FEDERAL ELECTION COMMISSION
WASHINGTON, D C 20463

SENSITIVE

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 5491
Jerry Falwell Ministries, Inc.	)	
The Liberty Alliance, Inc.	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MICHAEL E. TONER AND COMMISSIONERS DAVID M. MASON AND BRADLEY A. SMITH

In this matter, Complainant Campaign Legal Center alleges that Respondents Jerry Falwell Ministries, Inc. ("JFM") and the Liberty Alliance, Inc. ("LA") violated the Federal Election Campaign Act ("FECA"), 2 U.S.C. § 431 *et seq.* The Commission unanimously voted to dismiss this matter and close the file.

I. BACKGROUND

JFM and LA are nonprofit corporations ("NFPs") with their principal places of business in Virginia. They are incorporated in Washington, D.C.[1] LA is an *MCFL* corporation under the law of the Fourth Circuit, which includes Virginia, yet it is not clear whether it is an *MCFL* corporation under D.C. Circuit law.[2]

During the 2004 presidential campaign, a *Falwell Confidential* column by the Rev. Dr. Jerry Falwell posted on the website http://www.falwell.com expressly advocated the re-election of President Bush, solicited contributions to the Campaign for Working Families, a federal political-action committee and included a hyperlink to the PAC's website.[3]

The complaint alleges JFM and LA violated FECA, because the website contained express advocacy, solicited contributions to a multicandidate committee with which JFM and LA are not affiliated, and did not include a disclaimer.[4]

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[1] First General Counsel's Report in MUR 5491 ("OGC Report") at 1 & n.1.

[2] *Id.* at 13-14.

[3] *Id.* at 2-3.

[4] *Id.* at 1-2.

The http://www.falwell.com website indicates it is the website of LA, and the domain name is registered to LA.[5] The response to the complaint confirms that LA is responsible for the site.[6]

II. DISCUSSION

Various reasons support dismissing the allegations regarding express advocacy, the solicitation and the disclaimer.

A. JFM

Because LA, rather than JFM, appears responsible for the website, there is no basis for the allegations against JFM.

B. Expenditures, *MCFL* Corporations and the Press Exemption

Under FECA, money used to make an express-advocacy communication is an expenditure. *See McConnell v. FEC,* 540 U.S. 93, 191-92 (2003), *cited in Anderson v. Spear,* 356 F.3d 651, 663-66 (6th Cir.), *cert. denied,* 125 S.Ct. 453 (2004); *FEC v. Massachusetts Citizens for Life, Inc.,* 479 U.S. 238, 248-49 (1986) ("*MCFL*") (applying the express-advocacy test to corporations (citing *Buckley v. Valeo,* 424 U.S. 1, 42, 44 n.52, 80 (1976) (establishing the express-advocacy test))). Unless an exemption applies, FECA prohibits corporations from making expenditures. 2 U.S.C. § 441b (2002); *see generally id.* § 431(9)(A) (2002) (defining "expenditure"); *id.* § 431(17) (defining "independent expenditure").

One exemption is for *MCFL* corporations. *See MCFL,* 479 U.S. at 256-65; *FEC v. National Rifle Ass'n of Am.,* 254 F.3d 173, 187-93 (D.C. Cir. 2001) ("*NRA*"); *North Carolina Right to Life, Inc. v. Bartlett,* 168 F.3d 705, 713-14 (4th Cir. 1999) ("*NCRL*"), *cert. denied,* 528 U.S. 1153 (2000); *Minnesota Citizens Concerned for Life v. FEC,* 113 F.3d 129, 130-31, 133 (8th Cir. 1997) ("*MCCL*"); *FEC v. Survival Educ. Fund, Inc.,* 65 F.3d 285, 290-93 (2d Cir. 1995); *Day v. Holahan,* 34 F.3d 1356, 1363-65 (8th Cir. 1994), *cert. denied,* 513 U.S. 1127 (1995).[7]

Another exemption is the press exemption. 2 U.S.C. § 431(9)(B); *Reader's Digest Ass'n, Inc. v. FEC,* 509 F. Supp. 1210, 1214 (S.D.N.Y. 1981); *FEC v. Phillips Publishing, Inc.,* 517 F. Supp. 1308, 1313 (D.D.C. 1981).

