FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

Gabe Camarillo, Esquire
The Sutton Law Firm
150 Post Street
Suite 405
San Francisco, CA 94108

OCT 31 2008

RE: MUR 5952
Warren Hellman

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Dear Mr. Camarillo:

On January 28, 2008, the Federal Election Commission notified your client of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended ("the Act"). On October 22, 2008, the Commission found, on the basis of the information in the complaint and information provided by you, that there is no reason to believe your client, Warren Hellman violated the Act in connection with the allegations in this matter. Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. *See* Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Ana Peña-Wallace, the attorney assigned to this matter at (202) 694-1650.

Sincerely,

Audra L. Wassom
Acting Assistant General Counsel

Enclosure:
Factual and Legal Analysis

FEDERAL ELECTION COMMISSION

FACTUAL AND LEGAL ANALYSIS

RESPONDENT: Warren Hellman MUR: 5952

I. INTRODUCTION

This matter is based upon a complaint alleging that Christopher Lehane and Margie Sullivan are "operatives" of Hillary Clinton for President and Shelly Moskwa, in her official capacity as treasurer ("Clinton Committee"), who formed a state ballot measure committee, Californians for Fair Election Reform ("CFER") to influence the 2008 presidential election by making coordinated expenditures in support of the Clinton Committee. The complaint also alleges that Thomas Steyer, Nancy Parrish, Warren Hellman, and Norman Lear made contributions to CFER that exceeded the contribution limits of the Federal Election Campaign Act of 1971, as amended ("the Act").

II. FACTUAL BACKGROUND

In July 2007, a ballot measure entitled the "Presidential Election Reform Act" was submitted to the Attorney General of California to begin the process of qualifying for the June 2008 Primary ballot.[1] The ballot measure sought to change the way the State of California allocates its presidential electors by apportioning electors according to the popular vote winner in each congressional district rather than the current statewide winner-take-all system. According to media reports, if the measure qualified for the June 2008 ballot and was approved by a majority

[1] To qualify the measure for the June 2008 ballot, supporters of the initiative needed to collect 434,000 signatures of registered California voters by November 13, 2007. *See* Dan Morain, *GOP eyes California's electoral pie*, LOS ANGELES TIMES, August 6, 2007, at B-2.

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1 of voters in the state, it would have gone into effect for the November 2008 general election,
2 where it was expected to allocate a portion of California's fifty-five electoral votes to the
3 Republican presidential nominee. *See* Bill Schneider, *Republicans Want a Share of California*
4 *Electoral Votes*, www.cnn.com, August 9, 2007; Carla Marinucci, *GOP-backed bid to reform*
5 *state's electoral process folding*, SAN FRANCISCO CHRONICLE, Sept. 28, 2007, www.sfgate.com.

6 In August 2007, a group of California citizens established Californians for Fair Election
7 Reform as a ballot measure committee formed to oppose the Presidential Election Reform Act.
8 *See* CA Form 460, Recipient Committee Campaign Statement for CFER dated 1/30/2008.
9 According to a press release, Thomas Steyer served as the Director of CFER, the group was
10 endorsed by California's two Senators, and various state and local officials served on its
11 Advisory Committee. CFER Press Release, August 15, 2007,
12 www.fairelectionreform.com/news. State campaign finance records show that CFER reported
13 receiving thirteen individual contributions totaling $278,705. These contributions include the
14 $111,475 contribution from Thomas Steyer, $25,000 contribution from Nancy Parrish, $25,000
15 contribution from Warren Hellman, and $50,000 contribution from Norman Lear discussed in the
16 complaint.[2]

17 According to its website, CFER created and ran two radio spots and one video
18 advertisement, all of which are accessible on the group's website. www.fairelectionreform.com.
19 None of the advertisements specifically mention any federal candidates, but they do mention the
20 2008 presidential election and make references to "Republicans" and "Democrats." For
21 example, the text of the television advertisement and one of the radio advertisements is:

[2] CFER's state campaign finance disclosures indicate that Thomas Steyer made an additional contribution to CFER in the amount of $60,000 after the complaint was filed. CA Form 460, Recipient Committee Campaign Statement for CFER dated 1/30/2008.

