April 18, 2023

Federal Election Commission
Audit Division
Attn: Kendrick Smith
1050 First Street, NE
Washington, DC 20463

Re: Draft Final Audit Report, Steve Daines for Montana

Dear Mr. Smith,

This response is submitted by the undersigned counsel on behalf of Steve Daines for Montana ("SDFM" or the "Committee") in connection with the Audit Division's Draft Final Audit Report. The Committee does not request an oral hearing.

We appreciate the Audit Division's efforts throughout this lengthy process and acknowledge that Audit staff made numerous adjustments to its preliminary findings in response to ongoing discussions and additional information provided. You and Ms. Reminsky have been helpful, responsive, courteous, and professional at all times.

The Committee previously submitted an Exit Conference Response (dated March 11, 2022) and Interim Audit Report Response (dated October 31, 2022). It is our understanding that both prior responses are available to the Commissioners for reference and review.

Additionally, please note that the Committee changed treasurers effective April 14, 2023. An amended Form 1 was filed to reflect this change.

<u>Finding 1: Receipt of Contributions in Excess of the Limits</u>

Refunded Contributions

As noted in the Draft Final Audit Report, there is a category of excessive contributions that were refunded by the Committee, in some cases more than once, but never deposited by the contributor. The Draft Final Audit Report, at page 9, finds this category totals $60,327. As noted on page 10, the Committee issued a disgorgement check in the amount of $56,920 to the U.S. Treasury. The Committee also disclosed refunds totaling $96,782 on its October 2022 quarterly report and provided documentation to the Audit Division showing that refunds totaling $57,282 had been deposited by the refund recipient. On April 13, 2023, the Committee provided additional records to the Audit Division demonstrating the deposit of additional refund checks issued to donors in September 2022.

The Committee intends to resolve all remaining excessive contributions that have not be refunded, reattributed, or redesignated as permitted at the conclusion of this audit.

Excessive Contributions Projected Through Sampling

As indicated in the Draft Final Audit Report, the Committee has objected to the use of sampling at all stages of this audit. We understand that the Audit Division has employed statistical sampling for many years. However, the Audit Division's finding with respect to the Committee's disclosure of contributions illustrates exactly why we object to the use of sampling.

The Audit Division found the Committee accepted excessive contributions totaling $496,604. This total includes excessive contributions totaling $152,451 that were discovered through the Audit Division's "100% Review of High Dollar Contributions," and $52,350 discovered through the Audit Division's "100% Review of Contributions Received Through Joint Fundraisers." The *specific* contributions making up these totals were provided to the Committee and the Committee has refunded and resolved a significant number of these contributions.

The remaining amount, $291,803, is the Audit Division's "Sample Projection Amount." The Draft Final Audit Report explains at footnote 3 that "[t]he sample error amount ($291,803) was projected using a Monetary Unit Sample with a 95 percent confidence level. The sample estimate could be as low as $143,260 or as high as $583,597." With respect to the sample projection, the Committee was able to address the excessive contributions found within the sample itself, which was provided to the Committee in the form of a spreadsheet which now contains an itemized list of only five contributions.

At page 11, the Audit Division concludes that the Committee has not resolved excessive contributions totaling $382,427. It is our understanding that this total includes the sample projection amount of $291,803, for which no complete, itemized list of identified and confirmed excessive contributions actually exists. And, as footnote 3 indicates, the total projected figure may be incorrect by hundreds of thousands of dollars.

Apart from the specifically identified excessive contributions included in the sample itself, the Committee does not understand how it is possible that it could have corrected the remaining *projected* errors that were not specifically identified. The Committee objects to the Commission placing a report on the public record that concludes that the committee failed to resolve excessive contributions in an amount that is greatly inflated by the projected sample amount. The Committee worked diligently to correct the actual, identified excessive contributions that the Audit Division brought to its attention, and objects to being faulted for not correcting unspecified *projected* excessive contributions.

Finding 2: Disclosure of Debts and Obligations

Media Placement / Ad Buy Invoice

With respect to the referenced ad buy of $108,750, the Committee received an invoice for that amount from its media vendor for media placement on or about June 15, 2020. (This invoice was *not* from any television or radio station or any station's advertising broker.) The Committee previously explained that the advertising buy that was to be funded with the invoiced amount was not placed and that time; rather, it was delayed until September 2020. To the best of the Committee's knowledge, its media vendor did not withdraw and reissue the June 2020 invoice. Instead, the Committee issued payment on the June invoice in September 2020 when the ad buy was actually placed. The Draft Final Audit Report takes the position that the invoiced amount ($108,750) should be included in the total figure for debts and obligations not properly included on a Schedule D. The Committee disagrees and believes this figure should be excluded from the total.

