104.7(b)(3) (specifying that treasurer and committee “will only be deemed to have exercised best efforts” if “treasurer reports all contributor information not provided by the contributor, but in the political committee’s possession”); *id.* § 104.7(b)(4) (same and requiring committee to file with its next regularly scheduled report or file on or before its next regularly scheduled reporting

the missing occupation and name of employer information it obtained for 139 contributions, totaling \$53,842, on May 18, 2023. This materially corrected the public record but not within the timeframes in 11 C.F.R. § 104.7(b)(4). MPI did not address the untimely submission of the information in this category in its IAR Response. It has not, to date, presented evidence demonstrating best efforts under this category, such as that the failure to submit the information “was a result of reasonably unforeseen circumstances beyond the control of the committee” or that, “[u]pon discovering the failure, the committee promptly took all reasonable additional steps to . . . correct any inaccurate reports.”¹⁹ Instead, MPI submitted the required information in amended reports years after the initial receipts of contributions and almost six months after being alerted at the audit exit conference, without further explanation as to the delayed timing. OGC thus concludes that MPI has not met its burden to present evidence sufficient to demonstrate that it made best efforts for these contributions.

C. Best Efforts Documentation Not Provided by Committee

The third category concerns the requirement that committees not only demonstrate that they have made best efforts to obtain information required to be reported, but also that they have maintained the records demonstrating such efforts.²⁰ For 222 contributions totaling \$59,841, the unsworn Responses assert that, “to the best of the treasurer’s knowledge and belief,” MPI’s “solicitations included the requisite best efforts language” and “the treasurer sent a follow-up letter” seeking occupation and name of employer from contributors who did not provide it.²¹ Though the IAR Response generally states that MPI provided Audit staff a copy of the template letter it sent to contributors,²² the DFAR clarifies that the 222 contributions included in this category were not included in MPI’s lists of contributors to whom it had sent a follow-up letter. The Exit Response more specifically represents that “the treasurer did not log the sending of the follow-up letters, maintain copies or the like” for this category of contributions.²³

The Responses do not explain MPI’s failure to keep or submit supporting records but, rather, argue that such recordkeeping is not required to satisfy the best efforts defense. The Exit Response cites *RNC v. FEC*, generally, for the proposition that “committees are not obligated to

date amendments “[i]f any of the contributor information is received after the contribution has been disclosed on a regularly scheduled report”); Policy Statement, 72 Fed. Reg. at 31,440 (specifying that “Commission intends to consider a committee’s affirmative steps to . . . submit the information or reports at issue” (emphasis added)).

¹⁹ See Policy Statement, 72 Fed. Reg. at 31,440 (providing examples for which the Commission “will generally conclude that a committee has shown best efforts if the committee establishes” it).

²⁰ See 52 U.S.C. § 30102(i); 11 C.F.R. § 104.7(a); Policy Statement, 72 Fed. Reg. at 31,440 (“With respect to 11 CFR 104.7(a), the Commission intends to consider a committee’s affirmative steps to keep adequate records....”).

²¹ Exit Response at 1; see also IAR Response at 1.

²² IAR Response at 1.

²³ Exit Response at 1

obtain” contributor information because “all that is required is that a treasurer use her ‘best efforts’ in endeavoring to obtain and submit it.”²⁴ The Exit Response then argues, without authority, that “additional efforts” such as logging letters or maintaining copies, “are not required.”²⁵ The Exit Response concludes that “the treasurer’s recollection confirms” the best efforts requirements were met.²⁶

The IAR Response similarly argues that “the ‘best efforts’ obligation is minimal.”²⁷ More specifically, MPI argues that a sample follow-up letter submitted to Audit staff is sufficient to meet the best efforts standard.²⁸ In support of its argument, MPI cites MUR 6438 (Art Robinson for Congress) and MUR 5840 (Ellen Simon for Congress) for the proposition that a sample letter is sufficient to demonstrate best efforts, “especially if also accompanied by representation concerning a committee’s standard operating procedures.”²⁹ These MURs do not, however, determine that the best efforts defense is satisfied based on only a committee’s sample letter and representation of committee procedure.

In MUR 6438, the Commission did not conclude that the Robinson committee had satisfied the best efforts defense for its failure to disclose employer and occupation information. The Commission concluded that the Robinson committee had “satisfied some of the elements” of the best efforts defense but that more information about the Robinson committee’s efforts could be developed; the Commission also concluded, however, that an investigation would not be a prudent use of resources and thus exercised its prosecutorial discretion and dismissed the alleged reporting violation, with a caution.³⁰ Moreover, the Commission made the decision to dismiss for prosecutorial discretion after considering, in addition to sample follow up letters, a representation that the letters “were sent” to contributors, specific information showing the committee’s standard operating procedures involved sending a follow up letter within 30 days, the committee’s status as a first time campaign, and the committee’s demonstration of “significant improvement in its efforts to obtain and disclose” the required information

²⁴ Exit Response at 1; *accord supra*, note 3 and related text (describing best efforts safe harbor from Act’s “stringent” reporting requirements).

²⁵ Exit Response at 2.

²⁶ *Id.*

²⁷ IAR Response at 2.

²⁸ *Id.* at 3.

²⁹ *Id.* The IAR Response also cites a Statement of Reasons signed by MPI’s counsel and two other commissioners in support of its position, though the views of three commissioners do not represent the conclusions of the Commission. *See id.* (citing Statement of Reasons of Vice Chairman Petersen and Comm’rs. Hunter and McGahn, MURs 5957 (Committee to Elect Sekhon for Congress) and 6031 (Hagan Senate Committee)); *see also* 52 U.S.C. § 30109(a)(4) (requiring four affirmative votes at initial stage of an enforcement matter).