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> After four years in Iraq, thousands of American lives lost; thousands more injured. It's the central issue in the 2008 Presidential campaign. If a Democrat wins, America will start bringing our troops home. If a Republican wins, there's no telling how long the war could drag on. Now, desperate to hold on to the White House, Republicans are pushing an initiative here in California that carves up our state's presidential votes and hands the presidency to the Republicans – Even if they lose the popular vote. The LA Times says Republicans are "trying to rig the presidential election." If stopping the war is important to you, then stop and think about this initiative. A "yes" vote helps elect a Republican president. A "yes" vote prolongs the war. But this time we can say "no." Go to fairelectionreform.com. Help stop this partisan power grab. Dividing California's electoral votes only hurts Californians. [Paid for by Californians for Fair Election Reform with major funding from Tom Steyer.]

The text of the second radio advertisement is:

> I'm a California taxpayer, and this is a taxpayer alert. Every year we pay $50 billion more in federal taxes than we get back from Washington. For every tax dollar from California, 21 cents goes to other states. Now, after California has been shortchanged for years, special interests have cooked up a new scheme to reduce our influence even further, trying to pass an initiative carving up California's electoral votes in the presidential election. If it passes, experts say that we'll be left with less influence than states like New York, Texas, Ohio, Florida, and Illinois. The LA Times confirms it would "blunt the state's voting power." The Orange County Register calls it profoundly subversive. If you believe California's electoral votes should be counted like everyone else's, go to fairelectionreform.com. Help stop this scheme. Dividing California's electoral votes only hurts Californians. [Paid for by Californians for Fair Election Reform with major funding from Tom Steyer.]

Id. CFER's state disclosure reports indicate that the group purchased approximately $40,000 in television and radio airtime in California for the advertisements between August 15 and September 30, 2007. *See* CA Form 460, Recipient Committee Campaign Statement for CFER dated 1/30/2008. In addition to links to the advertisements, the CFER website also contains links to two petitions. One states "Urge Rudy Giuliani to come clean on his ties to the right-wing power grab initiative" and has a clickable link to "E-mail Rudy Now." www.fairelectionreform.com. The second petition link requests viewers to "Urge the 2008 presidential candidates to reject the California power grab now" and has a clickable link to "Sign

Our Petition." *Id.* In smaller print, CFER's homepage asks viewers to "contribute today" with a link to ActBlue's electronic contribution website. The disclaimer on CFER's website states that the site was paid for by CFER.

The complaint alleges that "Clinton operatives" Christopher Lehane and Margie Sullivan formed the ballot measure committee Californians for Fair Election Reform for the purpose of supporting and assisting the Clinton campaign.[3] As such, the complaint also alleges that donations to Californians for Fair Election Reform from "Clinton financial backers" Thomas Steyer, Nancy Parrish, Warren Hellman, and Norman Lear were actually "hidden donations" made in coordination with the Clinton Committee that exceeded the contribution limitations of the Act. Finally, the complaint states that it "defies belief" that the Clinton campaign was not involved with the effort to block the ballot initiative in question.

In his response, Warren Hellman categorically denies that his contribution to CFER was intended to support the Clinton campaign. Hellman states that his contribution was not solicited by the Clinton Committee, nor was his support for CFER affiliated with Clinton.

III. LEGAL ANALYSIS

A. CFER did not Coordinate with the Clinton Committee

Under the Act, an expenditure made by any person "in cooperation, consultation, or concert, with, or at the request or suggestion of" a candidate or party committee constitutes an in-kind contribution. 2 U.S.C. § 441a(a)(7)(B)(i) and (ii). The regulations that implement these

[3] The complaint does not detail any specific connections between Lehane, Sullivan, and the Clinton campaign, and a review of publicly available information did not uncover any ties. However, according to one media report, Lehane was a former spokesperson for President Bill Clinton's White House and Vice President Al Gore's 2000 presidential campaign and Sullivan was a former chief of staff to three Clinton Cabinet secretaries. Carla Marinucci, *Dem group played hardball to kill GOP election system plan*, SAN FRANCISCO CHRONICLE, Oct. 7, 2007, A-1.

