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FIRST GENERAL COUNSEL'S REPORT

MUR 6371

DATE COMPLAINT RECEIVED: 09/10/10

DATE OF NOTIFICATIONS: 09/16/10

LAST RESPONSE RECEIVED: 10/19/10

DATE ACTIVATED: 11/23/10

EXPIRATION OF SOL: September 2-14, 2015

COMPLAINANT:

Republican Party of Delaware

RESPONDENTS:

Friends of Christine O'Donnell and Matthew J.
Moran, in his official capacity as treasurer¹

Christine O'Donnell

Our Country Deserves Better PAC –
TeaPartyExpress.org and Betty Presley, in her
official capacity as treasurer

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 434(b)
2 U.S.C. § 441a(a)(2)
2 U.S.C. § 441a(a)(8)
2 U.S.C. § 441a(f)
11 C.F.R. § 109.21
11 C.F.R. § 110.6

INTERNAL REPORTS CHECKED: FEC Database

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter involves allegations that Our Country Deserves Better PAC –
TeaPartyExpress.org and Betty Presley, in her official capacity as treasurer (TPAC), a federal
non-connected political action committee, made excessive in-kind contributions to Delaware

¹ Matthew J. Moran became the Committee's treasurer on October 6, 2010.

1 Republican Senate primary candidate Christine O'Donnell (O'Donnell) and her principal
2 campaign committee, Friends of Christine O'Donnell and Matthew J. Moran, in his official
3 capacity as treasurer (O'Donnell Committee).

4 The complaint alleges that TPAC made, and that O'Donnell and the O'Donnell
5 Committee accepted, excessive contributions as a result of 1) TPAC coordinating its
6 expenditures with O'Donnell and the O'Donnell Committee; and 2) TPAC exercising direction
7 and control over contributions earmarked for supporting Ms. O'Donnell's candidacy. Both
8 TPAC and the O'Donnell Committee generally deny that there was any coordination of TPAC
9 expenditures, however, their responses focus on denying that O'Donnell had a private "closed
10 door" meeting after appearing at a TPAC event and do not specifically address other purported
11 interactions, including allegations that the O'Donnell Committee's press secretary was in "daily"
12 contact with TPAC. O'Donnell did not file a separate response. Further, TPAC denies that it
13 ever solicited or accepted earmarked contributions for the O'Donnell Committee and states that
14 it only solicited and accepted funds for its own independent expenditures.

15 As explained below, we recommend that the Commission 1) find reason to believe that
16 Our Country Deserves Better PAC -- TeaPartyExpress.org and Betty Presley, in her official
17 capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2) and 434(b) by making and failing to
18 disclose excessive in-kind contributions in the form of coordinated expenditures; 2) find reason
19 to believe that Christine O'Donnell violated 2 U.S.C. § 441a(f) by accepting excessive in-kind
20 contributions in the form of coordinated expenditures; and 3) find reason to believe that Friends
21 of Christine O'Donnell and Matthew J. Moran, in his official capacity as treasurer, violated
22 2 U.S.C. §§ 441a(f) and 434(b) by accepting or failing to disclose excessive in-kind
23 contributions in the form of coordinated expenditures. Further, we recommend that the

Commission find no reason to believe that Respondents violated the Act by making, receiving, or failing to report excessive in-kind contributions as a result of TPAC exercising direction or control over contributions earmarked for the O'Donnell Committee.

II. FACTUAL AND LEGAL ANALYSIS

A. Background Information

Christine O'Donnell was a candidate in the September 14, 2010, Republican special primary election to nominate a candidate for the Delaware Senate seat vacated by Vice President Biden. Friends of Christine O'Donnell is O'Donnell's principal campaign committee, and Matthew J. Moran is the current treasurer of that committee. The O'Donnell Committee did not report receiving any contributions from TPAC for the primary election cycle.