The Audit Division identified this issue in email correspondence in December 2021. Audit staff indicated that the invoice was not paid during the reporting period in which it was incurred, and the invoiced amount was not reported as a debt on two quarterly filings (July 2020 and October 2020). Audit requested comments or additional information about this particular invoice. In a response provided to the Audit Division on December 15, 2021, the Committee's treasurer explained: "Media is most generally required to be paid in advance. I would assume we decided not to purchase the 6/15/20 [vendor] invoice #6636 until a future date. It was actually purchased, and a wire was sent on 9/10/20." This issue was addressed again in our Interim Audit Report Response (October 31, 2022) at page 3 where we explained that "[t]he invoice dated June 15, 2020 did not reflect an actual obligation, and there was never any debt or obligation associated with this invoice that was required to be reported."

The Draft Final Audit Report states that no documentation was produced to verify this explanation, and absent such documentation, the amount must be treated as an unreported debt. The Committee did not produce written records evidencing the delay of the ad buy. It is possible that arrangements were made by telephone and no written records exist. The Committee contends, however, that its explanation is reasonable and entirely consistent with the realities of media placement / ad buy invoicing, and that no substantiating written documentation is necessary in these circumstances.

Invoices for television and radio advertising buys are typically issued to a political committee in advance by its media buyer *before* any actual contractual obligation to the television or radio stations exists. The media buyer generally does not commit to purchase airtime from a station without its client's funds in hand, and many stations will not book time until payment is received. This is unlike most vendors who provide goods and services first, and then receive payment from the committee. As a result, an invoice for an ad buy does not (in most cases) reflect an actual, incurred legal obligation because the ad buy has not yet been placed with the stations at the time the invoice is issued. Instead, once the ad buyer has the committee's funds, the ad buyer *then* incurs the obligation on the committee's behalf and simultaneously renders payment to the station's brokers. If the ad buy cannot be placed, perhaps due to limited inventory or because a station declines to run an ad, no obligation is created at all. Or, as happened here, the ad buy was simply not pursued until months later. In any of these cases, there is no debt or obligation.

In short, the June 2020 invoice does not indicate that an actual debt or obligation existed at the time the invoice was issued. The Committee was *not* contractually obligated in the amount of $108,750 to its vendor or to any stations in June 2020. The ad buy was not pursued in June 2020 but was ultimately placed in September 2020. Accordingly, no obligation was incurred and no debt existed until September 2020, and no reporting with respect to the issued invoice was required between June – September 2020.

Transactions Overlapping Reporting Periods

As previously noted in our Interim Audit Report Response (October 31, 2022), at pages 2-3, the Audit Division identified several invoices that were issued to the Committee during one reporting period and paid by the Committee early in the next reporting period. The Audit Division faults the Committee for not reporting these amounts as debts. As we previously noted, however, had these invoices been paid 6-8 days earlier, the transaction would not have "crossed" reporting periods and no debt disclosure would be necessary. The committee contends that the absence of this debt reporting is immaterial to the public record.

<u>Finding 3: Disclosure of Receipts</u>

Disclosure of Individual Contributions

As noted above, the Committee has objected to the use of sampling at all stages of this audit. The Audit Division's finding with respect to the Committee's disclosure of contributions again illustrates why we object to the use of sampling.

Based on the Audit Division's review of 100% of the committee's "high dollar contributions," the Audit Division found disclosure errors totaling $33,792, along with a total of $39,000 of disclosure errors from its 100% review of contributions from political committees. From the latter two categories, the Audit Division reports that the committee corrected and resolved disclosure errors totaling $19,600 and $38,000, respectively. These errors were specifically identified by Audit staff and the committee was able to take action to resolve them.

In addition to these categories that were subject to Audit's "100% review," the Audit Division *projects*, based on its sampling, that the Committee's reports contain additional disclosure errors totaling $535,012. *See* Draft Final Audit Report at 16. As noted in footnote 14 of the Draft Final Audit Report, "[t]he sample error amount ($535,012) was projected using a Monetary Unit Sample with a 95 percent confidence level. The sample estimate could be as low as $273,748 or as high as $970,100."

At page 21, the Audit Division concludes that the committee "did not correct 97% of the disclosure errors for contributions from individuals, totaling $549,204," meaning the committee's "disclosure errors remain materially incorrect." Again, $535,012 of this total figure is a sample projection for which, as we understand it, no complete, itemized list of identified and confirmed incorrect disclosures actually exists.[1] And, as footnote 14 indicates, the total figure may be incorrect by hundreds of thousands of dollars.