1 statutory provisions define "coordinated" and prescribe the treatment of a "coordinated"
2 expenditure as an in-kind contribution. 11 C.F.R. § 109.20(a) and (b).

3 Although the complaint alleges that the donations to CFER were coordinated with the
4 Clinton campaign, the complaint does not specifically allege – or provide any factual information
5 upon which to find – that CFER or its donors acted "in cooperation, consultation, or concert
6 with, or at the request or suggestion of" the Clinton Committee. Instead, the complaint merely
7 names four common donors and two political consultants with ties to former President Bill
8 Clinton, and concludes that that it "defies belief that the [Clinton] campaign was itself was not
9 involved with this effort to block PERA from the ballot in order to enhance Clinton's electoral
10 chances." Respondents Parrish, Hellman and Steyer specifically deny that the Clinton
11 Committee solicited their contributions to CFER, and the Clinton Committee denies that it had
12 any involvement in CFER's fundraising or financing. Accordingly, there is no factual or legal
13 support for finding that CFER or its donors coordinated expenditures with the Clinton
14 Committee.

15 Furthermore, it does not appear that CFER's radio and television advertisements were
16 coordinated with the Clinton Committee. With respect to whether a specific communication is
17 coordinated, 11 C.F.R. § 109.21 sets forth a three-pronged test: (1) the communication must be
18 paid for by a person other than a Federal candidate, a candidate's authorized committee, or
19 political party committee, or any agent of any of the foregoing; (2) one or more of the four
20 content standards set forth in 11 C.F.R. § 109.21(c) must be satisfied; and (3) one or more of the
21 six conduct standards set forth in 11 C.F.R. § 109.21(d) must be satisfied. *See* 11 C.F.R.
22 § 109.21(a). The Commission's regulations specify that payments for coordinated
23 communications are made for the purpose of influencing a federal election, and that they

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1 constitute in-kind contributions to the candidate or committee with whom or which they are
2 coordinated, and must be reported as an expenditure made by that candidate or committee.
3 11 C.F.R. § 109.21(b)(1). Accordingly, payments for coordinated communications are subject to
4 the contribution limits of the Act.

5 The content standards for coordinated communications include: (1) an "electioneering
6 communication"; (2) a "public communication" that disseminates campaign materials prepared
7 by a candidate; (3) a communication that "expressly advocates" the election or defeat of a clearly
8 identified federal candidate; and (4) certain "public communications," distributed 120 days or
9 fewer before an election (for presidential candidates), which refer to a clearly identified federal
10 candidate (or political party). 11 C.F.R. § 109.21(c). Any one of six conduct standards will
11 satisfy the third element of the coordination test, "whether or not there is agreement or formal
12 collaboration." 11 C.F.R. § 109.21(d) and 109.21(e).[4]

13 The television and radio advertisements paid for by CFER satisfy only the first prong of
14 the coordinated communications test. The first prong of the coordinated communications test is
15 satisfied because CFER – the entity that paid for the communications at issue – is a "person other
16 than [that] candidate, authorized committee, political party committee, or agent of any of the
17 foregoing." 11 C.F.R. § 109.21(a)(1). However, the second prong, the content standard, is not
18 satisfied. 11 C.F.R. § 109.21(c). The advertisements are not electioneering communications
19 because, *inter alia,* they do not refer to a clearly identified candidate, *see* 11 C.F.R.

[4] These conduct standards include: (1) communications made at the "request or suggestion" of the relevant candidate or committee; (2) communications made with the "material involvement" of the relevant candidate or committee; (3) communications made after one or more "substantial discussions" between the person paying for the communication and the relevant candidate or committee; (4) specific actions of a "common vendor"; (5) specific actions of a "former employee"; and (6) specific actions relating to the dissemination of campaign material. 11 C.F.R. § 109.21(d)(1)-(6).