³⁰ Factual & Legal Analysis (“F&LA”) at 16, 18-19, MUR 6438 (Art Robinson for Congress) (citing *Heckler v. Chaney*, 470 U.S. 821 (1985)).

throughout the course of the election cycle.³¹ In MUR 5840, the Commission found reason to believe the Simon committee failed to disclose contributor information and then, after investigation, took no further action and closed the file.³² In taking this action, the Commission concluded that the Simon committee had exercised best efforts to obtain missing information, citing the committee’s submission of sample letters and representations that the letters “were used throughout the campaign and were mailed on a monthly basis to *all* contributors” who failed to provide complete information.³³

Although MPI submitted to Audit staff a sample letter and a list identifying the contributors to whom it purportedly sent the follow up letter, none of the listed contributors are among the 222 contributors included in this category. Moreover, MPI has not represented, or provided information, that its standard operating procedures were designed to send timely follow up letters, as discussed above. MPI’s arguments that sample letters (especially with representations concerning operating procedures) suffice to demonstrate best efforts are thus unfounded both legally and factually.

Ultimately, MPI’s assertion that records are not required to document best efforts is incorrect. Commission regulations explicitly require that the treasurer or her authorized agent “shall use his or her best efforts to obtain, maintain and submit required information and *shall keep a complete record of such efforts.*”³⁴ Additionally, the Commission explained that the “written record” requirement “will assist in verifying that such a request was indeed made.”³⁵ In addition to those belt and suspender provisions, section 104.14 of Commission regulations which governs “formal requirements” relating to reports, requires that committees “shall maintain all records ... which shall provide in sufficient detail the necessary information and data from which the filed reports and statements can be verified, explained, clarified, and checked for accuracy and completeness.”³⁶

Ignoring these record requirements in favor of a treasurer’s “recollection” as recounted by counsel in unsworn Responses would transform best efforts from a defense available upon

³¹ *Id.* at 15-19.

³² See F&LA at 8, MUR 5840 (Simon) (Aug. 13, 2007) (finding reason to believe on basis that the committee “has provided no documentation substantiating its efforts to comply with the law”); F&LA at 2-3, MUR 5840 (Simon) (Feb. 26, 2009) (taking no further action after investigation).

³³ F&LA at 2-3, MUR 5840 (Feb. 26, 2009) (emphasis added).

³⁴ 11 C.F.R. § 102.9(d) (emphasis added); *cf.* Conciliation Agreement ¶¶ IV.7-8, MURs 5239 & 5240 (Democratic Party of Arkansas) (May 13, 2002) (stating that committee did not satisfy minimum recordkeeping requirements and did not show best efforts for obtaining records to support disbursements, citing section 102.9(d)).

³⁵ Amendments to Federal Election Campaign Act of 1971, 45 Fed. Reg. 15,080, 15,086 (Mar. 7, 1980). Section 104.7(b) has been amended in multiple respects since 1980, but the basic requirement of a written record remains unchanged.

³⁶ 11 C.F.R. § 104.14(b)(1).

MPI's demonstration of its diligence³⁷ to one dependent on the Commission's faith in the treasurer. The Commission has explained that best efforts requires more than such faith:

Congress's choice of a "best efforts" standard, rather than a "good faith" standard, suggests that a treasurer cannot rely upon his or her earnestness or state of mind to the gain shelter of [Section 30102(i)'s] safe harbor. Rather, a treasurer has the burden of showing that the actions taken — the efforts he or she made to comply with the applicable reporting deadlines — meet the statute's demanding benchmark.³⁸

The Exit Response asserts that MPI's treasurer made efforts to obtain missing contributor information without keeping the required records of those efforts. The unsworn assertions in both Responses concerning the treasurer's recollection do not fulfill any factor the Commission has identified as sufficient to satisfy the benchmark for best efforts.³⁹ They do not satisfy the plain language of 11 C.F.R. § 104.7(b) or other recordkeeping requirements.

The IAR Response asserts that the Commission's main concern for determining whether a committee has exercised best efforts is "whether a committee has in place a systemized method for complying with the Act's disclosure requirements."⁴⁰ Assuming *arguendo*, that a systematized method is all that is required to satisfy the Act's requirements, MPI has not made such a showing. OGC concludes that MPI has not demonstrated best efforts for 222 contributions totaling \$59,841.

³⁷ "The Commission considers best efforts to be 'a standard that has diligence as its essence.'" Policy Statement, 72 Fed. Reg. at 31,440 (quoting E. Allen Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law*, 46 U. Pitt. L. Rev. 1, 8 (1984)).

³⁸ Policy Statement, 72 Fed. Reg. at 31,440 (quoting Statement of Reasons at 2, Administrative Fine Case #549 (on Remand from *Lovely v. FEC*, 307 F. Supp. 2d 294 (D. Mass. 2004))); *see also* *RNC v. FEC*, 76 F.3d at 405 (quoting 122 Cong. Rec. 7922–23 (1976) (statement of Sen. Packwood) ("when introducing the 'best efforts' provision, the sponsoring senator said ... that a 'good faith effort' is 'not quite enough'")).

³⁹ *See* Policy Statement, 72 Fed. Reg. at 31,440.

⁴⁰ IAR Response at 3.