



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

AGENDA DOCUMENT NO. 21-41-A  
AGENDA ITEM  
For the hearing of DECEMBER 2, 2021

November 23, 2021

## MEMORANDUM

To: The Commission

Through: Alec Palmer *AP*  
Staff Director

From: Patricia C. Orrock *PCO*  
Chief Compliance Officer

Dayna C. Brown *DCB*  
Assistant Staff Director  
Audit Division

Nicole Burgess *NB*  
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By: Robert Morcomb *RM*  
Lead Auditor

Subject: Audit Hearing for Democracy Engine, Inc., PAC (A19-18)

Attached for your information is a copy of the Draft Final Audit Report (DFAR) and Office of General Counsel legal analysis that was provided to Democracy Engine, Inc., PAC (DEI) on October 15, 2021. Counsel representing DEI responded to the DFAR on November 1, 2021 and requested a hearing before the Commission to discuss the Audit Division's conclusion on Finding 1, Failure to Maintain a Bank Depository, and Finding 3, Failure to Maintain Records Sufficient to Verify Reported Activity. The hearing was granted on November 5, 2021 and has been scheduled for December 2, 2021.

### Finding 1. Failure to Maintain a Bank Depository

This Finding is based on DEI's failure to comply with 52 U.S.C. §30102(h)(1), 11 CFR §103.2 and 11 CFR §103.3(a). The Federal Election Campaign Act ("Act") and related regulations require that each political committee shall designate one or more state banks, federally chartered depository institutions (including a national

bank), or depository institutions, the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account or transaction account at one of its depositories.

During audit fieldwork the audit staff learned that DEI did not maintain its own bank depository, as the Citibank account, disclosed as the depository of record on Statements of Organization filed between October 13, 2009 and September 18, 2019, was closed in January 2012<sup>1</sup>. DEI's financial activity was instead processed through the depository (the Transfer Account) of Democracy Engine, LLC (DELLC). DELLC is a for-profit limited liability company whose principal business is the processing and distribution of web-based donations to charities, non-profits and political committees, including candidate committees at the local, state and federal level. DELLC's Transfer Account processed DEI's activity, as well as the activity of its other clients, thus combining DEI's federal activity with the activity of other political and non-political entities. Further, the Audit staff noted that DEI's disclosure reports filed during the audit period disclosed earmarked contributions on Schedules A (*Itemized Receipts*) and B (*Itemized Disbursements*) as though the contributions passed through its depository. DEI did not report the earmarked contributions as memo entries.

In response to the IAR, DEI stated, "although the Commission's regulations at 11 C.F.R. § 103.2 appear to "require" the maintenance of a campaign depository, such requirement should not be placed upon a dormant committee that has no receipts or disbursements and no cash on hand. DEI further stated that, since none of its conduit activities passed through a committee depository account, DEI should have disclosed all such activities during the 2018 election cycle as memo entries in accordance with 11 CFR § 110.6(c)(1)(v). DEI amended all its disclosure reports for the 2018 cycle to reflect all its activity as "memo entries" with \$0 in receipt and disbursement activity.

In the DFAR, the Audit staff maintained that DEI failed to maintain a bank depository for earmarked contributions and disbursements. DEI is a separate segregated fund, and therefore a political committee under the Act and is required to maintain at least one campaign depository and deposit all receipts and issue disbursements through such account, including earmarked contributions received in DEI's capacity as an intermediary or conduit, as required by the Act and Commission regulations. 52 U.S.C. § 30102(h)(1); 11 C.F.R. §§103.2 and 103.3.

In response to the DFAR, DEI provided a response consistent with the response it provided to the IAR concerning Failure to Maintain a Bank Depository. DEI stated, in part:

"Although DEI acknowledges the Audit Division's conclusion that Commission regulations appear to require that each political committee must maintain a depository account, the Commission should determine, in its

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<sup>1</sup> As noted on a bank statement provided to Audit Staff by DEI representatives, this account was closed in January 2012.

discretion, that the maintenance of an account with no funds by a committee that has no receipts or disbursements is unnecessary and impractical. It has been our experience that banks are less willing to allow their clients to maintain dormant or empty accounts and will force close the account after a period of inactivity. That is what happened to DEI prior to the 2018 election cycle. It makes no sense to require DEI to reopen an account until and unless it has funds to deposit or spend. DEI did, in fact, reopen an account in 2019 and has been depositing funds into that account and making expenditures from that account.”

The Audit staff did not agree with DEI’s assessment of its reporting requirements. The DFAR concluded that the original reporting of the earmarked contributions as *deposited* earmarked contributions was a more accurate representation of DEI’s financial activity because the earmarked contributions were not merely forwarded to recipient committees, but were first deposited, not in a DEI depository as required by 11 CFR §103.2, but instead in the DELLC depository<sup>2</sup>. This was done, as noted by DEI in its notarized affidavit, in accordance with its service agreement. In addition, DEI’s response to the Interim Audit Report, stated that, “All funds received and disbursed in connection with this conduit activity was done through credit card processing and DEI utilized a third-party vendor, [DELLC], to process the credit card contributions to each benefiting committee that received contributions in connection with its conduit fundraising activities.

### Finding 3. Failure to Maintain Records Sufficient to Verify Reported Activity

This Finding is based on DEI’s failure to comply with 11 CFR parts 102 and 104 and 11 CFR §104.14(b)(1), (2) and (3). The Federal Election Campaign Act (“Act”) and related regulations require a committee to maintain records, including bank records, with respect to the matters required to be reported, which shall provide in sufficient detail the necessary information and data from which the filed reports may be verified, explained, clarified and checked for accuracy and completeness. Committees shall keep all reports required to be preserved available for audit, inspection or examination by the Commission or its authorized representatives for a period of no less than 3 years after the report or statement is filed.

In the IAR, the Audit staff determined that DEI failed to maintain sufficient records, specifically bank records (see Finding 1 - Failure to Maintain a Bank Depository), to provide sufficient detail that would allow its reports filed with the Commission to be reconciled and verified for accuracy and completeness.

In response to the IAR, DEI stated that it “objects to this finding and characterization that it failed to maintain sufficient records to verify reported activity.”

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<sup>2</sup> DEI provided documentation and a link to a webpage indicating that DEI ran a “DE PAC California Project” that would split evenly earmarked contributions among 2018 Democratic Nominees for ten California House Districts. DEI stated in the web link, “We take your donation, divide it into 10 parts and hold onto the money until a Democratic nominee is selected in the primary in June.”

By filing the amendments described in Finding 1, DEI believes that this finding is “moot and that sufficient records have been provided by DELLC to verify the conduit activity.”

The DFAR concluded that because DEI failed to maintain a depository and therefore did not process receipts and disbursements through its designated depository, the Audit staff could not verify the disclosed activity on DEI’s campaign finance disclosure reports. The Audit staff maintained that DEI failed to maintain records, including its bank records and statements, with respect to these earmarked contributions, so the substance of the disclosure reports, “may be verified, explained, clarified and checked for accuracy and completeness.” A treasurer is required to maintain all records and accounts required to be kept under 11 C.F.R. § 102.9 for three years after the report to which such records and accounts relate is filed. 11 C.F.R. § 102.9 (c). These include contributions received and disbursements made and include earmarked contributions. This recordkeeping and reporting requirement includes earmarked contributions held by a conduit. 11 C.F.R. § 110.6 (c).

The DFAR further concluded that DEI provided no additional documentation to verify the conduit activity. As noted in Finding 1, DEI filed amendments to change the characterization of its activity from deposited earmarked contributions (non-memo entries) to earmarked contributions forwarded directly to recipients without first being deposited (memo entries). Since DEI’s financial activity was processed through the depository of DELLC and combined with DELLC’s other activity, the Audit staff could not verify the total original reported receipts and disbursements totaling \$6,207,589 and \$6,206,051, respectively. In addition, the Audit staff was also unable to verify the total reported amounts of the receipt and disbursement memo entries totaling \$6,100,540 and \$5,621,712, respectively, that DEI disclosed in the amended reports filed in response to the IAR. Lastly, DEI previously reported the payment of processing fees totaling \$284,717 to DELLC for the audit period. On March 23, 2021, DEI filed amended disclosure reports for the audit period that showed \$0 in processing fees.

