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December 20, 2010

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

Re: MUR 6411  
America's Families First Action Fund

Dear Mr. Hughey:

This response to the above-referenced complaint is filed on behalf of America's Families First Action Fund and David Rudd as treasurer (collectively "AFFAF"), an independent expenditure committee registered with the Federal Election Commission ("Commission" or "FEC"). The complaint, filed against two named Members of Congress and twenty-four organizations, is based solely on conjecture and innuendo and should be dismissed immediately by the Commission for the reasons set forth more fully below.

The complaint contends that AFFAF's independent expenditures were improperly coordinated with one or more federal candidates. Other than pure speculation, the complaint does not provide any factual or substantive support for such allegation.

**A. As An Independent Expenditure Committee, AFFAF Engaged In Constitutionally Permissible Independent Expenditures.**

In response to the Supreme Court's decision in *Citizens United* and the subsequent *Speechnow* decision in the District of Columbia circuit, the Commission approved the formation of political committees that may accept unlimited contributions, including contributions from

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corporation and labor organizations.<sup>1</sup> The activities of these new committees are limited to independent expenditures only, and the committees cannot make direct or in-kind contributions, including coordinated communications.

America's Families First Action Fund filed a Statement of Organization with the Commission on August 17, 2010 to become an independent expenditure political committee. The purpose of AFFAF is to continue the fight to help families recover from the economic crisis and build a better future for America's children. AFFAF worked to engage voters across the country and educate them on the consequences of returning to Republican policies that prioritized big businesses and caused the economy to implode. AFFAF developed an independent expenditure program to protect the Democratic majority in the United States House of Representatives. During the 2010 election cycle, AFFAF spent more than \$6 million in twenty-one different congressional districts.

**B. AFFAF's Communications Were Not Coordinated With Federal Candidates.**

- 1. An independent expenditure will be considered to have been coordinated only if it meets all three standards of the coordination regulation.**

The Commission's current coordinated communication regulation at 11 CFR §109.21 applies a three-pronged test: (1) the communication must be paid for by a person other than a Federal candidate, a candidate's authorized committee, or political party committee, or any agent of any of the foregoing; (2) one or more of the four content standards set forth in 11 CFR §109.21(c) must be satisfied; and (3) one or more of the six conduct standards set forth in 11 CFR §109.21(d) must be satisfied.<sup>2</sup> If one or more of the three prongs are not met, then the communication is not a coordinated communication and does not constitute a contribution under 2 U.S.C. §441a(a)(7)(B)(i) and (ii).<sup>3</sup>

As an independent expenditure committee that is not a principal campaign committee or political party entity, AFFAF paid for communications that expressly advocated for or against federal candidates, thus satisfying the first two prongs of the coordination regulation. At issue here is the first of six conduct standards: whether the communications were created, produced, or distributed at the request or suggestion of a candidate, candidate's committee or agent.<sup>4</sup> If the

<sup>1</sup> *Citizens United v. Fed. Election Comm'n*, 130 S.Ct. 876 (2010); *Speechnow.org v. Fed. Election Comm'n*, 599 F.3d 686 (2010); FEC Advisory Op. 2010-09; FEC Advisory Op. 2010-11.

<sup>2</sup> See 11 CFR §109.21(a).

<sup>3</sup> See *Coordinated and Independent Expenditures, Final Rules*, 68 Fed. Reg. 421, 427 (Jan. 3, 2003) (Explanation and Justification for 11 CFR §109.21(b)).

<sup>4</sup> See 11 CFR §109.21(d)(1). The references in the regulation to political party committees have been removed for the purpose of this response, as the complaint does not claim that AFFAF coordinated with any political party committee. Similarly, the second manner in which this first conduct standard may be satisfied, when a candidate, candidate's committee or candidate's agent assents to the payor's suggestion to create, produce or distribute a communication, is not addressed. The complaint does not allege such conduct, and the accompanying affidavit verifies that AFFAF did not engage in such activities.

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conduct standard fails, then the communication will not be deemed to be a coordinated communication and no candidate will have accepted an in-kind contribution.

