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For the meeting of March 25, 2021

March 12, 2021

MEMORANDUM

To: The Commission

Through: Alec Palmer *AP*
Staff Director

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

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

Kendrick Smith *KDS*
Audit Manager

Subject: Draft Final Audit Report Response from Dr. Raul Ruiz for Congress
(A19-03)

Following the approval of four Commissioners to make public the Draft Final Audit Report response from the Dr. Raul Ruiz for Congress committee, we ask that the response be made available on the Commission's website.

Attachment

November 20, 2020

Brian G. Svoboda

BY EMAIL AND U.S. MAIL

Federal Election Commission
Audit Division
Mr. Kendrick Smith
1050 First Street, NE
Washington, DC 20002
Email: audit@fec.gov

Re: Response to the Draft Final Audit Report on Dr. Raul Ruiz for Congress

Dear Mr. Smith:

On behalf of our client, Dr. Raul Ruiz for Congress ("the Committee"), we write to respond to the Draft Final Audit Report (the "DFAR") of the Audit Division.

After fieldwork, the response to the Exit Conference, and the response to the Interim Audit Report, the auditors have finally concluded that the Committee's "financial activity for the audit period is materially correct and no further action is warranted." See DFAR at 3. The only issue remaining is a lone, proposed finding of \$5,899, claiming potential personal use of campaign funds through "[p]ersonal vehicles ... used by committee staff for both personal and campaign activities."¹ Virtually all of the payments at issue were to gas stations,² in a campaign for office in a district spanning nearly 6,000 square miles.³

Like the misstatement finding, the potential personal use finding should be removed. The Commission should issue a final audit report that makes clear that the audit ended with no adverse finding against the Committee.

A. The Proposed Personal Use Finding Is Plainly Erroneous and Should Be Vacated

The proposed finding of potential personal use remains plainly erroneous. The auditors took special rules written for the purchase or lease of a campaign vehicle—not at issue here—and applied them generally to staff gas purchases, which are routine expenses on campaigns, especially in large, sprawling jurisdictions like California's 36th District. By the auditors'

¹ DFAR at 7.

² *Id.* at 7; see also email from William A. Antosz to Marty Kuest (May 4, 2020).

³ See https://www2.census.gov/geo/maps/cong_dist/cd113/cd_based/ST06/CD113_CA36.pdf. The remainder were a \$22.11 disbursement identified as for parking, and two \$7.95 disbursements identified as made to Anchor General Insurance. See Email from William A. Antosz to Marty Kuest (May 4, 2020).

reckoning, every time a campaign employee buys gas for campaign travel in a personal vehicle, the campaign must keep a contemporaneous log to document dates and expenses related to personal use, because the gas purchases are “vehicle expenses.” *See* DFAR at 7.⁴

However, there exists no clear precedent or advance notice to the regulated community stating that 11 C.F.R. § 113.1(g)(8)’s log requirement applies to gas purchases. For example, when the Commission published an interpretive rule that expressly addressed the reporting of reimbursements to individuals for travel expenses, it did not indicate the potential application of the “log” requirement.⁵ The October 19, 2020 memorandum from the Office of General Counsel (“OGC”), which accompanies the DFAR, contains no citation to any matter under review, audit, advisory opinion, or other authority that would purport to apply the eighteen-year-old log requirement to gas purchases, as the DFAR now purports to do.

OGC’s memorandum asserts that the log requirement extends beyond campaign-purchased vehicles, citing the 2002 rulemaking that created it. However, that same rulemaking said that the log requirement “is based on the analysis in AO 2001–3,” which involved the campaign purchase of a vehicle.⁶ Plainly, section 113.1(g)(8)’s log requirement was meant to cover the unusual situation of buying or leasing a campaign vehicle—not to cover common occurrences like when staff buy gas or rent cars for campaign travel.

While not at issue in this audit, the auditors’ interpretation of the log requirement would reach campaign rental cars, also. Section 113.1(g)(1)(ii)(D)’s substantive personal use restriction contains a carve-out for when a vehicle is used for *de minimis* personal activities. However, section 113.1(g)(8)’s log requirement does not: it applies whenever the vehicle is used for “both personal use and either campaign or office-holder use ...”⁷ Thus, under the auditors’ interpretation, whenever a campaign rents a car, and the staffer takes a detour to go to the store, the log requirement would apply. This would significantly and confoundingly increase the compliance burdens for presidential and other major campaigns that extensively use rental cars.

Even if one were to suppose that the log requirement applies every time a staffer buys gas for campaign travel in a personal vehicle or makes a personal stop in a campaign rental car, the DFAR still makes a critical error. It treats the absence of a log under 11 C.F.R. § 113.1(g)(8) as if it were a substantive violation of § 113.1(g)(1)(ii)(D)’s personal use prohibition. But section

⁴ The DFAR does not explain how the \$22.11 identified as for parking, nor the two \$7.95 disbursements identified as for insurance, can be presumed to “involve both personal use and either campaign or office-holder activity,” and thus could be subject to the log requirement. *See* DFAR at 7.

