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VIA HAND-DELIVERY

June 1, 2009

Jeff S. Jordan
Office of General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6183

Dear Mr. Jordan:

On April 21, 2009, Saun L. Strobel, Treasurer of Bay City Educators Public Affairs Council ("BCE-PAC"), received a letter dated April 16, 2009, from you on behalf of the Federal Election Commission ("FEC" or "Commission")), stating that your office had received a complaint ("Complaint") alleging that BCE-PAC may have violated the Federal Election Campaign Act of 1971, as amended ("FECA"). By letter dated May 4, 2009, Kim Collins stated that the Office of General Counsel had granted the request to extend the time for a response to June 1, 2009. I have been authorized to represent BCE-PAC and Ms. Strobel in this matter, and this response is submitted on their behalf.

Enclosed with Mr. Jordan's April 16, 2009 letter was the Complaint filed by Kyle Olson alleging that BCE-PAC, by making a $500 contribution to the Stupak for Congress Committee on June 18, 2008, became a "political committee" within the meaning of FECA, and that by failing to register as such with the FEC within ten days and file FECA reports, BCE-PAC failed to comply with FECA (see 2 U.S.C. §§ 433, 434) and its implementing regulations (see 11 C.F.R. § 102.1(c)).

As explained in full below, we submit that the FEC should take no further action on the Complaint for two independent and alternative reasons: *First*, as a matter of law, BCE-PAC is not a "political committee" as defined by FECA, and therefore it was under no legal obligation to register as a political committee, or file campaign finance reports, with the Commission. Rather, BCE-PAC was established under, and operates pursuant to, the Michigan Campaign Finance Act ("MCFA") for the purpose of political activities in connection with state and local elections only; and its one-time contribution of $500 to a federal candidate committee does not make BCE-PAC a "political committee" within the intendment of FECA. *Second*, even if it were the case that BCE-PAC's one-time contribution of $500 to a federal candidate committee technically rendered it a "political

committee," its failure to register as such with the Commission was at most an unknowing and unintentional violation. That being so, and given that BCE-PAC has no intention of making any contributions or expenditures in connection with federal elections in the future, the Commission should dismiss the Complaint in the exercise of its prosecutorial discretion even if it does conclude that a violation occurred.

FACTS

The Bay City Education Association ("BCEA") is a local union representing professional educators employed by public schools in Bay City, Michigan. Affidavit of Saun L. Strobel ¶ 2. The BCEA established BCE-PAC in 1971 for the purpose of making expenditures and contributions in connection with local candidate elections and making recommendations regarding statewide candidate elections to the political action committee sponsored by the Michigan Education Association, BCEA's affiliate. *Id.* ¶¶ 4 & Exhibit A.

After the passage of the Michigan Campaign Finance Act of 1976 ("MCFA"), BCE-PAC registered as an independent political committee pursuant to the MCFA. BCE-PAC files MCFA-required campaign finance disclosure reports with the Michigan Secretary of State and otherwise operates in compliance with the MCFA. Of relevance here, pursuant to the MCFA, BCE-PAC solicits contributions no more than twice per year and only from BCEA members and their spouses. BCE-PAC contribution solicitations are in writing, and such solicitations state that contributions are for political purposes and are voluntary. BCE-PAC's solicitation form further informs those solicited that contributions are "for political purposes," that contributions are voluntary, and that "[m]aking a contribution is neither a condition of employment nor a condition of [union] membership." *Id.* ¶¶ 5-9 & Exhibit B.

In May of 2008, B-PAC received an invitation to a fundraising dinner for the benefit of the candidate committee of Robert ("Bart") Stupak, who was seeking re-election to the United States Congress. At its May 27, 2008 meeting, BCE-PAC's Executive Committee authorized the contribution of $500 for attendance at the Stupak fundraiser. BCE-PAC paid that contribution to the Stupak for Congress Committee by check dated June 3, 2008. BCE-PAC reported this contribution on the campaign finance disclosure report that it filed with the Michigan Secretary of State for the period from April 21, 2008 to July 20, 2008. BCE-PAC made this contribution without the knowledge or realization that doing so might trigger reporting and/or other obligations under FECA. *Id.* ¶¶ 10-12. Because BCE-PAC made the contribution in response to an invitation to a fundraiser from individuals known to BCE-PAC's committee members from a prior state-level campaign, the committee members approving the contribution had paid little attention to the nature of the office for which the candidate was running. *Id.* ¶ 12.

