FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	MUR 6082
Majority Action	)	
Mark Longabaugh	)	
	)	

STATEMENT OF REASONS OF VICE CHAIRMAN MATTHEW S. PETERSEN AND COMMISSIONER CAROLINE C. HUNTER

This matter arose initially from a complaint filed against Majority Action and its executive director Mark Longabaugh by two so-called reform groups, alleging that Majority Action violated the Federal Election Campaign Act of 1971, as amended ("the Act"), during the 2006 election cycle.[1] Specifically, the complaint alleged that Majority Action failed to register and report as a political committee under the Act and violated the Act's contribution limits and source prohibitions by soliciting donations and airing television ads referring to various congressional candidates.[2] The National Republican Congressional Committee filed a similar complaint against Majority Action for its activities during the 2008 election cycle.[3]

The Office of General Counsel ("OGC") recommended that the Commission find reason to believe ("RTB") that Majority Action violated the Act by failing to register and report as a political committee either (i) during the 2006 election cycle after spending more than $1,000 on express advocacy communications and soliciting more than $1,000 in contribution, or in the alternative, (ii) during the 2008 election cycle after soliciting more than $1,000 contributions through its website. This recommendation relied not on the facts set forth in the complaints but rather on a 2006 newspaper article containing vague allegations about a mailer not even directly attributed to Majority Action and on an

[1] The complaint against Majority Action, originally designated by the Office of General Counsel ("OGC") as MUR 5842, also named the Economic Freedom Fund ("EFF") as a respondent for certain activities separate from those of Majority Action. OGC later separated the complaint against Majority Action and combined it with the related complaint, discussed in the above text, filed by the NRCC against Majority Action related to its activities in the 2008 election cycle and designated as MUR 6082. Accordingly, we issued a separate statement regarding the complaint against EFF in MUR 5842.

[2] MUR 5842, Complaint at 13-21.

[3] *See generally* MUR 6082, Complaint.

examination in 2008 of Majority Action's website.[4] For the reasons stated in greater detail below, we voted against OGC's RTB recommendation because both the evidence presented in the complaint and the information provided by OGC failed to establish reason to believe that Majority Action triggered political committee status in either the 2006 or 2008 election cycles.

I. FACTUAL BACKGROUND

Majority Action is an incorporated non-profit organization registered under Section 527 of the Internal Revenue Code.[5] Majority Action was established in 2005 with the stated purpose of "educat[ing] the public on political issues of national importance and to conduct other activities consistent with the status as a political organization under 26 USC 527."[6]

During the 2006 election cycle, IRS disclosures indicated that Majority Action raised approximately $2 million in donations from individuals and labor unions.[7] Majority Action spent almost all of that $2 million on various broadcast and Internet advertisements referring to federal candidates and their stances on legislative issues such as the minimum wage, congressional pay raises, the war in Iraq, tax and energy policy, congressional ethics rules, management of the House Page program, and stem cell research.[8]

Similarly, during the 2008 election cycle, IRS disclosures showed that Majority Action raised approximately $3.9 million in donations from individuals and labor unions.[9] Again, Majority Action spent almost all of those funds on various broadcast and print advertisements referring to federal candidates and their stances on legislative issues such as healthcare, taxes, energy policy, Social Security, and jobs outsourcing.[10]

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[4] The article was not cited in either complaint; OGC discovered the information during its own research prior to a statutorily required "reason to believe" ("RTB") finding by the Commission. Neither the Act nor the Commission's regulations provide for pre-RTB research. *See generally* 2 U.S.C. § 437g; 11 C.F.R. §§ 111.3(b)-111.7.

[5] MUR 5842, General Counsel's Report #2 at 2.

[6] *Id.* at 3. We note that registering under Section 527 of the Internal Revenue Code as a "political organization" is not synonymous with "political committee" status under the Act, and the former has no particular significance with respect to the latter. *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 13.

[7] MUR 5842, General Counsel's Report #2 at 3-4.

[8] *Id.* at 4; *see also* MUR 5842, Complaint at 11-13.

[9] MUR 6082, First General Counsel's Report at 3.

[10] *Id.* at 5-6; *see also* MUR 6082, Complaint at 2.

II. DISCUSSION

The Act defines "political committee" as "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year."[11] To avoid vagueness problems, the Supreme Court construed "expenditure" to "reach only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate."[12] Similarly, the Court narrowed the definition of contribution to encompass only (1) donations to candidates, political parties, or campaign committees; (2) expenditures made in coordination with a candidate or campaign committee; and (3) donations given to other persons or organizations but "earmarked for political purposes."[13]

In *FEC v. Survival Education Fund* ("*SEF*"), the Second Circuit clarified that "[t]he only contributions 'earmarked for political purposes' with which the *Buckley* Court appears to have been concerned are *those that will be converted to expenditures* subject to regulation under [the Act]."[14] In 2004, the Commission purported to implement the holding in *SEF* in promulgating 11 C.F.R. § 100.57,[15] which reads, in relevant part:

> 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.[16]

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[11] 2 U.S.C. § 431(4)(A).

[12] *Buckley v. Valeo*, 424 U.S. 1, 80 (1976).

[13] *Id.* at 24, n.24, 78.

[14] 65 F.3d 285, 295 (2d Cir. 1995) (emphasis added).

