



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

MAY 31 2011

Cleta Mitchell, Esq.
Foley & Lardner LLP
3000 K Street, NW #600
Washington, DC 20007

RE: MUR 6390
Senate Conservatives Fund and
Barry Wynn, in his official capacity as
treasurer

Dear Ms. Mitchell:

On October 8, 2010, the Federal Election Commission notified your clients, the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, of a complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On May 24, 2011, the Commission found, on the basis of the information in the complaint, and information provided by you, that there is no reason to believe that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, violated 2 U.S.C. §§ 434(b) and 441a(a). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's findings, is enclosed for your information.

If you have any questions, please contact Audra Hale-Maddox, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

A handwritten signature in black ink, appearing to read "Peter G. Blumberg".

Peter G. Blumberg
Assistant General Counsel

Enclosure
Factual and Legal Analysis

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FEDERAL ELECTION COMMISSION**FACTUAL AND LEGAL ANALYSIS**

RESPONDENT: Senate Conservatives Fund and Barry Wynn, MUR: 6390
in his official capacity as treasurer

I. INTRODUCTION

This matter was generated by a complaint filed with the Federal Election Commission ("the Commission") by Erin Hill, Executive Director of ActBlue. *See* 2 U.S.C. § 437g(a)(1). The complaint in this matter alleges that the Senate Conservatives Fund and Barry Wynn, in his official capacity as treasurer, ("SCF") made excessive contributions to ten different Senate candidates when it exercised direction and control over earmarked contributions that it had solicited. The complaint alleges that SCF's exercise of direction and control over the subject contributions made the contributions dually attributable to both the original individual contributors and to SCF as the conduit. Specifically, complainant states that SCF's use of an "easy button" on its webpage, which unequally apportioned a contribution among the available candidates, prevented contributors from choosing which candidates to support or the level of support; instead, these decisions were allegedly left to SCF. Insofar as SCF acted as a conduit for more than \$3 million in contributions during the 2010 election cycle, SCF allegedly violated 2 U.S.C. § 441a(a) by making excessive contributions to these ten candidates. The attribution of these "easy button" contributions to SCF would also result in SCF violating 2 U.S.C. § 434(b) by failing to report those contributions.

SCF states in its response that the "easy button" only suggested a possible division of the contribution at the contributor's request, and the contribution system then required the donor either to edit the suggested contribution amounts or accept the suggested division before

1 completing the contribution process. Therefore, SCF states that these controls in the “easy
2 button” contribution allocation system prevented its exercise of improper direction or control
3 over contributions.

4 A review of the information provided regarding how the SCF contribution system worked
5 indicates that choosing to use the “easy button” did not result in SCF exercising direction or
6 control over contributions. Therefore, the Commission found no reason to believe that the
7 Senate Conservatives Fund violated the Federal Election Campaign Act of 1971, as amended
8 (“the Act”).

9 **II. FACTUAL AND LEGAL ANALYSIS**

10 **A. Factual Summary**

11
12 South Carolina Senator Jim DeMint established the Senate Conservatives Fund as a
13 “political action committee dedicated to electing strong conservatives to the United States
14 Senate.” See the SCF website, (<http://senateconservatives.com/site/about>, last visited February
15 24, 2011.) For the 2010 election cycle, SCF encouraged earmarked contributions to ten Senate
16 candidates. See Complaint Attachment 1, a screenshot of the front page of the contributions
17 portion of the SCF website.

18 The SCF website appears to have been a major source of the organization’s fundraising.
19 The website’s contributions page displayed photos of the ten candidates along with text
20 indicating the Senate race involved and a blank box for entering contribution amounts. See
21 Complaint Attachment 1. A contributor could elect to contribute to the ten candidates in one of
22 two ways. A contributor could enter his/her own contribution amounts for some or all of the
23 SCF-supported candidates by typing amounts in the provided boxes. Alternatively, the

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1 contributor could enter a single desired contribution amount into a separate box and click an
2 "easy button" that would make an automatic suggested apportionment of the contribution. SCF's
3 response stated that the "easy button's" apportionment among the ten candidates "achieve[d]
4 maximum impact based on recent polling, candidate fundraising, and other factors." Response at
5 ¶ 2. If a contributor selected the "easy button" option, the website proposed unequal contribution
6 amounts in the boxes next to the candidates, depending on the candidates' needs, likelihood of
7 winning, etc. It appears that choosing the "easy button" allocated at least some of the
8 contribution to each of the ten candidates. See Response Attachment 1, a screenshot of a
9 potential "easy button" allocation (in which every candidate was allocated at least \$1 of a \$100
10 contribution).

