

February 7, 2023

Federal Election Commission
Attn: Amy L. Rothstein
Assistant General Counsel for Policy
1050 First Street, NE
Washington, D.C. 20463

**Comment Regarding Notice of Public Hearing and Request for
Public Comment [Notice 2023-01]**

Dear Ms. Rothstein:

By this letter, I provide the following comments regarding the Commission's request for information related to its procedural process for audits conducted in accordance with Title 2 of the Federal Election Campaign Act. As an attorney, I have represented clients in over thirty Title 2 audits. The committees that were subject to these audits were primarily state party committees. Through these audits, I am very familiar with the audit process and provide my insights below. I will note that the comments below represent my personal views and do not reflect the view of any specific client that I have represented before the Commission.

As a threshold matter, I would like to express my view that, in my experience, the Commission staff that I have interacted with during the audit process have been courteous, professional, and quite accommodating. I also believe that the Commission's current audit procedures work reasonably well and provide committees with a sufficient number of opportunities to address their concerns. I also believe that, for the most part, the public record of each audit affords for sufficient transparency and disclosure of the issues presented during the audit. Notwithstanding, I believe there are some structural issues within the audit process that could be improved that would save both the Commission and committees significant time and resources.

I note the following observations in ways that this process has been problematic or can be improved:

1) Exit Conference and Request for Legal Consideration

The exit conference, in my opinion, is the most significant step in the audit process. It gives an audited committee a first look at the issues that the Commission auditors have identified, and in many respects, allows the committee an opportunity to address factual issues or shortcomings. It also triggers the opportunity for a committee to file

a request for consideration of a legal question. I have two major concerns related to this phase of the audit.

First, during the Exit Conference, the Audit Division ordinarily presents a list of factual issues and requests additional information when there is a question of fact or a factual or recordkeeping deficiency. Subsequent to the Exit Conference, the committee is provided only ten business days to provide the requested information back to the Audit Division. In many cases, the information requested by the Audit Division is quite voluminous or complex and usually requires significant research by the committee or requires the committee to contact vendors and employees (oftentimes former employees) for additional information. It has been my experience that ten business days is not enough time to complete these tasks and I would implore the Commission to consider increasing this window to fifteen or twenty business days so that committees have sufficient time to respond to such information requests.

Second, while I appreciate the change in Commission procedures that provided the opportunity to request clarification of legal issues during the Exit Conference period, the use of that process has not always led to an immediate constructive result. First, I will note that the Commission procedures provide that a request for consideration must be filed, including the reason for the challenge, within fifteen days of the date of the Exit Conference. Depending on the complexity of the legal issue, I do not believe that this offers a reasonable amount of time to prepare such a request, especially since the committee cannot anticipate potential issues until the Exit Conference itself. As a voluntary process, unless a committee files a request for legal consideration, it is my experience that the Commission does not always give thoughtful consideration to legal issues that may be raised in an audit until review of the Draft Final Audit Report (“DFAR”). Thus, as a practical matter, the Audit Division and Office of General Counsel are free to pursue aggressive legal positions on legal issues and theories that do not necessarily have the Commissioners’ consensus until the end of the audit process. These complex and novel legal issues are often coupled with complex factual questions that may require significant resources during the Exit Conference. Ultimately, these questions could have been avoided had the legal issue been addressed earlier in the process by the Commission. Due to the lack of Commission intervention, my clients and I have spent significant time and effort, as well as legal fees, fighting issues that should have never reached the Exit Conference or later stages of the Audit process.

The larger issue with the legal request process is that, in most cases, it has not provided relief to the requestor, even where the issue that was presented did not have the support of four Commissioners in either direction. Under the current procedures, if a request for legal consideration does not receive the support of at least four Commissioners, the issue may proceed, undisturbed, to the Interim Audit Report (“IAR”). In my experience, even if a Commissioner sides with the audited committee with respect to a request for legal consideration, the Commissioner will allow the issue to proceed through to the IAR, and ultimately to the Draft Final Audit Report (“DFAR”) and the Final Audit Report (“FAR”).

By allowing a disputed issue to move forward, a committee must then relitigate the same issue up to three or four times during the Audit Process only to find out, during the consideration of the DFAR, that the Audit Division does not have sufficient Commission support for a finding on that particular issue. This process is particularly burdensome in state party audits as these audits generally present the most complicated questions related to federal campaign finance law and regularly involve several, repeating issues that do not currently have Commission consensus. The current process is costly to both the committee and the Commission both in the time and financial resources required to address the same issue on multiple occasions. My recommendation to correct this problem is discussed below.