[15] Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5602 (Feb. 7, 2007) (explaining that 11 C.F.R. § 100.57 "codifies the SEF analysis"). As we stated in another matter, we disagree with how *SEF* has been interpreted by the Commission in prior enforcement matters and do not believe that Section 100.57 accurately codifies the *SEF* analysis. *See* MUR 5541 (November Fund), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 8-11.

[16] 11 C.F.R. § 100.57(a). We note that, while *SEF* discussed contributions "*that will be converted to expenditures*," the regulation addresses much more broadly any communication that merely "indicates that any portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate." In other words, while *SEF* seemed to require some certainty in the linkage between contributions and expenditures, the regulation does not. *See SEF*, 65 F.3d at 295; *cf.* 11 C.F.R. § 100.57(a). Moreover, the "support or oppose" standard in Section 100.57 is not the same as the Commission's articulation of the express advocacy standard required by *Buckley* for expenditures. *See* 11 C.F.R. § 100.57(a); *cf.* 11 C.F.R. § 100.22. Nevertheless, Section 100.57 is a duly promulgated regulation, and for purposes of our analysis here, we assume its validity.

The definition of "political committee" is narrow. The Supreme Court has construed the term to "only encompass organizations that are under the control of a candidate or the major purpose of which is the nomination or election of a candidate."[17] In other words, the Act does not reach those "engaged purely in issue discussion," but instead can only reach "that spending that is unambiguously related to the campaign of a particular federal candidate"—specifically, "communications that expressly advocate the election or defeat of a clearly identified candidate."[18] The purpose of this narrowing construction is to restrict the number of groups that must "submit to an elaborate panoply of FEC regulations requiring the filings of dozens of forms, the disclosing of various activities, and the limiting of the group's freedom of political action to make expenditures or contributions."[19]

A. There is No Evidence that Majority Action Received Contributions or Made Expenditures in Excess of $1,000.

In this matter, the expenditure portion of the "political committee" analysis rests on whether any of Majority Action's ads contained express advocacy. With respect to Majority Action's 2008 ads, OGC concluded that none contained any express advocacy.[20] We agree with OGC's analysis. As recited in the factual background, all of Majority Action's 2008 ads focused on legislative issues, and all could plausibly be interpreted by reasonable minds in some way other than as advocating the election or defeat of a federal candidate.[21] Similarly, OGC found no express advocacy in any of Majority Action's 2006 ads cited in the first complaint.

However, in its review of publicly available materials regarding Majority Action's 2006 activities, OGC uncovered a newspaper article discussing a mailer targeting then-Congresswoman Sue Kelly. The article reported, in relevant part:

> "What we have here is a group of people who are coming in from outside the district and are trying to buy the race," said Kelly, who's locked in a tight race against Democrat John Hall. "It's all unaccountable money."
>
> The groups, which include the AFL-CIO and Majority Action, a big Democratic activist organization, have been flooding mailboxes across the

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[17] *Buckley*, 424 U.S. at 79-80.

[18] *Id.*

[19] *FEC v. GOPAC, Inc.*, 917 F. Supp. 2d 851, 858 (D.D.C. 1996) (*quoting FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 392 (D.C. Cir.), *cert. denied*, 454 U.S. 897 (1981)).

[20] MUR 6082, First General Counsel's Report at 8.

[21] *See* 11 C.F.R. § 100.22. We assume, *arguendo*, that Section 100.22(b) is constitutional and enforceable, although the provision has been found unconstitutional by every Federal court that has considered the regulation on its merits. *See* MUR 5694 (Americans for Job Security), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 2 nn.4-5.

> 19th Congressional District with glossy mailers blasting Kelly's 12-year record in Congress.
>
> "Would you rehire the captain of the Titanic?" one asks. "Sue Kelly: Part of the problem in Washington," another says.[22]

Notably, the article does not attribute the mailer to Majority Action but instead mentions that a number of groups, including the AFL-CIO, were distributing literature throughout then-Congresswoman Kelly's district. Furthermore, OGC could not produce a copy of the mailer. Thus, the sole basis for determining that Majority Action may have engaged in express advocacy communications is a newspaper article that mentions a mailer not specifically attributable to Majority Action and not cited in either complaint—and thus, never presented to Majority Action for a response.[23]

Without any specific evidence tying Majority Action to a communication that we have not seen but that might contain express advocacy, we could not find reason to believe that Majority Action triggered political committee status and, thus, violated the Act by failing to register and report with the Commission.[24] This is particularly true here because the communication was not even alleged in the complaint,[25] and, as discussed below, Majority Action was neither informed of that communication nor given an opportunity to respond prior to an RTB vote.

OGC also argued that, even if the Commission were to conclude there was insufficient evidence that Majority Action engaged in express advocacy, Majority Action still may have been required to register as a "political committee" in 2006 because it may have received "contributions" exceeding $1,000. OGC cited a *New York Daily News* article, which reported that a wealthy individual, Adam Rose, had called Majority Action and stated, "I'm this guy in New York you've never heard of and I want to do anything I

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[22] Brendan Scott, *Kelly Decries Outside Forces Funding Attacks Against Her*, TIMES HERALD-RECORD, November 1, 2006, *available at* http://www.recordonline.com/apps/pbcs.dll/article?AID=/20061101/NEWS/611010375 (last visited May 20, 2009).

[23] MUR 6082, First General Counsel's Report at 8.

