BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	**SENSITIVE**
	)	
Club for Growth, Inc.	)	MUR 5365
Club for Growth, Inc. PAC	)	
Pat Toomey, in his official capacity as Treasurer	)	

GENERAL COUNSEL'S REPORT # 2

I. ACTIONS RECOMMENDED

(1) Find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures; (2) Find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly accepting excessive and corporate contributions; (3) In the alternative, find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a) by making prohibited corporate expenditures; (4) Take no further action and close the file as to Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer; (5)

(6) Approve contingent suit authority.

II. BACKGROUND

This matter principally concerns the failure of Club for Growth, Inc. ("CFG") to register and report as a political committee during the 2000, 2002 and 2004 election cycles, despite having spent approximately $1.28 million on express advocacy of federal candidates and having received more than $1,000 in contributions in response to solicitations clearly indicating that the funds received would be targeted to the election or defeat of specific federal candidates. Information obtained during the investigation establishes that CFG triggered political committee status as early as August 2000 but has failed to register and report with the Commission for more than four years. As a result of its political committee status, CFG knowingly accepted at least $9.3 million in excessive contributions and approximately $93,000 in corporate contributions between 2000 and 2004.[1]

On April 25, 2005, this Office hand-delivered the General Counsel's Brief ("the GC Brief"), incorporated herein by reference, to counsel representing Respondents. The GC Brief

[1] *See infra* note 25.

sets forth the factual and legal basis upon which this Office is prepared to recommend that the Commission find probable cause to believe that CFG violated the Act, emphasizing CFG's failure to register and report as a political committee in violation of 2 U.S.C. §§ 433 and 434 as its primary theory. The GC Brief also put forth two alternative theories on which the General Counsel was prepared to recommend that the Commission find probable cause, namely that CFG and its separate segregated fund were a political committee with federal and nonfederal accounts and had improperly allocated expenditures, and that CFG made prohibited corporate expenditures.[2]

On May 31, 2005, after this Office granted a request for a 21-day extension of time to submit a responsive brief in exchange for equivalent tolling of the statute of limitations, Respondents submitted a 41-page Respondent's Brief and a two-volume Appendix ("CFG Brief"). In its response, CFG asserts that the Commission's notification of the complaint to its separate segregated fund, Club for Growth, Inc. PAC, rather than to CFG, within the five day period set forth in the Act requires dismissal of this matter, despite the fact that CFG received the proper notification less than two weeks later and has made no showing of prejudice. CFG further argues that it is not a political committee because it is a valid membership organization, does not have the major purpose to engage in express advocacy and has not made expenditures or received contributions meeting the statutory threshold.

As discussed below and in the GC Brief, the factual record developed during the investigation shows that the vast majority of CFG's disbursements are for federal campaign activity, including candidate research, polling, and advertisements referencing clearly identified federal candidates, with only a small fraction for state or local campaign activity. *See* GC Brief

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at 7-13. Moreover, virtually every solicitation produced by CFG states that its purpose is to "help Republicans keep control of Congress," "defeat status quo incumbents," and "elect more pro-growth leaders to Congress." *See id.* at 4-5, n.6. Based on these facts, and others cited in the GC Brief and herein, this Office believes that CFG's failure to register and report as a political committee, rather than the allocation violations discussed in the GC Brief, is the more appropriate theory on which to find probable cause.[3]

This Office also recommends that the Commission find probable cause to believe that CFG made prohibited corporate expenditures by funding approximately $1.28 million in express advocacy communications, the second alternative theory discussed in the GC Brief. *See* GC Brief at 31. Although the evidence overwhelmingly supports going forward on the political committee violation, this Office believes it is prudent to preserve the § 441b violation, in the alternative, for any subsequent litigation, in accordance with the Commission's practice in previous political committee matters.[4]

Accordingly, for the reasons discussed below and in the GC Brief, this Office recommends that the Commission find probable cause to believe that CFG violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures and violated 2 U.S.C. §§ 441a(f) and 441b(a) by knowingly accepting excessive and corporate contributions. In the alternative, this Office recommends that the Commission find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C.

[3] Indeed, CFG addresses only the political committee theory and rejects out of hand the alternative theories put forth in the GC Brief, stating, "There is no need to speculate how the Club's various activities might be classified if it were an ordinary commercial corporation or a political committee [with federal and nonfederal accounts]. It is not." CFG Brief at 4.

[4] *See FEC v. Malenick*, 310 F. Supp.2d 230, 237 (D.D.C. 2004), *rev'd in part on other grounds*, 2005 WL 588222 (D.D.C. Mar. 7, 2005) ("*Triad*"). In *Triad*, the Commission found probable cause to believe that Triad violated the Act by failing to register and report as a political committee and by accepting excessive and prohibited contributions and, in the alternative, that Triad made prohibited corporate expenditures and contributions. *See* Plaintiff Federal Election Commission's Statement of Material Facts at ¶ 344, *Triad*, 310 F. Supp.2d 230 (D.D.C. 2004) (No. 02-CV-01237).

§ 441b and 11 C.F.R. § 114.2(a) by making prohibited corporate expenditures. Finally, based on the impending Statute of Limitations, which begins to expire in September 2005, this Office recommends that the Commission grant contingent suit authority.

III. ANALYSIS

A. Club for Growth Failed to Register and Report as a Political Committee in Accordance with 2 U.S.C. §§ 433 and 434

As more fully set forth in the GC Brief, the evidence shows that CFG exceeded the statutory threshold for political committee status in at least two ways. First, CFG made expenditures far exceeding $1,000 by spending $1.28 million on communications to the general public expressly advocating the election or defeat of a clearly identified federal candidate. Second, CFG received contributions exceeding $1,000 in response to fundraising solicitations stating that funds received would be used to elect specific pro-growth Republicans to Congress, as well as in response to solicitations that specifically requested money to fund advertising campaigns against particular federal candidates. As a result of these expenditures and contributions, CFG, which has the major purpose of federal campaign activity, triggered political committee status as of 2000. From that point on, CFG had a continuing duty to report to the Commission and comply with the contribution limits and source limitations of the Act, which it has failed to do.

1. *Club for Growth Exceeded the $1,000 Statutory Threshold by Making Expenditures*

Between 2000 and 2004, CFG made expenditures totaling approximately $1.28 million on communications to the general public expressly advocating the election or defeat of a clearly identified federal candidate.[5] As discussed in the GC Brief, CFG financed numerous

[5] *McConnell v. FEC*, 124 S.Ct. 619 (2003), found that certain activities in addition to communications containing express advocacy influence federal elections. For example, the Court concluded that public

advertisements and GOTV phone messages that qualify as express advocacy under both 11 C.F.R. § 100.22(a) and (b). *See* GC Brief, 16-18 and App. A.

