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CONFIDENTIAL

1 I. INTRODUCTION

2 In 2010, the Commission on Hope, Growth and Opportunity ("CHGO") spent  
3 millions of dollars on federal campaign activity. This matter involves allegations that  
4 CHGO violated the Federal Election Campaign Act of 1971, as amended (the "Act"), by  
5 failing to report and include proper disclaimers on more than \$2 million in federal  
6 independent expenditures and electioneering communications. See 2 U.S.C. §§ 434,  
7 441d.<sup>1</sup> The amount of CHGO's independent expenditures and electioneering  
8 communications, when combined with the apparent lack of any significant non-electoral  
9 activity, also indicate that the group violated the Act by failing to organize, register, and  
10 report as a political committee in 2010.

11 CHGO asserts that "no text in any of the communications complained of by the  
12 DCCC contained a single word or any phrase that would constitute 'express advocacy,'  
13 as that term is defined at 11 C.F.R. § 100.22(a)." Resp. at 6 (June 1, 2011). CHGO  
14 argues that it "may not and does not engage in electoral politics at the federal level and

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<sup>1</sup> The Complaint in MUR 6391 alleges that CHGO violated the Act by spending over \$600,000 to air several advertisements that were either independent expenditures or electioneering communications. Specifically, the complaint alleges that CHGO (i) failed to report the ads pursuant to 11 C.F.R. §§ 109.10 or 104.20, and (ii) failed to include proper disclaimers pursuant to 11 C.F.R. § 110.11. See Compl., MUR 6391 (Oct. 7, 2010). Following the receipt of the MUR 6391 Complaint by the Commission, a notification letter and copy were sent to CHGO. Due to a clerical error, however, the letter and Complaint were not received by CHGO until November 29, 2010. At that time, CHGO filed with the Commission a motion to dismiss MUR 6391 on the basis that the delay in CHGO's receipt of the notification denied CHGO its due process. On April 21, 2011, the Commission unanimously determined that it would not grant the relief requested in CHGO's motion to dismiss, and CHGO was subsequently granted additional time to file a substantive response to the MUR 6391 Complaint.

The Complaint in MUR 6471 alleges that CHGO spent more than \$2.3 million to broadcast fifteen advertisements in twelve Congressional races. See Compl. at 3, MUR 6471 (May 23, 2011), amend. (Apr. 26, 2012). The MUR 6471 Complaint includes among its attachments each advertisement identified in the MUR 6391 Complaint, as well as several other advertisements. As in MUR 6391, the MUR 6471 Complaint alleges that CHGO aired advertisements that were either independent expenditures or electioneering communications, and (i) failed to report them pursuant to 2 U.S.C. § 434(g) or 2 U.S.C. § 434(f)(1), and (ii) failed to include proper disclaimers pursuant to 2 U.S.C. § 441d. This Complaint also alleges that the reporting violations were knowing and willful. See Compl. at 11. The available information, however, does not suggest that the reporting and disclaimer violations were knowing and willful.

1 all communications made to the public by CHGO are specifically issue oriented and do  
2 not advocate the election or defeat of any identified federal candidate.” *Id.* at 3.<sup>2</sup> CHGO  
3 maintains that the organization’s sole purpose is to educate the public on matters of  
4 economic policy formulation, and that CHGO is not a political committee. *See Supp.*  
5 *Resp.* at 5-6 (Oct. 20, 2011). In our view, these arguments are wide of the mark.

6 As discussed below, we recommend that the Commission find reason to believe  
7 that CHGO violated 2 U.S.C. §§ 434(c) and 434(f) by failing to report its independent  
8 expenditures and electioneering communications. We also recommend that the  
9 Commission find reason to believe that CHGO violated 2 U.S.C. § 441d(a)(3) by failing  
10 to include proper disclaimers stating that its communications were not authorized by any  
11 candidate or candidate’s committee, and 2 U.S.C. § 441d(d)(2) by failing to include  
12 proper audio disclaimers on each of the CHGO advertisements. Additionally, the  
13 available information regarding CHGO’s overall conduct in 2010 supports a finding that  
14 there is reason to believe that CHGO had as its major purpose the nomination or election  
15 of federal candidates. Accordingly, we recommend that the Commission find reason to  
16 believe that CHGO violated 2 U.S.C. §§ 432, 433, and 434 by failing to organize,  
17 register, and report as a political committee, and authorize an investigation.

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<sup>2</sup> Additionally, CHGO states that none of its communications was “‘targeted’ at any specific electoral constituency.” *Resp.* at 3. The Response states that if CHGO made an error with respect to the reporting of electioneering communications, such error was made in good faith, and in any event, the underlying policy considerations of the electioneering communications reporting requirements were served in this case by a combination of the disclaimer contained in each advertisement and the publicly available daily logs of broadcasters required by the FCC. *Id.* at 3-5. CHGO also argues that the disclaimer contained in each advertisement was sufficient, on the basis that no broadcaster objected to the disclaimer’s language and no member of the public complained that the identity of the communication’s sponsor was unclear or misleading. *Id.* at 4.

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CHGO Advertisement	Federal Candidate(s) Identified	Broadcast Area(s) <sup>5</sup>	Cost <sup>6</sup>
"Collectible Coin" (7 versions)	John Spratt/Mick Mulvaney; Walt Minnick; Suzanne Kosmas/Sandy Adams; Baron Hill/Todd Young; C.A. Ruppersberger/Marcelo Cardarelli; Paul Kanjorski/Lou Barletta; Dan Maffei/Ann Marie Buerkle	"nine cities"	\$635,910
"Make America Work" (2 versions)	John Salazar/Scott Tipton; Dan Maffei/Ann Marie Buerkle	Unknown	\$362,810
"Song and Dance" (4 versions)	John Spratt/Mick Mulvaney; Kathy Dahlkemper/Mike Kelly; Frank Kratovil/Andy Harris; Allen Boyd/Steve Southerland	South Carolina, Maryland, Pennsylvania, Ohio, Florida	\$793,150
"What She Believes"	Carol Shea-Porter	Manchester, NH; Portland, ME; Boston	\$415,270
"Queen Nancy"	Allen Boyd	Unknown	\$41,100