**2. All decisions relating to AFFAF's communications were made independently.**

As described in the attached affidavit by Christina Uribe, one of the founders of AFFAF, all decisions relating to communications by AFFAF were made independently and not coordinated with a federal candidate or candidate's agent. Specifically, AFFAF produced and distributed their communications without having any contact or conversations with a federal candidate or a candidate's agent. The complainant fails to provide factual support for any alternative conclusion.

Further, the complainant intentionally misconstrues the facts by suggesting that the high volume of independent expenditures in the final weeks before the general election should be viewed as suspicious. AFFAF spent over \$6 million on all activities in the 2010 election cycle: \$5.9 million in the month of October and \$4.7 million between October 14<sup>th</sup> and November 2<sup>nd</sup>. As discussed above, this increase in spending as the election approaches is consistent with all independent expenditure organizations. The Commission's own disclosure data catalogue for independent expenditures verifies this: while groups spent \$60 million on independent expenditures in September of 2010, this total rose to \$286 million between October 1<sup>st</sup> and November 2<sup>nd</sup>.<sup>5</sup> This argument completely disregards historical data and trends of escalating activity as the election approaches, and contradicts a basic, common sense understanding of the effectiveness of political communications.

AFFAF increased the amount of its independent communications as the election approached because this is when such communications are likely to have the most impact on voters; all decisions relating to the creation, production and distribution of AFFAF communications were made independently of any candidate or political party.

**3. The conduct standard is not met and thus all of AFFAF's communications were properly reported as independent expenditures.**

The Commission has provided additional guidance regarding the request or suggestion conduct standard, stating that the standard "is intended to cover requests or suggestions made to a select audience, but not those offered to the public generally."<sup>6</sup> The Commission includes the following examples to describe what qualifies as a request or suggestion by a candidate, authorized committee, or agent:

- 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, but a request

<sup>5</sup> Federal Election Commission, *Disclosure Data Catalog/Independent Expenditures*, <http://www.fec.gov/data/IndependentExpenditure.do?format=html> (last visited December 10, 2010). The Commission's statistics apply to all independent expenditures regardless of the candidates supported or opposed.

<sup>6</sup> See *Coordinated and Independent Expenditures, Final Rules*, 68 Fed. Reg. 421, 432 (Jan. 3, 2003) (Explanation and Justification for 11 CFR 109.21(d)(1)).

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posted on an intranet service or sent via electronic mail directly to a discrete group of recipients constitutes a request to a select audience does meet the conduct standard.

- A request in a public campaign speech or a newspaper advertisement is a request to the general public and is not covered, but a request during a speech to an audience at an invitation-only dinner or during a membership organization function is a request to a select audience and satisfies the conduct standard.<sup>7</sup>

Even assuming, *arguendo*, that the complainant's allegation that AFFAF increased its spending because of information reported in the referenced articles is factually correct, this claim does not meet the request or suggestion conduct standard. The newspaper articles describe several meetings where Democratic Members of the House of Representatives complained to each other that the Republicans had more independent expenditures supporting them than the Democrats. The meetings described in the articles were closed to the press and cite unnamed sources to support the account of the discussions that occurred. Newspaper descriptions of internal meetings of Democratic candidates do not satisfy the conduct standard. Even if this is an accurate description of the private conversations, the articles are insufficient alone to support an allegation of coordinated communications. Moreover, even if comments by a meeting participant to a newspaper reporter constitutes a request or suggestion under the conduct prong of the coordination regulation, that request or suggestion is made to the general public once it is published in an article. AFFAF did participate in any such meetings and thus could not be considered to have been part of a "select audience."<sup>8</sup>

The complaint identifies two candidates with whom AFFAF supposedly coordinated, Speaker Nancy Pelosi and Representative John Lamm. AFFAF did not have contact with these candidates or agents thereof, and did not engage in any independent expenditures in these candidates' respective districts.