In response to the DFAR, DEI objected to the DFAR’s assertions with respect to its failure to maintain accounts sufficient to verify reported activity, stating:

“DEI did not have any bank accounts during the reporting period and amended its reports to properly reflect this fact. Unsatisfied with this reality, the DFAR characterizes a scenario whereby DEI “uses” DELLC to conduct its business. DELLC is a for-profit entity that is in the industry of processing political contributions. During the 2018 election cycle, DEI did not undertake any activities that benefited the committee. The only activity undertaken by DEI, with no incremental costs, was to encourage donations directly to candidates. At the time the Commission earmarking regulations were promulgated (11 C.F.R. § 110.6), contributions were generally understood to be made by check or other written instrument. Thus, the Commission’s regulations make no reference as to the proper procedures related to earmarked contributions made by credit card. The Commission has, by Advisory Opinion, acknowledged that earmarked contributions can be made by credit card, but has only considered this

issue with respect to contributions that pass through a political committee's accounts. See e.g. Advisory Opinion 2019-15 (NORPAC); 2014-13 (ActBlue); 2008-8 (Jonathan Zucker); 2006-30 (ActBlue).

Contrary to the DFAR's assertion, DELLC was not acting as some type of "project" of DEI but rather, as a commercial vendor in the business of processing and forwarding contributions. DELLC processed and deducted a usual and normal charge for each contribution and instructed committees in receipt of such funds to report the deducted amounts as an operating cost to DELLC. The Commission has previously permitted for profit operations to process earmarked contributions and such activities were not subject to any additional conduit disclosure. See Advisory Opinion 2004-8<sup>3</sup> (allowing for profit corporation to forward earmarked contributions without further disclosure under commercial vendor exception of 11 C.F.R. § 110.6(b)(2)). See also e.g. Advisory Opinions 2012-22 (skimmerhat); 2015-15 (WeSupportThat.com); 2016-08 (eBundler.com, LLC)."

Even more on point, the Commission determined that individuals may create and operate a data processing service that identified suggested campaigns to support and facilitated the collection and forwarding of contributions through a for-profit LLC created to support the project. Advisory Opinion 2017-06 (Stein and Gottlieb). Essentially DELLC and DEI operated its activities in the 2018 cycle on substantially similar terms, allowing donors with interests in candidates holding certain political positions to find and contribute to them. Thus, DEI merely advised donors on campaigns to support and DELLC helped facilitate the collection and remittal of those contributions on commercial terms with the donors. DELLC withheld a sufficient amount of funds from each remittal to cover its costs and earned a reasonable profit on these activities. DELLC's activities are not subject to disclosure requirements because "their services are "akin to 'delivery services, bill-paying services, or check writing services.'" Advisory Opinion 2021-07 (PACMS), p.11.

Out of an abundance of caution, and a misunderstanding of Commission rules related to the definition of "conduit," DEI, albeit incorrectly, included this activity as reportable bundling activity on its initial reports PAC reports. Since DEI did not actually collect and forward contributions, it could not be considered a "conduit" under the Commission's regulations.

During the audit process, DEI realized that this activity should not have been included in its reports and recharacterized this activity as memo entries since the donations made through these projects did not pass-through DEI. In further hindsight, based upon the precedents cited above, it does not appear that DEI was even required to provide the memo entries in its amended reports. Commission precedents do not require that a for profit entity have a contractual relationship and determined that a for profit entity will be considered a commercial vendor and not a conduit if it collects and forwards contributions on behalf of a donor. Advisory Opinion 2017-06, pp. 6-7.

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<sup>3</sup> Although DEI references AO 2004-08, this appears to be a typographical error that should instead be a reference to AO 2006-08 (Brooks).

Faced with the obvious conclusions described above, the Audit Division, in an attempt to justify its finding, has attempted to make a novel argument that DEI and DELLC are one in the same and thus DELLC, a for profit entity is somehow merely a bank account of DEI. The General Counsel's memorandum attached to the DFAR attempts to characterize DELLC as a *de facto*, undesignated depository account. General Counsel Memorandum, DFAR for Democracy Engine, Inc. PAC, Page 3-4. The two matters cited by the memorandum do not appear to have any similarities to the relationship between DEI and DELLC and do not provide any principled explanation as to how a for-profit entity could serve as an undesignated depository account of a PAC. Since DELLC was neither a political committee, nor a conduit of earmarked contributions it cannot be subject to the recordkeeping requirements of the Act nor be required to disclose (albeit through DEI) its contribution processing activities. Thus, the DFAR and attached analysis from the General Counsel's office appear to be nothing more than a tortured effort to justify their initial legal position in the Interim Audit Report."

Whereas DEI's DFAR response now indicates that it "merely advised donors on campaigns to support and DELLC helped facilitate the collection and remittal of those contributions on commercial terms with the donors," the Audit staff notes that DEI stated in its response to the Interim Audit Report, "The only activity undertaken by DEI during the 2018 election cycle was to serve as a conduit for contributions in accordance with Commission's regulations at 11 C.F.R. § 110.6." Additionally, the Audit staff would highlight that the service agreement between DEI and DELLC, provided by DEI during fieldwork, contains a section that states, DEI desires to utilize a web-based mechanism to enable contributors to make contributions in connection with political committees subject to payment by contributors of convenience fees to DELLC. The treasurer for DEI was also the managing member of DELLC, who signed the agreement on behalf of both parties.

Documents related to this audit report can be viewed in the Voting Ballot Matters folder. Should you have any questions, please contact Nicole Burgess or Robert Morcomb 202-694-1200.

Attachments:

Draft Final Audit Report of the Audit Division October 15, 2021  
Office of General Counsel Legal Analysis, dated October 8, 2021  
DEI Response to Draft Final Audit Report, dated November 1, 2021

cc: Office of General Counsel



# Draft Final Audit Report of the Audit Division on the Democracy Engine, Inc., PAC (January 1, 2017 - December 31, 2018)

## Why the Audit Was Done

Federal law permits the Commission to conduct audits and field investigations of any political committee that is required to file reports under the Federal Election Campaign Act (the Act). The Commission generally conducts such audits when a committee appears not to have met the threshold requirements for substantial compliance with the Act.<sup>1</sup> The audit determines whether the committee complied with the limitations, prohibitions and disclosure requirements of the Act.

## Future Action

The Commission may initiate an enforcement action, at a later time, with respect to any of the matters discussed in this report.

## About the Committee (p. 2)

The Democracy Engine, Inc., PAC is a separate segregated fund - corporation. It is a non-qualified committee and is headquartered in Washington, DC. For more information, see the chart on the Committee Organization, p. 2.

## Financial Activity (p. 2)

• <b>Receipts</b>	
○ Contributions from Individuals	\$ 5,922,872
○ Offsets to Operating Expenditures	284,717
<b>Total Receipts</b>	<b>\$ 6,207,589</b>
• <b>Disbursements</b>	
○ Contributions to Federal Candidates/Committees	\$ 5,921,334
○ Operating Expenditures	284,717
<b>Total Disbursements</b>	<b>\$ 6,206,051</b>

## Findings and Recommendations (p. 3)

- Failure to Maintain a Bank Depository (Finding 1)
- Inaccurate Disclosure of Statement of Organization (Finding 2)
- Failure to Maintain Records Sufficient to Verify Reported Activity (Finding 3)

<sup>1</sup> 52 U.S.C. §30111(b).