Based on the knowledge of BCE-PAC's Treasurer and a review of BCE-PAC's records, BCE-PAC has made no contributions or expenditures in connection with federal elections other than the June 2008 contribution of $500 to the Stupak for Congress Committee. And, BCE-PAC does not intend to contribute to any candidate for federal office in the future. *Id.* ¶ 14.

DISCUSSION

The Commission should take no further action on the Complaint for the following independent and alternative reasons.

1. The Complaint should be dismissed, first of all, because as a matter of law BCE-PAC is not a "political committee" as defined by FECA and is not required to register as such or to file reports with the Commission. Of relevance here, FECA defines a "political committee" as:

> (A) any committee, club, association, organization, or other group of persons which receives contributions aggregating $1,000 during a calendar year or which makes expenditures[1] aggregating in excess of $1,000 during a calendar year; or
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> (B) any separate segregated fund established under the provisions of Section 441b(b) of this title ....

2 U.S.C. § 431(4). FECA requires registration by "[e]ach separate segregated fund established under the provisions of Section 441b(b) of this title ... no later than 10 days after establishment" and requires registration by "[a]ll other committees ... within 10 days after becoming a political committee within the meaning of section 431(4)". And, FECA requires reporting by "[e]ach treasurer of a political committee ...." 2 U.S.C. § 434(a)(1).

Simply put, BCE-PAC is *not* a "political committee" within the intendment of FECA in that it neither was established under Section 441b(b) nor did it become a political committee by spending in excess of $1,000 during a calendar year on political activities in connection with federal elections.

As an initial matter, BCE-PAC is not a "separate segregated fund established under the provisions of Section 441b(b)," and therefore is not a "political committee" under Section 431(4)(B). Rather, it is a political action committee that was established for the purpose of making contributions, expenditures, and recommendations in connection with state and local candidates, and that is operated under the Michigan Campaign Finance Act, Mich. Cons. Laws §§ 169.201-169.282. *See* Strobel Affidavit ¶¶ 4-6 & Exhibit A. As the pertinent FEC regulation makes clear, the focus of inquiry with regard to the Section 431(4)(B) definition of "political committee" is on "establishment events" such as "[a] vote by the ... governing body of an organization to create a separate segregated fund to be used wholly or in part for federal elections." 11 C.F.R. § 102.1(c). Here, by contrast, BCE-PAC was stablished for the purpose of political activities at the state and local level only.

Nor did BCE-PAC become a "political committee" by reason of its one-time contribution of $500 to a federal candidate committee. As Section 431(4)(A) makes clear only a committee or other organization or group (apart from a separate segregated fund established under FECA) only becomes a

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[1] The term "expenditure," in turn, is defined to include only those expenditures made in connection with federal elections. *See* 2 U.S.C. § 431(9)(A) (defining "expenditure" as "any purchase, payment, distribution, loan advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing an election for Federal office").

"political committee" if it receives contributions aggregating $1,000 in a calendar year and makes expenditures aggregating in excess of $1,000 in a calendar year. While it is clear that BCE-PAC received more than $1,000 in contributions in the last calendar year, its $500 expenditure in support of a federal candidate falls far short of the $1,000 expenditure threshold in Section 431(4)(A).