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1 §§ 100.29(a)(1) and 109.21(c)(1); they are not "public communications" that disseminate
2 campaign materials prepared by a candidate, *see* 11 C.F.R. § 109.21(c)(2); they do not "expressly
3 advocate" the election or defeat of a clearly identified federal candidate, *see* 11 C.F.R.
4 § 109.21(c)(3); and they were not distributed 120 days or fewer before a presidential candidate's
5 primary election,[5] *see* 11 C.F.R. § 109.21(c)(4)(ii) and (iii).

6 Because the content prong of the coordination test is not met, we do not need to analyze
7 the third prong of the test, the conduct prong. However, we note that the complaint did not
8 actually allege, nor have we found, any connection between CFER, the Clinton Committee or any
9 of the donors that would satisfy any of the conduct standards at 11 C.F.R. § 109.21(d)(1)-(6). In
10 light of the speculative nature of the allegations and the lack of factual information to
11 substantiate the claims, there is no support for finding that CFER coordinated its television and
12 radio advertisements with the Clinton Committee.

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13 **B. CFER is not a Political Committee under the Act**

14 The complainant's allegations that CFER was formed solely to help the Clinton campaign
15 and that contributions to CFER should be considered contributions to the Clinton Committee
16 raise the issue of whether CFER is a political committee under 2 U.S.C. § 431(4)(A). The Act
17 defines a "political committee" as any committee, club, association, or other group of persons
18 that receives "contributions" or makes "expenditures" for the purpose of influencing a federal
19 election that aggregate in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To
20 address overbreadth concerns, the Supreme Court has held that only organizations whose major

[5] The presidential primary election was scheduled for February 5, 2008, thus the 120-day period set forth at 11 C.F.R. § 109.21(c)(4)(ii) started on October 8, 2007. The available information indicates that the advertisements ran in August and September only. Although they were available on CFER's website during the 120-day period, the exemption for communications over the Internet from the definition of "public communication" at 11 C.F.R. § 100.26 is applicable here.

purpose is campaign activity can potentially qualify as political committees under the Act. *See, e.g., Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 262 (1986) ("*MCFL*"). The Commission has long applied the Court's major purpose test in determining whether an organization is a "political committee" under the Act, and it interprets that test as limited to organizations whose major purpose is federal campaign activity. *See* Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597, 5601 (Feb. 7, 2007); *see also* FEC's Mem. in Support of Its Second Mot. for Summ. J., *Emily's List v. FEC*, Civ. No. 05-0049 at 21 (D.D.C. Oct. 9, 2007).

1. <u>There is no basis to conclude that CFER received contributions exceeding $1,000</u>

The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). A gift, subscription, loan, advance, or deposit of money or anything of value made by any person in response to any communication is a contribution to the person making the communication if the communication indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate. 11 C.F.R. § 100.57(a).

The complaint alleges that Thomas Steyer, Nancy Parrish, Warren Hellman and Norman Lear contributed to CFER for the purpose of helping the Clinton Committee by funding the effort to block the ballot initiative. However, the complaint did not submit any solicitations or direct mail fundraising appeals that would indicate that CFER was soliciting funds for the purpose of influencing an election for Federal office. Furthermore, the only publicly available solicitation we identified was a "contribute today" link from CFER's website to an ActBlue contribution

page. The text of the ActBlue page contains no references to any Federal candidates and instead urges contributions to help the effort to defeat the ballot initiative and "stop the Republican power grab in California." Thus, because there is no indication that CFER's communications to donors "indicate[d] that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate," there is no evidence that CFER engaged in fundraising under these provisions. 11 C.F.R. § 100.57(a). Therefore, there is an insufficient basis on which to conclude that CFER has received contributions exceeding $1,000 and triggered political committee status through contributions.