⁵ *See* Reporting Ultimate Payees of Political Committee Disbursements, 78 Fed. Reg. 40,625 (2013).

⁶ Disclaimers, Fraudulent Solicitation, Civil Penalties, and Personal Use of Campaign Funds, 67 Fed. Reg. 76,962, 76,974 (2002).

⁷ 11 C.F.R. § 113.1(g)(8). *See also* Advisory Op. 2001-03 (imposing log requirement even when campaign-purchased vehicle is used only for *de minimis* personal travel).

113.1(g)(8) is a *recordkeeping requirement*, while section 113.1(g)(1)(ii)(d) is an *expenditure limitation*. While the campaign manager’s declaration in this audit may not have provided the same specific “dates and expenses” that a contemporaneous log would have provided, *see* OGC Memorandum at 8, his declaration is still probative evidence that no personal use occurred.

The Commission should remove the personal use finding from the report. If that finding stands, then the Committee would continue to face a charge that neither the law nor Commission precedent supports. For the first time in eighteen years, the regulated community would learn that the mileage log requirement, commonly understood to apply to campaign-purchased vehicles, is triggered every time a staffer buys a tank of gas, or rents a car and uses it for *de minimis* personal travel. The Commission should not use this audit as the occasion to put a wide swath of campaigns into sudden, purported non-compliance, advancing a novel interpretation of a rule that has been in place for nearly two decades.

B. The Full Commission Should Revise the Draft Final Audit Report to Make It Completely Clear That There Is No Adverse Finding Against the Committee

The Draft Final Audit Report comes to the Commission in an unusual way: no quorum of Commissioners appears to have weighed in on its findings. Normally, the Commission considers an interim audit report involving matters like these “in executive session prior to the report being sent to the committee being audited.”⁸ Here, the auditors provided the Committee with the Interim Audit Report on May 1, 2020, when there were only three Commissioners; a fourth Commissioner to establish quorum arrived on June 5.⁹ The auditors transmitted the DFAR on November 2, 2020, when the Commission again lacked quorum.

Under recent practice, this gap in oversight would permit the auditors to take subsequently rejected findings and place them on the public record. Recently, when an audit has concluded, the Commission has published all audit-related documents from the interim audit report onward on the Commission website.¹⁰ Here, that practice would result in the publication of two key documents—the Interim Audit Report and the Draft Final Audit Report—that no quorum of four Commissioners appears ever to have reviewed. The first document contains a misstatement finding that the auditors have since reversed, and both documents contain a spurious personal use finding.

Also, the format in which the auditors draft and publish the report can create the mistaken impression that a committee committed violations, even when the final report asserts none.

⁸ Procedural Rules for Audit Hearings, 74 Fed. Reg. 33,140, 33,141 (2009).

⁹ See <https://www.fec.gov/updates/week-june-1-5-2020/>.

¹⁰ See, e.g., https://transition.fec.gov/audits/2016/AuditReport_2016_MarshaBlackburnforCongress.shtml (most recent example of published audit documents). This was not always the case, as a review of audits released in 2009 and before reflects. See <https://www.fec.gov/legal-resources/enforcement/audit-search/>.

Because the auditors treat the audit report as a “living document,” starting with an interim audit report and supplementing it at each stage of the process, the Commission—or even the auditors—might reject a finding, and yet the report will still present that finding. For example, in this Draft Final Audit Report, the reader twice sees the phrase, “Misstatement of Financial Activity” in bold, oversized text.¹¹ One must read closely to find the key phrase: “[T]he Audit staff determined that RRFC’s financial activity for the audit period is materially correct and no further action is warranted.”¹²

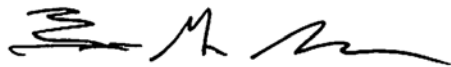
The Commission should ensure that the final audit report in this matter fully and fairly reflects the actual findings of the Commission itself. Instead of presenting adverse findings in bold type and noting in the “fine print” that they were later rejected, the Commission should say simply and clearly that there ultimately were no findings—as past audits have done.

CONCLUSION

We respectfully request that the Commission issue a final audit report that reflects the Committee’s material compliance with the Act.¹³

We appreciate the Commission's consideration of this response.

Very truly yours,



Brian G. Svoboda
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Counsel to Dr. Raul Ruiz for Congress

BGS:tcb

¹¹ See DFAR at 3, 4.

¹² See *id.*.

¹³ The Committee would not seek an audit hearing at this time, hoping that the Commission might appropriately resolve these matters without further burden.