



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

June 5, 2023

MEMORANDUM

TO: Patricia C. Orrock
Chief Compliance Office

Dayna C. Brown
Assistant Staff Director, Audit Division

FROM: Neven Stipanovic *NFS*
Associate General Counsel, Policy Division

Jessica Selinkoff *\$*
Assistant General Counsel, Compliance Advice

Danita Alberico *DA*
Attorney

SUBJECT: Interim Audit Report on Madison Project, Inc. (LRA 1163)

I. INTRODUCTION

The Office of the General Counsel has reviewed the draft Interim Audit Report (“IAR”) on the Madison Project, Inc. (“Committee”). The draft IAR contains one finding: Disclosure of Occupation and Name of Employer. The draft IAR concludes that the Committee 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 the Committee 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

The Committee, in its response to the audit exit conference (“Response”), 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. For the reasons below, OGC concludes, for each of the three categories, that the Committee has not presented evidence sufficient to demonstrate its best efforts.

A. Untimely Efforts Made to Obtain Contributor Information

The first category addressed in the draft IAR concerns “obtaining” information required to be reported. For 194 contributions totaling \$74,639, the draft IAR recounts that: (1) the Committee provided auditors a list of contributors to whom it had sent “best efforts” letters; (2) the list did not specify the dates the Committee sent the letters; and (3) the treasurer indicated the letters “were generally not mailed within 30 days.” The unsworn Response asserts, without supporting documentation, that “the treasurer did send follow-up letters within thirty days of being made aware” of missing information. The Response further explains that the Committee’s vendor responsible for receiving contributions “only provided [the Committee] 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.”

Commission regulations provide that the “date of receipt” of a contribution is the date a person “obtains possession of the contribution.”⁹ Even assuming, *arguendo*, that the unsworn Response satisfied the Committee’s burden for presenting evidence of best efforts, the Committee’s efforts were untimely and do not meet the best efforts standard. Because the Committee 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 the Committee’s own response, it failed to do so. The Committee explains that it sent follow up letters within 30 days of the vendor’s *forwarding* of the contributions, rather than within 30 days after the vendor’s receipt of the contributions. Because the vendors forwarded the contributions to the Committee every 30 days, the follow up letters appeared to have been sent more than 30 days after the vendor’s receipt.

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

⁹ 11 CFR 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).

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 the Committee’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.¹⁰ OGC concludes that the Committee has not demonstrated best efforts for 194 contributions totaling \$74,639.

B. Contributor Information Obtained but Not Disclosed

The second category concerns “submitting” the information obtained. The Response states that the Committee obtained the information for 142 contributions totaling \$54,372 and “will file amendments with the information at the appropriate time.” The draft IAR indicates that six months after the exit conference, the Committee filed amended disclosure reports on May 18, 2023, that materially corrected the public record.

To satisfy the best efforts standard, the committees must not only obtain the required information but also submit such information on its disclosure reports.¹¹ The Committee submitted the missing occupation and name of employer information it obtained for 139 contributions, totaling \$53,842, on May 18, 2023, that corrected the public record but not within the timeframes in 11 C.F.R. § 104.7(b)(4). OGC thus concludes that the Committee did not demonstrate best efforts for these contributions.

C. Best Efforts Documentation Not Provided by Committee

The third category concerns “obtaining” information and “maintaining” the records purportedly demonstrating such efforts. For 222 contributions totaling \$59,841, the unsworn Response asserts that, “to the best of the treasurer’s knowledge and belief,” the Committee’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. The Response further represents that “the treasurer did not log the sending of the follow-up letters, maintain copies or the like” for this category of contributions.

The Response cites *RNC v. FEC*, generally, for the proposition that “committees are not obligated to obtain” contributor information because “all that is required is that a treasurer use

¹⁰ See Policy Statement at 31,440.

¹¹ 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 amend its reports “[i]f any of the contributor information is received after the contribution has been disclosed on a regularly scheduled report”); Policy Statement at 31,440 (specifying that “Commission intends to consider a committee’s affirmative steps to . . . submit the information or reports at issue” (emphasis added)).

her ‘best efforts’ in endeavoring to obtain and submit” the information.¹² The Response then argues, without authority, that “additional efforts” such as logging letters or maintaining copies, “are not required.” The Response concludes that “the treasurer’s recollection confirms” the best efforts requirements were met.

The Committee’s unsupported 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.”¹³ Additionally, the Commission explained that the “written record” requirement “will assist in verifying that such a request was indeed made.”¹⁴ 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.”¹⁵

Ignoring these record requirements in favor of a treasurer’s “recollection” as recounted by counsel in an unsworn Response would transform best efforts from a defense available upon the Committee’s demonstration of its diligence¹⁶ 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.¹⁷

¹² *Accord supra*, note 3 and related text (describing best efforts safe harbor from Act’s “stringent” reporting requirements).

¹³ 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)).

¹⁴ 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.

¹⁵ 11 C.F.R. § 104.14(b)(1).

¹⁶ “The Commission considers best efforts to be ‘a standard that has diligence as its essence.’” Policy Statement 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)).

¹⁷ Policy Statement 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

The Response asserts that the Committee's treasurer made efforts to obtain missing contributor information without keeping the required records of those efforts. The unsworn assertion concerning the treasurer's recollection does not fulfill any factor the Commission has identified, as a matter of policy, as sufficient to satisfy the demanding benchmark for best efforts.¹⁸ It does not satisfy the plain language of 11 C.F.R. § 104.7(b) or other recordkeeping requirements. OGC concludes that the Committee has not demonstrated best efforts for 222 contributions totaling \$59,841.

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’”).

¹⁸ See Policy Statement at 31,440.