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2. <u>There is no basis to conclude that CFER made expenditures exceeding $1,000</u>

In determining whether an organization makes an expenditure, the Commission "analyzes whether expenditures for any of an organization's communications made independently of a candidate constitute express advocacy either under 11 C.F.R. § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Supplemental Explanation and Justification, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007). Under the Commission's regulations, a communication contains express advocacy when it uses phrases such as "vote for the President," "re-elect your Congressman," or "Smith for Congress," or uses campaign slogans or words that in context have no other reasonable meaning than to urge the election or defeat of one or more clearly identified candidates, such as posters, bumper stickers, or advertisements that say, "Nixon's the One," "Carter '76," "Reagan/Bush," or "Mondale!" 11 C.F.R. § 100.22(a); *see also MCFL*, 479 U.S. at 249 ("[The publication] provides in effect an explicit directive: vote for these (named) candidates. The fact that this message is marginally less direct than "Vote for Smith" does not change its essential nature."). Courts have held that "express advocacy also includes verbs that exhort one to campaign for, or contribute to, a clearly identified candidate."

FEC v. Christian Coalition, 52 F.Supp. 2d 45, 62 (D.D.C. 1999) (explaining why *Buckley*, 424 U.S. at 44, n.52, included the word "support," in addition to "vote for" or "elect," on its list of examples of express advocacy communication).

The Commission's regulations further provide that express advocacy includes communications containing an "electoral portion" that is "unmistakable, unambiguous, and suggestive of only one meaning" and about which "reasonable minds could not differ as to whether it encourages actions to elect or defeat" a candidate when taken as a whole and with limited reference to external events, such as the proximity to the election. 11 C.F.R. § 100.22(b).[6]

As discussed in the factual background section of this report, CFER distributed at least three radio and television advertisements and had a website that contained several links. A review of the ads reveals that none of them mention a clearly identified federal candidate and instead focus on the general terms of "Republican" and "Democrat." At the time the ads ran in California in August and September 2007, there were numerous candidates in the race and no presumptive nominee for either party. Although the advertisements mention the 2008 presidential election, they contain no exhortations that a viewer would understand as urging action for Clinton's election. The ads in question do not contain phrases, slogans or words that explicitly or "in effect" urge the election of Hillary Clinton or the defeat of any other presidential

[6] In *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. ___, 127 S.Ct. 2652 (2007) (*WRTL*), the U.S. Supreme Court held that "an ad is the functional equivalent of express advocacy," and thus subject to the ban against corporate funding of electioneering communications, "only if the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate." *Id.*, 127 S.Ct. at 2667. Although 11 C.F.R. § 100.22 was not at issue in the matter, the Court's analysis included examining whether the electioneering communication had "indicia of express advocacy" such as the "mention [of] an election, candidacy, political party, or challenger" or whether it "take[s] a position on a candidate's character, qualifications, or fitness for office." *Id.* The Commission subsequently incorporated the principles set forth in the *WRTL* opinion into its regulations governing permissible uses of corporate and labor organization funds for electioneering communications at 11 C.F.R § 114.15. *See* Final Rule on Electioneering Communications, 72 Fed. Reg. 72899, 72914 (Dec. 26, 2007).

candidate. *See* 11 C.F.R § 100.22(a). Instead, the only action the advertisements encourage is to "help stop this partisan power grab" by voting to defeat the ballot initiative. *See* 11 C.F.R § 100.22(b).

Similarly, the links on CFER's website do not appear to expressly advocate the election or defeat of a clearly identified candidate. Although one of the links specifically names Rudy Giuliani, who at the time was candidate for the Republican nomination, the text on the website does not encourage his election or defeat, and instead asks viewers to email Giuliani to "urge [him] to come clean on his ties to the right-wing power grab initiative." 11 C.F.R § 100.22(a). The second link does not specifically identify any candidate, and instead urges viewers to email all of the candidates – Republican and Democrat. In asking viewers to email the candidates, the only action these links encourage is to defeat the ballot initiative. 11 C.F.R § 100.22(b).