[24] Despite several Commission legislative recommendations, Congress has refused to change the statutory terminology relating to the initiation of an enforcement action. *See* Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) (noting past legislative recommendations to "clarify" that reason to believe means reason to investigate). In making an RTB determination, the Commission must identify the sources of information and examine the facts and reliability of the sources to determine whether they "reasonably give[] rise to a belief in the truth of the allegations presented." MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1. Thus, only if this threshold is met will there be a reason to investigate.

[25] *See supra* note 6.

can to beat Sue Kelly. I'm sending you $500,000. I need your address."[26] Like the *Times Herald-Record* article about the mailers, the *Daily News* article was not cited in either complaint and, thus, was not provided to Respondents.

OGC asserted that Mr. Rose's reported remarks warranted an investigation into whether Majority Action violated 11 C.F.R. § 100.57(a).[27] We disagree. As OGC conceded, there was no evidence that Majority Action had made any solicitations to Mr. Rose indicating that any portion of his funds would be used to "support or oppose" Kelly, which is required under Section 100.57(a).[28] In fact, the *Daily News* article indicated that Mr. Rose was motivated to make his donation to Majority Action solely because of his disagreement with Kelly over a legislative issue and not in response to any solicitation by the group.[29] Therefore, the *Daily News* story provides an insufficient basis on which to find RTB that a violation of the Act occurred.[30]

Alternatively, OGC argued that Majority Action may have triggered "political committee" status in 2008 because its website may have solicited "contributions" exceeding $1,000. Majority Action's website contained a main "Contribute" link at the top of each of the site's pages. By clicking on this link, viewers were taken to a page on another website that says, in part, "Majority Action engages solely in issue advocacy, and does not make contributions of expenditures in connection with federal elections. None of the funds it receives will be used to support oppose [sic] the election of a clearly identified federal candidate."[31] The viewer would then be taken to the page where he or she can make a donation to Majority Action.

Consistent with the rest of the website, this "Contribute" link was found at the top of the site's "In the News" pages. One of those pages republished a newspaper article describing Majority Action's activities and purpose, which, according to the article's author, was "to highlight the voting records of Republican incumbents who [sic] they deem vulnerable," as well as other second-hand accounts by the author that OGC

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[26] Ben Smith, *500G Sinks a Stalwart, Angry Gay Man's Revenge*, NEW YORK DAILY NEWS, November 13, 2006, *available at* http://www.nydailynews.com/archives/news/2006/11/13/2006-11-13_500g_sinks_a_stalwart__angry.html (last visited May 20, 2009) ("*Daily News* article").

[27] MUR 5842, General Counsel's Report #2 at 8.

[28] *Id.* at 8-9.

[29] *Daily News* article, *supra* note 34 (quoting Mr. Rose as saying, "I woke up one day and discovered that my member of Congress had voted to prevent me and my partner from marrying each other. I became incensed.").

[30] *See supra* note 27.

[31] MUR 6082 First General Counsel's Report, Attachs. A & B. This same disclaimer is found on the webpage that recounts Majority Action's history (http://www.majorityaction.net/history.php) as well as at the bottom of a number of webpages containing Majority Action press releases (*e.g.*, http://www.majorityaction.net/view_press.php?id=14).

characterized as emphasizing Majority Action's "electoral purpose."[32] At the bottom of this webpage, under the article, was a second "Make a Contribution" link.[33] Clicking on that link took the viewer directly to the donation page; the informational page described above would be skipped. OGC concluded that, under 11 C.F.R. § 100.57(a), the inclusion of this second "contribution" link on the page republishing the news article converted the news article into a communication that "indicates that a[] portion of the funds received will be used to support or oppose the election of a clearly identified Federal candidate," and therefore, funds received in response to that communication would be "contributions" sufficient to trigger political committee status.[34]

Assuming *arguendo* that Majority Action intended to endorse every single word in the article posted on its website, the article still does not demonstrate that the group accepted "contributions" for the purposes of the Act, regardless of whether we apply the standard under *SEF* or the formulation at 11 C.F.R. § 100.57. To constitute "contributions" under *SEF*, donations made in response to the solicitations must be "converted to" expenditures—i.e., express advocacy. Here, the article indicated that Majority Action's purpose was "to highlight *the voting records*" of federal candidates. In other words, the article demonstrated Majority Action's intent to discuss legislative issues, which clearly is not the same as express advocacy.[35] And as noted above, none of Majority Action's communications during the 2008 election cycle constituted express advocacy. Thus, under the *SEF* analysis, the solicitation at issue did not convert the donations given in response into contributions.

Similarly, Majority Action did not trigger political committee status by accepting contributions as defined in Section 100.57. Under its plain language, the regulation treats funds received in response to a public communication as "contributions" only 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." Here, the author of the republished article emphasized Majority Action's goal to "highlight the voting records" of federal candidates and "to serve as a counterbalance" against "outside conservative groups." Even if we assume the journalist's account amounts to Majority Action having what OGC characterized as an "electoral purpose," that is not the standard under the regulation. To wit, the article still does not demonstrate that Majority Action was specifically "supporting or opposing" the election of specific Federal candidates, as

[32] *Id.* at 9-11.

[33] *Id.* Attach. C.

[34] *Id.* at 9-11. Although we do not necessarily agree with the practice of treating press reports that are republished on respondents' websites as essentially adoptive admissions, we need not reach this issue here.