CFG argues that the advertisements and public communications cited in the GC Brief were not expenditures meeting the statutory threshold for political committee status because they did not use explicit words of advocacy that, in and of themselves, expressly advocate the election or defeat of a named candidate. *See* CFG Brief at 28-36 (*citing Buckley v. Valeo*, 424 U.S. 1, 40-44 (1976)). Each communication identified in the Brief, however, falls squarely within § 100.22(a). One phone message funded by CFG, for example, contained an endorsement by former Congressman and Vice Presidential candidate Jack Kemp, which stated, "Jeff will serve your first district, I believe in Arizona, with honesty, integrity, and dedication. Please vote on Tuesday and keep Jeff Flake in mind when you do," while another stated, "Jeff Flake is a Reagan Republican who would make a fine addition to Arizona's congressional delegation." *See* GC Brief, App. A at 2-3. Similarly, a phone bank message distributed by CFG to benefit Ric Keller, a primary and general election candidate in Florida's 8th Congressional district in 2000, asserted, "Ric Keller is a true Reagan Republican who would make a great conservative congressman in Washington fighting alongside me for our values. Please, remember to vote in Tuesday's primary." *Id.* at 3-4. A television advertisement aired by CFG in 2000 to benefit Keller, along with a nearly identical version broadcast as a radio advertisement, stated,

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communications that promote, support, attack, or oppose a clearly identified Federal candidate "undoubtedly have a dramatic effect on Federal elections," *id.* at 675, and that this test satisfies constitutional vagueness concerns. *See id.* at 675, n.64. While the Bipartisan Campaign Reform Act ("BCRA") principally applies this test to officeholders and party committees, it also appears in BCRA as a limit on the Commission's authority to exempt through regulation a communication that otherwise meets the requirements of an electioneering communication. The Court also found "that many of the targeted tax-exempt organizations engage in sophisticated and effective electioneering activities for the purpose of influencing federal elections, including waging broadcast campaigns promoting or attacking particular candidates and conducting large-scale voter registration and GOTV drives." *Id.* at 678, n.68. In this matter, because there is an ample record of CFG advertisements containing express advocacy and solicitations that make clear that the funds will be used by CFG to help elect or defeat a clearly identified candidate, a probable cause finding in this matter does not require that the Commission determine whether, in light of *McConnell*, the term "expenditure" should be read more broadly.

> This is a mission for Orange County Republican runoff voters. You must find a conservative Republican for Congress who will battle liberal Democrat Linda Chapin. Ric Keller is the true fiscal conservative in the runoff. Only Ric Keller offers a sharp contrast with Chapin on taxes and spending. Keller is a champion fighter for lower taxes and less wasteful spending. This tape will self-destruct in 10 seconds. Remember, only a tax cutter like Ric Keller can compete with liberal Linda Chapin.

Id. at 1. In 2002, CFG spent approximately $600,000 on its "Daschle Democrats" advertising campaign attacking Democratic Senate candidates in Texas, Arkansas, South Dakota, New Hampshire, Colorado and Missouri. *See* GC Brief at 10-11 and App. A at 5-6. An advertisement broadcast in the Arkansas Senate race, for example, compared Senate candidate Mark Pryor to "bobblehead" dolls of Senators Hillary Clinton, Edward Kennedy and Tom Daschle and asserted, "[T]he Daschle Democrats say yes to Mark Pryor for U.S. Senate, and that's bad for Arkansas," while the on-screen text read, "Mark Pryor... Bad for Arkansas" and "Say 'NO' to the Daschle Democrats." A virtually identical advertisement broadcast in the Texas Senate race similarly stated, "[T]he Daschle Democrats say yes to Ron Kirk for U.S. Senate, and that's bad for Texas." *Id.*

All of these communications refer to specific federal candidates, speak to viewers or listeners as voters, and contain an explicit directive to vote for or against the identified federal candidates and, thus, constitute express advocacy under 11 C.F.R. § 100.22(a). These same communications satisfy § 100.22(b) because they contain an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning and about which reasonable minds could not differ as to whether they encourage actions to elect or defeat the named candidate or encourage some other kind of action.[6] Moreover, a determination that the

[6] As discussed in the GC Brief, additional communications funded by CFG constitute express advocacy under § 100.22(b) alone. For example, in 2000, CFG contributed $20,000 to the American Conservative Union to fund an advertisement against Senate candidate Hillary Clinton criticizing her fitness to represent the State of New

advertisements and phone scripts identified in Appendix A of the GC Brief contain express advocacy is consistent with past Commission application of § 100.22(a), and many of the communications cited in the GC Brief are even more explicit than those the Commission has previously found to be express advocacy.[7]

Significantly, Respondent attempts to disavow the authenticity of several of the communications that qualify as express advocacy under even its own cramped reading of that term, such as the Jeff Flake phone bank script discussed above, asserting, "David Keating testified in this MUR that he could not verify whether various scripts cited in the General Counsel's Brief are draft or final versions... [T]he final versions may have excised those portions to which the General Counsel's Brief objects." *See* CFG Brief at 34-35.

York, stating, "In New York, babies like these all have one thing in common. They've lived in New York longer than Hillary Rodham Clinton." *See* GC Brief at 18, n.57

[7] *See, e.g.*, MUR 5146 (Michigan Democratic State Central Committee), Statement of Reasons of Commissioners Weintraub, Thomas, and McDonald at 9-10 (newspaper advertisement comparing the positions of Presidential candidates George Bush and Al Gore on issues relating to the Arab-American community, which stated, "[W]e support the Democratic ticket because on the whole, we agree with it more than we disagree," and "We need to give our allies a President who will work with them to end profiling, to end secret evidence and to bring a just peace in the Middle East," constituted express advocacy); MUR 5024R (Council for Responsible Government), Factual and Legal Analysis at 12-15 (brochure featuring an image of Tom Kean, Jr., discussing Kean's brief residence in New Jersey, and featuring the slogan, "New Jersey needs New Jersey leaders" is express advocacy under § 100.22(a)).

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9 Moreover, while evaluating the communications subject to the authenticity stipulations included in the Keating Affidavit, this Office discovered an additional example of express advocacy. In 2000, CFG funded the following phone bank message as part of a $39,634 GOTV effort on behalf of Ric Keller, which included other phone bank message previously discussed in the GC Brief:

> Hi, this is Republican Congressman Joe Scarborough from Florida's 1st district, located on the panhandle. I'm calling about Ric Keller, a candidate in Tuesday's runoff election. Ric Keller is a tax-cutting fiscal conservative and a Reagan Republican. He is the kind of candidate who can unite the Republican Party and run the best race against liberal Democrat Linda Chapin. Ric Keller is the only candidate in this race who has been endorsed by three Florida Republican congressmen. We know that Ric Keller would make an excellent congressman you can be proud of. Ric is the only true fiscal conservative in the runoff. Remember, a Liberal Republican can't unite our party or compete with Linda Chapin. Ric Keller would run the best race against Chapin. Thank you for listening to this message, which was paid for by the Republican Club for Growth.