TPAC registered with the Commission as a non-connected political action committee in August 2008 and filed for multicandidate status in March 2010. See 11 C.F.R. §§ 100.5(e)(3) and 102.3(a)(3). During 2009-2010, TPAC reported receiving approximately \$7.6 million in contributions and making approximately \$2.6 million in independent expenditures supporting federal candidates. See TPAC Disclosure Reports.

On August 30, 2010 TPAC endorsed O'Donnell and announced that it would spend as much as \$600,000 ahead of Delaware's September 14th primary election on O'Donnell's behalf. Washington Wire, Tea Party Backs O'Donnell in Delaware, The Wall Street Journal (Aug. 30, 2010, 5:51pm), <http://blogs.wsj.com/washwire/2010/08/30/tea-party-endorses-odonnell-in-delaware/tab/print/>. During the two weeks prior to the election, TPAC reported making independent expenditures totaling \$236,981 either in support of O'Donnell or in opposition to her Republican primary opponent, Mike Castle. See TPAC disclosure reports.² TPAC reported

² See also Complaint, Exhibit D for a spreadsheet detailing the cost of some TPAC media buys.

1 making \$52,130 of these independent expenditures (\$30,790 in support of O'Donnell's
2 candidacy and \$21,340 in opposition to Mike Castle) on September 2 and 3, 2010, and reported
3 making the remaining \$184,851 of independent expenditures between September 7 and 14, 2010.
4 *Id.*

5 The complaint alleges the following as evidence that TPAC coordinated its efforts with
6 O'Donnell and the O'Donnell Committee:

- 7 • O'Donnell appeared at a September 1, 2010, event hosted by the "Delaware 9-12
8 Patriots" and ended her remarks by introducing a TPAC official to provide the
9 audience with information as to how they could make contributions to TPAC.
10 Complaint at 2 and referenced video footage.
- 11 • O'Donnell appeared at a September 7, 2010, TPAC press conference held for the
12 specific purpose of publicizing its endorsement of, and ongoing independent
13 expenditures in support of, O'Donnell's candidacy.³ After the event, O'Donnell
14 reportedly entered a "closed door meeting" with a TPAC official. *Id.*
- 15 • TPAC announced its plans to host a September 9th "Radiothon for Christine
16 O'Donnell" to solicit funds to support her candidacy and additional rallies in support
17 of O'Donnell. *Id.* at 3 and Exhibit E. Complainant alleged "upon information and
18 belief" that O'Donnell was to make a speaking appearance at the radiothon.
- 19 • On September 2, 2010, O'Donnell's press secretary, Evan Queitsch, publicized the
20 upcoming TPAC Radiothon for O'Donnell on his Facebook page and stated that he
21 spoke to TPAC on a daily basis. *Id.*, Exhibit F.

22 The complaint also alleges that TPAC solicited and accepted contributions earmarked for
23 the O'Donnell Committee. Complainant submitted documents suggesting that on or about
24 September 7, 2010, TPAC sent an email solicitation, referred to as the "O'Donnell
25 MoneyBomb," to unidentified potential contributors requesting donations that it would use to
26 make independent expenditures to support O'Donnell's candidacy. *Id.* at Exhibit B. According
27 to a TPAC website posting, the "O'Donnell MoneyBomb" purportedly raised \$129,664.70,
28
29
30
31

³ Available information indicates that the press conference took place on September 7, 2010, and not on September 8, 2010, as referenced in the complaint. See Complaint at Exhibit A.

1 which caused TPAC to raise its fundraising goal from \$200,000 to \$250,000. *Id.* Complainant
2 alleges that all funds TPAC received in response to its solicitation should be regarded as
3 contributions that were earmarked for supporting the O'Donnell Committee. *Id.* at 4.

4 While the responses generally deny that there was coordination and specifically deny the
5 allegation that O'Donnell held a "closed door" meeting after the September 7th TPAC event, both
6 the O'Donnell Committee and TPAC responses are silent as to the other specific alleged
7 interactions between TPAC and the O'Donnell Committee. *See* Responses. TPAC denies either
8 soliciting or receiving any earmarked contributions. Neither TPAC nor the O'Donnell
9 Committee submitted sworn affidavits in connection with their responses.

