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COUNSEL

Ezra W. Reese  
PHONE: (202) 434-1616  
FAX: (202) 654-9109  
EMAIL: EReese@perkinscoie.com

Perkins  
Coie

607 Fourteenth Street N.W.  
Washington, D.C. 20005-2003  
PHONE: 202.628.6600  
FAX: 202.434.1690  
www.perkinscoie.com

December 16, 2010

Jeff S. Jordan  
Supervisory Attorney  
Complaints Examination & Legal Administration  
Federal Election Commission  
999 E Street, NW  
Washington, D.C. 20463

Re: MUR 6411

Dear Mr Jordan:

On behalf of National Wildlife Federation Action Fund ("NWFAF"), we submit this letter in response to the Complaint filed by Let Freedom Ring, Inc., dated October 22, 2010. This Complaint falsely alleges that expenditures made by NWFAF following statements made by Democratic candidates and aides constitute coordinated communications. The Complaint fails to provide any credible support for this claim, and fails to state any facts that, if true, would constitute a violation of the Federal Election Campaign Act of 1971 (the "Act").

The Commission may find "reason to believe" only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the Act. See 11 C.F.R. § 111.4(d). Unwarranted legal conclusions from asserted facts or mere speculation will not be accepted as true, and provide no independent basis for investigation. See Commissioners Mason, Sandstrom, Smith and Thomas, Statement of Reasons, MUR 4960 (Dec. 21, 2001). The Commission therefore should find no reason to believe that the Committee violated the Act, and should dismiss the matter immediately.

#### I. Facts

NWFAF is a nonprofit corporation, organized under section 501(c)(4) of the Internal Revenue Code. There is a firewall in place to ensure that communications paid for by NWFAF are independent. Throughout October 2010, NWFAF made independent expenditures in support of federal candidates. These independent expenditures were all properly reported by NWFAF to the Commission. As these reports demonstrate, none was in support of Speaker Nancy Pelosi or

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Representative John Larson – the only two federal candidates identified in the body of the Complaint – or in opposition to either of their opponents.

The Complaint alleges that, before NWFAF made these independent expenditures, news reports were published detailing the disparity in spending by outside groups supporting Republican and Democratic candidates in the November 2, 2010, election. The Complaint highlights two such reports which attribute comments to Speaker Pelosi and Representative Larson about the need for outside groups to "do more" in support of Democratic candidates. Complaint 2-4.

Relying solely on the fact that these comments were made before NWFAF made independent expenditures, Let Freedom Ring, Inc. filed the present Complaint. The Complaint offers no further evidence, other than the timing of the independent expenditures in relation to the public comments made by Speaker Pelosi and Representative Larson, to demonstrate that the independent expenditures made by NWFAF were coordinated with a candidate, authorized committee, or political party committee.

## II. Legal Analysis

To determine whether a communication is coordinated with a candidate, authorized committee, political party committee, or any agent of the foregoing, Commission regulations provide a three-pronged test: (1) the communication must be paid for by a person other than that candidate, authorized committee, or political party committee; (2) one or more of the content standards set forth in 11 C.F.R. 109.21(c) must be satisfied; and (3) one or more of the conduct standards set forth in 11 C.F.R. 109.21(d) must be satisfied. See 11 C.F.R. 109.21(a).

NWFAF does not dispute that it paid for public communications that expressly advocated the election or defeat of a clearly identified candidate for federal office, and therefore satisfied at least one of the elements of 11 C.F.R. 109.21(a). But the communications paid for by NWFAF did not satisfy any of the conduct standards set forth in 11 C.F.R. 109.21(d).

The only conduct standard cited in the Complaint involves a communication made at the "request or suggestion" of a candidate, authorized committee, or political party committee. 11 C.F.R. 109.21(d)(1). The standard is satisfied if (i) the communication is created, produced, or distributed at the request or suggestion of a candidate, authorized committee, or political party committee or (ii) the communication is created, produced, or distributed at the suggestion of a person paying for the communication and the candidate, authorized committee, or political party committee assents to the suggestion. *Id.*

The Complaint presents no evidence that the communications paid for by NWFAF were made at the "request or suggestion" of any candidate, candidate's committee, or political party committee. The "request or suggestion" conduct standard is intended to cover only "requests or suggestions

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made to a select audience, but not those offered to the public generally." Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed.Reg. 432 (Jan. 3, 2003). Here, the public comments made by Speaker Pelosi and Representative Larson were not directed to NWFAF or any other specific entity. Furthermore, the comments referred only to Democrats in general, and were reported by *Roll Call* and *Politico*, publications available to the public at large. The Complaint alleges no private communication between Speaker Pelosi or Representative Larson and NWFAF.

Additionally, even if it were true that a "request or suggestion" was made, the Complaint presents no evidence that any such request or suggestion was made with respect to the specific candidates supported or opposed by the communications paid for by NWFAF. The Commission has expressly stated that "[n]either of the two prongs of this conduct standard can be satisfied without some link between the request or suggestion and the candidate or political party who is, or that is, clearly identified in the communication." Explanation and Justification, Coordinated and Independent Expenditures, 68 Fed.Reg. 431 (Jan. 3, 2003). The only candidates mentioned in the Complaint are Speaker Pelosi and Representative Larson, neither of whom is identified in any of the communications made by NWFAF. Indeed, the Complaint presents no evidence of any contact whatsoever between NWFAF and any candidate or party.

Further, the only evidentiary basis for the coordination alleged in the complaint is the timing of the public comments made by Speaker Pelosi and Representative Larson and the communications made by NWFAF. The timing of activities cannot be relied upon as evidence of coordination where, as here, spending on independent expenditures would necessarily increase during the month before the general election. The Commission itself has recognized that "nearly all Senate and House candidate advertising takes place within 60 days of an election." See Explanation and Justification, Coordinated Communications, 71 Fed. Reg. 33194 (June 8, 2006). If a complainant need not make any specific charge of contact between a candidate and a third-party spender, but could trigger a Commission investigation simply by resorting to the fallacy of "after this, therefore because of this," then the effect would be to chill large amounts of lawful conduct.

Finally, NWFAF utilizes a firewall to protect it from speculative allegations of coordination. The conduct standards in 11 C.F.R. 109.21(d) "are not met if [an organization] has established and implemented a firewall" meeting certain requirements. 11 C.F.R. 109.21(h). Where such a firewall exists, only "specific information" showing the flow of material information about a candidate's plans, projects, activities or needs to the sponsor is sufficient to defeat the presumption that the conduct standard has not been met. *Id.* The Complaint does not allege that this flow of material information occurred nor does it present any "specific information" to support such an allegation.

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Thus, the Complaint presents no violation of the Act. It alleges no communication sponsored by NWFAP that referred to Representatives Pelosi or Larson, or to their opponents. Nor does it allege that Representatives Pelosi or Larson were agents of anyone else with respect to NWFAP's communications. See 11 C.F.R § 109.3. It presents public comments attributed to the two officeholders, and speculates from those comments that some sort of private contact may have occurred. But it alleges no contact whatsoever between anyone and NWFAP. Instead, it simply presumes that every independent expenditure in support of any Democratic candidate by any non-party group – including NWFAP – must have been made at Representative Pelosi or Larson's request or suggestion. This is a far cry from the "sufficiently specific allegation" that the Commission requires to proceed on a complaint. See Statement of Reasons, MUR 4960.

For the reasons set forth above, NWFAP respectfully requests that the Commission find no reason to believe that it has violated the Act, and dismiss this matter immediately.

Very truly yours,

  
Ezra W. Reese  
Counsel to National Wildlife Federation Action Fund