Like the other phone bank messages distributed on behalf of Ric Keller, this communication refers to a specific federal candidate, speaks to listeners as voters, and contains an explicit directive to vote for the identified federal candidate. *See* GC Brief at 16-18 and App. A at 3-4. In addition, it contains an electoral portion that is unmistakable, unambiguous, and suggestive of only one meaning and about which reasonable minds could not differ as to whether they encourage actions to elect or defeat the named candidate

CFG also appears to attach some significance to the fact that many of the cited examples of express advocacy date back to the 2000 election cycle, when CFG was in its "nascent stages." *See* CFG Brief at 30. The GC Brief, however, cites three examples of express advocacy in CFG's 2002 cycle advertisements, totaling approximately $840,000.

[10] As a result, this Office was primarily limited to publicly available communications when analyzing CFG's 2002 and 2004 cycle advertisements for express advocacy.

More importantly, by spending more than $350,000 for advertisements and phone scripts containing express advocacy in 2000 alone, CFG met the statutory threshold for political committee status as early as August 2000. *See* GC Brief at 16-18 and App. A. This resulted in a continuing duty to register with the Commission and report its activity since that time, which CFG failed to do.

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or encourage some other kind of action As a result, this phone script is express advocacy under both § 100.22(a) and (b).

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2. *Club for Growth Exceeded the $1,000 Statutory Threshold by Receiving Contributions*

CFG does not dispute that it received more than $1,000 in response to at least five fundraising solicitations that clearly indicated that funds received would be targeted to the election or defeat of clearly identified federal candidates for office. Rather, CFG argues that the funds received did not constitute contributions under *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995), because the text of the solicitations did not clearly indicate that the proceeds would be used for express advocacy. *See* CFG Brief at 36-38.

CFG misreads *Survival Education Fund*. That decision does not require that solicitations "make plain that [donations] would be used 'for activities and communications that expressly advocate...'" in order to result in contributions under the Act. *See* CFG Brief at 37. As discussed in the GC Brief, the court in that decision considered whether a solicitation sought "contributions" and, thus, was subject to the Act's disclaimer requirements under 2 U.S.C. § 441d(a), stating,

> Even if a communication does not itself constitute express advocacy, it may still fall within the reach of § 441d(a) *if it contains solicitations clearly indicating that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office*.... Only if the solicitation makes plain that the contributions will be used to advocate the defeat or success of a clearly identified candidate at the polls are they obliged to disclose that the solicitation was authorized by a candidate or his committee.

See GC Brief at 18-23 (*citing* 65 F.3d at 295). Citing the mailer's statement, "Your special election-year contribution will help us communicate your views to the hundreds of thousands of members of the *voting public*, letting them know why Ronald Reagan and his anti-people policies *must* be stopped," the court held that the mailer was a solicitation of contributions, concluding that this statement "leaves no doubt that the funds contributed would be used to

advocate Reagan's defeat at the polls, not simply to criticize his policies during an election year." 65 F.3d at 295 (emphasis in original). Notably, the statement cited by the court as the basis for its decision and the court's conclusion establishes that a solicitation need not indicate that funds received in response will be used for express advocacy to result in a contribution under the Act.

All of the solicitations cited in the GC Brief indicate that the funds received would be targeted to the election or defeat of clearly identified federal candidates. *See* GC Brief at 18-23. For example, CFG's 2000 solicitations request that supporters join the organization and donate money to CFG to "help [Jeff Flake] win the General Election on November 7th" and "get [Jeff Flake] elected," stating "Now is the time when you can make the most impact for Jeff Flake and our other candidates. Please join the Club for Growth with your gift of $50, $100, $250 or $1,000 today[.]" Similarly, an August 2003 solicitation requests funds for an advertising campaign targeting Senator Tom Daschle, asserting,

Although CFG claims that the examples of solicitations cited in the GC Brief indicate only that the funds received would be used for issue advocacy, the solicitations quoted above make clear that CFG intended to use the funds it received to help elect Jeff Flake in 2000 and defeat Senator Tom Daschle in 2004. Indeed, each of the solicitations discussed in the GC Brief clearly indicate the funds received would be targeted to electing or defeating a clearly identified federal candidate. *See* GC Brief at

18-23. As a result, all funds received by CFG in response to the identified solicitations constituted contributions.[11]

3. *Club for Growth's Major, If Not Sole, Purpose is Federal Campaign Activity*

As discussed in the GC Brief, CFG spends the vast majority of its money on candidate research, polling, and advertising, with spending for advertisements that supported or attacked

[11] As a result of CFG's conduct, this Office was unable to determine the amount of funds received in response to the solicitations cited in the GC Brief. Although the Commission is entitled to draw an adverse inference from a Respondent's refusal to respond to discovery requests in certain circumstances, it is unnecessary to do so here, as CFG does not dispute that it received more than $1,000 in response to the solicitations cited in the GC Brief. Moreover, based on CFG's annual receipts – which, for example, were approximately $7.5 million in the 2004 election cycle and included a $1 million contribution – it is almost certain that the amount received in response to each solicitation well exceeds $1,000. *See* GC Brief at 6.

This is particularly so given CFG's acceptance of unlimited contributions from individual donors totaling as much as $475,000 during a single election cycle. In the GC Brief, this Office relied on data about CFG's contributions compiled by the Center for Responsive Politics, which appeared to incorporate data not available on the IRS website at that time. In particular, the GC Brief lists contributions ranging from $100,000 to $1,000,000 in October 2004. *See* GC Brief at 6 (*citing* 527 Committee Activity, *at* http://www.opensecrets.org/527s/527cmtes.asp (Mar. 21, 2005)). The cited website has since attributed these contributions to Club for Growth.net, which it describes as an entity affiliated with Club for Growth, and IRS disclosure reports confirm this fact. Based on CFG's reports, the largest individual contributors to CFG during the 2004 cycle were Jackson Stephens ($475,000), Richard Gilder ($440,000), Harlan Crow ($275,000), Robert Rowling ($250,000), Robert McNair ($250,000), and Paul Singer ($250,000), with numerous additional contributions exceeding $100,000. In 2004 alone, CFG accepted more than $3.5 million in excessive contributions. *See infra* Section III.B and Attachment C at C-4.

clearly identified federal candidates equaling approximately 88 percent of its total disbursements in 2004. *See* GC Brief at 7-12. Virtually every solicitation produced by CFG to the Commission indicates that its purpose is to "help Republicans keep control of Congress," "defeat status quo incumbents," and "elect more pro-growth leaders to Congress," and includes specifically named federal candidates selected each cycle by CFG following extensive candidate research funded by CFG. *See id.* at 6, n.4. Other documents indicate that CFG has been closely involved in the campaign operations of several federal candidates, whose campaign personnel apparently have provided the organization with access to information about campaign strategy, fundraising, and the timing of advertising buys. *See id.* at 7, n.21. This evidence establishes that CFG's major, if not sole, purpose is federal campaign activity and, more specifically, electing pro-growth Republicans to Congress.