1  
2 CHGO's website was created in the summer of 2010. Supp. Resp. at 5. The  
3 former website's publicly available content consisted of a mission statement, one  
4 academic report, and several links to articles and polls produced by other sources. *See*  
5 Supp. Resp., Ex. B; [http://web.archive.org/web/20120731130332/](http://web.archive.org/web/20120731130332/http://hopegrowthopportunity.com/)  
6 <http://hopegrowthopportunity.com/> (last visited Oct. 31, 2013) (archived copy of original  
7 website). CHGO's website also contained a restricted area that purportedly allowed users  
8 with a login and password to access "special reports." *See* Supp. Resp., Ex. B;  
9 <http://www.hopegrowthopportunity.com/login.aspx> (last visited July 31, 2012) (archive  
10 unavailable). The site did not, however, allow public users to create a login and  
11 password in order to access the "special reports." Furthermore, although CHGO claims  
12 that it "regularly initiates academic studies," *see* Supp. Resp., Ex. B,

<sup>5</sup> *See* Fitzgerald, *Secret Donors*.

<sup>6</sup> *See Id.*; Compl. at 4-6, MUR 6471.

1 <http://www.hopegrowthopportunity.com/econometric-studies.aspx> (last visited July 31,  
2 2012) (archive unavailable), only one such study appears to have been made publicly  
3 available. *See supra* note 4.

4 According to CHGO, the organization accepted “less than \$4 million” in  
5 donations for the fiscal year 2010. Supp. Resp. at 4. According to CHGO’s 2010 tax  
6 return, however, CHGO received \$4,801,000 in contributions from fundraising events  
7 during calendar year 2010. Compl., MUR 6471, Ex. C (Form 990 – Return of  
8 Organization Exempt from Income Tax (Nov. 14, 2011)). For the same time period,  
9 CHGO’s tax return reports \$4,770,000 in expenses, including: \$4,319,825 to Meridian  
10 Strategies, LLC for media placement, \$275,000 to Meridian Strategies, LLC for media  
11 production, \$105,175 to Meridian Strategies, LLC for advertising and technology, and  
12 \$70,000 in compensation to its President/Executive Director and its counsel. *Id.* The  
13 expenses are further broken down into \$55,000 for advertising and promotion, \$20,000  
14 for information technology, \$25,000 for website maintenance, \$5,000 for economic  
15 research, and \$175 for copyright fees. *Id.*<sup>7</sup>

16 **B. Analysis**

17 As set forth below, there is reason to believe that CHGO violated multiple  
18 provisions of the Act in connection with the CHGO advertisements. First, all of the  
19 CHGO advertisements should have been reported to the Commission as either  
20 independent expenditures or electioneering communications. Second, each of the CHGO  
21 advertisements contains an incomplete disclaimer. Finally, because it made more than

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<sup>7</sup> It does not appear that CHGO conducted activities after 2010, as its 2011 tax return reported only \$31,000 in expenditures for website maintenance, accounting and legal fees, and compensation to its President and Executive Director. Form 990 – Return of Organization Exempt from Income Tax (May 4, 2012), available at <http://www.guidestar.org/FinDocuments/2011/271/920/2011-271920168-08862c6f-90.pdf>.

1 \$1,000 in expenditures during 2010 and had federal campaign activity as its major  
2 purpose, CHGO should have organized, registered and reported as a political committee.

3 1. Reporting Violations

4 a. Independent Expenditures

5 Under the Act, every person who makes independent expenditures in an aggregate  
6 amount or value in excess of \$250 during a calendar year shall report such independent  
7 expenditures to the Commission. 2 U.S.C. § 434(c)(1); 11 C.F.R. § 109.10. An  
8 "independent expenditure" is an expenditure by a person expressly advocating the  
9 election or defeat of a clearly identified federal candidate that is not coordinated with a  
10 candidate, a candidate's authorized committee, or their agents, or a political party  
11 committee or its agents. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

12 The Commission defines "express advocacy" at 11 C.F.R. § 100.22 as any  
13 communication that:

14 (a) Uses phrases such as "vote for the President," "re-elect your  
15 Congressman," "support the Democratic nominee," "cast your ballot for  
16 the Republican challenger for U.S. Senate in Georgia," "Smith for  
17 Congress," "Bill McKay in '94," "vote Pro-Life" or "vote Pro-Choice"  
18 accompanied by a listing of clearly identified candidates described as Pro-  
19 Life or Pro-Choice, "vote against Old Hickory," "defeat" accompanied by  
20 a picture of one or more candidate(s), "reject the incumbent," or  
21 communications of campaign slogan(s) or individual word(s), which in  
22 context can have no other reasonable meaning than to urge the election or  
23 defeat of one or more clearly identified candidate(s), such as posters,  
24 bumper stickers, advertisements, etc. which say "Nixon's the One,"  
25 "Carter '76," "Reagan/Bush" or "Mondale!"

26  
27 11 C.F.R. § 100.22(a); see also *Buckley v. Valeo*, 424 U.S. 1, 44 n.52 (1976); *FEC v.*  
28 *Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 249 (1986) (a communication is  
29 expressly advocating when "it provides, in effect, an explicit directive" to vote for the  
30 named candidates).

1 Commission regulations further define express advocacy as any communication

2 that:

3 When taken as a whole and with limited reference to external events, such  
4 as the proximity to the election, could only be interpreted by a reasonable  
5 person as containing advocacy of the election or defeat of one or more  
6 clearly identified candidate(s) because—(1) The electoral portion of the  
7 communication is unmistakable, unambiguous, and suggestive of only one  
8 meaning; and (2) Reasonable minds could not differ as to whether it  
9 encourages actions to elect or defeat one or more clearly identified  
10 candidate(s) or encourages some other kind of action.

11  
12 11 C.F.R. § 100.22(b). The Commission has stated that “communications discussing or  
13 commenting on a candidate’s character, qualifications or accomplishments are considered  
14 express advocacy under section 100.22(b) if, in context, they have no other reasonable  
15 meaning than to encourage actions to elect or defeat the candidate in question.” Express  
16 Advocacy; Independent Expenditures; Corporate and Labor Organization Expenditures,  
17 60 Fed. Reg. 35,292, 35,295 (Jul. 6, 1995) (explanation and justification).

18 As set forth below, it appears that many, but not all, of the CHGO advertisements  
19 expressly advocated the election or defeat of clearly identified federal candidates.