# **Draft Final Audit Report of the Audit Division on the Democracy Engine, Inc., PAC**

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(January 1, 2017 - December 31, 2018)

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# Part I

## Background

### Authority for Audit

This report is based on an audit of the Democracy Engine, Inc., PAC (DEI), undertaken by the Audit Division of the Federal Election Commission (the Commission) in accordance with the Federal Election Campaign Act of 1971, as amended (the Act). The Audit Division conducted the audit pursuant to 52 U.S.C. §30111(b), which permits the Commission to conduct audits and field investigations of any political committee that is required to file a report under 52 U.S.C. §30104. Prior to conducting any audit under this subsection, the Commission must perform an internal review of reports filed by selected committees to determine if the reports filed by a particular committee meet the threshold requirements for substantial compliance with the Act. 52 U.S.C. §30111(b).

### Scope of Audit

Following Commission-approved procedures, the Audit staff evaluated various risk factors and as a result, this audit examined:

1. the disclosure of individual contributors' occupation and name of employer;
2. the consistency between reported figures and bank records;
3. the completeness of records; and
4. other committee operations necessary to the review.

### Limitations

The Audit staff was not able to perform a reconciliation of DEI's bank records to its disclosure reports filed with the Commission because the DEI did not deposit funds nor make disbursements from a committee depository (see Finding 1 – Failure to Maintain a Bank Depository). Without bank records, the Audit staff was unable to verify the accuracy and completeness of the DEI disclosure reports filed during the audit period (see Finding 3 – Failure to Maintain Records Sufficient to Verify Reported Activity). In addition, because DEI filed amended reports of its financial activity during this election cycle, the Audit staff sought to perform an analysis of the original reports as compared to the bank records but was unable to do so.

## Part II

### Overview of Committee

#### Committee Organization

<b>Important Dates</b>	
• Date of Registration	October 13, 2009
• Audit Coverage	January 1, 2017 - December 31, 2018
<b>Headquarters</b>	
Washington, DC	
<b>Bank Information</b>	
• Bank Depositories <sup>2</sup>	None
• Bank Accounts <sup>2</sup>	None
<b>Treasurer</b>	
• Treasurer When Audit Was Conducted	Jonathan Zucker
• Treasurer During Period Covered by Audit	Jonathan Zucker (10/13/2009 – Present)
<b>Management Information</b>	
• Attended FEC Campaign Finance Seminar	No
• Who Handled Accounting and Recordkeeping Tasks	Treasurer

#### Overview of Financial Activity (Audited Amounts)<sup>3</sup>

<b>Cash on hand @ January 1, 2017</b>	<b>\$ 276</b>
<b>Receipts</b>	
○ Contributions from Individuals	5,922,872
○ Offsets to Operating Expenditures	284,717
<b>Total Receipts</b>	<b>\$ 6,207,589</b>
<b>Disbursements</b>	
○ Contributions to Federal Candidates/Committees	5,921,334
○ Operating Expenditures	284,717
<b>Total Disbursements</b>	<b>\$ 6,206,051</b>
<b>Cash on hand @ December 31, 2018</b>	<b>\$ 1,814</b>

<sup>2</sup> See Finding 1 – Failure to Maintain a Bank Depository.

<sup>3</sup> The amounts are as reported on DEI's disclosure reports. The Audit staff was not able to verify the accuracy and completeness of the amounts given DEI's lack of a bank depository and corresponding bank records. See Limitations in Part I and Finding 1 – Failure to Maintain a Bank Depository.

## Part III

# Summaries

### Findings and Recommendations

#### **Finding 1. Failure to Maintain a Bank Depository**

DEI failed to maintain a committee bank depository (depository). DEI also failed to deposit receipts received and disbursements made, as required by federal statute, using a committee-maintained depository. Instead, all DEI's receipts and disbursements were processed through the depository of Democracy Engine, LLC<sup>4</sup> (DELLC). DEI's activity was processed through DELLC's transfer account (Transfer Account) along with the activity of other DELLC clients, thus combining DEI's federal activity with the activity of other political and non-political entities.

During audit fieldwork, DEI provided bank statements showing that DEI established its own depository on September 18, 2019 and provided an April 2020 bank statement demonstrating that DEI now processed activity through this depository. In response to the Interim Audit Report recommendation, DEI stated that it was filing amendments to "correctly characterize [its] activity as non-depository bundled contributions for which [DEI] served as a conduit." DEI amended all its reports for the 2018 cycle to reflect all activities as "memo entries." The Audit staff maintains that DEI failed to maintain a bank depository for earmarked contributions and disbursements. (For more detail, see p. 5.)

#### **Finding 2. Inaccurate Disclosure of Statement of Organization**

DEI disclosed a closed depository on its amended Statements of Organization during the audit period. DEI filed an amended Statement of Organization on September 19, 2019<sup>5</sup>, disclosing Amalgamated Bank as its committee depository. In response to the Interim Audit Report recommendation, DEI acknowledged that it should have filed a "miscellaneous disclosure" with the Commission that its depository institution had forced closed its account due to inactivity. However, DEI believed that no additional information was required until a new depository account was established in September 2019, at which time it filed an amendment to its Statement of Organization. (For more detail, see p. 8.)

#### **Finding 3. Failure to Maintain Records Sufficient to Verify Reported Activity**

DEI failed to maintain sufficient records, specifically bank records (see Finding 1 - Failure to Maintain a Bank Depository), to provide sufficient detail that would allow its

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<sup>4</sup> Democracy Engine, LLC (DELLC) is the sole stockholder of Democracy Engine, Inc. Democracy Engine, Inc. PAC (DEI), the subject of this audit report, discloses Democracy Engine, Inc. as a connected organization on its Statement of Organization.

<sup>5</sup> DEI filed this amended Statement of Organization prior to the October 2, 2019 audit notification.

reports filed with the Commission to be reconciled and verified for accuracy and completeness. As a part of standard audit procedures, total reported receipts and disbursements, as well as reported cash balances, are verified through a review of bank records. However, since DEI did not maintain its own depository and its activity was processed with other DELLC clients, reported receipts totaling \$6,207,589 and reported disbursements totaling \$6,206,051, could not be verified for accuracy and completeness. In response to the Interim Audit Report recommendation, DEI stated that “it objects to this finding and characterization that it failed to maintain sufficient records to verify reported activity.” By filing the amendments described in Finding 1, DEI believes that this finding is “moot and that sufficient records have been provided by DELLC to verify the conduit activity.” (For more detail, see p. 9.)

## Part IV

# Findings and Recommendations

### Finding 1. Failure to Maintain a Bank Depository

#### Summary

DEI failed to maintain a committee bank depository (depository). DEI also failed to deposit receipts received and disbursements made, as required by federal statute, using a committee-maintained depository. Instead, all DEI's receipts and disbursements were processed through the depository of Democracy Engine, LLC<sup>6</sup> (DELLC). DEI's activity was processed through DELLC's transfer account (Transfer Account) along with the activity of other DELLC clients, thus combining DEI's federal activity with the activity of other political and non-political entities.

During audit fieldwork, DEI provided bank statements showing that DEI established its own depository on September 18, 2019 and provided an April 2020 bank statement demonstrating that DEI now processed activity through this depository. In response to the Interim Audit Report recommendation, DEI stated that it was filing amendments to "correctly characterize [its] activity as non-depository bundled contributions for which [DEI] served as a conduit." DEI amended all its reports for the 2018 cycle to reflect all activities as "memo entries." The Audit staff maintains that DEI failed to maintain a bank depository for earmarked contributions and disbursements.

#### Legal Standard

**A. Depositories.** Each political committee shall designate one or more state banks, federally chartered depository institutions (including a national bank), or depository institutions, the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation, Federal Savings and Loan Insurance Corporation, or the National Credit Union Administration, as its campaign depository or depositories. Each political committee shall maintain at least one checking account or transaction account at one of its depositories. 52 U.S.C. §30102(h)(1) and 11 CFR §103.2.