10 **B. Coordination**

11 The Federal Election Campaign Act of 1971, as amended (the Act), provides that no
12 multicandidate committee shall make contributions to any candidate and his authorized political
13 committee with respect to any election for Federal office which, in the aggregate, exceed \$5,000.
14 2 U.S.C. § 441a(a)(2). The Act also provides that no candidate or political committee shall
15 knowingly accept any contribution that exceeds the applicable limitations. 2 U.S.C. § 441a(f).
16 Further, the Act provides that political committees must report both the amount of all
17 contributions received and source of any contributions which have an aggregate value in excess
18 of \$200. 2 U.S.C. § 434(b)(2)-(3). The Act provides that an expenditure made by any person "in
19 cooperation, consultation, or concert, with, or at the request or suggestion of," a candidate or his
20 authorized committee or agency is a contribution to the candidate. *See* 2 U.S.C.
21 § 441a(a)(7)(B)(i); 11 C.F.R. § 109.20(a).

22 A communication is coordinated with a candidate, an authorized committee, a political
23 party committee, or an agent of any of the foregoing when the communication 1) is paid for, in

1 whole or part, by a person other than that candidate, authorized committee, or political party
2 committee; 2) satisfies at least one of the content standards⁴ described in 11 C.F.R. § 109.21(c);
3 and 3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d).
4 11 C.F.R. § 109.21(a)(1) – (3). In contrast, an independent expenditure is an expenditure by a
5 person for a communication expressly advocating the election or defeat of a clearly identified
6 candidate that is not made in cooperation, consultation, or concert with, or at the request or
7 suggestion of a candidate, a candidate's authorized committee, or their agents, or a political party
8 committee or its agents. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

9 The complaint alleges that TPAC made excessive in-kind contributions as a result of
10 coordinating some or all of its communications with the O'Donnell Committee. The available
11 information indicates that the first and second prongs (payment and content) of the coordination
12 regulations are met, because TPAC paid for public communications that expressly advocated the
13 election or defeat of two clearly identified Senate candidates (O'Donnell and Castle) that were
14 publicly distributed in the candidate's jurisdiction 90 days or fewer before the candidate's
15 primary election. 11 C.F.R. § 109.21(c)(3) and (c)(4)(i). Respondents dispute that their
16 interactions would satisfy any of the conduct prong standards.

17 The conduct standards that may have been triggered by TPAC's interactions with
18 O'Donnell and the O'Donnell Committee include:

- 19 • The "request or suggestion" standard, which is satisfied if the communication is
20 created, produced, or distributed at the request or suggestion of a candidate,
21 authorized committee, or political party committee; or if the communication is
22 created, produced, or distributed at the suggestion of a person paying for the

⁴ The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit's decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. See *Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (Sept. 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. The new standard would not change the analysis in this Report.

1 communication and the candidate, authorized committee, or political party
2 committee assents to such suggestion. 11 C.F.R. § 109.21(d)(1).

- 3
- 4 • The "material involvement" standard, which is satisfied if the candidate,
5 authorized committee, or political party committee is materially involved in
6 decisions regarding 1) the communication's content; 2) the intended audience for
7 the communication; 3) the means or mode of the communication; 4) the specific
8 media outlet for the communication; 5) the timing or frequency of the
9 communication; or 6) the size or prominence of the printed communication or the
10 duration by broadcast, satellite, or cable. 11 C.F.R. § 109.21(d)(2).
 - 11
 - 12 • The "substantial discussion" standard, which is satisfied if the communication is
13 created, produced, or distributed after there are one or more discussions about the
14 communication between the candidate or her committee and the person paying for
15 the communication during which substantial information about the candidate's or
16 political party committee's campaign plans, projects, activities, or needs is
17 conveyed to the person paying for the communication, and that information is
18 material to the creation, production, or distribution of the communication.
19 11 C.F.R. § 109.21(d)(3).