20 Accordingly, we recommend that the Commission find reason to believe that CHGO  
21 violated 2 U.S.C. § 434(c) by failing to properly report its independent expenditures.

22 *i. “Collectible Coin”*

23 The MUR 6471 Complaint includes seven versions of “Collectible Coin,” six of  
24 which are mock advertisements for a collectible coin bearing the faces of President  
25 Barack Obama, Nancy Pelosi, and a specific Democratic congressional candidate, which  
26 is then followed by an endorsement of that Democratic congressional candidate’s  
27 Republican opponent. *See supra* Section II.A.2.; Compl., MUR 6471, Attach.

1 These six versions of the ad are the same except for the candidates featured in the ads,  
2 and all six contain express advocacy under section 100.22(a).

3 One such version features Democratic candidate Dan Maffei and his Republican  
4 opponent, Ann Marie Buerkle, and states:

5 Now you can own a piece of American history enshrining forever  
6 President Obama increasing the national debt to a staggering \$13.4 trillion.  
7 Clad in 24-carat fool's gold, the coin commemorates Dan Maffei's  
8 unwavering votes for the Pelosi agenda an astounding 96% of the time.  
9 You can own this prized collectible for just your share of the national  
10 debt—plus all the taxes Pelosi can think of. Call Congressman Dan  
11 Maffei to order yours today.  
12

13 The advertisement then abruptly switches narrators, and an image of Ann Marie Buerkle  
14 appears along with the written message: "Help Ann Marie Buerkle. Stop the Spending.  
15 Make America Work Again." The new narrator states: "Ann Marie Buerkle has a better  
16 idea: Stop the spending and get America working again." See Compl., MUR 6471,  
17 Attach.

18 In the context of the advertisement, the phrase "Help Ann Marie Buerkle," can  
19 have no other reasonable meaning than to urge her election. It is similar to both "support  
20 the Democratic nominee," which is one of the enumerated "phrases" in section 100.22(a),  
21 as well as "Release Bennett," which appeared in the "Utah Values" mailer in MUR 6317  
22 (Stewart).<sup>8</sup> In the context of a comparison between Maffei's record and Buerkle's "better  
23 idea," "Help Ann Marie Buerkle" provides, in effect, an explicit directive to vote for  
24 Buerkle. Therefore, the six versions of the "Collectible Coin" ad contain express

---

<sup>8</sup> In MUR 6317, the Commission found that a mailer expressly advocated the defeat of Senator Robert Bennett in his bid for nomination for U.S. Senate at the 2010 Utah Republican Party Convention when it stated, in pertinent part: "State Delegates, on May 8<sup>th</sup>, Release Bennett with a vote of thanks and extend the call to someone new." Factual and Legal Analysis at 7, MUR 6317 (Stewart).

1 advocacy, and the cost of financing them should have been reported as independent  
2 expenditures under 2 U.S.C. § 434(c). *See* 11 C.F.R. § 100.22(a).

3 One version of "Collectible Coin" differs slightly from the rest in that it (i) casts a  
4 favorable light on a Democratic candidate (Walt Minnick) and (ii) does not contain  
5 express advocacy. In the Walt Minnick version, no opponent is mentioned—only  
6 President Obama and Nancy Pelosi are featured on the fake coin—and thus there is no  
7 contrast drawn between Minnick and a competitor. Additionally, the final graphic  
8 features an image of Minnick and the text: "Walt Minnick. Stop the Spending. An  
9 Independent Voice for Idaho. Call [a phone number believed to be Minnick's office  
10 phone number at the time]." The voice-over states: "Stop the spending. Stand with Walt  
11 Minnick: Idaho's independent voice." Without any direct comparison between Minnick  
12 and his opponent, or between an opponent's platform and Minnick's "better idea" (as in  
13 the other versions of "Collectible Coin"), the ad's call to "stand with" Minnick is less  
14 explicit and could have a reasonable meaning other than to encourage actions to elect  
15 Minnick, such as contacting Minnick to encourage him oppose government spending.

16 Similarly, the advertisement does not contain express advocacy under section  
17 100.22(b) because it lacks an "electoral portion." It does not feature Minnick's opponent  
18 or mention an election, and the advertisement's call to "stand with" Minnick, in the  
19 context of the ad, is not an unmistakable or unambiguous way to urge viewers to vote for  
20 Minnick's election. Reasonable minds could differ as to whether the ad encourages  
21 actions to elect or defeat Minnick, or whether it more generally expresses support for his  
22 positions. Therefore, the Minnick version of "Collectible Coin" does not contain express  
23 advocacy and its cost need not have been reported as an independent expenditure.

1 CHGO may, however, have been required to report this ad as an "electioneering  
2 communication." *See infra* Section II.B.1.b.

3 ii. "Make America Work"

4 There are two versions of a CHGO ad entitled "Make America Work" that attack  
5 Democratic candidates and endorse their Republican opponents. Both versions of this ad  
6 contain express advocacy under section 100.22(a). One version features John Salazar and  
7 his opponent, Scott Tipton, and the other features Dan Maffei and his opponent, Ann  
8 Marie Buerkle. The Salazar/Tipton version of the ad states:

9 John Salazar says he's an independent voice. But he voted for the Pelosi  
10 agenda an astounding 97% of the time. Salazar squandered billions on a  
11 bogus stimulus bill as unemployment skyrocketed. And Salazar led the  
12 charge with Pelosi for Obamacare, further crippling rural Colorado's  
13 economy. As a local business owner, Scott Tipton believes Coloradans  
14 know best how to create jobs and grow our economy. Help Scott Tipton  
15 make America work again.

16  
17 A graphic on the screen states, "The Tipton Plan," the pillars of which are "cut[ting]  
18 taxes and wasteful spending" and "creat[ing] jobs for Colorado." The text accompanying  
19 the final image of Scott Tipton also reads: "Help Scott Tipton Make America Work  
20 Again." *See* Compl., MUR 6471, Attach.<sup>9</sup>

21 As in "Collectible Coin," the advertisement's call to "Help Scott Tipton" is akin  
22 to asking viewers to "support" him, and in context can have no other reasonable meaning  
23 than to urge Tipton's election. *See* 11 C.F.R. § 100.22(a). The ad clearly contrasts  
24 Salazar's purported positions, which "squandered billions" and "crippl[ed] rural  
25 Colorado's economy," with "The Tipton Plan," which promises to cut taxes and create

<sup>9</sup> The first portion of the Maffei/Buerkle ad substitutes Maffei for Salazar but is almost identical in text. The Maffei/Buerkle ad continues, "Ann Marie Buerkle believes New Yorkers know best how to create jobs and grow our economy. She'll stand up to Nancy Pelosi, fight to create jobs, and lower taxes for all New Yorkers. Help Ann Marie Buerkle make America work again." Compl., MUR 6471, Attach.

