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By Fax and Hand Delivery

Mr. Christopher Hughey
Acting General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Matter Under Review 6411 - Response to the Complaint on behalf of SEIU-COPE and Gerald Hudson

Dear Mr. Hughey:

The Service Employees International Union Committee on Political Education ("SEIU-COPE") and Gerald Hudson, in his official capacity as Treasurer of SEIU-COPE, submit this response to the complaint filed by Let Freedom Ring, Inc. ("Complaint"). As shown below, the Commission should find that there is no reason to believe that SEIU-COPE committed a violation of the Federal Election Campaign Act ("FECA") as alleged in the Complaint, and it should therefore take no further action against it in this matter.

SEIU-COPE is one of 24 independent organizations the Complainant alleges coordinated independent expenditures ("IEs") and, in some cases, electioneering communications ("ECs") during the 2010 general election with Representatives Nancy Pelosi (D-CA) and John Larson (D-Ct) and "other unnamed Members of Congress." The IEs by SEIU-COPE identified in the Complaint did not involve Rep. Pelosi or Rep. Larson's own re-election campaigns, and reports filed with the Commission make clear that SEIU-COPE made no IEs in connection with those campaigns. Instead, the allegedly coordinated IEs involve the general elections in 11 other Congressional Districts. Furthermore, apart from its vague allegation regarding "unnamed Members of Congress,"[1] the Complaint does not allege any coordination or even any opportunity

[1] This vague allegation, of course, fails to meet the requirement in the Commission's regulations that a complaint must "contain a clear and concise recitation of the facts which describe a violation of a statute or regulation over which the Commission has jurisdiction." 11 C.F.R. § 111.4(d)(3). "John Doe" complaints are not permitted under FECA or

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for coordination between SEIU-COPE and the candidates in those 11 federal elections.

Rather than alleging coordination or an opportunity for coordination between SEIU-COPE and the candidates who were supported by the committee's IEs, the Complaint relies on two unrelated sets of facts that taken separately or together do not provide a basis for finding reason to believe ("RTB"). First, the Complaint alleges that according to media reports on or about September 17, 2010, Reps. Pelosi and Larson met with unnamed "[r]ank-and-file House Democrats" who complained about the lack of support they were receiving in their re-election campaigns from unspecified "liberal groups". These discussions were reported to have taken place in a meeting of the House Democratic Caucus and at a regularly held meeting between Rep. Pelosi and "freshmen Democrats". Second, IE reports filed with the Commission show that in the approximately 7-week period following these meetings, SEIU-COPE and the other respondents spent varying amounts of money on IEs in support of certain Democratic candidates.

The Commission may open an investigation in response to a complaint only where, by the vote of at least four members, it determines that there is "reason to believe that a person has committed, or is about to commit" a violation of the Act. 2 U.S.C. § 437(g)(a)(2). "The Commission finds 'no reason to believe' when the complaint, any response filed by the respondent, and publicly available information, when taken together, fail to give rise to a reasonable inference that a violation has occurred, or even if the allegations were true, would not constitute a violation of the law." Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545, 12546 (March 16, 2007). In a passage frequently cited by subsequent Commissions, a bipartisan group of Commissioners similarly stated the governing standard as follows:

> 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 FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. ... Unwarranted legal conclusions from asserted facts ... or mere speculation ... will not be accepted as true. In addition, while credibility will not be weighed in favor of the complainant or the respondent, a complaint may be dismissed if it consists of factual allegations that are refuted with sufficiently compelling evidence provided in the response to the complaint ... or from public sources such as the Commission's reports database.

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the Commission's regulations, and, therefore, this aspect of the Complaint should be dismissed as not meeting the standards for a valid complaint.

Statement of Reasons of Commissioners Mason, Sandstrom, Smith and Thomas, In Matter Under Review 4960 (Hillary Rodham Clinton for US Senate Exploratory Committee)(December 21, 2000).

In points 1 and 2 below, we show that the facts alleged in the Complaint, even if taken as true, would not constitute a violation of law. In point 3, we show that the facts in the Complaint also fail to give rise to a reasonable inference that a violation has occurred. For these reasons, there is no reason for SEIU-COPE to provide a detailed factual response to the Complaint. *See, e.g.,* Statement of Reasons of Chairman Weld and Commissioners Mason and Thomas in MUR 4850 (Deloitte & Touche, LLP) (July 20, 2000) ("A mere unsubstantiated accusation without any supporting evidence does not shift the burden of proof to respondents. While a respondent may choose to respond to a complaint, *complainants* must provide the Commission with a reason to believe violations occurred. The burden of proof does not shift to a respondent merely because a complaint is filed.") Nevertheless, even though the Complaint here provides no evidence to support a finding of RTB, in order to avoid any misunderstanding, SEIU-COPE categorically denies that it met with or otherwise coordinated with Reps. Pelosi and/or Larson (or with any other Member of Congress or congressional employee) with respect to the Committee's IEs or ECs in the 2010 general election. If called upon to testify, each of the individuals involved in the SEIU-COPE public communications would confirm this statement.

