



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of:)	
)	
The November Fund and)	MUR 5541
Bill Sittman, in his official)	
capacity as treasurer;)	
U.S. Chamber of Commerce)	
Tom Donohue)	

**STATEMENT OF REASONS OF COMMISSIONERS
CYNTHIA L. BAUERLY AND ELLEN L. WEINTRAUB**

On October 21, 2008, the Commission failed, by a vote of 3-3, to accept a signed conciliation agreement with the November Fund and Bill Sittman, in his official capacity as treasurer ("The November Fund"), that would have settled violations of 2 U.S.C. §§433, 434, 441a(f), and 441b(a) of the Federal Election Campaign Act of 1971, as amended ("FECA"). We voted to adopt the recommendation of the Office of the General Counsel to accept the signed conciliation agreement. We write to articulate our reasons for doing so and to express our concern about the dramatic departure this result represents from the Commission's prior enforcement efforts and the law itself.

Although our colleagues who voted to reject the signed conciliation agreement have not yet issued their Statement of Reasons, we believe it is important to provide the public with some understanding of the decision in this matter. Our discussion of their arguments is based on the articulation of their reasons thus far and we will respond to any further arguments in a second Statement if necessary.

I. Background

This matter arose from a complaint filed by Citizens for Responsibility and Ethics in Washington alleging, *inter alia*, that the U.S. Chamber of Commerce ("the Chamber") and Tom Donohue as president, violated the FECA by making corporate contributions or expenditures to influence a federal election in connection with a \$3,000,000 contribution to an organization called The November Fund, and that the November Fund violated the

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FECA by failing to register and report as a political committee. The allegations in the complaint were very similar to those in several prior Matters Under Review ("MUR"), including MUR 5365 (Club for Growth); MUR 5403 (America Coming Together); MUR 5440 (The Media Fund); and MUR 5487 (Progress for America Voter Fund), all of which dealt with the political committee status of organizations registered under section 527 of the Internal Revenue Code ("527 organizations").

On March 8, 2005, the Commission found reason to believe the November Fund violated §§ 433, 434, 441a(f) and 441b(a) of the Act, and that the U.S. Chamber of Commerce and Thomas Donohue, President & CEO, violated 2 U.S.C. § 441b(a) of the Act. At that time, the Commission launched a formal investigation into the matter. The investigation spanned several years and uncovered thousands of pages of documents. We will not attempt to recite all of the relevant facts, but summarize as follows:

- The November Fund was created in November 2004 by Ken Rietz, COO of Burson Marsteller, and officials at the United States Chamber of Commerce, a client of Burson Marsteller.
- The Chamber contributed \$3,000,000 to The November Fund for the purpose of preventing John Edwards from being elected Vice President of the United States. The Chamber's contribution represented 95% of the total contributions to The November Fund. *See Factual and Legal Analysis at 2.*
- Solicitations to potential donors, which netted a total of \$124,718, indicated that the funds received would be used in Presidential election battleground states to attack Sen. Edwards and his career as a trial lawyer and raise voters' concerns about his influence were he to be elected Vice President.
- The November Fund spent approximately \$1,172,962 on Internet advertisements and direct mail pieces directly attacking Senator Edwards. The remainder of The November Fund's disbursements, or approximately \$1,951,756, was for fundraising and administrative costs, and television and radio advertisements that were intended to "complement" the anti-Edwards advertisements.

Upon completion of the investigation, based upon the voluminous body of evidence uncovered during the investigation and consistent with Commission precedent regarding other 527 organizations, the Commission authorized the Office of General Counsel to enter into pre-probable cause conciliation negotiations with The November Fund.

Pursuant to the Commission's instructions, the Office of General Counsel successfully negotiated a conciliation agreement with the November Fund and Bill Sittman, in his official capacity as treasurer. The legal theory upon which this matter was

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based is the same legal theory that the Commission has consistently applied in other enforcement matters regarding 527 organizations. See MUR 5365 (Club for Growth); MUR 5403 (America Coming Together); MUR 5440 (The Media Fund); MUR 5487 (Progress for America Voter Fund); MUR 5542 (Texans for Truth); MUR 5568 (Empower Illinois); and MUR 5754 (MoveOn.org). Specifically, the Commission analyzes whether an organization has received contributions or made expenditures, as defined in the FECA, in excess of \$1,000 during a calendar year and, if it has, then looks to whether the organization's "major purpose" is campaign activity.