CFG does not dispute that virtually all of its disbursements were for candidate research, advertising campaigns that support federal candidates or attack their opponents, and polling aimed at ascertaining the vulnerability of moderate House and Senate incumbents, as set forth in the GC Brief, nor does it offer examples of state or local campaign activity to refute that it is overwhelmingly focused on influencing the nomination and election of federal candidates. *See* CFG Brief at 20-21. Instead, CFG discounts its campaign activities as "merely a means to an end" in that all of these activities serve its ultimate goal, which is to promote pro-growth legislation and public policy. CFG also argues that it does not have "the" major purpose of engaging in "express advocacy," and that this is what the constitutional limitation on the definition of "political committee" articulated in *Buckley* requires. *See* CFG Brief at 13, 15, 17-19. Finally, CFG argues that it is a legitimate membership organization because it does not have

express advocacy as its primary purpose. *See* CFG Brief at 9-10. This Report addresses each of CFG's arguments in turn.

(a) CFG is Precisely the Type of Organization Contemplated by the Major Purpose Test

In its Reply Brief, CFG argues that only its ultimate goal of advancing pro-growth policies is relevant, characterizing any "express electoral activities" as "merely a tactic in pursuing the Club's primary goal [of advancing pro-growth policies]." CFG Brief at 13, 19-24. CFG dismisses the explicitly electoral activities mentioned even in its own Bylaws with the following explanation:

> In short, all of the election related activities mentioned in the Bylaws are merely a means to an end. If the Club could achieve full implementation of its pro-growth policies without supporting a single candidate, it would gladly do so. The Club is not like a campaign committee or similar candidate controlled organization whose primary purpose is to elect candidates.

Id. at 20-21.

CFG's argument that only its ultimate purpose is relevant, if credited, would allow almost *any* political committee, including campaign committees, to avoid regulation under the Act by citing an overarching policy goal. It is an organization's activities, spending and public statements of purpose, however, not its general motivation for employing these tactics, which are relevant in determining an organization's major purpose. *See MCFL*, 479 U.S. at 262 ("[S]hould MCFL's independent spending become so extensive that the organization's major purpose may be regarded as campaign activity, the corporation would be classified as a political committee."); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) ("The organization's purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.") (*citing MCFL*, 479 U.S. at 262).

CFG plainly satisfies the major purpose test in *Buckley*. Virtually all of CFG's public statements demonstrate that its major purpose is electing pro-growth Republicans to Congress and defeating "Republicans In Name Only," including specific federal candidates selected by CFG each election cycle. *See* GC Brief at 4-13, 23-27. In May 2004, for example, former CFG President Stephen Moore stated, "All we cared about was keeping (Curt) Bromm out of Congress – that was our whole agenda."[12] Previously, Moore stated that CFG's goal was to replace the Republican Party and take over its fundraising, asserting, "We want it to be, in 10 years, that no one can win a Senate or House seat without the support of the Club for Growth."[13] As discussed in the GC Brief, numerous fundraising solicitations state that CFG's goal is electing pro-growth Republicans to Congress, describing CFG as "a membership organization with a sole mission – to support political candidates who are advocates of the Reagan vision of limited government and lower taxes."[14] Similarly, in its initial registration with the IRS, CFG described itself as "primarily dedicated to helping elect pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns."[15]

CFG also spends almost all of its money on candidate research, polling, and advertisements, a fact it does not dispute. *See* GC Brief at 4-13, 23-27. In 2004, for example, CFG spent more than $7 million on advertising supporting or criticizing clearly identified federal candidates, approximately 88 percent of its total disbursements, and no money on state or local

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12 Kevin O'Hanlon, *Neb. Candidate's Congress Bid Thwarted*, ASSOCIATED PRESS, May 12, 2004

13 *See* Matt Bai, *Fight Club*, N.Y. TIMES MAG., Aug. 10, 2003, at 24

14 *See* GC Brief at 4-5

15 *See id.* at 4 (*citing* CFG, Form 8871: Political Organization Notice of 527 Status (Aug. 4, 2000)).

campaign activity.[16] *See* GC Brief at 12-13. Taking the entire 2004 election cycle into account, CFG spent approximately 77 percent of its total disbursements on advertisements referencing clearly identified federal candidates. *See id.* Thus, while CFG's federal election-related activities may have been, as CFG claims, "merely a means to an end," they comprise the vast majority of CFG's spending.

(b) CFG Meets the Major Purpose Test Under D.C. District Court Caselaw

CFG argues that it is not a political committee because it does not have the major purpose of engaging in express advocacy, which it claims is constitutionally required.[17] *See* CFG Brief at

[16] CFG cites Advisory Op. 1996-3 (Breeden-Schmidt Foundation) to establish that an organization can avoid political committee status even if its contributions to federal candidates constitute up to 48 percent of its spending. That opinion provides no legal support for its interpretation of the major purpose test. Moreover, CFG ignores several critical aspects of the opinion that factually distinguish it from the instant matter. While CFG correctly notes that the Breeden-Schmidt Foundation ("Foundation") spent as much as 48 percent of its total disbursements on candidate contributions without triggering political committee status, this occurred only in its first year of operation and, in every subsequent year, the Foundation spent between four and ten percent of its total disbursements on federal contributions. The Commission specifically conditioned its opinion on the small percentage of disbursements dedicated to federal contributions between 1991 and 1994, stating, "The Commission cautions you that this conclusion is valid only insofar as the Foundation does not alter the recent pattern of activities (including its disbursements)." The Commission also asserted that the Foundation's statement of purpose in the testamentary trust under which it was created, as well as other supporting documents provided by the Foundation, indicated that its other disbursements were wholly unrelated to election campaigns. *See* Advisory Op. 1996-3 at 1, 3. These facts differ substantially from CFG's stated electoral purpose, including statements in its own organizational documents, and high percentage of campaign-related disbursements. *See* GC Brief at 7-12.