C. Respondent LA as an *MCFL* Corporation

In *MCFL,* the Supreme Court identified three features of a corporation indicating it was an *MCFL* corporation:

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[5] *Id* at 5

[6] Resp. of JFM and LA at 3, 8 n.14, 12 n.20, 17 (Aug 31, 2004).

[7] Synonyms for "*MCFL* corporations" include "nonprofit advocacy corporations," *see FEC v Beaumont,* 539 U.S. 146, 149, 150, 156, 158, 160 & n.6 (2003), "*MCFL* organizations," *see McConnell v. FEC,* 540 U.S. 93, 210-11 (2003), and "qualified nonprofit corporations." 11 C.F.R. § 114.10 (2002)

> *First,* it was formed for the express purpose of promoting political ideas, and cannot engage in business activities. ... *Second,* it has no shareholders or other persons affiliated so as to have a claim on its assets or earnings. ... *Third,* [it] was not established by a business corporation or a labor union, and it is its policy not to accept contributions from such entities.

479 U.S. at 264. Such a corporation has a First Amendment right to make independent expenditures. *Id.* at 256-64. The Commission later codified these features as requirements for *MCFL* status. *See* 11 C.F.R. § 114.10(c) (1995).

The Fourth Circuit – which includes Virginia, where LA has its principal place of business – subsequently addressed the third feature identified in *MCFL*. In *NCRL*, the plaintiff NFP had accepted a small percent of its annual revenues from for-profit corporations. This did not prevent the plaintiff NFP from being an *MCFL* corporation because the features identified in *MCFL* are not hard and fast requirements for *MCFL* status. As the court observed, each circuit addressing this issue had noted that "the list of nonprofit corporate characteristics in *MCFL* was not 'a constitutional test for when a nonprofit corporation must be exempt,' but 'an application, in three parts, of First Amendment jurisprudence....'" *NCRL*, 168 F.3d at 714 (quoting *Day,* 34 F.3d at 1363, and citing *Survival Educ. Fund,* 65 F.3d at 292). *MCFL's* "listing of factors essential to its holding on the facts of a particular case does not impose a code of compliance that other nonprofit corporations must follow to the letter" to be *MCFL* corporations. *Survival Educ. Fund,* 65 F.3d at 292.

The fact that LA is an *MCFL* corporation in the Fourth Circuit is a valid reason, given that LA's principal place of business is in the Fourth Circuit, to exercise prosecutorial discretion and dismiss the express-advocacy claims against LA. *See Heckler v. Chaney,* 470 U.S. 821 (1985).

Nevertheless, because (1) LA's principal place of business is in Virginia, (2) LA is incorporated in the District of Columbia and (3) a federal district court in the District of Columbia may apply D.C. Circuit law rather than Fourth Circuit law to determine LA's *MCFL* status, the OGC Report in this matter recommended that the Commission consider whether LA is an *MCFL* corporation under "all applicable court precedent," meaning *both* Fourth Circuit and D.C. Circuit law.[8] Under this approach, an NFP would have to jump through two hoops instead of one to be an *MCFL* corporation.

The D.C. Circuit has interpreted *MCFL* differently than the Fourth Circuit has. In *NRA,* the D.C. Circuit compared the Fourth Circuit's decision in *NCRL* and the Second Circuit's decision in *Survival Education Fund,* with the Eighth Circuit's decision in *Day.* While the former looked to the *percent* of an NFP's revenue that came from for-profit corporations, the latter looked to the *amount.* The D.C. Circuit followed the Eighth Circuit, *see* 254 F.3d at 192 (citing *Day,* 34 F.3d at 1365), and held that an NFP's receiving a small *amount* of corporate money did not prevent the NFP from being an *MCFL* corporation. *See id.; see also Hawaii Right to Life, Inc. v. FEC,* No. 1:02CV02313 (D.D.C. Dec. 16, 2002) (expanding *NRA* by enjoining enforcement of 11 C.F.R. § 114.10 against an NFP that engaged in business activities and accepted contributions from for-profit corporations); *MCCL,* 113 F.3d at 130 (noting that an NFP "may not be denied the *MCFL* exemption merely because it engages in