1 jobs. Implementation of "The Tipton Plan" depends entirely on Tipton defeating Salazar  
2 in the election, and the ad's call to "Help Scott Tipton" provides, in effect, an explicit  
3 directive to vote for Tipton so that he can put "The Tipton Plan" into practice. Thus, the  
4 two versions of the ad contain express advocacy and the cost of financing them should  
5 have been reported as an independent expenditure under 2 U.S.C. § 434(c).<sup>10</sup> See  
6 11 C.F.R. § 100.22(a).

7 *iii. "Song and Dance"*

8 There are four versions of a CHGO ad entitled "Song and Dance," which features  
9 a chorus line with three of the dancers' faces replaced with the faces of President Obama,  
10 Pelosi, and a specific Democratic Congressional candidate, and which is then followed by  
11 an endorsement of that Democratic Congressional candidate's Republican opponent. The  
12 four versions of the ad are the same except for the candidates featured in the ads, and all  
13 four contain express advocacy under section 100.22(a). The Allen Boyd/Steve  
14 Southerland iteration of "Song and Dance" states:

15 It's the worst economy in decades. And the folks in Washington are living  
16 it up, spending our tax dollars like there's no tomorrow. Leading this big  
17 song and dance: Obama, of course, and Nancy Pelosi. But there's one  
18 face you might not expect to see—our old friend Allen Boyd. Instead of  
19 looking out for us, Boyd approved billions in deficit spending without  
20 missing a beat. Let's pull the plug on this song and dance once and for all.  
21

22 At this point in the advertisement, the music stops and the screen fades to black.

23 An image of Steve Southerland then appears. A printed message reads: "Fight Back.  
24 Join Steve Southerland. Stop the Big Spenders in Congress." The narrator states: "Join

---

<sup>10</sup> The ad featuring Dan Maffei and his opponent, Ann Marie Buerkle, contains express advocacy because the ad is materially indistinguishable from the Salazar/Tipton ad.

1 Steve Southerland's fight against the big spenders in Washington." *See* Compl., MUR  
2 6471, Attach.

3 The advertisement's directives to "pull the plug on this song and dance once and  
4 for all" (the "song and dance" being Boyd's purported activities as a member of  
5 Congress), "Stop the Big Spenders in Congress" (Boyd having been identified as one of  
6 the leaders of the "Big Spenders"), and "Join Steve Southerland's fight against the big  
7 spenders in Washington" (Steve Southerland being Boyd's opponent and Boyd having  
8 been identified as one of the "big spenders"), in context, can have no other reasonable  
9 meaning than to urge Boyd's defeat. *See* Factual and Legal Analysis at 7, MUR 6317  
10 (Stewart) ("Release Bennett with a vote of thanks and extend the call to someone new" is  
11 suggestive of only one plausible meaning — advocating against the election of Senator  
12 Bennett). Even though the words used in "Song and Dance" are "marginally less direct  
13 than 'Vote for Smith,'" that margin does not change the meaning of the advertisement.  
14 The ad "Song and Dance" provides, "in effect, an explicit directive" to vote against Boyd  
15 and for Southerland. *MCFL*, 479 U.S. at 249. Therefore, the four versions of the ad  
16 contain express advocacy and the cost of financing them should have been reported as  
17 independent expenditures under 2 U.S.C. § 434(c). *See* 11 C.F.R. § 100.22(a).

18 *iv. "What She Believes"*

19 One CHGO ad (entitled "What She Believes") contains a split-screen image with  
20 text on the left side, and a clip of Congressional candidate Carol Shea-Porter at a podium  
21 addressing an unidentified group of people on the right side. The ad proceeds as follows:

On-screen text: Shea-Porter defends her votes for: \$862 billion stimulus	Porter: "Now, I'm not going to pretend that I'm voting with the opposite party half the time. I'm not. I'm not.
Shea-Porter defends her votes for: \$940 billion Obamacare	I think I have about a 90% rating with the President, and maybe 93...
It gets worse Shea-Porter voted for the Pelosi House agenda 93%!	...93% with the House.
Does she believe what we believe? Call Congresswoman Shea-Porter (603) 641-9536	All along, I have said, you know, 'This is what I believe.' This is what I believe."  Narrator voice-over: "Call Congresswoman Shea-Porter. Let her know if what you believe is what she believes when it comes to spending your tax dollars."

1

2 See Compl., MUR 6471, Attach.

3

"What She Believes" does not contain express advocacy under sections 100.22(a)

4

or 100.22(b). The advertisement does not contain any so-called "magic words" or other

5

words that in context can have no other reasonable meaning than to urge the election or

6

defeat of Shea-Porter. "What She Believes" discusses Shea-Porter's voting record on

7

two pieces of legislation (the health care bill and the stimulus bill), and more generally

8

notes how closely her votes align with the President and the House. It does not clearly

9

urge the election or defeat of Shea-Porter on the basis of those votes, instead asking the

10

viewer to call Shea-Porter and "let her know if what you believe is what she believes

11

when it comes to spending your tax dollars." Further, there is no clear electoral portion

12

to the advertisement; it does not mention an election or Shea-Porter's opponent. Even

13

though the advertisement casts a negative light on Shea-Porter's voting record ("It gets

14

worse"), reasonable minds could differ as to whether the advertisement encourages

1 actions to defeat Shea-Porter or encourages her constituents to contact Shea-Porter in an  
2 attempt to convince her to vote with the House and the President less often than she has  
3 in the past.

4 Therefore, "What She Believes" does not contain express advocacy and its cost  
5 need not have been reported as an independent expenditure. It does, however, appear that  
6 CHGO should have reported this ad as an "electioneering communication" under  
7 2 U.S.C. § 434(f). *See infra* Section II.B.1.b.