[35] The Supreme Court has "long recognized that the distinction between campaign advocacy and issue advocacy may often dissolve in practical application. Candidates, especially incumbents, are intimately tied to public issues involving legislative proposals and governmental actions." *FEC v. Wisconsin Right to Life* ("*WRTL*"), 127 S. Ct. 2652, 2659 (2007) (quoting *Buckley*, 424 U.S. at 42).

required by Section 100.57.[36] Moreover, the fact that the article characterized Majority Action's activities in Oregon as being "an early headache for the reelection efforts of Republican Senator Gordon Smith" also fails to meet the standard of Section 100.57. The article suggests that Majority Action was a "headache" for Senator Smith because the group targeted his legislative positions on energy policy and gas prices.[37] In other words, the group was a "headache" for reasons related to his position on certain issues rather than reasons related to supporting or opposing his specific reelection, which is the standard required under the regulation.

More fundamentally, we cannot agree that Majority Action's specific statements disclaiming any intent to use money that it received from donors to support or oppose a federal candidate can be trumped by an article republished on its website. As noted above, when an interested person sought to make a donation to Majority Action by clicking on the large "Contribution" link at the top of each page of the website, he or she was presented with a disclaimer specifically stating that Majority Action would not use any money received to support or oppose a federal candidate. OGC rightfully determined that this statement meant that Majority Action's request for donations did not meet the regulatory standard of Section 100.57(a) and, thus, did not constitute a contribution. Therefore, we conclude that the specific disclaimer, repeated on several pages throughout the website, was not nullified by the presence of a single news article republished on the site, even though the second, less conspicuous "contribute" link on the bottom of the page containing the article did not lead the viewer to the same disclaimer he would see if he clicked on the larger "contribution" link at the top of the page.

Because we find insufficient evidence indicating that Majority Action either accepted "contributions" or made "expenditures" exceeding the statutory threshold for "political committee" status, we need not address OGC's allegation that Majority Action's "major purpose appears to have been federal campaign activity,"[38] noting only that that doctrine is a narrowing construct that spares some organizations from "political committee" status. It is not an affirmative factor to use in evaluating a group's status.[39]

[36] As we have noted previously, a "support or oppose" standard may be unconstitutionally vague. *See* MURs 5977 & 6005 (American Leadership Project, *et. al*), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 14-15.

[37] *See* MUR 6082, First General Counsel's Report, Attach. C at 1.

[38] *Id.* at 12.

[39] *See* MUR 5541 (November Fund) Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn at 12-13.

B. To Find Reason to Believe Based on Unsworn Facts to Which Respondents Did Not Have an Adequate Opportunity to Respond Would be Inappropriate.

As we have noted already, the complaints in this matter made no allegations and provided no facts sufficiently demonstrating that Majority Action triggered political committee status by either making "expenditures" or receiving "contributions" exceeding the statutory $1,000 threshold. Instead, OGC's RTB recommendation regarding "political committee" status was based on information it discovered independently of the complaints. As we noted in a prior matter,[40] this raises questions about the extent to which OGC, prior to a finding of RTB, may (if it all) properly gather outside information and then rely on it when making an RTB recommendation.

The Act and Commission regulations spell out the conditions that must be met before the Commission may investigate a complaint's allegations. The Act provides that a complaint "shall be in writing, signed, and sworn to by the person filing such complaint, shall be notarized, and shall be made under penalty of perjury ... ."[41] Once the Commission receives a complaint, OGC reviews it for "substantial compliance with the technical requirements of 11 C.F.R. § 111.4,"[42] and then "recommend[s] to the Commission whether or not it should find reason to believe[,] ... no reason to believe[,] ... or that the Commission otherwise [should] dismiss a complaint."[43] The Commission may not entertain an RTB finding, let alone commence an investigation, until the respondent has the opportunity to submit, in writing, reasons why the Commission should take no further action.[44]

Even if we assume that certain limited reviews of publicly available materials for the purpose of verifying information in complaints are permissible actions done in "the normal course of carrying out [the Commission's] supervisory responsibilities,"[45] at an absolute minimum, any facts or allegations unearthed during such reviews that OGC uses to support RTB recommendations should be provided to respondents, as well as an explanation of their relation to the underlying complaint. This will ensure that respondents have a full and fair opportunity to respond to any new facts or allegations. Such an opportunity was not afforded to Majority Action in this matter; this failure

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[40] *See* MUR 6056 (Protect Colorado Jobs), Statement of Reasons of Vice Chairman Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn.

[41] 2 U.S.C. § 437g(a)(1).

[42] 11 C.F.R. § 111.5(a).

[43] *Id.* § 111.7.

[44] 2 U.S.C. § 437g(a)(1); 11 C.F.R. § 111.6(a).

[45] 2 U.S.C. § 437g(a)(2); 11 C.F.R. §§ 111.3, 111.8(a).

undermines the command that "[t]he Commission shall not take any action, or make any finding, against a respondent ... unless it has considered [its] response."[46]

To illustrate the importance of providing Majority Action with the proposed F&LA in this matter, we attach to this statement a copy of the document in which we highlight all of the additional information that OGC produced but was not contained in either complaint. We believe that without the portions of the document that are highlighted, Majority Action did not have an adequate opportunity either to apprise themselves of the allegations against them or to provide a meaningful response.