**B. Deposit of Receipts and Disbursements.** All receipts by a political committee shall be deposited in account(s) established pursuant to 11 CFR §103.2, except that any contribution may be, within 10 days of the treasurer's receipt, returned to the contributor without being deposited. The treasurer of the committee shall be responsible for making such deposits. All deposits shall be made within 10 days of the treasurer's receipt. A committee shall make all disbursements by check or similar drafts drawn on an account at its designated campaign depository, except for expenditures of \$100 or less made from a petty cash fund maintained pursuant to 11 CFR §102.11. Funds may be transferred from the depository for investment purposes but shall be returned to the depository before such funds are used to make expenditures. 11 CFR §103.3(a).

<sup>6</sup> Democracy Engine, LLC (DELLC) is the sole stockholder of Democracy Engine, Inc. Democracy Engine, Inc. PAC (DEI), the subject of this audit report, discloses Democracy Engine, Inc. as a connected organization on its Statement of Organization.

## **Facts and Analysis**

### **A. Facts**

During audit fieldwork, the Audit staff learned that DEI did not maintain its own bank depository (see Limitations, p.1.), as the Citi[bank] account, disclosed as the depository of record on Statements of Organization filed between October 13, 2009 and September 18, 2019, was closed in January 2012<sup>7</sup>. DEI's financial activity was instead processed through the depository (the Transfer Account) of Democracy Engine, LLC (DELLC). DELLC is a for-profit limited liability company whose principal business is the processing and distribution of web-based donations to charities, non-profits and political committees, including candidate committees at the local, state and federal level. DELLC's Transfer Account processed DEI's activity, as well as the activity of its other clients, thus combining DEI's federal activity with the activity of other political and non-political entities.

During audit fieldwork, DEI's representative indicated, in a notarized affidavit, that "effective on or around March 1, 2020, earmarked donations to [DEI] will be processed by DELLC via a [DEI] owned merchant account and deposited to a [DEI] owned bank account (the Amalgamated Bank account on [DEI's] current Form 1); distributions will be made from the [DEI] owned account in the form of checks and ACH transfers. DELLC will still serve as a vendor to the PAC, but the funds will now be segregated from other DELLC donation volume." DEI's representative submitted an April 2020 bank statement demonstrating that effective that month, DEI processed its activity through this bank account.

### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed the lack of a committee depository with DEI's representative during the exit conference.

In response to the exit conference, DEI representatives submitted a response indicating that it had no expenditures other than those directly related to earmarked contributions after January 2012. DEI representatives stated that 11 CFR §100.6 does not require that earmarked contributions, for which a committee serves as a conduit or intermediary, pass through the committee's depository account. As such, the contributions were processed and distributed by DELLC in accordance with the services agreement between DELLC and DEI. The representatives also noted it was their understanding that it was common practice for political committees, without financial activity, but which remain active and file reports with the Commission, not to maintain a depository account with a zero balance given the practice of financial institutions to assess fees even on zero balance accounts. Further, if it intended to receive any contributions or make any expenditures that required a depository account, it would have immediately reopened its account at Citibank or opened a new account and amended its Statement of Organization as it did in September 2019 in anticipation of expenditures for merchant account fees from a new merchant processor. DEI representatives noted that the Amalgamated Bank account was opened prior to any notice of the audit.

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<sup>7</sup> As noted on a bank statement provided to Audit Staff by DEI representatives, this account was closed in January 2012.

Although DEI cited 11 CFR §100.6, which pertains to connected organizations, the Audit staff noted that Democracy Engine, Inc. is DEI's connected organization, as disclosed on each Statement of Organization DEI has filed, whereas DEI itself is a political committee, registered with the Commission since October 2009. The statute and regulations for political committees require the use of a campaign depository as cited above. The Audit staff further noted that DEI's disclosure reports filed during the audit period disclosed earmarked contributions on Schedules A (*Itemized Receipts*) and B (*Itemized Disbursements*) as though the contributions passed through its depository. DEI did not report the earmarked contributions as memo entries per 11 CFR § 110.6(c)(1)(iv).

The Interim Audit Report recommended that DEI provide any additional comments it deemed necessary with respect to this matter.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, DEI stated, "although the Commission's regulations at 11 C.F.R. § 103.2 appear to "require" the maintenance of a campaign depository, such requirement should not be placed upon a dormant committee that has no receipts or disbursements and no cash on hand. DEI further stated that, since none of its conduit activities passed through a committee depository account, DEI should have disclosed all such activities during the 2018 election cycle as memo entries in accordance with 11 CFR § 110.6(c)(1)(v). DEI amended all its disclosure reports for the 2018 cycle to reflect all its activity as "memo entries" with \$0 in receipt or disbursement activity.

The Interim Audit Report did not recommend that DEI amend its reports; however, DEI indicated that it did so to correctly characterize its activity as "non-depository bundled contributions for which DEI served as conduit." DEI amended its reports to change its entries from deposited earmarked contributions to undeposited earmarked contributions (memo entries).

Commission regulations require that conduits must comply with special reporting rules, which vary depending on whether the contribution was deposited in the conduit's bank account or was passed on directly to the recipient committee. In accordance with 11 CFR § 110.6(c)(1)(v), if the committee deposits the earmarked contribution, the committee reports the earmarked contributions on Schedules A (*Itemized Receipts*) and B (*Itemized Disbursements*). If the committee forwards the contribution without depositing it first, the committee must itemize the same information in memo entries on Schedules A and B. In the case of DEI, the earmarked contributions were not merely forwarded to recipient committees, but were first deposited, not in a DEI depository as required by 11 CFR §103.2, but instead in the DELLC depository. This was done, as noted by DEI in its notarized affidavit, in accordance with its service agreement. In addition, DEI's response to the Interim Audit Report, stated that, "All funds received and disbursed in connection with this conduit activity was done through credit card processing and DEI utilized a third-party vendor, [DELLC], to process the credit card contributions to each benefiting committee that received contributions in connection with its conduit fundraising activities"



The Audit staff does not agree with DEI's assessment of its reporting requirements. The original reporting of the earmarked contributions as *deposited* earmarked contributions was a more accurate representation of DEI's financial activity. As currently disclosed on the amended reports filed in response to the Interim Audit Report, it appears that the earmarked contributions were not deposited and processed by a depository, when in fact they were, albeit by DELLC's depository rather than a DEI depository. The Audit staff maintains that DEI failed to maintain a bank depository for earmarked contributions and disbursements. DEI is a separate segregated fund, and therefore a political committee under the Act and is required to maintain at least one campaign depository and deposit all receipts and issue disbursements through such account, including earmarked contributions received in DEI's capacity as an intermediary or conduit, as required by the Act and Commission regulations. 52 U.S.C. § 30102(h)(1); 11 C.F.R. §§103.2 and 103.3.

## **Finding 2. Inaccurate Disclosure of Statement of Organization**

### **Summary**

DEI disclosed a closed depository on its amended Statements of Organization during the audit period. DEI filed an amended Statement of Organization on September 19, 2019<sup>8</sup>, disclosing Amalgamated Bank as its committee depository. In response to the Interim Audit Report recommendation, DEI acknowledged that it should have filed a "miscellaneous disclosure" with the Commission that its depository institution had forced closed its account due to inactivity. However, DEI believed that no additional information was required until a new depository account was established in September 2019, at which time it filed an amendment to its Statement of Organization.

### **Legal Standard**

**A. Registration.** A separate segregated fund must file a Statement of Organization no later than 10 days after establishment. 52 U.S.C. §30103(a).

**B. Contents.** The Statement of Organization shall include a listing of all banks, safety deposit boxes, or other depositories used by the committee. 52 U.S.C. §30103(b)(6).

### **Facts and Analysis**

#### **A. Facts**

DEI disclosed a closed depository on its Statements of Organization. DEI filed its original Statement of Organization with the Commission in October 2009, disclosing its depository as Citi[bank]. As previously noted in Finding 1 above, the Citibank depository was closed in January 2012.

<sup>8</sup> DEI filed this amended Statement of Organization prior to the October 2, 2019 audit notification.