In sum, under Section 431(4)(A) and (B) there are two alternative ways by which an entity can be considered a "political committee" for the purposes of FECA: (1) by being *established* as a political committee in the first instance; or (2) by *becoming* a "political committee" by reason of post-establishment federal political activities meeting the dollar thresholds. Under the applicable definitions, an entity can be established as a separate segregated fund under the applicable FECA provisions (Section 431(4)(B)); or, if the entity was not established under FECA, it can *become* one by taking in at least $1,000 in contributions and by making more than $1,000 in expenditures in a calendar year (Section 431(4)(A)). Indeed, the establishment/becoming distinction is reflected in the FECA provision governing registration, which provides that a "[e]ach separate segregated fund *established* under the provisions of section 441b(b) shall file a statement of organization no later than 10 days *after establishment*," while "[a]ll other committees shall file a statement of organization within 10 days after *becoming* a political committee within the meaning of section 431(4)." This distinction is further underscored by the Commission's regulation implementing the definitions themselves. In that regulation, the Commission provides that:

> (a) *Except as provided in 11 C.F.R. 100.5(b)* ... any committee, club, association, organization, or other group of persons which receives contributions aggregating $1,000 during a calendar year or which makes expenditures aggregating in excess of $1,000 during a calendar year is a political committee.
>
> (b) Any separate segregated fund established under the provisions of Section 441b(b) is a political committee.

11 C.F.R. § 100.5 (emphasis added). The Commission's regulations thus observe the distinction between separate segregated funds established under FECA, on the one hand, and the separate category of other entities that, although not established as separate segregated funds under FECA, become FECA political committees by virtue of post-establishment expenditures above certain dollar thresholds, on the other.

To be sure, the Complaint cites non-binding advisory opinions from the Commission's General Counsel stating, in the context of political committees organized under state law, that "under 2 U.S.C. § 431(4)(B) a separate segregated fund is a political committee regardless of the amount of contributions or expenditures it makes" and that "a separate segregated fund becomes a political committee under the Act regardless of the total amount of contributions it makes to Federal candidates or other Federal political Committees." Complaint at5 1-2 (quoting AO 2003-09 (Nov. 25, 2003) and AO 1982-46 (July 29, 1982)). *See also* AO-1981-6 (March 16, 1981). We respectfully submit that the conclusions stated in those non-binding Advisory Opinions, which are not accompanied any reasoning at all, are contrary to the statutory language as analyzed above. To reiterate, Section 431(4)(A) and (B) establish two different ways that an entity will be deemed a FECA political

committee: by *being established* as a "separate segregated fund under the provisions of Section 441b(b) of this title" (Section 431(4)(B)) or, as to entities other than those established under FECA, by *becoming* a FECA "political committee" by reason of post-establishment events (Section 431(4)(A)). As the Commission's own regulation confirms, the focus of the Section 431(4)(B) inquiry is on "establishment events," 11 C.F.R. § 102.1(c), and not on events that post-date the establishment of the committee that might make the entity become a FECA "political committee." Only the definition set forth at Section 431(4)(A) speaks to that issue, and that definition includes the monetary thresholds for contributions and expenditures.

While the statutory language and the pertinent regulations are dispositive here, it is worth noting that the reading of the key definitional provisions set forth in the Advisory Opinions cited above would have perverse consequences that Congress plainly could not have intended. That is, to the extent that the Advisory Opinions' reading of Section 431(4)(A) and (B) does not read Section 431(4)(A) out of the statute entirely, it makes little sense as a matter of policy. The Advisory Opinions appear to be guided by the notion that an entity that is established as a separate segregated fund for the purposes of *state* campaign finance regulation should be retroactively deemed to be to have been "established under the provisions of section 441b(b)" under Section 431(4)(B) if it engages in any amount of spending in connection with a federal election, while an entity that is not set up as a separate segregated fund, but nonetheless accepts contributions totaling less than $1,000 and makes expenditures of $1,000 or less in a calendar year is not a "political committee" under Section 431(4)(A). Leaving aside the absence of any support in the language of the statute for this retroactivity notion, that would mean that Congress was more concerned about entities set up as separate segregated funds pursuant to the safeguards established in state-law campaign finance regimes than it was about other organizations and groups that make expenditures in connection with federal elections without being subject to any safeguards whatsoever—the "committee[s], club[s], association[s], organization[s], or other group[s] of persons" dealt with by Section 431(4)(A), as to which the monetary thresholds apply. Indeed, if the entity in question is a separate segregated fund set up under state law, that would mean that the entity is subject to a sophisticated campaign finance regime. States like Michigan that take the step of requiring a separate segregated fund for state and/or local election spending also usually include prohibitions against the use of corporate and union treasury funds for political activities as well as other safeguards such as solicitation disclosures that are at least analogous to FECA's—as Michigan does. It would be odd to say the least to impute to Congress the notion that a small amount of federal political spending by an entity that is already subject to a sophisticated state-law campaign finance regime should require compliance with FECA, while the same small amount of federal spending by a completely unregulated entity that observes no such safeguards does not trigger the obligation to comply with FECA. As the statue makes clear, and the pertinent regulations confirm, that was not Congress's intent.