11 The complainant alleges, "upon information and belief," that contributors using the "easy
12 button" do not see or cannot control the apportionment of their contributions. Complaint at 1.
13 However, the response states that "the website ... allows the donor to edit the suggested
14 division..." Response at ¶ 3. A button at the bottom of the initial contribution screen invited
15 contributors to "Complete Your Contribution." See Response Attachment 1. Clicking that
16 button took contributors to the next page in the process, on which the photos of the candidates
17 and the allocated contribution amounts for each were again displayed, and on which the
18 contributor entered name, contact information, and credit card information. See Response
19 Attachment 2, a screenshot of the contribution information page. The response states that
20 contributors could edit the amounts contributed to each candidate on this second page as well.
21 See Response at ¶ 3. The second page also invited the contributor to give an extra contribution to
22 SCF to "cover our costs and elect more conservatives," and included a donor agreement

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1 confirming that the funds were federally permissible funds. *See* Response Attachment 2. The
2 bottom of the screenshot of the second page is cut off in Attachment 2, but it appears that
3 confirming the donor agreement moved the contributor to the third page in the contribution
4 process. *See* Response Attachment 3, a screenshot of the contribution completion page. The
5 page provided at Attachment 3 displayed all the information the contributor entered, including
6 the total contribution, contributions by candidate, credit card information and contact
7 information. This page included a “Complete Your Donation” button, underneath which is a link
8 asking “See a mistake? Click here to make changes.” *See id.* Clicking the Complete Your
9 Donation button generated an e-mailed receipt, which detailed the contribution given to each
10 candidate. *See* Response Attachment 4.

11 SCF’s response states that “[t]he website [“easy button”] shows the donor how his/her
12 contribution *could* be divided and allows the donor to edit the suggested division on not just the
13 first page of the site, but also on the second page where the donor enters his/her personal
14 information. The “easy button” is used to inform contributors as to which candidates have the
15 greatest need, but it does not force them to do anything; *and all donations are fully disclosed and*
16 *capable of being edited and allocated however the donor chooses to do so.* Response at ¶ 3,
17 (emphasis in original). The response also included an affidavit from an SCF contributor and
18 “easy button” user, Don Workman, who stated that he “appreciate[s] this [“easy button”] feature
19 that allows me to decide the total amount I wish to contribute and then allows me to either divide
20 equally the contributions to each candidate, allocate according to my own formula, or contribute
21 to candidates based on a suggested allocation. ... [T]his feature ... allows me to make

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contributions to several candidates in a much more convenient manner.” *See* Response
Attachment 5 at ¶¶ 4 and 5.

B. Legal Analysis

No multi-candidate PAC may contribute more than \$5,000 to any candidate and his or her
authorized political committee with respect to any election for federal office. 2 U.S.C.

§§ 441a(a)(2)(A). Any political committee other than an authorized committee must report all
expenditures, including contributions made to other political committees. 2 U.S.C.

§ 434(b)(4)(H)(i). “A conduit’s or intermediary’s contribution limits are not affected by the
forwarding of an earmarked contribution except where the conduit or intermediary exercises any
direction or control over the choice of the recipient candidate.” 11 C.F.R. § 110.6(d)(1). Further,
if the conduit does exercise direction or control over the choice of the recipient candidate, the
contribution is considered a contribution from both the original contributor and the conduit, with
the entire contribution amount attributed to each. 11 C.F.R. § 110.6(d)(2).

The term “direction or control” has not been specifically defined by the Commission. In
AO 1980-46 (National Conservative PAC) (“NCPAC”), the Commission considered a PAC’s
plan to conduct a mass mailing soliciting earmarked contributions to a specific candidate, which
contributions were to be sent to NCPAC, bundled by NCPAC, and then delivered to the
candidate’s committee. The Commission cited several factors that led it to conclude that
NCPAC did not exercise direction or control over the earmarked contributions flowing from its
solicitation, including: 1) the contributor, not NCPAC, made the choice whether to contribute to
the specified candidate, 2) the potential contributor could decide not to contribute, 3) NCPAC
did not have any significant control over the timing of contributions, 4) NCPAC did not have

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1 control over the amount of the contribution, and 5) NCPAC did not have control over the
2 intended recipient of the contribution because the contributions were solicited as checks made
3 out to the candidate's committee. *See* AO 1980-46 (NCPAC) at 3.

4 Applying these factors to the present matter indicates that SCF's use of the fundraising
5 "easy button" did not amount to the exercise of discretion or control over contributions as
6 contemplated by 11 C.F.R. § 110.6(d)(1). The information provided by SCF indicates that the
7 potential contributor could choose to contribute or not, could choose the timing and amount of
8 any contribution, and could choose to which of SCF's recommended candidates he/she desired to
9 contribute or to simply make a contribution to SCF for its operating expenses. Regarding the
10 "easy button," the information provided indicates that choosing to push the "easy button"
11 provided the contributor with a suggested apportionment of the contribution. However, the
12 contributor could then choose to accept the suggested allocations, change the allocations, or
13 make contributions only to some of the candidates supported by SCF while not contributing to
14 others.

15 The contributor had full knowledge of how the "easy button" apportioned the
16 contribution, and the website offered the contributor multiple opportunities to review and/or alter
17 the suggested contribution amounts. SCF only processed and distributed contributions after the
18 contributor confirmed the "easy button" choices or made wanted changes. *See* Response at ¶ 5
19 and Attachments 1-4. Based on the information in the response, including the screen shots and
20 the affidavit from Don Workman, an SCF "easy button" user, it appears that the "easy button"
21 system did not give SCF "direction or control" over contributions.

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1 Accordingly, there is no reason to believe that the Senate Conservatives Fund and Barry
2 Wynn, in his official capacity as treasurer, violated 2 U.S.C. §§ 441a(a) and 434(b) by exercising
3 direction or control over contributors' contributions and failing to report the resulting
4 contributions.

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