From February 2012 through September 18, 2019, DEI continued to disclose Citibank as its depository<sup>9</sup>. DEI filed an amended Statement of Organization on September 19, 2019, to report Amalgamated Bank as its committee depository. Amalgamated Bank is also the depository used by DELLC.

### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed this matter with DEI's representative during the exit conference.

In response to the exit conference, DEI representatives submitted a response stating that as of January 2012, its depository account had a zero balance and while it had no specific recollection of requesting that the account be closed, noted that it may have made such a request after being informed that Citibank would continue to assess fees on the account. DEI representatives stated it was their understanding that it was common practice for political committees without financial activity, but which remain active and file reports with the Commission, not to maintain a depository account with a zero balance given the practice of financial institutions to assess fees, even on zero balance accounts.

As noted above, 52 U.S.C. §30103(b)(6) requires that committees disclose all bank accounts, safety deposit boxes, or other depositories used. The Audit staff noted that from February 2012 through September 18, 2019, including two amended Statements of Organization filed during the 2017-2018 election-cycle, DEI incorrectly disclosed Citibank as the depository it was using, although this depository was closed in January 2012.

The Interim Audit Report recommended that DEI provide any additional comments it deemed necessary with respect to this matter.

### **C. Committee Response to Interim Audit Report**

In response to the Interim Audit Report recommendation, DEI acknowledged that it should have filed a "miscellaneous disclosure" to notify the Commission that its depository institution had forced closed its account due to inactivity. Further, DEI stated it believed that no additional information was required until a new depository account was established in [September] 2019, at which time it filed an amendment to its Statement of Organization.

## **Finding 3. Failure to Maintain Records Sufficient to Verify Reported Activity**

### **Summary**

DEI failed to maintain sufficient records, specifically bank records (see Finding 1 - Failure to Maintain a Bank Depository), to provide sufficient detail that would allow its reports filed with the Commission to be reconciled and verified for accuracy and completeness. As a part of standard audit procedures, total reported receipts and disbursements, as well as reported cash balances, are verified through a review of bank records. However, since

<sup>9</sup> DEI filed two amended Statements of Organization during the audit period with the incorrect disclosure.

DEI did not maintain its own depository and its activity was processed with other DELLC clients, reported receipts totaling \$6,207,589 and reported disbursements totaling \$6,206,051, could not be verified for accuracy and completeness. In response to the Interim Audit Report recommendation, DEI stated that it “objects to this finding and characterization that it failed to maintain sufficient records to verify reported activity.” By filing the amendments described in Finding 1, DEI believes that this finding is “moot and that sufficient records have been provided by DELLC to verify the conduit activity.”

### **Legal Standard**

**Contents of Reports.** Each political committee required to file any report or statement shall maintain all records as follows:

- Maintain records, including bank records, with respect to the matters required to be reported, including vouchers, worksheets, receipts, bills and accounts, which shall provide in sufficient detail the necessary information and data from which the filed reports may be verified, explained, clarified and checked for accuracy and completeness;
- Preserve a copy of each report or statement required to be filed under 11 CFR parts 102 and 104, and all records relevant to such reports or statements; and
- Keep all reports required to be preserved under this section available for audit, inspection or examination by the Commission or its authorized representative(s) for a period of not less than 3 years after the report or statement is filed. 11 CFR §104.14(b)(1), (2) and (3).

### **Facts and Analysis**

#### **A. Facts**

The Audit staff could not verify the reported receipts and disbursements totaling \$6,207,589 and \$6,206,051, respectively, for accuracy and completeness, due to DEI’s failure to maintain sufficient records, specifically bank records.<sup>10</sup> Although DEI maintained an accounting of receipts and disbursements processed by DELLC, the Audit staff notes the regulations go beyond simple documentation requirements and specifically require that committee records provide information sufficient to verify, explain and check for accuracy and completeness of reports, in addition to the requirement to use a campaign depository as cited above. Use of a campaign depository ensures a clear financial trail of records linking receipts and disbursements to a third-party financial institution and provides a complete and verifiable disclosure history for audit purposes.

#### **B. Interim Audit Report & Audit Division Recommendation**

The Audit staff discussed the recordkeeping issue with the DEI representative during the exit conference. The DEI representative noted that DEI’s practice of using the DELLC bank account predated the audit period and offered to provide further detailed information related to the reported transfers to candidates. However, DEI’s representative stated that DEI would not be able to provide further information regarding receipts.

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<sup>10</sup> See Limitations, p. 1.

In response to the exit conference, DEI representatives provided the Audit staff with additional disbursement data files from DELLC. The data files contained information regarding the gross disbursement amounts paid to candidates and the portion of the disbursements attributed to DEI, as DEI's activity was often a subset of gross amounts paid to candidates/committees. The Audit staff was able to trace gross DEI transfer amounts and gross DEI check amounts on the DELLC bank statements. However, the Audit staff was not able to verify that the data files contained the entire population of DEI records since its activity was processed with other DELLC clients on the bank statements.

The Interim Audit Report recommended that DEI provide any additional comments it deemed necessary with respect to this matter.

### C. Committee Response to Interim Audit Report

In response to the Interim Audit Report recommendation, DEI stated that it "objects to this finding and characterization that it failed to maintain sufficient records to verify reported activity." By filing the amendments described in Finding 1, DEI believes that this finding is "moot and that sufficient records have been provided by DELLC to verify the conduit activity."

The Audit staff notes that DEI provided no additional documentation to verify the conduit activity. As noted in Finding 1, DEI filed amendments to change the characterization of its activity from deposited earmarked contributions (non-memo entries) to earmarked contributions forwarded directly to recipients without first being deposited (memo entries). The Audit staff reviewed these amendments and noted that, in addition to changing the entries from non-memo entries to memo entries, the amended reports also reflect the following changes:

- DEI reduced the total receipt and disbursement activity reported by \$107,049 and \$584,339, respectively.

The decrease in total reported receipts was due to the following:

2017 - 2018	Amendments filed March 23, 2021	Audited Reports	Difference
Contributions from Individuals Schedule A, Line 11(a)	\$6,006,306	\$5,922,872	\$83,434 Increase
Offsets to Operating Expenditures (Refunds) Schedule A, Line 15	\$0.00	\$284,717	(\$284,717) Decrease
Refunds of Federal Contributions Schedule A, Line 16	\$94,234	\$0.00	\$94,234 Increase
<b>Net Decrease in Total Reported Receipts</b>			<b>(\$107,049) Decrease</b>

The decrease in total reported disbursements was due to the following:

2017 - 2018	Amendments filed March 23, 2021	Audited Reports	Difference
Operating Expenditures Schedule B, Line 21(b)	\$0.00	\$284,717	(\$284,717) Decrease
Contributions to Federal Candidates Schedule B, Line 23	\$5,535,578	\$5,921,334	(\$385,756) Decrease
Refunds of Contributions to Individuals/Persons other than Political Committees Schedule B, Line 28(a)	\$86,134	\$0.00	\$86,134 Increase
<b>Net Decrease in Total Reported Disbursements</b>			<b>\$584,339</b>

DEI did not provide an explanation for the change in disclosure amounts.

- Prior to the audit, DEI reported earmarked contributions from individuals received and forwarded totaling \$5,922,872 and \$5,921,334, respectively, a difference of \$1,538 (\$5,922,872 less \$5,921,334). The amended reports now reflect, via memo entries, that the earmarked contributions from individuals received and forwarded were \$6,006,306 and \$5,535,578<sup>11</sup>, respectively, a difference of \$470,728 (\$6,006,306 less \$5,535,578). DEI did not provide an explanation for the change in disclosure amounts.