In order to provide Majority Action an adequate opportunity to address the facts and legal reasoning upon which the RTB recommendation was founded, we had recommended that the Commission send Majority Action the proposed "Factual and Legal Analysis" ("F&LA") prior to any vote.[47] The proposed F&LA discussed both the newspaper article that OGC was relying on and Majority Action's website solicitations. Providing the proposed F&LA would have allowed Majority Action the opportunity to receive notice of, and respond to, allegations not contained in the complaints filed against them—an outcome consistent with notions of due process and fundamental fairness.[48] Unfortunately, we could not find sufficient support for this modest proposal. Absent our colleagues' agreement to present OGC's proposed F&LA to the Respondents, we proposed a compromise by which the Commission would send Majority Action a letter containing substantial portions of the F&LA. This proposal was not adopted either.[49]

Without attempting to resolve the issue in this statement, the Commission should more fully address the permissible boundaries of pre-RTB inquiries and fact-gathering. At some point, such inquiries and fact-gathering, even if they merely involve reviewing information from publicly available sources, reach a threshold where they become investigations without the imprimatur of an RTB finding. The Commission has an obligation under the Act and its regulations to ensure that that line is not crossed. As part of our comprehensive evaluation of the Commission's enforcement procedures, the

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[46] 11 C.F.R. § 111.6(b).

[47] In matters where the Commission votes to find RTB, the respondent is notified of the finding in an F&LA, which sets forth the factual and legal basis of the RTB finding.

[48] This outcome also would have more faithfully complied with the spirit of the Act and Commission regulations. *See* 2 U.S.C. § 437g(a)(1) ("Within 5 days after receipt of a complaint, the Commission shall notify, in writing, any person alleged in the complaint to have committed such a violation. Before the Commission conducts any vote on the complaint, other than a vote to dismiss, any person so notified shall have the opportunity to demonstrate, in writing, to the Commission within 15 days after notification that no action should be taken against such person *on the basis of the complaint.*") (emphasis added); 11 C.F.R. § 111.6 ("A respondent shall be afforded an opportunity to demonstrate that no action should be taken *on the basis of a complaint* . . . .") (emphasis added).

[49] Our colleagues were prepared to send respondents some of the information in the proposed F&LA. But in our experience, this would not have been enough information to adequately address either the facts or the legal implications of those facts.

Commission should more clearly delineate what types of pre-RTB actions are permissible and what types are not and, furthermore, enact procedures that ensure that a respondent has an adequate opportunity to address the factual and legal issues that form the basis of an RTB recommendation before the Commission votes on the recommendation. Respect for due process requires that we do at least that.

III. CONCLUSION

The complaints in this matter alleged that Majority Action violated the Act by failing to register as a "political committee" and, thus, violated the Act's contribution limits and source prohibitions. However, the complaints failed to allege sufficient facts to demonstrate that Respondents had either made "expenditures" (*i.e.*, express advocacy) or accepted "contributions" (*i.e.*, funds "that will be converted to expenditures") exceeding the statutory $1,000 threshold for "political committee" status. The information independently discovered by OGC also was inadequate to support an RTB finding. Accordingly, for these reasons, we rejected OGC's recommendation to find reason to believe in this matter and voted to close the file.

MATTHEW S. PETERSEN
Vice Chairman

July 14, 2009
Date

CAROLINE C. HUNTER
Commissioner

July 14, 2009
Date

FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS*

Respondent: Majority Action **MUR:** 6082

I. INTRODUCTION

This matter concerns allegations that Majority Action ("MA"), an entity organized under Section 527 of the Internal Revenue Code, violated various provisions of the Federal Election Campaign Act of 1971, as amended ("the Act"), when it failed to register and report with the Commission as a political committee in violation of 2 U.S.C. §§ 433 and 434, and when it failed to comply with the Act's contribution limits and source prohibitions in violation of 2 U.S.C. §§ 441a(f) and 441b(a). MA is also a respondent in another pending matter before the Commission, MUR 5842, and the allegations in this matter are similar to the allegations present in MUR 5842.[1]

Specifically, the Complaint in MUR 6082 asserts that beginning with the 2006 election cycle, MA spent over $1.8 million on television advertisements opposing Republican candidates running for the U.S. House of Representatives, and it reportedly declared that it intended to spend between $2 million and $10 million on as many as ten 2008 elections for Federal office. Complaint at 1. The Complaint argues that MA has made statements and spent funds demonstrating that it has a major purpose of influencing

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* ***This is the draft Factual & Legal Analysis prepared by the Office of General Counsel as a proposed explanation of the Commission's reasoning at the initial stage of this matter. However, a majority of the Commission did not adopt the Office of General Counsel's recommendations in this matter, and this document was not adopted by the Commission. The highlighted text indicates information or analysis which, in the view of the Commissioners who voted not to accept the recommendations of the Office of General Counsel in this matter, was not contained in the complaint.***

[1] In MUR 5842, Democracy 21 and Campaign Legal Center filed a similar complaint alleging that Majority Action violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a). The complaint is currently pending before the Commission.

a Federal election. Complaint at 2. In its Response, MA denies its activities triggered political committee status. MA claims that it did not make "contributions" or "expenditures" under the Act and that it "was formed to educate the American public regarding Congressional voting records and to promote progressive and Democratic legislative issues." Response at 2.

Based on available information discussed below, the Commission finds reason to believe that MA violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, failing to report contributions and expenditures, knowingly accepting contributions in excess of $5,000, and knowingly accepting union contributions.