8 v. "Queen Nancy"  
9

10 There was a single CHGO ad entitled "Queen Nancy," which features images of  
11 candidates Allen Boyd and Nancy Pelosi, among others, and states:

12 Once upon a time, there was a very demanding queen of the Congress  
13 named Nancy. Whenever Queen Nancy gave an order, it was obeyed.  
14 One of her most loyal followers was our Allen Boyd, voting for the  
15 queen's agenda 96% of the time. But one day, Allen rebelled and voted  
16 'no' on Obamacare. Queen Nancy shouted, 'Off with his head!' and Allen  
17 quickly changed his vote to 'yes.' Call Allen. Urge him to vote 'no'  
18 again. Tell him you're not afraid of Queen Nancy, and he shouldn't be  
19 either.

20  
21 Text on the screen reads: "Call Congressman Allen Boyd. (850) 561-3979. Tell him to  
22 repeal Obamacare." *See* Compl., MUR 6471, Attach.

23 "Queen Nancy" does not contain express advocacy under sections 100.22(a) or  
24 100.22(b). The advertisement does not contain any so-called "magic words" or other  
25 words that in context can have no other reasonable meaning than to urge the election or  
26 defeat of Boyd or any of the other candidates shown in the advertisement. Rather, it  
27 discusses Boyd's vote on a particular piece of legislation and asks the viewer to "call  
28 Allen" and "urge him to vote 'no' again" on the same legislation. Its directive to the  
29 viewer is clear, and it does not advocate Boyd's election or defeat—in fact, the

1 advertisement anticipates that Boyd will remain in Congress and have a second  
2 opportunity to vote on the identified piece of legislation. Further, it does not contain a  
3 clear electoral portion. Instead, it is focused on a particular vote cast by Allen Boyd in  
4 his capacity as a member of Congress. Although the ad contains an unflattering  
5 characterization of the purported reason behind Boyd allegedly switching his vote on  
6 health care legislation, it does not reference an election or Boyd's opponent. "Queen  
7 Nancy" exhorts the viewer to act, but reasonable minds could differ as to whether it  
8 encourages actions to defeat Boyd or whether it merely encourages the viewer to  
9 influence Boyd's possible vote on a later health care bill.

10 Therefore, "Queen Nancy" does not contain express advocacy and its cost need  
11 not have been reported as an independent expenditure. CHGO may, however, have been  
12 required to report the ad as an "electioneering communication" under 2 U.S.C. § 434(f).  
13 *See infra* Section II.B.1.b.

14 b. Electioneering Communications

15 Under the Act, every person who makes a disbursement for the direct costs of  
16 producing and airing electioneering communications in an aggregate amount in excess of  
17 \$10,000 during any calendar year shall, within 24 hours of each disclosure date, report  
18 such electioneering communications to the Commission. 2 U.S.C. § 434(f)(1); 11 C.F.R.  
19 § 104.20. An "electioneering communication" is defined as any broadcast, cable, or  
20 satellite communication which (a) refers to a clearly identified candidate for federal  
21 office, (b) is publicly distributed within 60 days before a general election or 30 days  
22 before a primary election, and (c) is targeted to the relevant electorate. 2 U.S.C.  
23 § 434(f)(3); 11 C.F.R. § 100.29. The term "electioneering communication" does not

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1 include a communication that constitutes an expenditure or an independent expenditure.  
2 2 U.S.C. § 434(f)(3)(B)(ii). A communication is “targeted to the relevant electorate”  
3 when it can be received by 50,000 or more persons in the congressional district the  
4 candidate seeks to represent. 11 C.F.R. § 100.29(b)(5)(i).

5 The CHGO advertisements that contain express advocacy—six versions of  
6 “Collectible Coin,” both versions of “Make America Work” and all four versions of  
7 “Song and Dance”—are not electioneering communications. *See* 2 U.S.C.  
8 § 434(f)(3)(B)(ii). Conversely, “What She Believes” appears to qualify as an  
9 electioneering communication that should have been reported to the Commission. First,  
10 it was a broadcast, cable, or satellite communication that clearly identified Carol Shea-  
11 Porter, a candidate for federal office in the 2010 general election. *See supra* Section  
12 II.A.2.; Compl., MUR 6471, Attach. Second, the Complaints allege, and CHGO’s  
13 Response confirms, that each of the CHGO advertisements (including “What She  
14 Believes”) ran between September 24 and November 2, 2010—the time period within 60  
15 days before the 2010 general election. *See* Resp. at 3, Supp. Resp. at 3. Third, while  
16 CHGO’s response generally denies that its advertisements were “‘targeted’ at any  
17 specific electoral constituency,” *see* Resp. at 3, CHGO allegedly spent at least \$415,270  
18 to run ads opposing Shea-Porter in Manchester, New Hampshire, which is in her  
19 congressional district, as well as in Portland, Maine, and Boston, which may be close  
20 enough to the constituents in her congressional district to receive the broadcasts. *See*  
21 Compl. at 6, MUR 6471; Fitzgerald, *Secret Donors*. It appears that “What She Believes”  
22 was one of those ads (if not the only such ad), and that “What She Believes” was targeted  
23 to the relevant electorate. Therefore, “What She Believes” appears to satisfy the

1 definition of "electioneering communication" and should have been reported to the  
2 Commission under 2 U.S.C. § 434(f).

