September 10, 2018

Honorable Lisa J. Stevenson, Esq.
Acting General Counsel
Office of General Counsel
Federal Election Commission
1050 First Street, NE
Washington, DC 20463

Re: Request under 11 C.F.R §112.1 for an Advisory Opinion regarding the Application of 52 U.S.C. §30119 of the Federal Election Campaign Act (FECA) to an Individual Contractor with the United States Postal Service

Dear Ms. Stevenson:

I am requesting an advisory opinion regarding my ability under 52 U.S.C. §30119 to make, as I wish to make, federal campaign and PAC donations for the upcoming November 2018 federal elections and future such elections. I am an individual who has a "personal services" contract with the United States Postal Service (Postal Service) which will continue in effect through those elections. While I understand that the Federal Election Commission (FEC) has previously opined in an advisory opinion that a contractor hauling U.S. mail was subject to the restrictions of §30119 (AO 1980-37 *Stenholm*), I contend for the following reasons that the *Stenholm* decision did not examine the essentially unique legal and fiscal standing of the Postal Service within the federal executive and so is in error.

The United States Postal Service is not an Agency or Department of the United States.

Under the Postal Reorganization Act of 1970 (PRA), 39 U.S.C. §§101 *et seq.* at §401 (1), the Postal Service is an "independent establishment of the executive branch of the Government of the United States." Among the Postal Service's various powers under the PRA, it may sue and be sued in its official name [§401(1)], enter into contracts (§401(3)], and determine the form and content of its contracts [§401(4)]. Pursuant to §410(a) of the PRA, no federal law pertaining to public or federal contracts applies to the exercise of the powers of the Postal Service. In an effort to wall off the Postal Service from political and other untoward pressure, §1002 of the PRA forbids any elected federal or state official, political party representative at any level, or any other person or organization to make a recommendation regarding either the hire or other favorable employment action concerning any individual.

The FECA itself and its implementing regulations contain no definition of what constitutes a federal "department" or "agency." Thus, there is nothing in the body of the FECA to lead to an

understanding that the meaning of those terms differs from that containing in the Title 5 U.S.C. (Government Organization and Employees) which establishes the general organization of the executive branch. Section 101 of Title 5 names the civilian executive departments of the Government, which list does not include the Postal Service. Similarly, §201 of Title 5 enumerates the military departments, in which rendition the Postal Service again is not found. "Government corporations" are defined in §103, and they do not include "independent establishments." Of greatest importance, under §104 the Postal Service is expressly excluded from the definition of an "independent establishment" for the purposes of Title 5. The full import of this exclusion becomes clear in §105 which informs that an executive "agency" means an executive department, a government corporation, and an independent establishment, none of which encompasses the Postal Service as a matter of definition. It could not be clearer that Congress in 1970 knowingly and expressly chose to create this non-agency, non-departmental status for the Postal Service among federal executive entities. How Congress statutorily constructed and launched the Postal Service therefore limits the scope of the operation of §30119 of the FECA in the postal universe; and such is a matter for Congress to address statutorily should it choose to do so.

Accordingly, the Postal Service, which sues and is sued and contracts in its own name, is not a department or agency for the purposes of 52 U.S.C. §30119(a); and thus an individual contractor with the Postal Service is not subject to the strictures of the section. The non-coverage of individual postal contractors by §30119(a), albeit seemingly singular within the executive branch (except that the same holds true for the Postal Regulatory Commission, 5 U.S.C. §104), finds its parallels in the other branches of the government, since §30119 on its face does not apply, for example, to individual contractors performing IT consulting work either for the Clerk of the U.S. House or for the Administrative Office of U.S. Courts.

I only Meet the Second Definitional Prong of §30119 in the Most Attenuated Fashion.

Separately, I had hoped also to demonstrate that I did not fit in any regard within the other prong of the of §30119 definition of a contractor, one who is paid in whole or in part from moneys appropriated by Congress. Unfortunately for that argument, while Congress made no provision for any nature of appropriation to the Postal Service, having lost $2.742 billion in FY 2017, in the first five months of FY 2018, *see* continuing resolutions for FY 2018 passed as PL 115-56, PL115-90, PL 115-96, PL 115-120, and PL 115-123, Congress did pass on March 23, 2018 the Consolidated Appropriations Act of 2018, PL 115-141, in which the legislature appropriated $58.118 million to the Postal Service in reimbursement of revenue foregone in the handling of free or reduced-cost mailings for the blind and those voting from overseas. Nonetheless, that sum of money is less than 0.00826% of the projected total 2018 postal revenue of $70.215 billion – the Service's actual postal revenue through the 3rd Quarter of 2018 being $53.694 billion. These figures mean that of every $1000 the Postal Service could pay me between March 23 and

October 1, 2018, 8¼ cents of that would be due to the appropriation. Such a small sum is extremely *de minimis* as a factor of postal revenue, *see* 39 U,S.C. §2003 creating the Postal Service Fund and denoting its sources of income. Such renders irrational here the application of §30119 in light of the policy underlying the FECA, that the appropriation power of Congress as applied to the Postal Service, first, would rationally and realistically incentivize me to corrupt a federal elected official to favorably affect my postal contract and, second, would lead that official to attempt to influence this appropriation, so clearly minute with respect to the entire postal weal, in order to pressure postal officials to act favorably to me as a contractor. The requirement that the contractor's earnings had to be paid in whole or in part with funds appropriated by Congress is that body's recognition that there had to be a nexus of sufficient dimension to bear rational scrutiny, that the federal political world had to have sufficient fiscal connection with/access to the agency or department from which the evil of corruption, or its appearance, could realistically arise. It is a relatively small step to find that if this comparatively miniscule appropriation serves to implicate §30119(a), then the appropriation of a single dollar to a $70 billion entity, literally meeting the requisites of the statute although wholly unmoored from the underlying statutory purpose and the clear congressional judgment that there must be a true nexus, would serve as well.

In any event, if such technicality and literalism is to govern here with regard to the second definitional prong of who is a federal contractor, then the singular status of the Postal Service, not being either the United States or an agency or a department because of a considered choice made by Congress when the Postal Service was created, surely is sufficient to establish that the first prong of §30119(a)'s definition of a federal contractor has not been satisfied.

I look forward to your speedy resolution of this request.

Very truly yours,

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