1. <u>The Facts Set Forth in the Complaint, Even If True, Provide No Evidence of Coordination or Even An Opportunity For Coordination Between Reps. Pelosi/Larson and SEIU-COPE.</u>

The facts in the Complaint and the two media articles [2] on which it relies, even if true, do not contain any direct evidence that SEIU-COPE's IEs (or ECs) were coordinated with Reps. Pelosi or Larson, or with any of the candidates who were supported by those communications. Specifically, there is no allegation regarding any meeting or any other communication between Reps. Pelosi/Larson or persons acting on their behalf, and SEIU-COPE or its employees, contractors, consultants, agents or other representatives, regardless of the subject matter.

News stories such as the ones attached to the Complaint that quote or paraphrase anonymous sources are of dubious reliability and should not standing alone, as in this case, provide a basis for finding RTB. *See, e.g.,* Statement of Reasons of Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn in MUR 6002 (Freedom

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[2] The two reports from the *BNA Money & Politics Report,* which are attached as Exhibit 4 to the Complaint and as Exhibit 1 to the Supplement to the Complaint, provide even fewer facts upon which a finding of RTB could be based. Neither report mentions Reps. Pelosi or Larson or any other candidate in the general election, and neither alleges in even the most general terms any coordination with any outside organization, including SEIU-COPE.

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Watch)(2010)("we ... would be reluctant to make a reason-to-believe finding based solely on information culled from [anonymous news] sources whose credibility and accuracy are difficult to ascertain"); Statement of Reasons of Vice Chairman Matthew S. Petersen And Commissioners Caroline C. Hunter And Donald F. McGahn in MUR 6056 (Protect Colorado Jobs, Inc.)(2009).

Moreover, the *Roll Call* article merely reports that Rep. Larson stated that "they ask groups on a 'regular basis'," without specifying which groups. The *Politico* article states that Rep. Pelosi "vowed to pressure liberal groups to do more – and quickly," but, similarly, the report does not identify the "liberal groups". Most importantly, even assuming the accuracy of the articles, neither story indicates that unions in general or SEIU-COPE in particular was one of the groups to which they referred, although based on the reports themselves this is doubtful - the *Politico* article mentions that Rep. Pelosi was particularly concerned with "environmental and pro-health groups," and the article asserts that Pelosi went out of her way to state that she had no complaint with organized labor's efforts because of its extensive program of field efforts in support of Democratic candidates.

Additionally, even if the articles had identified a specific discussion between Reps. Pelosi and/or Larson and SEIU-COPE, which they did not, neither article specifies the kinds of support Reps. Pelosi or Larson thought were important. Instead, the articles use ambiguous terms such as "getting involved," "doing more," and "getting out there," which could mean a wide-range of campaign-related activities many of which may be coordinated with candidates without violating FECA. Specifically, political committees such as SEIU-COPE may make cash or in-kind contributions to federal candidates within the limits specified in FECA, even at the request of the candidates, and unions such as SEIU may also coordinate their communications with their members and others in their restricted classes with the candidates whom they are supporting.[3] See 11 C.F.R. §114.2(c). If Rep. Pelosi or Larson had actually urged unions such as SEIU to "get out there," such a request would have been completely lawful and a far cry from a request to conduct unlawful coordinated public communications.

Finally, the news stories provide no facts regarding the identities of the Democratic candidates, if any, on whose behalf Reps. Pelosi and Larson might have sought the assistance of outside groups. In particular, there is nothing in the media articles to suggest that Pelosi and Larson sought assistance for the 11 candidates who benefitted from SEIU-COPE's public communications, none of whom are even identified in the news reports as having attended the meetings. More than 225 incumbent Democratic Members of Congress ran for re-election

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[3] Furthermore, since SEIU/SEIU-COPE maintain a fire-wall between their connected (membership) and independent programs pursuant to 11 C.F.R. § 109.21(h), even if Reps. Pelosi and/or Larson had communicated with the union, this fact would not show the existence of coordination unless the persons with whom they communicated were identified and actually worked on the independent side of the wall.

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in the 2010 general election; the news reports do not identify which ones needed, or wanted, assistance and made their desires known to the Democratic leaders.

In sum, the Complaint and supporting attachments, even if true, do not provide sufficient facts to support an RTB finding based on any meeting or other direct communication between Reps. Pelosi and/or Larson and SEIU-COPE.

2. The *Roll Call* and *Politico* Articles Do Not Constitute A "Request or Suggestion" Within the Meaning of 11 C.F.R. § 109.

Apart from the alleged statements by Reps. Pelosi and Larson addressed in point 1, the Complaint seems to take the position that the articles in *Roll Call* and *Politico* in themselves constituted a "request or suggestion" to SEIU-COPE and the other respondents to undertake public communications on behalf of Democratic candidates. This contention fails as both a factual and legal matter.