3 "Queen Nancy" and the Walt Minnick version of "Collectible Coin" satisfy the  
4 first two prongs of the "electioneering communication" definition. First, they were  
5 broadcast, cable, or satellite communications that clearly identified Allen Boyd and Walt  
6 Minnick, respectively, both of whom were candidates for federal office in the 2010  
7 general election. *See supra* Section II.A.2.; Compl., MUR 6471, Attach. Second, the  
8 Complaints allege, and CHGO's Response confirms, that each of the CHGO  
9 advertisements (including "Queen Nancy" and the Minnick version of "Collectible  
10 Coin") ran between September 24 and November 2, 2010—a time period completely  
11 within 60 days before the 2010 general election. *See Resp.* at 3; *Supp. Resp.* at 3. With  
12 respect to the third element of the "electioneering communication" definition, CHGO's  
13 Response generally denies that the advertisements were "'targeted' at any specific  
14 electoral constituency." *Id.* Many of the CHGO advertisements, however, reportedly  
15 were run in (or near) the named candidates' electoral districts. In addition to the  
16 aforementioned television ad opposing Shea-Porter, CHGO reportedly paid \$302,300 to  
17 run three "Song and Dance" ads on Baltimore TV stations featuring Frank Kratovil, who  
18 at the time was a candidate in the Congressional district surrounding Baltimore. *See*  
19 *Compl.* at 6, MUR 6471; Fitzgerald, *Secret donors*. CHGO also reportedly spent at least  
20 \$741,928 to run "Song and Dance" ads in South Carolina, Maryland, Pennsylvania, Ohio  
21 and Florida. *Id.* The four versions of "Song and Dance" included in the Complaints  
22 featured candidates from South Carolina (John Spratt/Mick Mulvaney), Maryland (Frank  
23 Kratovil/Andy Harris), Pennsylvania (Kathy Dahlkemper/Mike Kelly) and Florida (Allen

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1 communication that expressly advocates the election or defeat of a clearly identified  
2 candidate, and therefore requires a disclaimer pursuant to 2 U.S.C. § 441d. The written  
3 disclaimer on each CHGO advertisement reads as follows: "Paid for by the Commission  
4 on Hope, Growth and Opportunity, a tax-exempt 501c(4) [*sic*] organization and not a  
5 federal political committee. This message is not coordinated with any candidate or  
6 committee. www.hopegrowthopportunity.org." Resp. at 4; Compl., MUR 6471, Attach.

7 a. "Not authorized"

8 The disclaimer requirements at 2 U.S.C. § 441d draw a distinction between those  
9 communications authorized by a candidate and those communications not authorized by a  
10 candidate. *See* 2 U.S.C. §§ 441d(a)(1)-(3). The disclaimer here fails to state that the  
11 communication is "not authorized" by any candidate or candidate's committee pursuant  
12 to 2 U.S.C. § 441d(a)(3), instead stating only that the message is "not coordinated" with  
13 any candidate or committee.

14 The terms "authorized" and "coordinated" are not interchangeable. A  
15 communication can be authorized by a candidate without being coordinated with that  
16 candidate. Thus, it is potentially misleading to a viewer who may believe that a  
17 candidate did not authorize an advertisement when its disclaimer states it is "not  
18 coordinated." Similarly, a communication can be coordinated with a candidate without  
19 the candidate's authorization if, for instance, an organization pays for a public  
20 communication that expressly advocates for a candidate, and the communication is based  
21 on information about the candidate's plans, projects, activities, or needs that the  
22 organization obtained from a former employee of the candidate. *See* 11 C.F.R.  
23 § 109.21(d)(5).

1 A disclaimer that states that the communication is not coordinated with a  
2 candidate does not provide the information required by 2 U.S.C. § 441d(a)(3).  
3 Accordingly, we recommend that the Commission find reason to believe that CHGO  
4 violated 2 U.S.C. § 441d(a)(3) by failing to include proper disclaimers stating that its  
5 communications were not authorized by any candidate or candidate's committee.

6 b. "Stand by your ad"

7 Television communications paid for by persons other than candidates and not  
8 authorized by a candidate must include an audio statement by a representative of such  
9 person indicating the name of the person responsible for the content of the advertising.  
10 2 U.S.C. § 441d(d)(2); 11 C.F.R. §§ 110.11(c)(4)(i)-(ii). The Commission has  
11 previously found reason to believe that a group violated 2 U.S.C. § 441d by failing to  
12 include "stand by your ad" disclaimer language in a radio ad that was not authorized by a  
13 candidate. *See* MUR 5889 (Republicans for Trauner). Here, as in MUR 5889, none of  
14 the CHGO advertisements appear to contain any audio statement indicating the name of  
15 the person responsible for its content.

16 The Commission has previously dismissed with caution partial disclaimer  
17 violations of 2 U.S.C. § 441d(d)(1) involving radio advertisements by candidates  
18 containing incomplete audio disclaimers. *See* MUR 6260 (Rocky for Congress)  
19 (dismissing a matter where a disclaimer identifying the candidate and that the candidate's  
20 committee paid for the ad, but lacking "stand by your ad" language, nevertheless  
21 contained sufficient identifying information to prevent the public from being misled as to  
22 who paid for it); MUR 6252 (A.J. Otjen for Congress) (dismissing a matter where an  
23 audio disclaimer identifying the candidate but failing to state that the candidate approved

1 the communication was nevertheless sufficient to prevent misleading the public).<sup>13</sup>  
2 Dismissal with caution is not warranted here, however, because the CHGO  
3 advertisements do not contain any audio disclaimers whatsoever. Thus, they are not  
4 merely technical violations resulting from a poorly executed attempt to comply with  
5 2 U.S.C. § 441d(d)(2), but rather a complete omission of the language required by  
6 2 U.S.C. § 441d(d)(2).

7 Accordingly, we recommend that the Commission find reason to believe that  
8 CHGO violated 2 U.S.C. § 441d(d)(2) by failing to include proper audio disclaimers on  
9 each of the CHGO advertisements.

10 3. Political Committee Status

11 Although the complainant's allegations regarding reporting violations by CHGO  
12 specifically referred to its failure to report electioneering communications and  
13 independent expenditures, the available information appears to establish that CHGO  
14 violated the Act by failing to organize, register and report as a political committee.

15 a. The Test for Political Committee Status

16 The Act and Commission regulations define a "political committee" as "any  
17 committee, club, association or other group of persons which receives contributions  
18 aggregating in excess of \$1,000 during a calendar year or which makes expenditures  
19 aggregating in excess of \$1,000 during a calendar year." 2 U.S.C. § 431(4)(A); 11 C.F.R.  
20 § 100.5. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court held that defining

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<sup>13</sup> As noted, 2 U.S.C. § 441d(d)(1) imposes requirements on communications by candidates or authorized persons. *See supra* note 12. The failure to include "stand by your ad" language in communications made by a candidate who is identified in the communication (as in MURs 6260 and 6252) arguably presents a lesser risk of misleading the public as to the person responsible for the advertising than does the failure to include such language in communications by other persons that do not identify a representative of the responsible person.