2) Commission Oversight of Legal Issues Presented in the Audit

In order to streamline the Audit process, I recommend that general Commission oversight must start earlier in the process, and similar to the enforcement process, legal issues raised in the Audit should be required to be affirmatively approved by four Commissioners in order to proceed to later stages of the Audit. By requiring four affirmative votes to approve proceeding on a disputed legal issue, committee and Commission resources can be preserved by not requiring either to reconsider the same legal issue multiple times. In order to facilitate proper due process, I would suggest replacing the request for legal consideration with a procedure where there is a more formal and thoughtful consideration of the IAR.

My recommendation for a revised process is as follows:

- a) a list of findings are presented to the audited committee prior to Commission consideration, and the audited committee is given the opportunity to make factual and legal arguments to the Commission relative to the proposed findings. If the audited committee raises no legal concerns, the Audit Division proceeds to an Exit Conference phase whereby the committee is allowed to address any factual discrepancies or shortcomings identified by the committee.
- b) If an audited committee requests preliminary review of any legal issues presented by the Audit Division, the committee makes such a request, in writing, within 30 days of receipt of the Audit Division's proposed findings. Any legal issues presented to the Commission during this stage should require four affirmative votes of the Commission to proceed to the next phase of the Audit.
- c) Once the preliminary review phase is completed, the Audit Division can proceed to an Exit Conference phase. By addressing and eliminating legal issues prior to the Exit Conference phase, potential findings that present complex factual issues can be mooted, thus preserving time and resources for both the audited committee, as well as the Commission.

- d) At the end of the Exit conference phase, the Commission can proceed in the same manner as the current Commission process, including the issuance of an IAR, DFAR and FAR.

The process suggested above would allow the Commission to give more thoughtful and thorough consideration to the factual and legal concerns of an audited committee prior to the Exit Conference or the Commission's issuance of the IAR. Unlike the apparent cursory review and approval of the IAR that is undertaken in the current process, consideration of the IAR, as well as the process suggested above, should be subject to the same level of rigorous review as the current legal question process or Commission consideration of the DFAR. If a sufficient number of Commissioners do not agree with the legal theories presented by the Audit Division during this phase, the issue should be prevented from moving forward in the Audit process at this stage. By making the documents related to this stage public, the regulated community will still have sufficient notice as to these issues. As discussed below, it should also allow for a simpler and shorter FAR in many cases.

3) Presentation of Actual Issue to be Addressed by Audited Committee

On several occasions during an audit, I have been presented with a finding that a state party committee failed to file a 24-hour independent expenditure report for activities that were clearly not independent expenditures, but rather exempt party activities that, in the opinion of the Audit Division, did not meet the necessary minimum documentation requirements for exempt party activities. When I queried the Audit Division as to why this approach was taken, the response was that a reporting violation is a lesser offense than a making an excessive contribution. While this approach is certainly appreciated from an enforcement perspective, it is a great cause of confusion during the Audit process whereby the Audit Division continues to pursue this fiction until such time that it deems the matter resolved despite consistent denials from the committee that such activities were independent expenditures. In most cases, the issue is finally resolved through the provision of additional factual information by the committee. However, the record reads as though there was initially a potential reporting violation. This is confusing, not based on law or fact, and potentially prejudicial to the audited committee.

In such cases, I suggest that the Audit Division adheres to a policy that requires it to present the most likely legal issue rather than creating a tangential issue in an attempt to help the committee. This only causes further confusion to the audited committee, as well as to the Commissioners themselves, as described in my example below.

4) Final Audit Report

As a general matter, I believe the current FARs present a fair recitation of issues and resolutions presented in the Audit. However, I will note the following observation: In a couple of recent instances, the discussion of "Additional Issues" did not adequately explain the reasoning of the 3-3 split amongst Commissioners, contrary to the

requirements of Commission Audit procedures. By way of example, in a recent FAR, the Commission split 3-3 on multiple issues related to a state party audit.¹ In this Audit, there was a potential finding related to a 24-hour independent expenditure report (which was actually an exempt party activity (See discussion above)). Ultimately, the Audit Division appeared to determine that it agreed with the audited committee that no 24-hour report was required. However, the Commission split 3-3 on this potential finding, that, in my opinion, should have been found in favor of the audited committee or removed from the FAR entirely. I believe that some Commissioners may have misunderstood the procedural status of the issues presented (or perhaps I did) in this finding and inadvertently failed to support the ultimate Audit Division recommendation. This confusion could have been avoided if the FAR followed the Commission's existing rules which require that for any finding that does not receive four Commission votes, the Report must provide a brief explanation as to the position of the Commissioners as to why they did or did not support the proposed finding. In my recent experience, this requirement has not been followed, and at least in this instance, has left me confused as to the current position of Commissioners on the issues presented in the potential finding. To be sure, the Audit procedures state:

“C. For any recommended finding that does not receive four or more votes either approving or rejecting the recommendation, the Audit Division will move the discussion to an “Additional Issues” section. Each “Additional Issue” will contain a brief summary of the facts, any applicable legal standards, a brief recitation of the Audit Division’s recommendation, **and a statement describing the Commission’s discussion of the issue and a recitation of the vote on the recommended finding** [footnote omitted, emphasis added].”²

Although I have found earlier FAR’s that adhere to this standard,³ more recent FAR’s do not adhere to the current Directive. The Commission must ensure that such a directive is followed in the future, or, as I would recommend, require that any Commissioner who does not support a proposed finding of the Audit Division found in the DFAR be required to submit a Statement of Reasons related to the opposition of the proposed finding. This would give the audited committee, as well as the regulated community, clear guidance on the legal position of the Commissioner on the issues presented in the proposed finding.

These concerns may be somewhat alleviated by other structural changes I have recommended above to the Audit process. In that regard, if the Commission were to agree with my proposal for additional Commission intervention earlier in the Audit

¹ See Final Audit Report of the Commission on the Kentucky State Democratic Central Committee, 2018 Cycle, documents found at <https://www.fec.gov/legal-resources/enforcement/audit-reports/authorized-committee-audit-reports/kentucky-state-democratic-central-executive-committee-2018/>

² FEC Directive on Processing Audit Reports, p. 4 (Effective April 26, 2011).

³ See Final Audit Report of the Commission on the Minnesota Democratic Farmer-Labor Party, 2008 Cycle, at pp. 14-15.

process, I recommend that any issues that are eliminated by Commission action earlier in the Audit process be clearly marked in the FAR or, in the alternative, be excluded from the FAR. In either case, documents related to such considerations should be put on the final Audit record in such a way that would allow the audited committee and others who may wish to review the public file to determine what issues were considered and rejected by the Commission and the reasoning of the Commission.

5) Confidentiality

As a general matter, it is my understanding that for-cause audits enjoy the same level of confidentiality as the enforcement process itself. Assuming that is the case, unless otherwise waived by the audited committee, confidentiality of the existence of and issues presented in the audit should remain confidential until the release of the FAR.

However, there appears to be certain triggers that allow premature disclosure of the existence of the audit. For example, it is my understanding that a Commissioner may file an “objection” that puts consideration of a DFAR onto the public meeting schedule. In a recent Audit, an objection put the DFAR on the public meeting agenda, only to be pulled back and approved on a tally vote. While this procedure may be standard and acceptable within the framework of Commission business, it prematurely caused the public disclosure of the existence of an audit prior to the time that the audited committee was prepared to address any public inquiries or interest with respect to the Audit.

While I support full transparency of Commission consideration of the proceedings of an audit once the FAR is issued, I strongly suggest that the Commission review and revise its procedures to protect the confidentiality of audits and either ensure that there is no public disclosure of an audit prior to the issuance of the FAR (unless otherwise waived by the audited committee), or, in the alternative, provide clear notice in its processes on what may cause an audit to be placed on the public record prior to the release of the FAR.

I hope that my comments above have been constructive and assist the Commission in any revisions it may choose to make to its existing procedures. I truly thank you for this opportunity to provide feedback. As I stated at the beginning of my comments, the Audit Division has always comported itself in a courteous and professional matter.

Unfortunately, I have a scheduling conflict on February 14th and will not be able to participate in the hearing portion of this proceeding, so I would like to send a representative from my firm in my stead should the Commission so desire. Nevertheless, I would be more than happy to provide supplemental testimony or engage in any other conversations or meetings requested by the Commission related to the improvement of the Audit process.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil P. Reiff". The signature is stylized and cursive.

Neil P. Reiff