Since DEI's financial activity was processed through the depository of DELLC and combined with DELLC's other activity<sup>12</sup>, the Audit staff could not verify the total original reported receipts and disbursements totaling \$6,207,589 and \$6,206,051, respectively. In addition, the Audit staff was also unable to verify the total reported amounts of the receipt and disbursement memo entries totaling \$6,100,540 and \$5,621,712, respectively, that DEI disclosed in the amended reports filed in response to the Interim Audit Report. The Audit staff maintains that DEI failed to maintain records, including bank records, to provide sufficient detail that would allow its reports filed with the Commission to be reconciled and verified for accuracy and completeness.

<sup>11</sup> Recipient committees disclosed on FEC reports approximately \$4.5 million from DEI as the conduit committee, per the Data Disclosure database. Without DEI bank records, the Audit staff is not able to determine if the material discrepancy is DEI's error.

<sup>12</sup> DELLC had bank receipt and disbursement activity of approximately \$71 million and \$68 million, respectively.



FEDERAL ELECTION COMMISSION  
WASHINGTON, D.C. 20463

Original Completion: September 22, 2021  
Revised: October 8, 2021

**MEMORANDUM**

TO: Patricia C. Orrock  
Chief Compliance Officer

Dayna C. Brown  
Assistant Staff Director  
Audit Division

FROM: Neven F. Stipanovic *NFS*  
Associate General Counsel  
Policy Division

Lorenzo Holloway *LH*  
Assistant General Counsel  
Compliance Advice

Margaret J. Forman *MJF*  
Attorney

SUBJECT: Draft Final Audit Report on Democracy Engine, Inc., PAC (LRA 1110)

The Office of the General Counsel has reviewed the proposed Draft Final Audit Report (“Proposed DFAR”) on Democracy Engine, Inc., PAC (“DEI”). The DFAR contains three findings: Failure to Maintain a Bank Depository (Finding 1), Inaccurate Disclosure of Statement of Organization (Finding 2), and Recordkeeping for Receipts and Disbursements (Finding 3). We concur with the findings, and comment on Findings 1 and 3. If you have any questions, please contact Margaret J. Forman, the attorney assigned to this audit.

**I. ALL POLITICAL COMMITTEES ARE REQUIRED TO MAINTAIN AND USE A DESIGNATED CAMPAIGN DEPOSITORY (FINDING 1).**

DEI failed to maintain and use a designated campaign depository during the audit period, as required under the Federal Election Campaign Act. 52 U.S.C. § 30102(h)(1); *see* proposed DFAR at 5-8. DEI instead received earmarked contributions and made disbursements through an account owned and controlled by DEI’s affiliated LLC, Democracy Engine, LLC (DELLC). *See* proposed DFAR at 6; *see also* Advisory Opinion 2011-06<sup>1</sup> (Democracy Engine) (affiliation of DEI and DELLC).

DEI acknowledges that it did not maintain and use a designated campaign depository, but argues that, “[a]lthough the Commission’s regulations at 11 C.F.R. § 103.2 appear to ‘require’ the maintenance of a campaign depository, such requirement should not be placed upon a dormant committee that has no receipts or disbursements and no cash on hand.” Correspondence from Jonathan Zucker, Treasurer, Democracy Engine, Inc., PAC to Thomas Hintermeister, [formerly] Assistant Staff Director, Audit Division, Federal Election Commission (March 1, 2021). Furthermore, DEI states: “After further reflection, DEI acknowledges that, since none of its conduit activities passed through a committee depository account, DEI should have disclosed all such activities during the 2018 election cycle as memo entries in accordance with 11 C.F.R. § 110.6(c)(1)(v). Therefore, DEI proposes to amend all reports for the 2018 cycle to reflect all activities as ‘memo entries.’ See IAR at p. 6.”

We disagree with DEI’s position. First, the requirement to maintain a designated depository is a statutory requirement of every political committee, including DEI, under the Federal Election Campaign Act. 52 U.S.C. § 30102(h)(1) (“Each political committee shall designate one or more State banks, federally chartered depository institutions, or depository institutions ... as its campaign depository or depositories”).<sup>2</sup> Section 103.2 does not provide a regulatory exception to this statutory requirement, but rather, restates this requirement. 11 C.F.R. § 103.2. (“Each political committee shall designate one or more State banks, federally chartered depository institutions (including a national bank), or depository institutions ... as its campaign depository or depositories”).

Second, each political committee must use its own designated depository for its financial activity. 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.3. A political committee must

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<sup>1</sup> Advisory Opinion 2011-06 (Democracy Engine), in which both DEI and DELLC were requestors, did not address the specific facts presented here, notably that DEI would not maintain a designated depository and that DEI would run all its receipts and disbursements through DELLC. Rather, Advisory Opinion 2011-06 addressed the vendor processor activities of DELLC on behalf of subscribers who choose to use DELLC as a vendor to make their contributions to recipient political committees. Advisory Opinion 2011-06. This advisory opinion also briefly addressed DEI as a political committee affiliated with DELLC, which, as a separate segregated fund, could be a recipient of earmarked contributions from subscribers within the restricted class of DEI’s connected organization. Advisory Opinion 2011-06 (Democracy Engine) at 2, 6, n. 5. Therefore, because the material facts in this audit are outside the confines of the facts as presented in Advisory Opinion 2011-06, DEI cannot rely on Advisory Opinion 2011-06 as a defense to the findings in this audit report. 11 C.F.R. § 112.5. We also note that Advisory Opinion Request 2009-28 (Democracy Engine, Inc., PAC) presented questions on the issue of earmarking contributions but that the Commission was unable to render an advisory opinion.

<sup>2</sup> All committees, even dormant committees, must designate and maintain a campaign depository. 52 U.S.C. § 30102(h)(1) (each political committee shall designate one or more state or federally insured national banks or credit unions as a campaign depository or depositories).

deposit all receipts into the campaign depository designated by the Committee, and all disbursements, except petty cash, must be made from its designated campaign depository.<sup>3</sup> *Id.* In part, this is so that each political committee's receipts and disbursements can be accounted for by the political committee in a third-party financial institution, which must be "State banks, federally chartered depository institutions, or depository institutions the deposits or accounts of which are insured by the Federal Deposit Insurance Corporation . . . or the National Credit Union Administration, as its campaign depository or depositories." 52 U.S.C. § 30102(h)(1); *see* 11 C.F.R. §§ 103.2, 103.3.<sup>4</sup>

Third, the regulations provide that a conduit must either deposit the earmarked contribution into its own designated account and then disburse funds to the recipient committee from the conduit's account, or the conduit must directly forward the contributor's check on to the recipient committee as designated by the contributor.<sup>5</sup> 11 C.F.R. § 110.6(c)(1)(v); *see* 11 C.F.R. § 110.6(c)(1)(iv)(A)-(C). Here, however, DEI did not deposit the earmarked contributions into its designated depository account.

DEI deposited these earmarked contributions into its affiliated LLC's account (DELLC), and then disbursed funds from this same undesignated account to the recipient committees of these earmarked contributions.<sup>6</sup> Proposed DFAR at 6-8. DELLC's bank account, therefore, served as DEI's *de facto*, undesignated depository account. *Cf.* MUR 7126 (Michigan State Dem Committee), Factual & Legal Analysis at 12 (Aug. 25, 2016) (failure to

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<sup>3</sup> A political committee may transfer contributions received in the political committee's designated campaign depository account to another entity for investment purposes, but on the condition that the political committee must transfer the funds back to the political committee's designated campaign depository account before the disbursements may be made. 11 C.F.R. § 103.3(a); *see* Advisory Opinions 1997-06 (Hutchison) (transfer to and from investment account), 1986-18 (Bevill) (cash management account), 1999-08 (Specter) (mutual funds and stocks), 2014-02 (Make Your Laws, PAC) (Bitcoin), 1980-39 (Fluor PAC) (investment trust). If the investment account does not fall within any of the categories of institutions listed in 52 U.S.C. § 30102(h)(1) or 11 C.F.R. § 103.2, the political committee is not required to designate that account as an additional campaign depository. Advisory Opinion 1980-39 (Fluor PAC), at 2.