II. FACTUAL BACKGROUND

According to its Internal Revenue Service ("IRS") Form 8871, MA was established on July 12, 2005, and is based in Alexandria, Virginia. In the 2008 version of its web page and press releases, MA touts itself as "an independent political group organized under Section 527 of the Internal Revenue Code that promotes and builds a Democratic progressive agenda in the U.S. Senate and House of Representatives."[2] One news article reported that MA "has expanded its scope [from the 2006 election cycle] to include Senate races as it works to offset conservative groups that have upped the ante in down-ballot races while most Democrats have focused on the presidential race."[3] Based upon statements made by Bill Buck, the Executive Director of MA, the news article reported that "because Democrats have been so concerned about taking back the White

[2] Our History, http://www.majorityaction.net/history.php (last visited Dec. 15, 2008).

[3] Sam Youngman, *Liberal 527 Groups Returns to Focus on House and Senate Races*, THE HILL, July 2, 2008, *available at* In The News, http://www.majorityaction.net/view_news.php?id=10 (last visited Dec. 15, 2008).

House, outside conservative groups have been able to make commitments and get involved on the congressional level without drawing much attention or pushback," and therefore MA would serve as a "counterbalance."[4]

It appears that MA was largely inactive from January 2007 through March 2008, receiving no funds and making disbursements totaling $123,383.[5] *See* MA IRS 8872 Forms. However, the group significantly increased its fundraising and disbursements from April 2008 through November 2008, raising $3,896,000 in funds and making disbursements of $3,867,513. *Id.* It appears that MA received substantial funds from various individuals as well as labor unions. MA's largest individual donations came from Stephen Silberstein ($266,000) and Tim Gill ($250,000). *Id.* Majority Action's union funds came from Change to Win ($1,350,000), a coalition of labor unions, and the Service Employees International Union ($655,000), as well as numerous others. *Id.*

Two of MA's solicitations appear on its website.[6] The first solicitation ("Solicitation #1") can be found when accessing the "CONTRIBUTE" link on the home page of Majority Action's website. The link transfers the viewer to ActBlue's website, where a solicitation for MA is placed.[7] By accessing another "Contribute" link on the

[4] *Id.*; *see also*, Will Evans, *Profile: Majority Action*, NPR, (Aug. 4, 2008), http://www.npr.org/templates/-story/story.php?storyID=93044639 (last visited Dec. 18, 2008) (stating that MA would concentrate its efforts on Senate races in 2008).

[5] The majority of MA's disbursements went to "consulting" companies, and $50,000 went to a loan repayment. *See* MA IRS 8872 Forms.

[6] Majority Action, http://www.majorityaction.net (last visited February 6, 2009), .

[7] ActBlue is an organization registered as a political committee with the Commission. ActBlue operates a website which seeks to raise funds for Democratic candidates and committees as well as independent organizations. *See* ActBlue Website, http://www.actblue.com.

solicitation itself, the link takes the viewer to a contribution form. The solicitation itself states:

> Help Majority Action Today!
>
> Majority Action is an independent political group organized under Section 527 of the Internal Revenue Code that promotes and builds a Democratic progressive agenda in the U.S. Senate and House of Representatives. Our goal is to educate the American public about the voting records of Republican members of Congress and to create a positive issue environment for the success of a Democratic progressive agenda.
>
> Your support for Majority Action will help us continue to speak out on issues that matter to the American public. We need your help to promote a progressive Democratic Agenda from attacks from the radical right.
>
> Majority Action engages solely in issue advocacy, and does not make contributions or expenditures in connection with federal elections. None of the funds it receives will be used to support oppose [sic] the election of a clearly identified federal candidate.

The second solicitation ("Solicitation #2") begins with a news article posted on MA's website, which discusses MA's efforts to win seats in House and Senate races. *See* Youngman, *supra* note 3.[8] The article states: "The Majority Action Fund, one of George Soros's liberal 527 groups that helped Democrats retake the House in 2006, is back in action after lying dormant for the last two years." *Id.* According to the article, Bill Buck of MA stated that the primary role of the organization would be to "highlight the voting records of Republican incumbents who they deem vulnerable," and that MA sought to "spread its influence because Democratic focus has been almost entirely on the race for the White House, and House and Senate candidates could suffer as a result." *Id.* The article indicates that MA has run more than $250,000 on advertisements attacking the voting record of Republican Senator Gordon Smith of Oregon. *Id.* At the bottom of the

[8] *See* Majority Action Website, www.majorityaction.net/view_news?id=10.

article, the website displays a link stating, "Make a Contribution." *Id.* This link takes the viewer to the same contribution form used in Solicitation #1. *Id.* Publicly available information suggests that MA aired nine television advertisements concerning federal candidates during the 2008 election cycle. These advertisements all appear on MA's website and focus on four Republican office holders who ran for federal office in 2008. These candidates include: Marilyn Musgrave, who ran in the Fourth Congressional District of Colorado; Jim Risch, who ran in the U.S. Senate race in Idaho; Gordon Smith, who ran in the U.S. Senate race in Oregon; and Elizabeth Dole, who ran in the U.S. Senate race in North Carolina. All of the advertisements appear to criticize the candidates' positions on health, tax, and energy issues and conclude by asking viewers to contact the office holder regarding a particular issue.

For example, four of the television advertisements target Smith over his votes on specific energy issues and purported connections with energy companies. In one of those advertisements, entitled "Dollars," the advertisement begins by listing gas prices in Oregon and asks, "Gas prices are skyrocketing and what is Gordon Smith doing?" The advertisement then criticizes Smith's acceptance of campaign contributions from oil and auto companies and his votes against higher fuel mileage standards. The advertisement concludes by stating, "Tell Gordon Smith we need lower fuel costs not billions for big oil," and displaying a phone number that the viewer may call. The other advertisements aired by MA also follow a similar format.