20 Complainant asserts that given the interactions between O'Donnell and TPAC, "it is
21 inconceivable that TPAC's communications were made without substantial discussions with
22 O'Donnell, O'Donnell's material involvement, or the request or suggestion of O'Donnell."
23 Complaint at 6. While Respondents acknowledge O'Donnell's appearance at a TPAC press
24 conference to thank TPAC for the endorsement, they deny having any discussions about TPAC's
25 independent expenditures. Based on the available information, O'Donnell and the O'Donnell
26 Committee had multiple interactions with TPAC during the two weeks prior to the primary
27 election. Some of the interactions do not appear to satisfy the conduct prong. However,
28 Respondents do not specifically address other reported interactions, such as the Facebook
29 postings and the radiothon, that might satisfy the conduct prong.

30 We will analyze the alleged interactions in the order presented by the complaint.

1. September 1st Event

On September 1, 2010, O'Donnell spoke at what the Complainant characterizes as a TPAC event hosted by the Delaware 9-12 Patriots. Complaint at 2, *see also* <http://www.912delawarepatriots.com>. Video footage provided by Complainant shows O'Donnell, in response to a question from the audience, asking a person at the back of the room named "Tiffany" -- who Complainant identifies as Tiffany Ruegner, Field Director of the Tea Party Express -- "what's your website, Tiffany," and "Tiffany" responds by announcing the TPAC website address. *See* Video File COD at Tea Party.

The complaint alleges that O'Donnell introduced Ms. Ruegner to explain how the audience could donate to TPAC. Complaint at 2. The responses do not specifically discuss or even acknowledge O'Donnell's appearance at this event, but generally assert that, other than the September 7th TPAC press conference at which she thanked TPAC for its support, her "other remarks were all devoted to her platform as a candidate." *See* Responses. While the September 1st video footage provided by Complainant shows O'Donnell directing the question about TPAC's website to a TPAC representative, who explains how a person can access the website and obtain further information from and about TPAC, it does not show O'Donnell soliciting donations for TPAC. Further, the video footage does not show Ruegner soliciting funds.

After introducing Ruegner, O'Donnell also makes the following statement, which disclaims prior contacts with TPAC:

Okay, good, good. I'll tell you, this is exciting. The Tea Party Express has a winning track record and you know again, it's funny, a reporter kept saying to me "well, when you talk to the tea party express," and I'm like "really, I didn't talk to them," and the fact that I thought Tiffany was a Castle tracker proves that I did not talk to them.

Video File COD at Tea Party.

1 In sum, the video footage provided by Complainant falls short of the complaint's
2 characterization of the event. The September 1st video footage only shows O'Donnell directing a
3 question regarding TPAC's website address to a TPAC representative, and does not show either
4 O'Donnell or the TPAC representative soliciting donations for expenditures supporting
5 O'Donnell. Also, the video footage shows O'Donnell stating that she had no interactions with
6 TPAC prior to this event.

7 2. September 7th Event

8 On September 7, 2010, TPAC held a press conference regarding its efforts to support
9 O'Donnell, and O'Donnell attended this event. Complaint, Exhibit A. Complainant states that,
10 after the introductory remarks by Amy Kremer, Chairman of the Tea Party Express, Kremer
11 recognized O'Donnell's presence, and O'Donnell then made a statement urging Delaware voters
12 to vote for her in the upcoming September 14th special primary election. *Id.* at 2. The complaint
13 also alleges that after the September 7, 2010, event, O'Donnell was seen entering a "closed door"
14 meeting with a TPAC official. *Id.*; see Video File COD Behind Closed Doors.

15 According to Respondents, O'Donnell appeared without the advance knowledge of
16 TPAC and publicly thanked TPAC for its endorsement and support of her candidacy. TPAC
17 Response at 2. TPAC asserts that such a tangential appearance by O'Donnell at an event held to
18 "mobilize grassroots support for the O'Donnell candidacy where the *only* comments were to
19 thank the organizers hardly constitutes a 'request, behest, suggestion' that TPAC make the
20 expenditures it had already determined to make in support of its endorsement of the O'Donnell
21 candidacy." *Id.* Respondents argue that O'Donnell's public appearance at the September 7th
22 event does not constitute material involvement by the O'Donnell Committee. *Id.* Respondents

1 deny that there have ever been any non-public meetings between O'Donnell or persons from her
2 campaign and TPAC. *Id.* at 2 and O'Donnell Committee Response at 1.