<sup>4</sup> As part of the accounting of a political committee's financial activity, at least one of the political committee's designated depository accounts must be a checking account or transaction account. 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.2. Moreover, limits, recordkeeping requirements, and conditions apply to a political committee's financial transactions that cannot be accounted for by a financial institution. *See* 52 U.S.C. § 30102(h)(2) (political committee may maintain a petty cash fund for disbursements for any single transaction of \$100 or less so long as records of each disbursement are kept).

<sup>5</sup> The Commission has recognized several ways that political committees may serve as conduits for earmarked contributions, but in doing so the Commission has never allowed a political committee conduit to avoid the statutory requirement of maintaining and using its designated campaign depository. *See e.g.*, Advisory Opinion 2014-19 (ActBlue); Advisory Opinion 2014-13 (ActBlue); Advisory Opinion 2014-07 (Crowdpac) (explicitly referencing conduit earmarking activities of DEI and DELLC); Advisory Opinion 2012-03 (ActRight); Advisory Opinion 2006-30 (ActBlue).

<sup>6</sup> DEI's treasurer also served in a role with DELLC which was material to the business of DELLC, and which enabled him to complete these transactions for DEI. DEI's treasurer is also the managing member of DELLC, and as such is responsible for establishing the procedures governing the interaction between DEI and DELLC. *See* Zucker aff. (May 27, 2020). DEI's treasurer's duties with DELLC also included inserting the coding information to generate the spreadsheets, in response to the audit, which indicate the amounts, as internally managed by DELLC, of the disbursements to recipient committees as well as the contributor information. Zucker aff. (May 27, 2020) at 1, para. 7.



deposit receipts in a designated campaign depository);<sup>7</sup> MUR 7127 (Sean Braddy), Factual & Legal Analysis at 5-6 (Nov. 28, 2017) (failure to use a proper campaign depository and commingling).<sup>8</sup> All of DEI's financial activity ran through this undesignated bank account, which processed a multitude of financial transactions encompassing DELLC's activities. *See* Memorandum from Neven F. Stipanovic to Patricia C. Orrock, Interim Audit Report on Democracy Engine, Inc., PAC (LRA 1110) (Nov. 23, 2020) at 2, note 2. Because DEI received contributions and made disbursements from DELLC's account,<sup>9</sup> this account is, therefore, a campaign depository of DEI, albeit an undesignated one.<sup>10</sup> 52 U.S.C. § 30102(h)(1); 11 C.F.R. §§ 103.2, 103.3.

## **II. COMMITTEES MUST KEEP RECORDS OF ALL MATTERS REQUIRED TO BE DISCLOSED WITH THE COMMISSION (FINDING 3).**

Because DEI failed to maintain a designated depository and therefore did not run receipts and disbursements through its designated depository, the Audit Division concludes that it cannot verify any of the disclosed activity on DEI's campaign finance disclosure reports.<sup>11</sup> DEI maintains that "DEI objects to this finding and characterization that it failed to maintain sufficient records to verify reported activity. By filing the proposed amendments described in Finding 1, DEI believes that this finding is moot and that sufficient records have been provided by DELLC to verify the conduit activity as properly characterized above and in proposed amended reports."<sup>12</sup> Correspondence from Jonathan Zucker, Treasurer, Democracy Engine, Inc., PAC to Thomas Hintermeister, [formerly] Assistant Staff Director, Audit Division, Federal Election Commission (March 1, 2021).

We disagree with the amendments filed by DEI, and with DEI's explanation that the finding is moot because DEI filed amendments stating that the earmarked contributions were

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<sup>7</sup> <https://www.fec.gov/files/legal/murs/7126/17044416170.pdf>.

<sup>8</sup> <https://www.fec.gov/files/legal/murs/7127/17044435658.pdf>.

<sup>9</sup> According to the DELLC bank account statements provided to the Audit Division, this account is insured by the Federal Deposit Insurance Corporation. *See* 52 U.S.C. § 30102(h)(1); 11 C.F.R. § 103.2.

<sup>10</sup> We do not recommend that the Commission conduct an audit of this account, given the multitude of transactions on behalf of other entities that are not subject to this audit.

<sup>11</sup> Because in this audit DEI and not DELLC served as a conduit for the earmarked contributions, the contributions and disbursements to recipient committees were not processed in the same manner as in Advisory Opinion 2011-06. There, DELLC and DEI represented that DELLC would serve as a vendor processor. In Advisory Opinion Request 2009-28 (Democracy Engine Inc., PAC), DEI's request included detailed plans to serve as a conduit earmarking contributions with an independent vendor; however, the Commission could not reach an agreement. *See* RE: AOR 2009-28 (Dec. 17, 2009); *see also* 11 C.F.R. § 112.5(a)(2) ("An advisory opinion rendered by the Commission ... may be relied on by ... any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which such advisory opinion is rendered.").

<sup>12</sup> When DEI amended its reports to disclose all the activity as memo entries, with no receipts or disbursement activity by DEI, the contribution amounts and disbursements to recipient committees were not consistent with the prior reporting amounts for both contributions and disbursements, and the amended report had a more significant discrepancy between the contributions disclosed as received and contributions disclosed as disbursed to recipient committees. *See* Proposed DFAR at 12.

never deposited. The amendments are not correct because the earmarked contributions were deposited and disbursed through an undesignated depository account, *see infra* pp. 2-4.

Therefore, DEI was required to itemize these transactions on the appropriate schedules of receipts and disbursements attached to conduit DEI's disclosure report.

11 C.F.R. § 110.6(c)(1)(v). DEI did not forward these earmarked contributions in the form of the contributors' checks or other written instruments of the contributors, because the contributor's contributions first passed through the undesignated depository account and then later were disbursed as separate transactions from this undesignated account. Had DEI forwarded the contributors' checks directly on to the recipient committees, it would not have deposited these contributions into an account. The purpose of reporting memo entries for forwarded contributor checks is to make clear for the public record that the contributor's check was deposited directly into the recipient committee's account after passing through the conduits' hands, but without being deposited by, or on behalf of, the conduit.

11 C.F.R. § 110.6(c)(1)(v) *see* 11 C.F.R. § 110.6(c)(1)(iv)(A)-(C).

A treasurer is required to maintain all records and accounts required to be kept under 11 C.F.R. § 102.9 for three years after the report to which such records and accounts relate is filed. 11 C.F.R. § 102.9(c). These include contributions received and disbursements made, and include earmarked contributions. *Id.*; *see* 11 C.F.R. §§ 102.8, 102.10. DEI was responsible for receiving and holding onto earmarked contributions for prospective candidates and eventual nominees. *See* Audit Materials, Screenshots of DEI/DELLC Webpages, 2018 Election Cycle; *See also* Advisory Opinion 2014-07 (Crowdpac) at 4, 7-8. During the period covered by this audit, DEI reported earmarked contributions, as itemized contributions on Schedule A, and itemized disbursements on Schedule B of its disclosure reports. *See* proposed DFAR at 7; *see e.g.*, Democracy Engine, Inc., PAC 2018 Year-End Report, FEC Form 3X, Schedules A and B, (Jan. 31, 2019).<sup>13</sup> As a part of its recordkeeping obligations, DEI was responsible for maintaining and preserving all records, including its bank records and statements, with respect to these earmarked contributions, so that the substance of these disclosure reports "may be verified, explained, clarified, and checked for accuracy and completeness."

11 C.F.R. § 104.14(b)(1); *see* 11 C.F.R. § 104.14(b)(2)-(3). This recordkeeping and reporting requirement includes earmarked contributions held by a conduit. 11 C.F.R. § 110.6(c) (conduit required to file reports); *see* Advisory Opinion 2006-30 (ActBlue) at 6.

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<sup>13</sup> <https://docquery.fec.gov/pdf/008/201901319144259008/201901319144259008.pdf>.