In addition, according to news reports, MA distributed at least two mailers in North Carolina concerning Senator Elizabeth Dole, who was running for re-election in

2008.[9] The first mailer criticizes Dole's position on Social Security by stating, "Elizabeth Dole's plan to privatize our Social Security and invest it in the stock market is a real gamble these days . . . ." The mailer then urges readers to "Call Elizabeth Dole at 919-856-4630 and tell her to stop gambling with our retirement." Another mailer sent by Majority Action criticizes Dole for her stance on outsourcing and tax breaks for corporations. The mailer begins by stating that "[a]fter 43 years in Washington, the only job Elizabeth Dole hasn't done is protect ours," and concludes by telling readers, "Call Elizabeth Dole at 919-856-4630. Tell her to stop sending our jobs overseas."

Since the 2008 election, MA's activities have largely subsided. It has reportedly raised no funds since November 4, 2008. *See* MA IRS Form 8872, 2008 Post-General Election Report. In addition, MA has reportedly spent approximately $8,000, which was used solely for payroll expenses. *See* MA IRS Form 8872, 2008 Post-General Election Report.

III. LEGAL ANALYSIS

Majority Action may be a "political committee" subject to the contribution limitations, source prohibitions, and reporting requirements of the Act. *See* 2 U.S.C. §§ 431(4)(A), 433, 434, 441a, and 441b. The Act defines a "political committee" as any committee, club, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A). To address overbreadth

[9] *See* Rob Christensen, *Pittenger Lends $1.2 million to his campaign*, THE NEWS & OBSERVER, October 31, 2008; *see also* Posting of Ryan Teague Beckwith to The News and Observer, http://projects.newsobserver.com/under_the_dome/mailer_targets_dole_on_trade (October 24, 2008).

concerns, the Supreme Court has held that only organizations whose major 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 Supplemental Explanation and Justification*, Political Committee Status, 72 Fed. Reg. 5595, 5606 (Feb. 7, 2007).

The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift 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(9)(A)(i). 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). Further, Commission regulations provide that funds received in response to any communication are contributions 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.

MA is also a respondent in MUR 5842 involving allegations that MA should have registered as a political committee based upon its 2006 activities. In MUR 5842, the Commission found reason to believe that MA violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, failing to report contributions and expenditures, knowingly accepting contributions in excess of

$5,000, and knowingly accepting union contributions. *See* MUR 5842 (Majority Action), Factual and Legal Analysis ("F&LA"). The Commission found that MA likely made more than $1,000 in expenditures expressly advocating the defeat of a clearly identified federal candidate by distributing flyers targeting Congresswoman Sue Kelly that asked, "Would you rehire the captain of the Titanic?" *Id.* at 7 In addition, the Commission concluded that MA likely received over $1,000 in response to solicitations clearly indicating that funds received would be used to oppose the election of Congresswoman Kelly. *Id.* at 8-9. MA's major purpose appeared to have been to influence the 2006 elections because all of its publicly available advertisements focused on federal elections and featured clearly identified federal candidates. *Id.* at 9. In addition, MA appeared to have raised and spent most of its funds during the 2006 election cycle, and public statements by its founders indicated that MA's goal was to defeat Republican incumbents in Congressional races. *Id.*

The complaint in MUR 6082 does not make any new allegations regarding MA's 2006 activities that were not addressed in MUR 5842. As set forth below, it appears that MA accepted contributions as defined by 11 C.F.R. § 100.57(a) during the 2008 election cycle. However, the Commission concludes from the review of MA's publicly available advertisements that these advertisements did not expressly advocate the election or defeat of a clearly identified federal candidate within the meaning of either 11 C.F.R. § 100.22(a) or (b). Thus, these advertisements are not "expenditures" under the Act. Nevertheless, while MA may not have made expenditures during the 2008 election, assuming that MA had already triggered political committee status in 2006, MA had an obligation to continuously report its funds and disbursements. *See* 2 U.S.C. § 434. Thus,

because the Commission concluded that MA triggered political committee status in 2006, the Commission concludes that the following analysis supports a finding of reason to believe that MA triggered political committee status during the 2008 election cycle.

A. Majority Action May Have Exceeded the Statutory Threshold for Contributions by Receiving over $1,000 in Response to a Solicitation Clearly Indicating that Funds Received Will Be Used to Support or Oppose the Election of a Clearly Identified Federal Candidate

Funds received in response to any communication are contributions 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). Although the complaint alleges that MA accepted excessive and prohibited contributions, MA does not address whether its solicitations result in contributions under 11 C.F.R. § 100.57(a). Instead, as MA did in its Response to the Complaint in MUR 5842, MA narrowly interprets *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995), arguing that only payments earmarked for express advocacy constitute "contributions" under the Act. *See* MUR 6082 Response at 2.