II. Legal Analysis

The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of \$1,000 during a calendar year. See 2 U.S.C. § 431(4)(A). For the purpose of triggering political committee status, the Act defines the terms "contributions" and "expenditures" as including "anything of value made by any person for the purpose of influencing any election for Federal office." See 2 U.S.C. § 431(8)(A)(i), (9)(A)(i).

The November Fund exceeded the statutory threshold for political committee status when it received "contributions" exceeding \$1,000 in response to fundraising solicitations clearly indicating that funds received would be used to target the defeat of Sen. Edwards in the 2004 Vice Presidential election. Money received in response to fundraising solicitations that clearly indicate the funds being sought will be targeted to the election or defeat of clearly identified federal candidates constitute contributions under the Act. 2 U.S.C. § 431(8)(A); *FEC v. Survival Education Fund, Inc.*, 65 F.3d 285, 295 (2d Cir. 1995) ("*Survival Education Fund*"); see also 11 C.F.R. § 100.57. In this matter, the evidence showed that the language used in a series of fundraising solicitations sent by and on behalf of The November Fund to the Chamber, and in some cases other donors, clearly indicated that the funds received would be targeted to the reelection of George W. Bush and/or the defeat of a specific federal candidate, Sen. John Edwards, and by extension Sen. John Kerry.¹

Some of our colleagues have suggested that the Commission could not apply 11 C.F.R. § 100.57 in this matter because that regulation was promulgated *after* the activity at issue in this matter occurred. This assertion is faulty for two reasons. First, the Factual and Legal Analysis in this matter, which formed the basis of the Commission's decision to find reason to believe the November Fund violated the Act, makes no mention of 11 C.F.R. § 100.57 and instead relies on *Survival Education Fund*. See 65 F.3d 285, 295 (2d Cir. 1995) (finding that a mailer solicited "contributions")

¹ For example, a July 19, 2004, solicitation from the November Fund to the U.S. Chamber of Commerce stated in part: "'The Truth about Trial Lawyers' campaign should have the following objectives: ... Positively impact the Bush-Cheney re-election by helping to solidify the base while having an impact on swing voters" and "During the final two weeks of the campaign, we will continue the broadcast advertising without Edwards' name, while using direct mail, print and the Internet to go after Edwards."

under FECA when it left “no doubt that the funds contributed would be used to advocate [a candidate’s] defeat at the polls, not simply to criticize his policies during the election year.”). Second, although section 100.57 was indeed promulgated a month after the activity at issue in this matter occurred, the definition at 11 C.F.R. § 100.57 merely codified *Survival Education Fund* and did not create a new framework for which the November Fund was not already on notice.² See Explanation and Justification, *Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees*, 69 FR 68056 (Nov. 23, 2004); Supplemental Explanation and Justification, *Political Committee Status*, 72 FR 5595 (Feb. 7, 2007). Thus, we believe that the rule of *Survival Education Fund*, as codified in 11 C.F.R. § 100.57, is directly applicable to this matter and any suggestion to the contrary is not tenable. Applying this standard to the factual record here results in a finding that The November Fund received far more than the \$1,000 statutory threshold for contributions in response to its solicitations, thereby triggering political committee status. See 2 U.S.C. § 431(8)(A).

With respect to the “major purpose” test, the Supreme Court has held that “[t]o fulfill the purposes of the Act” and avoid “reach[ing] groups engaged purely in issue discussion,” only organizations whose major purpose is campaign activity can be considered political committees under the Act. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 79; *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) (“*MCFL*”).

An organization’s “major purpose” may be established through public statements of purpose. See, e.g., *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-36 (D.D.C. 2004) (court found organization evidenced its “major purpose” through its own materials which stated the organization’s goal of supporting the election of Republican Party candidates for federal office and through efforts to get prospective donors to consider supporting federal candidates); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“organization’s [major] purpose may be evidenced by its public statements of its purpose or by other means”).³ An organization also can satisfy *Buckley*’s “major purpose” test through sufficient spending on campaign activity. *MCFL*, 479 U.S. at 262-264 (political committee status would be conferred on *MCFL* if its independent spending were to become so extensive that the group’s major purpose may be regarded as campaign activity).

² Indeed, the Notice of Proposed Rulemaking, which signaled the Commission’s intention to codify *Survival Education Fund*, was published in the Federal Register on March 11, 2004 and a hearing on the proposed rule was held in April 2004, several months before the November Fund came into existence.

³ In its IRS Notice of 527 Status, The November Fund states that its purpose is to “engage in political activities that educate the general public regarding the public policy positions of candidates for federal, state and local office and mobilize voters in compliance with federal and state laws.” The November Fund, Form 8871 (Aug. 11, 2004).