The conduct prong of the definition of coordinated communication is satisfied whenever a communication is created, produced, or distributed "at the request, or suggestion of a candidate, authorized committee, or political party committee." 11 C.F.R. § 109.21(d)(1)(i). Assuming *arguendo* that statements made in a public meeting attended by numerous people may constitute a "request or suggestion" within the meaning of this regulation, it is quite another matter to find coordination on the basis of statements made in "closed-door" meetings which were not even attended by the persons or groups that allegedly made the subsequent coordinated communications simply because those private statements were leaked to the media. There is no evidence that Reps. Pelosi or Larson intended any comments they made to the Democratic Caucus or the Democratic freshman to be repeated to the media and by the media in turn to report those comments to the groups that they may have hoped to influence. As far as can be determined from the articles in question, the Democratic leaders' statements found their way into the media without their assistance or authorization. Moreover, no representative of SEIU-COPE was in attendance at the meetings, and there is no evidence in the record that any individual associated with SEIU-COPE or its independent expenditure program even knew of these statements. In short, no "request or suggestion" was made and none was received. This alone is grounds for finding no RTB.

Further, even assuming that Reps. Pelosi and Larson actually intended to send a message through the leaked reports, it is still clear that, as a matter of law, a generalized plea for support distributed to the public (as through the news articles in this case) does not in itself constitute a "request or suggestion" within the meaning of the regulation. The Commission made this clear when it first adopted the conduct standard as part of its BCRA regulations:

> A request or suggestion encompasses the most *direct* form of

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> coordination, given that the candidate or political party committee communicates desires to another person who effectuates them... The "request or suggestion" conduct standard in paragraph (d)(1) is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally. For example, a request that is posted on a web page that is available to the general public is a request to the general public and does not trigger the conduct standard in paragraph (d)(1)... Similarly, a request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered....

Coordinated and Independent Expenditures, 68 Fed. Reg. 421, 432 (Jan. 3, 2003).[4] The reason for this is clear: if a publicly distributed request for assistance by a candidate or political party can constitute a "request or suggestion" under the coordination regulation then the conduct standard would become virtually meaningless. Candidates and parties regularly make public pleas for assistance in letters, speeches, meetings, websites, press statements, interviews and the like. If an individual or group can be found to have made a coordinated communication merely because of such pleas, then the prohibition on coordinated communications will interfere significantly with the right to participate independently in federal elections.

3. No "Reasonable Inference" of Coordination Can Be Based on the Timing of SEIU-COPE's Independent Expenditures.

The Complaint appears to take the position that SEIU-COPE (and all of the other respondents) must have coordinated with Reps. Pelosi and Larson because they each made independent expenditures in the period following the two meetings described in the media. This

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[4] In 2006, the Commission amended its coordinated communications regulation to add an exception to the "material involvement," "substantial discussion," "common vendor," and "former employee" conduct standards for information obtained from a publicly available source. *See* 11 C.F.R. §§ 109.21(d)(2)-(5). The Commission explained at the time that it was not applying this exception to the "request or suggestion" conduct standard because that standard does not depend on information conveyed by the candidate. However, the Commission also quoted the legislative history of FECA stating that "a general request for assistance in a speech to a group of persons by itself should not be considered to be a 'suggestion' that such persons make an expenditure to further such election or defeat." *Coordinated Communications*, 71 Fed. Reg. 33,190, 33,305 (June 8, 2006). This explanation indicates that while the Commission may have wished in 2006 to leave open the possibility that a specific request in a public communication might fall within the "request or suggestion" standard, it still did not intend to include more generalized pleas for support, as in the alleged statements by Reps. Pelosi and Larson, even assuming they intended their statements to be leaked to the press.

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argument, of course, could be applied to any organization, PAC or individual who made independent expenditures in support of Democratic candidates for election to the House of Representatives following September 17, 2010. But here it cannot reasonably be inferred that the meetings (or any other unreported communications that might have taken place) caused the respondents' subsequent public communications to take place simply because of their sequence in time. The Complaint ignores the fact that organizations that disseminate independent expenditures with rare exceptions do so in the weeks immediately preceding an election for the obvious reason that this is the best time to influence the election. *Cf. Shays v. FEC*, 528 F.3d 914, 924 (D.C.Cir. 2008) (finding on the basis of information provided by the Commission that the "vast majority" of advertising by candidates occurs in the 90/120 windows that the Commission regulates more strictly.) SEIU-COPE has consistently conducted a majority of its IEs in the two month period prior to a general election: for example, reports filed with the Commission show that in 2004 SEIU-COPE spent 81% of its IEs after September 1, in 2006 it spent 71% in that period, and in 2008, 42%.[5] The reason for this is obvious and no inference can reasonably be made that a politically active organization such as SEIU coordinated with federal candidates merely because a story appeared in the media prior to the time period saying that candidates were eager for "liberal groups" support.

Conclusion

For the foregoing reasons, the Commission should find no reason-to-believe that SEIU-COPE made coordinated communications as alleged in the complaint filed by Let Freedom Ring, Inc.

Respectfully submitted,

Michael B. Ttister

[5] The comparable figure for 2010 is 46%, and this includes IEs made in connection with primary elections that were actually made in the weeks leading up to these elections.