[17] In arguing that the major purpose test requires express advocacy, CFG apparently alludes to, but does directly cite, reasoning developed by the Fourth Circuit in *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 712 (4th Cir. 1999) ("*NCRL I*"), the only opinion to so construe the major purpose test. In that opinion, the court invalidated a North Carolina statute that defined "political committee" because, by its terms, it failed to limit regulation to groups that expressly supported or opposed a candidate (*i.e.*, funded express advocacy), characterizing *Buckley* as restricting political committee status to only those entities "that have as a major purpose engaging in express advocacy in support of a candidate." *Id.* at 712 (*citing Buckley*, 424 U.S. at 44, n.52). Various courts, however, including a district court within the Fourth Circuit, have construed this statement regarding the major purpose test as *dicta*. *See North Carolina Right to Life, Inc. v. Leake*, 108 F. Supp.2d 498, 503 n.2 (E.D.N.C. 2000), *rev'd* 344 F.3d 418, 429 (4th Cir. 2003), *vacated and remanded*, 541 U.S. 1007 (2004) ("*NCRL II*"); *see also McConnell v. FEC*, 251 F. Supp.2d 176, 602 (D.D.C. 2003) (Kollar-Kotelly, J.), *aff'd*, 540 U.S. 93, 189-94 (2003); *National Fed'n of Republican Assemblies v. United States*, 218 F. Supp.2d 1300, 1330 (S.D. Ala. 2002), *vacated on other grounds sub nom. Mobile Republican Assembly v. United States*, 353 F.3d 1357 (11th Cir. 2003). In addition, the holding of *NCRL I* has been called into question by the Supreme Court remand for further consideration in light of *McConnell* in its successor litigation. *See NCRL II*, 344 F.3d at 429 (4th Cir. 2003) (invalidating the North Carolina political committee statute revised following *NCRL I* as overbroad because the $3,000 statutory threshold triggering a rebuttable presumption that an organization possesses "a major purpose to support or oppose the nomination or election of one or more clearly identified candidates" was based on an arbitrary level of spending bearing no relation to the nature of the entity and its overall activities, but declining to address whether an entity can

18-19. CFG further argues that only the statements of purpose in its formal organizational documents, not its activities or other public statements, control the determination of its major purpose. *See id.* at 20-21.

Here, CFG disregards the reported decisions that would likely be persuasive to the D.C. District Court in any subsequent litigation.[18] In *GOPAC*, 917 F. Supp. at 859-62, for example, the court held that an organization must have as its major purpose the election of a candidate or candidates for federal office to qualify as a political committee, asserting,

> Accordingly, the legal standard set forth in the December 23, 1994 Memorandum and Order controls this case: an organization is a "political committee" under the Act if it received or expended $1,000 or more and had as its major purpose the election of a particular candidate or candidates for federal office. This test draws two relatively clear lines: first the line between state and federal candidates, derived from the plain language of the Act and principles of federalism; and second, the line between an organization whose major purpose was to support a particular federal candidate or candidates and an organization whose major purpose did not involve support for any particular federal candidate, either because there was no candidate running at the time, or because the support was not directed to the election of any particular candidate but was more in the nature of general party support.

Id. at 862 (internal citations omitted). The district court found that, although GOPAC's ultimate goal was to increase Republican representation in Congress, virtually all of its activities were

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have multiple major purposes or whether a certain percentage of campaign-related spending is constitutionally mandated), *vacated and remanded*, 541 U.S. 1007 (2004). In *McConnell*, the Supreme Court described the express advocacy standard as "functionally meaningless." *See* 124 S.Ct. at 688-89. It is difficult to imagine, then, that the major purpose test, which is not statutorily mandated, would turn entirely on express advocacy. Indeed, at least one federal court has explicitly rejected the argument that an organization's major purpose must be express advocacy. *See Richey v. Tyson*, 120 F. Supp.2d 1298, 1310, n.11 (S.D. Ala. 2000).

[18] Although CFG is incorporated in Virginia, its corporate headquarters and principal place of business has been the District of Columbia since 1999, and a substantial part of the activities in question occurred here. *See* 2 U.S.C. § 437g(a)(6)(A); *see also* 28 U.S.C. § 1391(c) (defining a defendant corporation's residence as any judicial district in which it is subject to personal jurisdiction); *Zhu v. Fed. Housing Fin. Bd.*, 2004 WL 1249788 at *2 (D.C. Cir. Jun. 7, 2004) (*per curiam*) ("The district court has personal jurisdiction over individuals domiciled in, organized under the laws of, or maintaining a principal place of business in the District of Columbia.") (*citing* D.C.Code § 13-422; *El-Fadl v. Central Bank of Jordan*, 75 F.3d 668, 672 (D.C.Cir.1996)).

directed at electing state and local candidates to influence redistricting and to produce a "farm team" of future Congressional candidates. *Id.* at 858. The court concluded that the relationship between GOPAC's efforts to elect state and local candidates who would run in future federal races and favorably affect redistricting following the 1990 census and the potential impact on federal elections was too indirect to satisfy the major purpose test. *Id.* at 862-64.

In contrast, CFG's stated immediate purpose and direct support of federal campaign activity, including candidate research, polling, and advertisements, is central to determining major purpose. CFG is, in effect, the inverse of GOPAC. While GOPAC's indirect goal was increasing Republican representation in Congress, all of its activities were directed at state and local candidates. Here, by contrast, virtually all of CFG's activities are directed to electing federal candidates, with little or no support to state and local candidates. *See* GC Brief at 6-13. Moreover, CFG's immediate priority is electing pro-growth Republicans to Congress, with the advancement of pro-growth policies an indirect benefit of CFG's efforts to "improve the gene pool" by increasing the Congressional representation of fiscally conservative Republicans.[19] Thus, unlike GOPAC, the relationship between CFG's stated purpose and the impact of its activities on federal elections is direct and substantial.

CFG also attempts to distinguish *Triad*, 310 F. Supp.2d 230, 234-36, the only decision applying *GOPAC*, on the basis that Triad stipulated that its goals for the 1996 election cycle were to "(1) Return Republican House Freshmen; (2) Increase by 30 the Republican House Majority; [and] (3) Increase Senate Republicans to a Filibuster-proof 60." *See* CFG Brief at 27-28, n.21. The *Triad* court, however, based its major purpose determination on more than this stipulation. First, the court noted that the cited stipulation listed "numerous" Triad documents announcing these goals. Second, the court cited two other documents as evidence of Triad's

[19] *See supra* note 12.

public statements establishing major purpose: a brochure that stated, "TRIAD has already put in place a team of political advisors and interested organizations, and is working on assembling a team of donors to work together in 1996 for the same goal: Retaining GOP control of Congress and the advance of a conservative issue agenda;" and a letter that stated, "A major part of TRIAD's time in the next two years will be working with the 104th Congress Freshmen and targeting approximately 20 other Democratic held seats. Regardless of the GOP Presidential nominee, the focus must be on maintaining the House majority." *Triad*, 310 F. Supp.2d at 235. Third, the court noted that Triad's spending and activities, which included political audits of federal candidates and "Fax Alerts" endorsing specific candidates, were aimed at electing federal candidates, citing the following testimony by Robert Cone, a large contributor to Triad:

> [It] was the objective of the whole TRIAD concept to get major donors involved so that the ideally conservative candidates could be elected, and if those types of candidates with those types of views got into Congress there wouldn't necessarily be a need for heavy lobbying... [because] they would be in sync with the values that we held.