In this matter, The November Fund's public statements and solicitations made clear that its mission was to oppose John Edwards's candidacy in 2004.⁴ Furthermore, The November Fund spent virtually all of its money on federal campaign activity. Specifically, of its \$3,124,718 budget, The November Fund spent \$456,127 on Internet advertisements and \$716,835 on direct mail pieces that attacked Senator Edwards. The November Fund's website, which it spent \$56,500 to create and manage, also focused almost exclusively on John Edwards and the Kerry-Edwards campaign. The remainder of The November Fund's disbursements financed administrative costs (\$384,802) and television and radio advertisements (\$1,510,454) that did not identify a federal candidate but were – by its own admission – intended to complement the anti-Edwards advertisements. Thus, through its public statements regarding its purpose and its spending on campaign activity, it is clear that The November Fund's major purpose was campaign activity, satisfying *Buckley's* test.

In refusing to accept the signed conciliation agreement, some of our colleagues have suggested that The November Fund's major purpose was issue advocacy focused on trial lawyers rather than campaign activity to defeat John Edwards. The facts here simply do not support this view. The November Fund's strategic choice to focus on the fact that John Edwards was a trial lawyer as its vehicle for attacking his candidacy does not negate the fact that its statements and spending show that its major purpose was to defeat the Kerry-Edwards ticket in the November 2004 election. Nothing in its communications or solicitations could be read, for example, as promoting tort reform legislation or any other related issue. Instead, what is clear is that it aimed to prevent a trial lawyer from achieving the "biggest prize of all – the White House." It is also worth noting that the organization's choice of "The November Fund" as its name leaves little to the imagination about its intent to influence the November 2004 general election.

The facts in this matter clearly establish that The November Fund exceeded the \$1,000 threshold for political committee status set forth in 2 U.S.C. § 431(4) by receiving over \$1,000 in contributions in response to fundraising solicitations clearly indicating that the funds received would be targeted to the election or defeat of a clearly identified federal candidate. As a result, because The November Fund had the major purpose of federal campaign activity, The November Fund had a duty to register as a political committee with the Commission and to disclose its receipts and disbursements to the public through reports filed with the Commission. This is a duty the November Fund has apparently acknowledged by voluntarily entering into a conciliation agreement with the

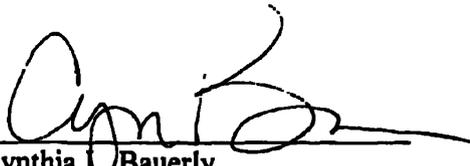
⁴ For example, The November Fund's major purpose is evident in a "Strategic Overview" memorandum provided to its board by its senior strategist. The memo suggests that since "Kerry-Edwards are leading narrowly in public polls as of early August in Ohio, Nevada, New Mexico, and Wisconsin," "these four should be top priorities." In the final section of the memo, the author argues that The November Fund "should attempt to simply raise the 'doubt level' on Edwards by reinforcing known attitudes that play to our greater strengths." Additionally, in an overview document prepared for and distributed to prospective large donors, The November Fund stated that it would "have a single focus – to tell the truth about trial lawyers, especially the career of John Edwards. Now, they are after the biggest prize of all – The White House – with over 1,000 political appointments and potentially four members of the Supreme Court. We formed The November Fund to promote a full discussion of those issues before November 2nd."

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Commission. Our colleagues' refusal to accept the signed conciliation agreement with the November Fund amounts to a refusal to enforce the law.

We do not dispute the ability of the current Commissioners to depart from the decisions of past Commissioners in the enforcement context. In fact, if those decisions were arbitrary and capricious or contrary to our regulations or the law, we believe it is our duty to depart from those decisions and enforce the law fairly, equitably, and in a manner that comports with Congressional intent. That is not what happened here. The Commission's previous decision to find reason to believe the November Fund violated the FECA; the decision to open an investigation; the decision to enter into conciliation prior to a finding of probable cause to believe; and the terms that the Commission approved in its proposed conciliation agreement, were all decisions well grounded in law, based upon the facts, and in accordance with Commission precedent. That is why we supported the recommendation of the Office of the General Counsel to accept the agreement signed by the November Fund, and why we are gravely concerned by the refusal of three of our colleagues to do so.

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Cynthia L. Bauerly
Commissioner

12/19/2008
Date


Ellen L. Weintraub
Commissioner

12/19/08
Date