Therefore, there is no basis upon which to conclude that CFER has made expenditures exceeding $1,000 and triggered political committee status through expenditures.[7]

C. The Clinton Committee did not Establish, Finance, Maintain or Control CFER

Finally, the complaint alleges that "Clinton operatives" were instrumental in "forming and donating to CFER," which may be construed as an allegation that the Clinton Committee, through agents, established, financed, maintained or controlled CFER. To determine whether a Federal candidate or officeholder directly or indirectly established, financed, maintained or controlled another entity, the Commission applies the ten factors set forth at 11 C.F.R.

[7] Because we conclude that CFER does not appear to have accepted contributions in excess of $1,000 or made expenditures in excess of $1,000, it is unnecessary for the Commission to make a determination as to the major purpose of CFER.

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1 § 300.2(c)(2)(i) through (x), as well as any other relevant factors, in the context of the overall
2 relationship between the Federal candidate or officeholder and the entity.[8]

3 The only information the complaint points to in support of its allegation that the Clinton
4 Committee "established, financed, maintained or controlled" CFER is that two individuals with
5 prior connections to Hillary Clinton's husband, President Bill Clinton, are political consultants
6 for CFER, and four large donors to CFER are also donors to the Clinton Campaign. Applying
7 the ten factors to these tenuous connections is insufficient to show that the Clinton Committee
8 established, financed, maintained or controlled CFER. In fact, based upon the limited
9 information contained in the complaint and available in the public domain, it does not appear any
10 of the ten factors are present with respect to the Clinton Committee's relationship to CFER.
11 11 C.F.R. § 300.2(c)(2)(i) through (x). Additionally, in its Response, the Clinton Committee
12 explicitly denied that it established, financed, maintained or controlled CFER. The Clinton
13 Committee contends that it has no role with respect to CFER, there are no overlapping officers or
14 staff, the Clinton Committee did not provide any funds to CFER and does not control CFER's

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[8] Such factors include, but are not limited to: (i) Whether a sponsor, directly or through its agent, owns controlling interest in the voting stock or securities of the entity; (ii) Whether a sponsor, directly or through its agent, has the authority or ability to direct or participate in the governance of the entity through provisions of constitutions, bylaws, contracts, or other rules, or through formal or informal practices or procedures; (iii) Whether a sponsor, directly or through its agent, has the authority or ability to hire, appoint, demote, or otherwise control the officers, or other decision-making employees or members of the entity; (iv) Whether a sponsor has a common or overlapping membership with the entity that indicates a formal or ongoing relationship between the sponsor and the entity; (v) Whether a sponsor has common or overlapping officers or employees with the entity that indicates a formal or ongoing relationship between the sponsor and the entity; (vi) Whether a sponsor has any members, officers, or employees who were members, officers or employees of the entity that indicates a formal or ongoing relationship between the sponsor and the entity, or that indicates the creation of a successor entity; (vii) Whether a sponsor, directly or through its agent, provides funds or goods in a significant amount or on an ongoing basis to the entity, such as through direct or indirect payments for administrative, fundraising, or other costs, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17, and otherwise lawfully; (viii) Whether a sponsor, directly or through its agent, causes or arranges for funds in a significant amount or on an ongoing basis to be provided to the entity, but not including the transfer to a committee of its allocated share of proceeds jointly raised pursuant to 11 CFR 102.17, and otherwise lawfully; (ix) Whether a sponsor, directly or through its agent, had an active or significant role in the formation of the entity; and (x) Whether the sponsor and the entity have similar patterns of receipts or disbursements that indicate a formal or ongoing relationship between the sponsor and the entity. 11 C.F.R. § 300.2(c)(2).

activities. Thus, there is no basis upon which to conclude that the Clinton Committee established, financed, maintained or controlled CFER.

Therefore, there is no reason to believe that Warren Hellman violated the Act in connection with the allegations contained in the complaint in this matter.

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