Id. (capitalization and second alteration in original).

Try as it may, CFG cannot distance itself from *Triad* on the basis of the stipulation. Like Triad, CFG's extensive electoral activities and public statements demonstrate its major purpose is electing federal candidates. As discussed in the GC Brief, various fundraising solicitations use language similar to Triad's, declaring that CFG's goal is to "strengthen and expand" the "controlling stake the GOP now enjoys in Washington" and "help Republicans retain control of the House and Senate in the upcoming elections." *See generally* GC Brief at 4, n.6

Indeed, even the documents cited in CFG's own Reply Brief establish that CFG has the major purpose of

electing federal candidates. For example, the fundraising solicitation by Congressman Ric Keller, part of which CFG cites as evidence of the organization's policy goals, states,

> I would like to tell you a little bit about the Club for Growth. It originally began as a regular roundtable policy group. In 1999, this group decided that if it were going to truly affect public policy it must help elect individuals who would vote for and implement better fiscal policy.
>
> ....
>
> Since the Club targets the most competitive races in the country, your membership in the Club will help Republicans keep control of Congress. More importantly, it will help Republicans keep control by electing leaders committed to the pro-growth, limited government beliefs we share.
>
> ....
>
> I strongly urge you to become a member of The Club for Growth. By doing so, you will dramatically help other candidates across the country like myself. As you know, we must work together to elect Republican congressmen and congresswomen who will fight for a free America.

Many of the other documents quoted by CFG in its Reply Brief as purported support for its argument contain significant language regarding the organization's electoral purpose that has been omitted or ignored by Respondent.[20] *See* CFG Brief at 19, 22-24.

[20]

More importantly, virtually all of CFG's disbursements were for candidate research, advertising campaigns that support federal candidates or attack their opponents, and polling aimed at ascertaining the vulnerability of moderate House and Senate incumbents, as set forth in the GC Brief -- facts that CFG does not dispute. *See* CFG Brief at 20-21. In 2004, for example, CFG spent more than $7 million, or approximately 88 percent of its annual budget, on advertisements that referenced clearly identified federal candidates. *See* GC Brief at 11-12. And, as discussed in the GC Brief, between 2000 and 2004 CFG spent approximately $1.28 million on advertisements and communications containing express advocacy. *See id.* at 16-18 and App. A.

CFG's numerous statements in its fundraising solicitations and organizational documents, as well as its extensive campaign-related spending, including, but not limited to, more than $1 million in express advocacy communications, establish that CFG's major purpose is federal campaign activity and, more specifically, electing specific federal candidates to Congress, including federal candidates identified each election cycle through candidate research funded and conducted by CFG.[21] As a result, CFG meets the major purpose test as construed by the district court in *GOPAC* and later in *Triad*.

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[21] CFG claims that the GC Brief "seizes on" its status as a 527 organization to establish major purpose. *See* CFG Brief at 26-27. Although the major purpose analysis does not rest on CFG's status as a 527 organization, CFG's description of purpose in its IRS filings and its status as a 527 organization are pertinent as a factual matter. Indeed, in its initial notification of 527 status to the IRS, CFG described itself as "primarily dedicated to helping elect pro-growth, pro-freedom candidates through political contributions and issue advocacy campaigns." *See supra* note 15 and accompanying text; GC Brief at 4.

(c) Club for Growth Is Not a Valid Membership Organization

Based on the same reasoning as its major purpose argument, CFG contends that it is does not have the primary purpose of engaging in express advocacy and, thus, is a legitimate membership organization. *See* CFG Brief at 9-10. The membership organization regulations, however, exclude entities that are primarily organized to influence federal elections, not just those with the primary purpose to fund express advocacy. *See* 11 C.F.R. § 100.134(e)(6); Definition of "Member" of a Membership Organization, 64 Fed. Reg. 41266, 41268-69 (Jul. 30, 1999). As discussed above, CFG's activities are overwhelmingly focused on electing fiscally conservative candidates to federal office, and virtually all of CFG's solicitations state that CFG's sole or primary purpose is electing pro-growth candidates to Congress, rendering CFG ineligible for membership organization status under the final criterion. *See* GC Brief at 19, n.58.

CFG relies on MUR 2804 (American Israel Political Affairs Committee) as authority for its argument that it is a legitimate membership organization, asserting that AIPAC was a membership organization, not a political committee, because its electoral activity was subsidiary to its ultimate purpose of promoting pro-Israel policies. *See* CFG Brief at 15. CFG argues that, despite AIPAC's "systematic and continuing efforts" to promote pro-Israel federal candidates, including direct contributions and express advocacy, AIPAC's political activities did not rise to such a level as to make them a major purpose of the organization. *See id.* (*citing* MUR 2804, General Counsel's Brief). Specifically, CFG asserts, "[T]he factual recital made clear that promoting the nomination and election of pro-Israel candidates through express advocacy and otherwise was a significant part of AIPAC's settled operations both in relative and absolute terms." *Id.*

Again, in attempting to draw an analogy, CFG omits several critical distinguishing facts. First, the General Counsel concluded, based on an examination of AIPAC's activities, that

AIPAC was fundamentally a lobbying organization, stating, "AIPAC's campaign-related activities, while likely to have crossed the $1,000 threshold, constitute only a small portion of its overall activities and does not appear to be its major purpose." MUR 2804, General Counsel's Brief at 102. Although the Brief used the term "small portion" without reference to any concrete numerical data, the Commission asserted in subsequent litigation that AIPAC had an annual budget of $10 million, less than one percent of which was used for campaign spending. *See Akins v. FEC*, 101 F.3d 731, 734, 744 (D.C. Cir. 1997) (*en banc*), *vacated on other grounds*, 524 U.S. 1, 29 (1998). Moreover, AIPAC was a 501(c)(4) organization that, by definition, could not make participation in political campaigns its primary activity without adversely affecting its tax-exempt status.[22]

As discussed *supra*, CFG, by contrast, spends virtually all of its money on campaign-related activities and, thus, is primarily organized to influence federal elections.[23] *See* GC Brief at 11-12, 16-18 and App. A. Based on this distinction alone, the General Counsel's Brief in

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[22] *See* Judith E. Kindell and John Francis Reilly, *Election Year Issues*, 2002 WL 32593934, at *82 (I.R.S. Pub. 2002) (*citing* Rev. Rul. 81-95, 1981-1 C.B. 332 ("[A]n organization may carry on lawful political activities and remain exempt under section 501(c)(4) as long as it is primarily engaged in activities that promote social welfare.")).