# SANDLER REIFF

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November 1, 2021

Ms. Dayna C. Brown  
Acting Assistant Staff Director  
Audit Division  
Federal Election Commission  
1050 First Street, N.E.  
Washington, D.C. 20463

Dear Ms. Brown:

I serve as counsel to Democracy Engine, Inc. PAC (“DEI”). By this, for the reasons stated below, DEI requests a hearing before the Commission to further provide and clarify its views pertaining to the issues raised by the Audit Division’s Draft Final Audit Report (“DFAR”).

It is believed that some time in 2012, DEI’s bank force closed its bank account due to inactivity and a zero bank balance. Between 2012 and 2019, DEI did not directly engage in any fundraising activities nor make any direct expenditures. In 2019, prior to the notification of this Audit, DEI opened a new depository account. As a general matter, DEI does not have any staff or other overhead costs. To the extent that DEI has even engaged in any activities between 2012 and 2019, DEI solicited contributions from individual donors to be earmarked to specific federal candidates. Rather than writing checks to these candidates or DEI, the individual donors contributed by credit card, which were processed by Democracy Engine, LLC (“DELLC”). DELLC is a for-profit company whose professional services include the processing and forwarding of political contributions.

DEI initially, and we believe incorrectly, disclosed all of the activities as passing through DEI as an earmarked contribution and a forwarded contribution to the designated candidate. Upon further reflection, and with consultation with Commission staff, DEI amended its reports in March 2021 to properly reflect the activities as memo entries since none of the earmarked contributions passed through a bank account of DEI. In hindsight, even this level of reporting may have been more than necessary since DEI never “handled” any of the contributions and donors used a for-profit vendor to process and forward the contributions to the candidates. See 11 C.F.R. § 110.6(c)(1)(v) (requiring any earmarked contribution that passes through a committee as a receipt and disbursement and any forwarded contributions made by check or other written instrument be disclosed as a memo entry). Finally, it should be noted that the process utilized by DELLC during the 2018 election cycle is substantially identical to those described and approved by the Commission in Advisory Opinion 2011-06.

Below, please find our comments related to the specific findings found in the DFAR. For purposes of our request for a hearing, the request is limited to issues related to Findings ## 1 & 3 of the DFAR related to recordkeeping and reporting of conduit activities.

Finding #1 (maintenance of a depository)

Although DEI acknowledges the Audit Division's conclusion that Commission regulations appear to require that each political committee must maintain a depository account, the Commission should determine, in its discretion, that the maintenance of an account with no funds by a committee that has no receipts or disbursements is unnecessary and impractical. It has been our experience that banks are less willing to allow their clients to maintain dormant or empty accounts and will force close the account after a period of inactivity. That is what happened to DEI prior to the 2018 election cycle. It makes no sense to require DEI to reopen an account until and unless it has funds to deposit or spend. DEI did, in fact, reopen an account in 2019 and has been depositing funds into that account and making expenditures from that account.

Findings # 1 & 3 (recordkeeping and reporting related to conduit activity)

DEI objects to the DFAR's assertions with respect to its failure to maintain accounts sufficient to verify reported activity. As stated above, DEI did not have any bank accounts during the reporting period and amended its reports to properly reflect this fact. Unsatisfied with this reality, the DFAR characterizes a scenario whereby DEI "uses" DELLC to conduct its business. DELLC is a for-profit entity that is in the industry of processing political contributions. During the 2018 election cycle, DEI did not undertake any activities that benefited the committee. The only activity undertaken by DEI, with no incremental costs, was to encourage donations directly to candidates. At the time the Commission earmarking regulations were promulgated (11 C.F.R. § 110.6), contributions were generally understood to be made by check or other written instrument. Thus, the Commission's regulations make no reference as to the proper procedures related to earmarked contributions made by credit card. The Commission has, by Advisory Opinion, acknowledged that earmarked contributions can be made by credit card, but has only considered this issue with respect to contributions that pass through a political committee's accounts. See e.g. Advisory Opinion 2019-15 (NORPAC); 2014-13 (ActBlue); 2008-8 (Jonathan Zucker); 2006-30 (ActBlue)

Contrary to the DFAR's assertion, DELLC was not acting as some type of "project" of DEI but rather, as a commercial vendor in the business of processing and forwarding contributions. DELLC processed and deducted a usual and normal charge for each contribution and instructed committees in receipt of such funds to report the deducted amounts as an operating cost to DELLC. The Commission has previously permitted for profit operations to process earmarked contributions and such activities were not subject to any additional conduit disclosure. See Advisory Opinion 2004-8 (allowing for profit corporation to forward earmarked contributions without further disclosure under commercial vendor exception of 11 C.F.R. § 110.6(b)(2)). See also e.g. Advisory Opinions 2012-22 (skimmerhat); 2015-15 (WeSupportThat.com); 2016-08 (eBundler.com, LLC).

Even more on point, the Commission determined that individuals may create and operate a data processing service that identified suggested campaigns to support and facilitated the collection and forwarding of contributions through a for-profit LLC created to support the project. Advisory Opinion 2017-06 (Stein and Gottlieb). Essentially DELLC and DEI operated its activities in the 2018 cycle on substantially similar terms, allowing donors with interests in candidates holding certain political positions to find and contribute to them. Thus, DEI merely advised donors on campaigns to support and DELLC helped facilitate the collection and remittal of those contributions on commercial terms with the donors. DELLC withheld a sufficient amount of funds from each remittal to cover its costs and earned a reasonable profit on these activities. DELLC's activities are not subject to disclosure requirements because "their services are "akin to 'delivery services, bill-paying services, or check writing services.'" Advisory Opinion 2021-07 (PACMS), p.11.

Out of an abundance of caution, and a misunderstanding of Commission rules related to the definition of "conduit,"<sup>1</sup> DEI, albeit incorrectly, included this activity as reportable bundling activity on its initial reports PAC reports. Since DEI did not actually collect and forward contributions, it could not be considered a "conduit" under the Commission's regulations.

During the audit process, DEI realized that this activity should not have been included in its reports and recharacterized this activity as memo entries since the donations made through these projects did not pass-through DEI. In further hindsight, based upon the precedents cited above, it does not appear that DEI was even required to provide the memo entries in its amended reports. Commission precedents do not require that a for profit entity have a contractual relationship and determined that a for profit entity will be considered a commercial vendor and not a conduit if it collects and forwards contributions on behalf of a donor. Advisory Opinion 2017-06, pp. 6-7.

Faced with the obvious conclusions described above, the Audit Division, in an attempt to justify its finding, has attempted to make a novel argument that DEI and DELLC are one in the same and thus DELLC, a for profit entity is somehow merely a bank account of DEI.<sup>2</sup> The General Counsel's memorandum attached to the DFAR attempts to characterize DELLC as a *de facto*, undesignated depository account. General Counsel Memorandum, DFAR for Democracy Engine, Inc. PAC, Page 3-4. The two matters cited by the memorandum do not appear to have any similarities to the relationship between DEI and DELLC and do not provide any principled explanation as to how a for-profit entity could serve as an undesignated depository account of a PAC. Since DELLC was neither a political committee, nor a conduit of earmarked contributions it cannot be subject to the recordkeeping requirements of the Act nor be required to disclose (albeit through DEI) its contribution processing activities. Thus, the DFAR and attached analysis from the General Counsel's office appear to be nothing more than a tortured effort to justify their initial legal position in the Interim Audit Report.

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<sup>1</sup> "conduit" is defined as "any person who receives and forwards an earmarked contribution to a candidate or a candidate's authorized committee..." 11 C.F.R. § 110.6(b)(2).

<sup>2</sup> It should be noted that DELLC has provided the Audit Division with substantial documentation to document the transactions that have been disclosed as conduit activity by DEI on its original and amended reports.

If you require any further information, or have any other questions, please call me at (202) 479-1111.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil Reiff". The signature is fluid and cursive, with the first name "Neil" being more prominent than the last name "Reiff".

Neil Reiff  
Counsel to Democracy Engine Inc. PAC