Because MA's activities at issue in this matter occurred during the 2008 election cycle, an analysis of whether the organization's solicitations resulted in contributions requires the application of Section 100.57, not reliance upon *Survival Education Fund*. Nevertheless, the court in *Survival Education Fund* found that "even if a communication itself does not constitute express advocacy," a communication may still be deemed as seeking contributions if "it contains solicitations clearly indicating that contributions will be targeted to the election or defeat of a clearly identified candidate for federal office." *Survival Education Fund*, 65 F.3d at 295. In holding that the solicitation at issue in that

case sought contributions and therefore required a disclaimer, the court made no determination as to whether the funds received were actually spent or reserved for express advocacy communications. *See id.* Instead, the court supported its holding with the determination that the solicitation left no doubt that the funds contributed would be used to advocate Ronald Reagan's defeat at the polls. *See id.* Consistent with the Second Circuit's holding, the Commission has rejected MA's arguments of what constitutes a contribution in past political committee matters. *See, e.g.*, MUR 5365 (Club for Growth); MUR 5440 (The Media Fund) (Commission found Media Fund surpassed $1,000 contribution limit because language used in fundraising solicitations indicated that funds received would be targeted to the election or defeat of specific federal candidates).

As discussed in Section II, we found two solicitations on MA's website that the group used to seek funds for its activities. Solicitation #1 can be found when accessing the "CONTRIBUTE" link on MA's website.[10] The link transfers the viewer to ActBlue's website, where a solicitation for MA is placed.[11] Solicitation #1 does not seek "contributions" as defined by 11 C.F.R. § 100.57, because the solicitation explicitly states that funds will not be used to support or oppose the election of a clearly identified federal candidate and limits its discussion solely to MA's goal of promoting Democratic issues with no indication that funds will be used for the election or defeat of a federal candidate.

[10] MA website, http://www.majorityaction.net.

[11] ActBlue website, http://www.actblue.com/page/majorityaction.

Solicitation #2 begins with an article detailing MA's activities in the 2008 federal elections and displaying a "Make a Contribution" link.[12] When the viewer accesses the "Make a Contribution" link, the link takes the viewer to a contribution form on ActBlue's website. Although MA did not write the article, it placed the article on its own website thereby endorsing the article's statements characterizing it as an organization focused on defeating Republican "House and Senate candidates" and using the article's content to solicit funds. *Id.* By placing the "Make A Contribution" link at the end of the article, which directly takes the viewer to a contribution form, MA used the article to inform viewers that funds raised in response to this solicitation will be used to oppose the reelection of Senator Gordon Smith, as described below, and possibly support or oppose others in House and Senate races.

The article in Solicitation #2 makes clear that MA was going to do more than simply oppose the voting record of someone who happens to be a candidate. Rather, the article reports that the MA sought "to highlight the voting records of Republican incumbents who they deem vulnerable." *Id.* The article further describes how MA's activities specifically focused on defeating a clearly identified federal candidate by stating "[s]o far this year, the Majority Action Fund has only gotten involved in Oregon, where it has proven to be an early headache for the reelection efforts of Republican Senator Gordon Smith." *Id.* Bill Buck is quoted as saying, "'[w]e're gearing back up now . . . . You got to start somewhere.'" *Id.* The article emphasizes MA's electoral purpose by stating that Bill Buck "said this week that because Democrats have been so concerned about taking back the White House, outside conservative groups have been

[12] Youngman, *supra* note 3.

able to make commitments and get involved on the congressional level without drawing much attention or pushback." *Id.* Buck then is quoted as saying, "'I think that's something that people are missing because everybody's looking at the presidential level . . . Part of our role will be to serve as a counterbalance.'" *Id.* The article further states, "Buck said the campaign is gearing up and trying to try and spread its influence because Democratic focus has been almost entirely on the White House, and House and Senate candidates could suffer as a result." *Id.* These statements leave no doubt that that MA's activities targeted a clearly identified federal candidate, Gordon Smith, and were focused on opposing him and electing more Democratic candidates in House and Senate races, not just simply engaging in issue advocacy.

Thus, any funds received in response to this solicitation would constitute contributions under 11 C.F.R. § 100.57(a). Furthermore, while a disclaimer will not be dispositive in the case of a solicitation that makes clear that funds received will be used to support or oppose a federal candidate, in contrast to Solicitation #1, Solicitation #2 contains no disclaimer that funds received would not be used to support or oppose the election of a clearly identified federal candidate.

B. Majority Action's Major Purpose Appears to Have Been Federal Campaign Activity

The facts obtained through publicly available information indicate that the main purpose of MA was campaign activity during the 2006, *see* MUR 5842 (Majority Action) Proposed Revised F&LA, and the 2008 election cycles. In 2008, it appears that all of MA's publicly available advertisements focused on federal elections, and featured clearly identified federal candidates. *See supra* Section II. In addition, MA appears to have raised and spent most of its funds just before the 2008 elections. While there were no

reported contributions for all of 2007, MA's reported contributions and expenditures for 2008, a Presidential election year, totaled well over $6 million. *See* MA IRS Forms 8872. Furthermore, MA's Executive Director Bill Buck reportedly made public statements that MA's activities would focus on defeating vulnerable Republican candidates in House and Senate races because most Democrats appeared to concentrate their efforts on the 2008 Presidential race as described by the article, *Liberal 527 Group Returns to Focus on House and Senate*, discussed in *supra* Section III.A.

IV. CONCLUSION

For all the foregoing reasons, the Commission finds reason to believe that Majority Action violated 2 U.S.C. §§ 433, 434, 441a(f), and 441b(a) by failing to register as a political committee with the Commission, by failing to report contributions and expenditures, by knowingly accepting contributions in excess of $5,000, and by knowingly accepting union contributions.