1 political committee status “only in terms of the annual amount of ‘contributions’ and  
2 ‘expenditures’” might be overbroad, reaching “groups engaged purely in issue  
3 discussion.” *Id.* at 79. To cure that infirmity, the Court concluded that the term “political  
4 committee” “need only encompass organizations that are under the control of a candidate  
5 or the *major purpose of which is the nomination or election of a candidate.*” *Id.*  
6 (emphasis added). Accordingly, under the statute as thus construed, an organization that  
7 is not controlled by a candidate must register as a political committee only if (1) it crosses  
8 the \$1,000 threshold and (2) it has as its “major purpose” the nomination or election of  
9 federal candidates.

10 i. *The Commission's Case-By-Case Approach*  
11 *to Major Purpose*  
12

13 Although *Buckley* established the major purpose test, it provided no guidance as  
14 to the proper approach to determine an organization’s major purpose. *See, e.g., Real*  
15 *Truth About Abortion, Inc. v. FEC*, 681 F.3d 544, 556 (4th Cir. 2012), *cert. denied*,  
16 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311) (“*RTAA*”). The Supreme Court’s  
17 discussion of major purpose in a subsequent opinion, *Massachusetts Citizens for Life v.*  
18 *FEC*, 479 U.S. 238 (1986) (“*MCFL*”), was similarly sparse. *See id.* at 262. In that case,  
19 the Court identified an organization’s independent spending as a relevant factor in  
20 determining an organization’s major purpose, but examined the entire record as part of its  
21 analysis and did not chart the outer bounds of the test. 479 U.S. at 238. Following  
22 *Buckley* and *MCFL*, lower courts have refined the major purpose test—but only to a

1 limited extent.<sup>14</sup> In large measure, the contours of political committee status—and the  
2 major purpose test—have been left to the Commission.<sup>15</sup>

3       Following *Buckley*, the Commission adopted a policy of determining on a case-  
4 by-case basis whether an organization is a political committee, including whether its  
5 major purpose is the nomination or election of federal candidates. Political Committee  
6 Status, 72 Fed. Reg. 5595 (Feb. 7, 2007) (Supplemental Explanation and Justification).  
7 The Commission has periodically considered proposed rulemakings that would have  
8 determined major purpose by reference to a bright-line rule—such as proportional (*i.e.*,  
9 50%) or aggregate threshold amounts spent by an organization on federal campaign  
10 activity. But the Commission consistently has declined to adopt such bright-line rules.  
11 See Independent Expenditures; Corporate and Labor Organization Expenditures, 57 Fed.  
12 Reg. 33,548, 33,558-59 (July 29, 1992) (Notice of Proposed Rulemaking); Definition of  
13 Political Committee, 66 Fed. Reg. 13,681, 13,685-86 (Mar. 7, 2001) (Advance Notice of  
14 Proposed Rulemaking); *see also* Summary of Comments and Possible Options on the  
15 Advance Notice of Proposed Rulemaking on the Definition of “Political Committee,”  
16 Certification (Sept. 27, 2001) (voting 6-0 to hold proposed rulemaking in abeyance).

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<sup>14</sup> See *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 396 (D.C. Cir. 1981) (stating that political committee “contribution limitations did not apply to . . . groups whose activities did not support an existing ‘candidate’” and finding Commission’s subpoena was overly intrusive where directed toward “draft” group lacking a “candidate” to support); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 861-62 (D.D.C. 1996) (holding that a group’s support of a “farm team” of future potential federal candidates at the state and local level did not make it a political committee under the Act); *see also Unity08 v. FEC*, 596 F.3d 861, 869 (D.C. Cir. 2010) (concluding that an organization “is not subject to regulation as a political committee unless and until it selects a ‘clearly identified’ candidate”).

<sup>15</sup> Like other administrative agencies, the Commission has the inherent authority to interpret its statute through a case-by-case approach. See *SEC v. Chenery Corp.*, 332 U.S. 194, 202-03 (1947) (“[T]he choice made between proceeding by general rule or by individual . . . litigation is one that lies primarily in the informed discretion of the administrative agency.”)

1 In 2004, for example, the Commission issued a notice of proposed rulemaking  
2 asking whether the agency should adopt a regulatory definition of "political committee."  
3 See Political Committee Status, 69 Fed. Reg. 11,736, 11,745-49 (Mar. 11, 2004) (Notice  
4 of Proposed Rulemaking). The Commission declined to adopt a bright-line rule, noting  
5 that it had been applying the major purpose test "for many years without additional  
6 regulatory definitions," and concluded that "it will continue to do so in the future." See  
7 Final Rules on Political Committee Status, Definition of Contribution, and Allocation for  
8 Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68,056, 68,064-  
9 65 (Nov. 23, 2004).

10 ii. *Challenges to the Commission's Major Purpose*  
11 *Test and the Supplemental E&J*  
12

13 When the Commission's 2004 decision not to adopt a regulatory definition was  
14 challenged in litigation, the court rejected plaintiffs' request that the Commission initiate  
15 a new rulemaking. *Shays v. FEC*, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) ("*Shays I*").  
16 The district court found, however, that the Commission had "failed to present a reasoned  
17 explanation for its decision" to engage in case-by-case decision-making, rather than  
18 rulemaking, and remanded the case to the Commission to explain its decision. *Id.* at  
19 116-17.

20 Responding to the remand, the Commission issued a Supplemental Explanation  
21 and Justification for its final rules on political committee status to further explain its case-  
22 by-case approach and provide the public with additional guidance as to its process for  
23 determining political committee status. Political Committee Status, 72 Fed. Reg. 5595  
24 (Feb. 7, 2007) ("Supplemental E&J"). The Supplemental E&J explained that "the major  
25 purpose doctrine requires fact-intensive analysis of a group's campaign activities

1 compared to its activities unrelated to campaigns.” *Id.* at 5601-02. The Commission  
2 concluded that the determination of an organization’s major purpose “requires the  
3 flexibility of a case-by-case analysis of an organization’s conduct that is incompatible  
4 with a one-size fits-all rule,” and that “any list of factors developed by the Commission  
5 would not likely be exhaustive in any event, as evidenced by the multitude of fact  
6 patterns at issue in the Commission’s enforcement actions considering the political  
7 committee status of various entities.” *Id.*

8 To determine an entity’s “major purpose,” the Commission explained that it  
9 considers a group’s “overall conduct,” including public statements about its mission,  
10 organizational documents, government filings (*e.g.*, IRS notices), the proportion of  
11 spending related to “federal campaign activity,” and the extent to which fundraising  
12 solicitations indicate that funds raised will be used to support or oppose specific  
13 candidates. *Id.* at 5597, 5605. Among other things, the Commission informed the public  
14 that it compares how much of an organization’s spending is for “*federal campaign*  
15 *activity*” relative to “activities that [a]re not campaign related.” *Id.* at 5601, 5605  
16 (emphasis added).