Consequently, BCE-PAC is not, as a matter of law, a "political committee" within the intendment of FECA and thus was under no obligation to register as such and file campaign finance reports with the Commission.

2. In the alternative, even if the Commission disagrees with the analysis above and concludes that BCE-PAC's one-time contribution to a federal candidate committee rendered BCE-PAC a

"political committee" for the purposes of FECA's registration and reporting requirements, no further action is warranted on this complaint because BCE-PAC's failure to register with the Commission was at most an unknowing and unintentional violation.

It is important to put this matter in its proper context. This violation—if violation it was—was an isolated event as well as inadvertent. BCE-PAC's treasurer has no knowledge of any other BCE-PAC expenditures in connection any federal elections in the past, and a review of BCE-PAC's records revealed no such expenditures. Strobel Affidavit ¶ 14. Because BCE-PAC made the contribution in response to an invitation to a fundraiser from individuals known to B-PAC's committee members from a prior state-level campaign, the committee members approving the contribution had paid little attention to the nature of the office for which the candidate was running. Strobel Affidavit ¶ 12. And, BCE-PAC has no intention of making any contributions or expenditures in connection with federal elections in the future. Strobel Affidavit ¶ 14.

Equally to the point, any violation that occurred here is confined to reporting and disclosure. Because BCE-PAC is operated pursuant to Michigan law, and because the Michigan Campaign Finance Act imposes safeguards that are in relevant respects congruent to those imposed by FECA, there is no concern here about the contribution having come from prohibited funds, or from funds that were raised from persons other than the relevant restricted class and/or without proper disclosure. Like FECA, Michigan law prohibits a union from using treasury funds for making contributions and expenditures while allowing a union to sponsor a separate segregated fund for that purpose; prohibits solicitations for contributions to such a separate segregated fund from persons other than union members and their spouses (a restricted class that is more restrictive that the analogous FECA restricted class); and prohibits contributions obtained by coercion or physical force, by making a contribution a condition of employment or membership, or by using or threatening to use job discrimination or financial reprisals. *See* Mich Stat. Ann. §§ 169.254(2); 169.255(1), (4) & (6). In addition, Michigan law requires solicitation disclosures comparable to FECA's. *See id.* § 169.255(6); Mich. Admin. Code § 169.39d. BCE-PAC complies with these requirements and as a result uses no union treasury funds for state and local political activities, solicits only from the restricted class of union members and their spouses, solicits contributions no more than once each year, and uses written solicitation forms that inform solicitees that BCE-PAC "collects voluntary contributions from association members for political purposes," that contributions are voluntary, and that "[m]aking a contribution is neither a condition of employment nor a condition of [union] membership." Strobel Affidavit, Exhibit B. In sum, even if the Commission determines that a violation did occur here, that violation was unintentional and was confined to a failure to register and to report a one-time, small contribution to a federal candidate.

All this being so, the Commission should dismiss the Complaint in the exercise of its prosecutorial discretion even if it does conclude that a violation occurred.

CONCLUSION

The Complaint alleges BCE-PAC failed to register as a political committee under FECA and file FECA-required campaign finance reports as a consequence of BCE-PAC's one-time contribution of $500 to a federal candidate committee. As we have shown above, the Commission should take no further action on this Complaint because (1) that single contribution did not render BCE-PAC a FECA "political committee" as a matter of law; and (2) in the alternative, any violation was unintentional and unknowing and was confined to a failure to register and make a report with respect to a single, small contribution. We therefore respectfully request that the Complaint be dismissed.

Sincerely,

Philip A. Hostak
Counsel to the Bay City Educators Public Affairs Council and Saun L. Strobel

Enclosures