The facts as outlined in Ms. Uribe's affidavit are as follows: AFFAF made all decisions regarding communications independently of candidates, AFFAF did not participate in any meetings that are described in the complaint, and AFFAF did not have any direct contact with any federal candidates where a request or suggestion that meets the conduct standard could have been relayed to AFFAF.

There is no evidence or other information to suggest that the request or suggestion prong of the conduct standard has been satisfied, and thus Commission should dismiss the complaint.

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<sup>7</sup> See *id.*

<sup>8</sup> Because the complaint fails to provide any evidence to support these unsubstantiated allegations, the complaint should be dismissed since it does not meet the minimum requirements for a complaint under 11 C.F.R. §111.4(d). A complaint, to be sufficient, valid and appropriate for filing and consideration by the Commission, must conform to certain provisions, including a recitation of facts which describes a violation of a statute or regulation. The complaint is based on pure speculation and the documents attached to it do not support a single violation of the Act.

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**C. The Complaint Was Filed Purely for Political Purposes.**

Filed just ten days before the general election, this complaint was a feeble attempt to raise the complainant's political profile and target candidates and organizations with which the complainant disagrees politically. The complaint fails to meet the minimum requirements for complaints to the FEC, and does not provide any facts or other evidence to support its allegations against AFFAF, much less against any of the other twenty-three organizations named as respondents.

The political motivations are apparent throughout the complaint, most obviously through the following sentence:

"All expenditures by the third-party Respondents following the demands of Pelosi and her henchman are illegal in-kind corporate and union contributions to the campaigns of the referenced Democratic candidates."<sup>9</sup>

Categorizing Democratic Members of Congress as Speaker Pelosi's "henchman" is a politically charged statement, and exposes the complainant's main goal of attracting attention to its organization in the final days of the election cycle.

The supplement to the complaint further uncovers the political motivations of the complainant. The one-page letter was hand delivered on the same day as the complaint, October 22<sup>nd</sup>, and states the following:

"After preparation of the Complaint, a news report was published which identifies yet another liberal group, America's Families First Action Fund, apparently formed by Democratic operatives for the purposes of carrying out the demands of Speaker Pelosi and others to raise and spend funds in support of Democratic candidates and in opposition to their Republican opponents." (emphasis in the original)<sup>10</sup>

The characterization of AFFAF as "yet another" group is bizarre since the complainant already named AFFAF in the original complaint. The accompanying news article was actually published on October 15<sup>th</sup>, a full week before the complaint and supplement were hand delivered to the Commission, making the timing even more curious.<sup>11</sup>

In contrast to the complainant's gross mischaracterization of the facts, the news article accurately identifies AFFAF as an independent expenditure political committee registered with the FEC that is engaged in independent communications. The article summarizes the amount of funds spent in opposition to Republican candidates in five states, and does not suggest that AFFAF is coordinating its efforts with any candidate or party committee. The complainant

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<sup>9</sup> See Complaint at page 7.

<sup>10</sup> See Supplement at page 1.

<sup>11</sup> Kenneth P. Doyle, *Democratic-Leaning 'Super-PAC' Spends \$1.1 Million in Key Races, FEC Filings Show*, BNA Money & Politics Report, Oct. 15, 2010.

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attempts to twist these statements into coordination with Speaker Pelosi, despite the fact that Speaker Pelosi is not named in the article.

Finally, the complainant posted a summary of the complaint and a link to its full text on its website, and organized a conference call for reporters on the morning the complaint was hand delivered to the Commission.<sup>12</sup>

The publicity by the complainant, combined with the obvious haste in which the complaint was compiled and the lack of factual support for any allegations against AFFAF – in the complaint or in the supplement – reveal the blatant political motivations of the complainant.

**Conclusion**

For the foregoing reasons, the Commission should immediately dismiss this complaint.

Respectfully submitted,

Lyn Utrecht  
Eric Kleinfeld  
Patricia Fiori  
Karen Zeglis

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<sup>12</sup> Let Freedom Ring, *Let Freedom Ring lodges FEC complaint against, Pelosi, Larson et al*, <http://www.letfreedomringusa.com/news/read/1468> (last visited December 9, 2010).

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