3 The September 7th video footage, which is somewhat confusing, shows O'Donnell
4 leaving the stage and walking down a hallway and entering a room with unidentified individuals.
5 See Video File COD Behind Closed Doors. Although a person who resembles the individual
6 previously identified as Tiffany Ruegner from the September 1st event remains on the outside of
7 the closed door with members of the press, it is not clear 1) whether any of the persons who
8 actually entered the room were associated with TPAC; or 2) whether any "meeting" occurred
9 after the door was closed or if the persons who entered the room left through a different door.
10 Accordingly, there is no information to contradict Respondents' denials that there ever was a
11 private meeting between O'Donnell and TPAC.

12 3. Radiothon and Facebook Postings

13 The complaint also cites to a September 2, 2010, statement allegedly made by the
14 O'Donnell Committee's press secretary, Evan Queitsch, on his Facebook page that he speaks to
15 TPAC "daily." See Complaint, Exhibit F. Further, the complaint states that TPAC was planning
16 to host a "Radiothon for Christine O'Donnell" during which, "upon information and belief,
17 candidate O'Donnell will make a speaking appearance" and "in connection with this event,
18 TPAC has solicited funds to support O'Donnell." *Id.* at 3 and Exhibit E. The attachment states
19 that the September 9, 2010, Radiothon for Christine O'Donnell was "to raise money and
20 awareness for the conservative candidate for US Senate Christine O'Donnell" See
21 <http://www.facebook.com/event.php?eid=111135075609225>. Complaint at 3 and Exhibit E.
22 The posting does not indicate whether or not O'Donnell was scheduled to make an appearance.⁵

⁵ Complainant also alleges that media reports state that TPAC was planning to hold at least two rallies in support of O'Donnell, in Dover, Delaware and Sussex, Delaware. Complaint at 6. Respondents do not address these

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1 The complaint attachment indicates that Queitsch added a post at 11:54 a.m. on
2 September 2, 2010, stating "Tea Party Express Radiothon on #wdel@ 7PM Thurs Sept. 9th
3 #delaware #netde ur calls and guests discuss #desen race.... listen online www.wdel.com." *Id.*
4 Exhibit F. About three hours later, Queitsch added another post to his page, apparently directed
5 a WDEL radio station employee (Jensen) that reads "@Jensen 1150 WDEL let me know if you
6 want to know about the Tea Party Express as I speak w/them daily." *Id.*

7 As mentioned before, the radiothon "to raise money and awareness for conservative
8 candidate for US Senate Christine O'Donnell" appears to satisfy the content prong. *Id.* The
9 information as to Queitsch's Facebook postings on September 2nd regarding the upcoming
10 radiothon and his "daily" contact with TPAC can be interpreted as suggesting that an O'Donnell
11 Committee agent may have had discussions about TPAC's radiothon for O'Donnell a week or
12 more prior to the radiothon. *Id.* at Exhibit F. While the Facebook postings do not independently
13 satisfy the conduct prong with regard to the radiothon, the information that TPAC and the
14 O'Donnell Committee were in "daily" contact raises questions about whether those contacts
15 included discussions regarding the radiothon that might satisfy the conduct prong by constituting
16 a request or suggestion, material involvement, or substantial discussions.

17 We recognize that it is possible that Queitsch was referring to discussions completely
18 unrelated to the radiothon. However, unlike the September 7th event, Respondents do not
19 specifically address this allegation, much less rebut it. Further, the responses lack affidavits that
20 might explain why this information fails to satisfy the conduct prong. Although O'Donnell's
21 public statement on September 1st indicates that she had not personally spoken to TPAC,
22 Queitsch's statement the next day that he talked with TPAC "daily" raises questions as to

allegations other than by making a general assertion that O'Donnell's "other remarks were all devoted to her platform as a candidate." See Responses.