[23] CFG does not itself conduct any lobbying or legislative activities; it uses related 501(c)(4) organizations for these purposes. Until the end of the 2004 election cycle, CFG Advocacy handled activities directly related to advancing pro-growth policies. ("There's a new group in town – The Club for Growth Advocacy. This group will be able to do some things under the crazy tax law that the Club can't do or shouldn't do. Club for Growth Advocacy will promote public policies conducive to economic growth through education and lobbying."); CFG claims that CFG Advocacy has changed its name to the Free Enterprise Fund, which is under the control of former President Stephen Moore, and implies that CFG itself conducts legislative activity. *See* CFG Brief at 23-24 and App. A. Currently, however, CFG is conducting lobbying and policy-related activities through Club for Growth State Action, Inc. ("CFG State Action"), another 501(c)(4) organization. In its Brief, CFG claims that CFG State Action has informally licensed the Club for Growth name and has no connection to this matter. *See* CFG Brief at App. A. On its website, however, CFG describes CFG State Action as its lobbying affiliate, and CFG's recently revised IRS registration characterizes CFG State Action as a "connected" organization. Despite CFG's efforts to portray CFG as actively involved in legislative issues such as Social Security reform, CFG State Action has funded all recent advertisements regarding Social Security reform and the Central American Free Trade Agreement. *See, e.g.*, CFG Press Release, *at* http://www.clubforgrowth.org/blog/archives/018507.php (Feb. 4, 2005); CFG Press Release, *at* http://www.clubforgrowth.org/blog/archives/020039.php (Mar. 29, 2005); CAFTA Print Advertisements, *at* http://www.clubforgrowth.org/blog/archives/021715.php (Jun. 10, 2005).

AIPAC is inapposite and does not support a conclusion that CFG is a valid membership organization.[24] Indeed, allowing an entity that has the major purpose of electing federal candidates, like CFG, to qualify as a membership organization simply by paying dues or allowing supporters to vote on a single policy question would permit almost every political committee to circumvent the Act and avoid registering with the Commission.

4. *Conclusion*

For all of the foregoing reasons, this Office recommends that the Commission find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures.

[24] CFG also argues that its supporters constitute "members" under 11 C.F.R. § 100.134(f). *See* CFG Brief at 38-40. As discussed in the GC Brief at pp. 5-6, 19 n.58, CFG supporters currently are not required to pay dues and may become "members" by providing contact information to the organization. Although CFG claims that members may vote on a binding policy question, resulting in a "significant organizational attachment" under 11 C.F.R. § 100.134(f)(2)-(3), only one such vote has occurred since CFG eliminated its dues requirement in 2003. This Office has been unable to obtain additional information about the policy question cited by CFG because of its refusal to fully comply with discovery in this matter, but believes that a single vote on tort reform is insufficient for CFG's supporters to qualify as members. Indeed, CFG itself distinguishes between those "members" who provide only contact information to the organization and those who make financial contributions, sending candidate endorsements only to the latter.

The First General Counsel's Report in this matter argued that, because CFG is not a legitimate membership organization, it also met the statutory threshold for expenditures by funding communications containing express advocacy sent to its "members" during the 2000 cycle. Although several of CFG's "membership" communications contain no disclaimer that they were paid for by CFG PAC, there is no additional evidence to refute *See* Club for Growth Bulletin, Oct. 8, 2002 (no disclaimer stating that CFG PAC funded the candidate recommendations); Club for Growth Bulletin. Sept. 28, 2000, Club for Growth Bulletin, Aug. 31, 2000, Club for Growth Bulletin, Aug. 16, 2000, As a result, this Office does not base its political committee recommendations on this theory.

B. Club for Growth Knowingly Accepted Excessive and Prohibited Contributions in Violation of 2 U.S.C. §§ 441a(f) and 441b(a)

As a political committee, CFG should have complied with the Act's contribution limits and source restrictions since at least 2000. According to IRS disclosure reports, CFG accepted approximately $9.3 million in unlimited individual contributions and $93,000 in corporate contributions between 2000 and 2004.[25] Accordingly, this Office recommends that the Commission find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of $5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions.

The First General Counsel's Report and the GC Brief in this matter argued that, because CFG and CFG PAC are affiliated and share a single contribution limit, CFG PAC and Pat Toomey, in his official capacity as treasurer, also violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of $5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions.

As a result, to streamline this matter, this Office now recommends that the Commission take no further action and close the file as to Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer.

[25] The amount of corporate contributions set forth here and in Attachment C is based on disclosure reports filed with the IRS.

C. In the Alternative, Club for Growth Made Prohibited Corporate Expenditures in Violation of 2 U.S.C. § 441b

The Act prohibits corporations from making contributions or expenditures from their general treasury funds in connection with a federal election. *See* 2 U.S.C. § 441b(a); 11 C.F.R. § 114.2(a). As discussed in the GC Brief, CFG, an incorporated 527 organization, spent approximately $1.28 million on communications expressly advocating the election or defeat of clearly identified federal candidates, which constitute corporate expenditures prohibited by the Act. *See* GC Brief at 18, App. A. Although the evidence overwhelmingly supports going forward on a political committee theory, this Office believes it is prudent to preserve the § 441b violation for subsequent litigation as an alternative to finding that CFG failed to register and report as a political committee and, as a result, knowingly accepted excessive and corporate contributions. *See Triad*, 310 F. Supp.2d at 237. Accordingly, in the alternative, this Office recommends that the Commission find probable cause to believe that CFG violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a).[26]

D. The Commission Followed Proper Procedure in Notifying Club for Growth and Club for Growth Made No Showing of Prejudice

The Commission received the complaint in MUR 5365 on May 13, 2003, and provided notice of the complaint to CFG's separate segregated fund, CFG PAC, four business days later, on May 19, 2003. Ten days later, counsel for Respondents informed the Commission by telephone that it had served the complaint on the wrong entity. Acknowledging an

[26] CFG is ineligible for *MCFL* status because it accepted corporate contributions totaling at least $10,000 in 2000, $45,000 in 2001-02, and $38,550 in 2003-04, amounts that are not *de minimus*. *See FEC v. National Rifle Ass'n*, 254 F.3d 173, 192 (D.C. Cir. 2001) (holding that the NRA qualified for *MCFL* status in 1980 because the organization received only $1,000 in corporate contributions but was not eligible in 1978 and 1982, when it received $7,000 and $39,786, respectively); *see also* 11 C.F.R. §114.10(c)(4)(i); *supra* note 25. In addition, the Commission's regulations limit qualified nonprofit corporation status to organizations described in 26 U.S.C. § 501(c)(4). *See* 11 C.F.R. §114.10(c)(5).

administrative oversight, the Commission sent the notification to CFG on June 3, 2003, 21 days after having received the complaint.