With respect to sample projection, the Committee was able to address the errors found within the sample itself, which was provided to the Committee in the form of a spreadsheet containing an itemized list of eight transactions. Apart from these eight specifically identified disclosure errors, the Committee does not understand how it is possible that it could have corrected the remaining *projected* errors that were not specifically identified. The Committee objects to the Commission placing a report on the public record that concludes that the Committee failed to "correct 97% of the disclosure errors for contributions from individuals" and that its "disclosure errors remain materially incorrect." Both assertions are deeply misleading and quite simply incorrect. The Committee worked diligently to correct the actual, identified reporting errors that the Audit Division brought to its attention, and objects to being faulted for not correcting unspecified *projected* disclosure errors.

Finally, "the Audit staff recommends that SDFM amends its disclosure reports or file a Form 99 to correctly disclose the remaining contributions from individuals totaling $549,204." Again, the Committee does not understand how it could possibly satisfy this recommendation.

Disclosure of Joint Fundraising Receipts

While we do not contest the Audit Division's overall findings with respect to the Committee's disclosure of joint fundraising receipts, we do wish to note that a significant portion of the total "disclosure error" figure consists of minor reporting errors that in no way materially impacted the public record or deprived anyone of information. Specifically, the Audit Division identifies a total of $345,034 of joint fundraising transfer memo entries reported with an incorrect date of receipt. (The Committee has filed amended reports to correct virtually all of the incorrect disclosures found by the Audit Division.) With respect to these "date of receipt" errors, in nearly all instances the Committee mistakenly reported the date of receipt as the date it received the transfer from the joint fundraising committee, rather than the date the contribution was received by the joint fundraising committee. This is harmless error. More specifically, it makes no difference for purposes of public disclosure that a contribution was reported as received on Friday rather than the preceding Monday. Both the contributor's identity and the contribution amount were reported on the public record as required.

[1] By email dated April 12, 2023, the Audit Division explained that "[t]he errors identified by the sample mainly relate to incorrect/incomplete names or incorrect dates" and that "most of the errors identified in the sample and 100% reviews were contributions received between September and December 2020." We are unsure if the "errors identified in the sample" were concentrated in this period because that is when the highest volume of contributions occurred, or if the sample was specifically targeted to that period.

Finally, we note that the value of the error attributed to the Committee for this minor reporting discrepancy is tied to the amount of the contribution, meaning the error valuation varies widely and is based entirely on a factor that was not in any way related to the disclosure error. For example, a contribution of $2,800 that is reported with the date of receipt off by a few days is treated as a $2,800 reporting error. The exact same error made with respect to a $25 contribution is tallied as a $25 reporting error. Whether this makes sense from a public disclosure perspective is highly debatable.

Conclusion

With respect to Finding 1, the Committee addressed a substantial portion of the excessive contributions actually identified by the Audit Division and acknowledges that further resolution is needed. As noted above, the Committee intends to resolve all outstanding excessive contributions that have not be refunded, reattributed, or redesignated as permitted at the conclusion of this audit once the Commission's findings are finalized. The Committee objects, however, to the Audit Division's use of statistical sampling to project the existence of nearly $300,000 in excessive contributions that have not actually been identified.

With respect to Finding 2, the Committee objects to the Audit Division's treatment of the $108,750 media placement invoice and the small number of unreported debts that crossed reporting periods and believes the Commission should not accept these portions of the proposed findings. As explained above, the Audit Division's position with respect to the June invoice appears to reflect either a lack of understanding of media buying and its accompanying invoicing process, or an inflexible approach that treats all invoices as presumptive evidence of an actual debt or obligation. Invoices and timely payments that overlap reporting periods by a matter of days are a normal part of a committee's cashflow, and the position of the Audit Division on these invoices should also be rejected.

With respect to Finding 3, the Committee addressed nearly all of the errors that were specifically identified by the Audit Division. For the reasons stated, the Committee above opposes the Audit Division's use of statistical sampling and objects to findings that fault the Committee for failing to correct "projected" errors that were never specifically identified by the Commission. Finally, the misreported date of receipt errors that the Audit Division identified in connection with the Committee's joint fundraising receipts are minor errors that were at all times immaterial for purposes of public disclosure. Those date of receipt errors have been corrected in amended reports and the amended dates disclosed no new information of any value to the public.

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Thank you for your consideration.

Sincerely,

Jason Torchinsky
Michael Bayes
Counsel to Steve Daines for Montana