1 TPAC's interactions with the O'Donnell Committee. Further, if O'Donnell appeared at the
2 radiothon, her appearance could have triggered the "material involvement" standard of the
3 conduct prong. *See* Advisory Opinion 2003-25 (Weinzapfel) (the Commission noted that given
4 the importance and potential campaign implications of such appearances, it is implausible that a
5 Federal candidate would appear in a public communication without being materially involved in
6 one or more of the listed decisions regarding the communication). *See also* 11 C.F.R. §
7 109.21(d)(2).

8 In order to determine whether the conduct prong has been satisfied, we need to obtain
9 answers to the questions about the O'Donnell Committee's involvement with TPAC's radiothon,
10 if any, the nature of the "daily" contacts between TPAC and Queitsch, and whether O'Donnell
11 actually appeared during the radiothon. Accordingly, we recommend that the Commission
12 1) find reason to believe that Our Country Deserves Better PAC -- TeaPartyExpress.org and
13 Betty Presley, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2) and 434(b) by
14 making and failing to disclose excessive in-kind contributions in the form of coordinated
15 expenditures; 2) find reason to believe that Christine O'Donnell violated 2 U.S.C. § 441a(f) by
16 accepting excessive in-kind contributions in the form of coordinated expenditures; and 3) find
17 reason to believe that Friends of Christine O'Donnell and Matthew J. Moran, in his official
18 capacity as treasurer, violated 2 U.S.C. § 434(b) and 441a(f) by accepting and failing to disclose
19 the receipt of excessive in-kind contributions in the form of coordinated expenditures. Further,
20 we recommend that the Commission authorize an investigation in order to obtain the necessary
21 information to determine whether the conduct prong has been satisfied and, if so, whether any
22 resulting contribution would be excessive.

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C. Earmarking

The Act provides that all contributions by a person that are made on behalf of, or to, a candidate, including contributions that are in any way earmarked or otherwise directed to the candidate through an intermediary or conduit, are contributions from the person to the candidate. 2 U.S.C. § 441a(a)(8). A contribution is earmarked when there is "a designation, instruction, or encumbrance, whether direct or indirect, express or implied, oral or written, which results in all or any part of a contribution or expenditure being made to, or expended on behalf of, a clearly identified candidate or a candidate's authorized committee." 11 C.F.R. § 110.6(b). An earmarked contribution counts against the contributor's contribution limit for the recipient candidate. 11 C.F.R. § 110.6(a). If an intermediary or conduit exercised any direction or control over the choice of the candidate receiving the contribution, the funds are treated as contributions from both the original contributor and from the intermediary or conduit to the recipient candidate. 11 C.F.R. § 110.6(d).

The complaint, referring to the "MoneyBomb" solicitation, alleges that TPAC solicited and accepted contributions for the purpose of supporting O'Donnell, and that all funds received in response to this solicitation must be considered "earmarked" for O'Donnell. *See supra* at 4 (description of MoneyBomb solicitation). The complaint contends that because TPAC exercised discretion and control over the contributions earmarked for expenditures in support of O'Donnell, TPAC's resulting expenditures should be regarded as excessive and unreported contributions to the O'Donnell Committee. Complaint at 4. Complainant cites to MUR 3620 (Democratic Senatorial Campaign Committee or "DSCC") for the proposition that funds solicited for the purpose of making party coordinated expenditures on behalf of a particular candidate can be deemed to have been earmarked for this candidate and should be considered

1 contributions from both the original and the soliciting organization. Although not specifically
2 cited by Complainant, the aggregation provision at 11 C.F.R. § 110.1(h), states that when a
3 contributor gives to an unauthorized committee with "knowledge" that a "substantial portion" of
4 his or her contribution will, in turn, be "contributed to" or "expended on behalf of" a particular
5 candidate, such contributions must be aggregated with contributions made to that candidate's
6 authorized committee.