[8] OGC Report at 14; *see also id* at 13 n.14. Actually, the D.C. Circuit could be a forum regardless of where an NFP is incorporated because suits filed under 2 U.S.C. § 437g(a)(8) (2002) may be filed in the United States District Court for the District of Columbia. That court might apply D.C. Circuit law regardless of where the NFP is incorporated or has its principal place of business. So under the OGC Report's approach, the Commission would always have to consider D.C. Circuit law in determining an NFP's *MCFL* status.

minor business activities or accepts insignificant contributions from business corporations" (citing *Day,* 34 F.3d at 1363-65)); *id.* at 130-31, 133 (holding that 11 C.F.R. § 114.10 violates the First Amendment).

Moreover, LA could qualify as an *MCFL* corporation under the D.C. Circuit's *NRA* decision, as well under the Fourth Circuit's *NCRL* decision. However, given the clear application of *NCRL,* the small amount of money involved, the limited scope of the activity[9] and the significant possibility of *MCFL* application in the D.C. Circuit, it is not worthy of the Commission's resources to determine definitively whether LA is an *MCFL* corporation under *NRA* and to become embroiled in the conflict-of-law questions which would be entailed in any determination adverse to LA. Thus, the remainder of Complainant's express-advocacy allegation is dismissed as a matter of prosecutorial discretion. *See Heckler v. Chaney, supra.*

D. The Press Exemption

Although the OGC Report rejects applying the press exemption in this matter,[10] we have neither accepted nor rejected the press exemption here. Given the current rulemaking involving *inter alia* the Internet and the press exemption, *see* Internet Communications, 70 Fed. Reg. 16967 (proposed April 4, 2005), the full contours of the press exemption are under consideration at the moment. Moreover, Jerry Falwell has been involved in broadcasting since 1956. Even aside from the Internet aspects, the claim that the *Falwell Confidential* publication falls within the press function is not without merit. The Commission's pending rulemaking raising questions about the extent and nature of the press exemption on the Internet, and the author's extensive media background,[11] provide an additional reason for declining to investigate in this matter. *See Reader's Digest,* 509 F. Supp. at 1214.

E. Solicitation

Regarding the solicitation allegation, the amount of money and the scope of activity that the complaint alleges was involved were small.[12] Moreover, the Commission recently and unanimously dismissed a matter involving apparently more extensive solicitation activity than may have arisen at the hands of Respondents. *See In the Matter of Dog Eat Films, Inc; ABB 2004 PAC and Michael Archuleta, in his official capacity as treasurer; Committee to Re-Defeat the President and David A. Lytel, in his official capacity as treasurer; Michael Dobbins; Michael Moore; MoveOn.org Voter Fund; MoveOn.org PAC and Wes Boyd, in his official capacity as treasurer; Fellowship Adventure Group, LLC; IFC Films, LLC; Lions Gates Films, Inc.; Harvey Weinstein; and Bob Weinstein,* MURs 5474 and 5579. Accordingly, the solicitation allegation is due to be dismissed as a matter of prosecutorial discretion. *See Heckler v. Chaney, supra.*

F. Disclaimer

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[9] *See, e.g.,* Resp. of JFM and LA at 19 n.38 (noting that LA does not pay for an outside service to send e-mail or to post information on http://www.falwell.com and also noting that it takes only an estimated half hour each week to format, e-mail and post the column containing the alleged express advocacy).

[10] OGC Report at 6-12.

[11] *See* Resp. of JFM and LA at 4, 5-6 & nn.7-11, 8 & n.15

[12] *See, e g.,* Resp of JFM and LA at 19 n 38

As the OGC Report correctly notes, current Commission regulations do not require a disclaimer in these circumstances,[13] so the disclaimer allegation is without merit.

July 22, 2005

Michael E. Toner, Vice Chairman

David M. Mason, Commissioner

Bradley A. Smith, Commissioner

[13] OGC Report at 14-15.