CFG argues that the Commission's failure to notify it of the complaint within the five-day notification period set forth in 2 U.S.C. §437g(a)(1) renders the investigation invalid and requires dismissal of this matter. *See* CFG Brief at 5-7. Ostensibly in support of its argument that the five-day notification period is mandatory, CFG quotes *Perot v. FEC*, 97 F.3d 553, 559 (D.C. Cir. 1996):

> Section 437g is as specific a mandate as one can imagine; as such, the procedures it sets forth – procedures purposely designed to ensure fairness not only to complainants but also to respondents – must be followed.

CFG Brief at 6. Following this quote, CFG cites the previous page of the *Perot* opinion, which CFG characterizes as "specifically citing the 5-day notice requirement and stating that the court 'presume[s] this was done.'" *Id.* (*quoting* 97 F.3d at 558). Thus, CFG attempts to create the impression that the court applied the quoted language to the notice requirement in § 437g(a)(1), rendering the five-day notification requirement mandatory.

CFG mischaracterizes *Perot*. There, the court held that 2 U.S.C. § 437g(a)(8) does not permit a candidate to bring suit in federal court against the Commission's failure to rule on debate challenges where the 120-day statutory period had not expired. Indeed, the court mentioned § 437g(a)(1) only in passing. Significantly, the language quoted in CFG's Brief fails to indicate the omission of several significant words that make clear the *Perot* court's holding does not pertain to § 437g(a)(1):

> Section 437g is as specific a mandate as one can imagine; as such, the procedures it sets forth – procedures purposely designed to ensure fairness not only to complainants but also to respondents – must be followed *before a court may intervene*.

Perot, 97 F.3d at 559 (omitted words italicized). By eliminating the final clause of this quote, CFG misrepresents the significance of the case.

Caselaw does not support the proposition that a minimal delay in notification invalidates a subsequent investigation or enforcement action, particularly where no prejudice results. While there is no relevant caselaw concerning the notification procedures set forth in § 437g(a)(1), the Supreme Court has held on several occasions that a statutory provision stating that the Government "shall" act within a specified time does not create not a jurisdictional limit precluding later action unless a statute specifies a consequence for noncompliance with statutory timing provisions. *See, e.g., Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 158-59 (2003) (*quoting United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993)). Otherwise, the statutory deadline is directory, not mandatory. *See Brotherhood of Ry. Carmen Div., Transp. Communications Int'l Union v. Pena*, 64 F.3d 702, 704 (D.C. Cir. 1995) ("[A]bsent a clear indication that Congress intended otherwise, we will deem a statutory deadline to be directory."). Because § 437g(a)(1) contains no such consequence for failing to comply with the notification period, the five-day limit is directory, not mandatory, and does not preclude Commission action in this matter.

Cook v. United States, 104 F.3d 886, 889-90 (6th Cir. 1997), further demonstrates that CFG's argument must fail. In that case, the plaintiffs sought to quash an administrative summons for bank records issued by the IRS to a third-party bank in connection with an investigation of possible tax evasion, arguing that the IRS had failed to comply with an Internal Revenue Code provision requiring it to notify the taxpayers of the summons no later than 23 days before the bank records were to be examined. *See id.* (*citing* 26 U.S.C. § 7609(a)). Although the IRS provided the requisite notification only one day after the statutory period

expired, plaintiffs argued that the statute's use of "shall" rendered the notice period mandatory and urged the court to quash the summons. The court declined to do so, citing the absence of a clear legislative statement indicating an intent to render void every summons not complying with the technical requirements of the statute, the public interest at stake in effective and efficient enforcement of the tax laws, and the lack of actual prejudice resulting from the untimely notice. *See id.*[27]

Here, CFG has not demonstrated – or even alleged – that it has suffered prejudice from receiving notification within 21 days of its filing. Indeed, CFG and CFG PAC share the same principals and counsel, who had actual notice of the complaint within the five-day period. Based upon the foregoing, and because CFG has now had four separate opportunities to respond to the allegations in the complaint, its claim that the Commission's defective notice invalidates the investigation and requires dismissal of this matter is without merit.

IV. CONCILIATION AND CONTINGENT SUIT AUTHORITY

[27] *See also Abolaji v. District of Columbia Taxicab Comm'n*, 609 A.2d 671, 672 (D.C. App. 1992) (revocation of taxicab operator's license valid despite failure to provide notice of a complaint within the statutory ten-day period based on the lack of substantial prejudice from the delay and the legitimate public interest in protecting taxi passengers from harm); *cf. FEC v. Franklin*, 718 F. Supp. 1272 (E.D. Va. 1989), *vacated in part on other grounds*, 902 F.2d 3 (4th Cir. 1989) (Commission allowed to proceed against an unknown Respondent where the Commission provided notice of the complaint only to an attorney hired by the Respondent to investigate rumors linking a candidate to drug use, not to represent him before the Commission, because the Commission "met the notice requirements contained within § 437g(a) by providing notice and opportunity to respond to the unknown respondent through attorney Franklin.")

this Office requests contingent suit authority at this time.

V. RECOMMENDATIONS

1. Find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. §§ 433 and 434 by failing to register as a political committee with the Commission and report its contributions and expenditures.

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2. Find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. § 441a(f) by knowingly accepting contributions in excess of $5,000 and 2 U.S.C. § 441b(a) by knowingly accepting corporate contributions.

3. In the alternative to recommendations 1 and 2, find probable cause to believe that Club for Growth, Inc. violated 2 U.S.C. § 441b and 11 C.F.R. § 114.2(a) by making prohibited corporate expenditures.

4. Take no further action and close the file as to Club for Growth, Inc. PAC and Pat Toomey, in his official capacity as Treasurer.

5.

6. Approve contingent suit authority.

7/5/05
Date

Lawrence H. Norton
General Counsel

Rhonda J. Vosdingh /BY AMT
Rhonda J. Vosdingh
Associate General Counsel

Ann Marie Terzaken
Assistant General Counsel

Julie Kara McConnell
Staff Attorney

27044173211

Attachment A