7 TPAC argues that the provisions are not intended to apply to contributions solicited for
8 the purpose of making independent expenditures. TPAC Response at 1. There is no information
9 to indicate that TPAC ever told any donor that it would make a contribution to the O'Donnell
10 Committee, or that it would forward any of the funds received to the O'Donnell Committee in
11 the form of a coordinated in-kind contribution. TPAC argues that it is permitted to solicit and
12 receive a maximum of \$5,000 from an individual during a calendar year, and at no time did it
13 ever solicit more than \$5,000 from any individual donor or receive more than \$5,000 from any
14 individual donor. See 11 C.F.R. § 110.1(d); TPAC Response at 1. Further, TPAC responds that
15 it has never made either a direct or indirect contribution to the O'Donnell Committee,⁶ but has
16 made independent expenditures in support of O'Donnell and/or in opposition to her opponent,
17 Mike Castle. TPAC Response at 1.

18 Earmarking involves donors contributing funds to one committee that are intended to be
19 passed along to a specific candidate with the initial committee acting as a conduit or
20 intermediary. In MUR 3620 (DSCC), the Commission found that earmarking can occur where a
21 candidate solicits his or her own maxed-out donors for funds to be used on that candidate's
22 behalf by a party committee making coordinated expenditures.

⁶ On November 2, 2010, the O'Donnell Committee received a contribution from TPAC in the amount of \$2,000, which was after October 7, 2010, the date that TPAC filed its response to the complaint. See O'Donnell Committee 2010 30-Day Post Election Report at 1059.

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1 In contrast to earmarked contributions, independent expenditures are, by definition, not
2 made in concert or cooperation or at the request or suggestion of the candidate, authorized
3 committee, a political party committee, or the agents of any of the foregoing.⁷ See 2 U.S.C.
4 § 431(17); *see also* 11 C.F.R. § 100.16. Party coordinated expenditures, such as those at issue in
5 MUR 3620 (DSCC), are subject to established limits, similar to contribution limits. See 11
6 C.F.R. §§ 109.30 and 109.37(b). Party independent expenditures, on the other hand, like third
7 party independent expenditures, are not subject to such limits. *Id.* See *also* *FEC v. Colorado*
8 *Republican Federal Campaign Committee*, 533 U.S. 431, 441 (2001).

9 The Commission recently addressed this issue in an advisory opinion, where it
10 determined that a political committee could solicit and accept contributions intended for making
11 independent expenditures in support of a particular candidate without being subject to the
12 Commission's "earmarking regulations" or the aggregation provision of 11 C.F.R. § 110.1(h).
13 See Advisory Opinion 2010-09 (Club for Growth) at 5. The Commission advised that as long as
14 a political committee does not contribute to, or coordinate its expenditures with, the candidate it
15 seeks to support, the solicitation and acceptance of contributions intended to fund specific
16 independent expenditures do not pose any risk of circumventing the contribution limits, and thus
17 are not subject to the restrictions imposed by 11 C.F.R. § 110.1(h). *Id.* TPAC's solicitation and
18 acceptance of contributions for the purpose of making independent expenditures in connection
19 with the primary election appears indistinguishable from the activity approved in AO 2010-09.

20 The "MoneyBomb" solicitation was for TPAC's own independent expenditures, and did
21 not inform potential donors that their contributions would be contributed to the O'Donnell

⁷

1 Committee as in-kind contributions or as coordinated expenditures.⁸ In the absence of such
2 language in the available TPAC solicitation or any message accompanying the contributions to
3 TPAC, there is no basis upon which to conclude that the donors were earmarking their
4 contributions to TPAC in a manner that would instruct TPAC to make a contribution to the
5 O'Donnell Committee.

6 Therefore, we recommend that the Commission find no reason to believe that Our
7 Country Deserves Better PAC – TeaPartyExpress.org and Betty Prasley, in her official capacity
8 as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2), or 441a(a)(8) by failing to report earmarked
9 contributions and by making excessive contributions as a result of exercising direction or control
10 over earmarked contributions. We further recommend that the Commission find no reason to
11 believe that Christine O'Donnell violated 2 U.S.C. §§ 441a(f), or that Friends of Christine
12 O'Donnell and Matthew J. Moran, in his official capacity as treasurer, violated 2 U.S.C.
13 §§ 441a(f) or 434(b) by accepting or failing to disclose excessive in-kind contributions in the
14 form of earmarked contributions sent through Our Country Deserves Better PAC –
15 TeaPartyExpress.org.

16 **III. PROPOSED INVESTIGATION**

17 An investigation would seek additional information regarding TPAC's September 9th
18 radiothon in support of O'Donnell and the Facebook posting made by the O'Donnell

⁸ The Commission has determined that contributions were earmarked only where there was clear documentary evidence demonstrating a designation or instruction by the donor, but has rejected earmarking based on circumstantial evidence where the contribution checks lacked a clear designation or instruction. See MURs 6221 (Transfund), 5732 (Matt Brown for U.S. Senate), 5678 (Liffrig for Senate), 5445 (Davis), and 5019 (Keystone Federal PAC) (although contributors were likely aware that the PAC would contemporaneously contribute to the candidates' committees, there was no evidence that the contributors actually knew that a portion of their contributions would be given to specific candidates); but see MURs 4633/4634 (Triad Management Services) (Commission found reason to believe and opened an investigation where circumstances, including the proximity in timing and similarity in contribution amounts, as well as information about communications between contributors and the respondent, raised substantial questions of whether contributors had knowledge that the PACs would use their contributions to support specific candidates).

Committee's purported press secretary, Evan Queitsch, regarding his "daily" contact with TPAC in an effort to determine whether the conduct prong has been satisfied.

Although we first would seek information voluntarily from the respondents, we are asking the Commission to authorize the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas.

IV. RECOMMENDATIONS


1. Find reason to believe that Our Country Deserves Better PAC – TeaPartyExpress.org and Betty Presley, in her official capacity as treasurer, violated 2 U.S.C. §§ 441a(a)(2) and 434(b) by making and failing to disclose excessive in-kind contributions in the form of coordinated expenditures.
2. Find reason to believe that Christine O'Donnell violated 2 U.S.C. § 441a(f) by accepting excessive in-kind contributions in the form of coordinated expenditures.
3. Find reason to believe that Friends of Christine O'Donnell and Matthew J. Moran, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(f) by accepting and failing to disclose in-kind contributions in the form of coordinated expenditures.
4. Find no reason to believe that Our Country Deserves Better PAC – TeaPartyExpress.org and Betty Presley, in her official capacity as treasurer, violated 2 U.S.C. §§ 434(b), 441a(a)(2) or 441a(a)(8) by failing to report earmarked contributions and by making excessive contributions as a result of exercising direction or control over earmarked contributions.


MUR 6371 (TPAC)
First General Counsel's Report

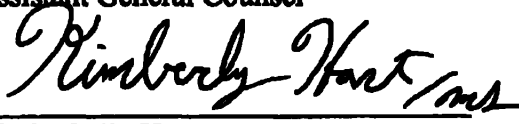
5. Find no reason to believe that Christine O'Donnell violated 2 U.S.C. §§ 441a(f) by accepting excessive in-kind contributions in the form of earmarked contributions.
6. Find no reason to believe that Friends of Christine O'Donnell and Matthew J. Moran, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(f) or 434(b) by accepting or failing to disclose excessive in-kind contributions in the form of earmarked contributions.
7. Authorize the use of compulsory process.
8. Approve the attached Factual and Legal Analyses.
9. Approve the appropriate letters.

Christopher Hughey
Acting General Counsel

3/25/11
Date


Stephen A. Gura
Deputy Associate General Counsel
for Enforcement


Mark D. Shonkwiler
Assistant General Counsel


Kimberly D. Hart
Staff Attorney