17 To provide the public with additional guidance, the Supplemental E&J referenced  
18 enforcement actions on the public record, as well as advisory opinions and filings in civil  
19 enforcement cases following the 2004 rulemaking. *Id.* at 5604-05. The Commission  
20 noted that the settlements in several MURs involving section 527 organizations “provide  
21 considerable guidance to all organizations” regarding the application of the major  
22 purpose test and “reduce any claim of uncertainty because concrete factual examples of

1 the Committee's political committee analysis are now part of the public record." *Id.* at  
2 5595, 5604.

3 After the Commission issued the Supplemental E&J, the *Shays I* plaintiffs again  
4 challenged, under the Administrative Procedure Act, 5 U.S.C. §§ 551-59, the  
5 Commission's case-by-case approach to political committee status. The court rejected  
6 the challenge, upholding the Commission's case-by-case approach as an appropriate  
7 exercise of the agency's discretion. *Shays v. FEC*, 511 F. Supp. 2d 19, 24 (D.D.C. 2007)  
8 ("*Shays II*"). The court recognized that "an organization . . . may engage in many non-  
9 electoral activities so that determining its major purpose requires a very close  
10 examination of various activities and statements." *Id.* at 31.

11 Recently, the Fourth Circuit rejected a constitutional challenge to the  
12 Commission's case-by-case determination of major purpose. The court upheld the  
13 Commission's approach, finding that *Buckley* "did not mandate a particular methodology  
14 for determining an organization's major purpose," and so the Commission was free to  
15 make that determination "either through categorical rules or through individualized  
16 adjudications." *RTAA*, 681 F.3d at 556. The court concluded that the Commission's  
17 case-by-case approach was "sensible, . . . consistent with Supreme Court precedent and  
18 does not unlawfully deter protected speech." *Id.* at 558.<sup>16</sup> The Fourth Circuit concluded

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<sup>16</sup> The *RTAA* court rejected an argument that the major purpose test must be confined to "(1) examining an organization's expenditures to see if campaign-related speech amounts to 50% of all expenditures; or (2) reviewing 'the organization's central purpose revealed by its organic documents.'" *RTAA*, 681 F.3d at 555. The Fourth Circuit recognized that determining an organization's major purpose "is inherently a comparative task, and in most instances it will require weighing some of the group's activities against others." *Id.* at 556; *see also Koerber v. FEC*, 483 F. Supp. 2d 740 (E.D.N.C. 2008) (denying preliminary relief in challenge to Commission's approach to determining political committee status, and noting that "an organization's 'major purpose' is inherently comparative and necessarily requires an understanding of an organization's overall activities, as opposed to its stated purpose"); *FEC v. Malenick*, 310 F. Supp. 2d 230, 234-37 (D.D.C. 2004) (considering organization's statements in brochures and "fax alerts" sent to potential and actual contributors, as well as its spending influencing federal

1 that the Supplemental E&J provides “ample guidance as to the criteria the Commission  
2 might consider” in determining an organization’s political committee status and therefore  
3 is not unconstitutionally vague. *Id.*; see *Free Speech v. FEC*, No. 2:12-cv-00127-SWS, at  
4 12-14 (D. Wy. Mar. 19, 2013) (quoting *RTAA* and upholding Commission’s case-by-case  
5 method of determining political committee status), *aff’d* 720 F.3d (10th Cir. 2013).<sup>17</sup>

6 *iii. Organizational and Reporting Requirements for*  
7 *Political Committees*  
8

9 Political committees—commonly known as “PACs”—must comply with certain  
10 organizational and reporting requirements set forth in the Act. PACs must register with  
11 the Commission, file periodic reports for disclosure to the public, appoint a treasurer who  
12 maintains its records, and identify themselves through “disclaimers” on all of their  
13 political advertising, on their websites, and in mass e-mails. See 2 U.S.C. §§ 432-34;  
14 11 C.F.R. §110.11(a)(1).<sup>18</sup> The Act’s reporting requirements “are minimal” and the  
15 organizational requirements are not “much of an additional burden.” *SpeechNow.org v.*

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elections); *FEC v. GOPAC, Inc.*, 917 F. Supp. 851, 859 (D.D.C. 1996) (“The organization’s purpose may be evidenced by its public statements of its purpose or by other means, such as its expenditures in cash or in kind to or for the benefit of a particular candidate or candidates.”); *id.* at 864, 866 (applying a fact-intensive inquiry, including review of organizations’ meetings attended by national leaders and organization’s “Political Strategy Campaign Plan and Budget,” and concluding that organization did not have as its major purpose the election of federal candidates).

<sup>17</sup> The Supreme Court’s decision in *FCC v. Fox Television Stations, Inc.* is not to the contrary. See 132 S. Ct. 2307, 2317 (2012) (“[A] regulation is not vague because it may at times be difficult to prove an incriminating fact but rather because it is unclear as to what fact must be proved”). In that case, the FCC’s indecency standard was held to be vague for lack of notice when it applied a new stricter standard, *ex post facto*, to the Fox defendants, and when it relied on a single “isolated and ambiguous statement” from a 50-year old administrative decision to support its finding of indecency against the ABC defendants. *Id.* at 2319. Here, in sharp contrast, the Supplemental E&J — which was issued several years before the conduct at issue — provides extensive guidance on the Commission’s approach to major purpose and has withstood both APA and constitutional challenges. See *Center for Individual Freedom v. Madigan*, 697 F.3d 464 (7th Cir. 2012) (“*Madigan*”) (rejecting vagueness challenge to the definition of “political committee” in the Illinois campaign finance statute).

<sup>18</sup> An organization must register as a political committee when it crosses the \$1,000 threshold and determines, based on the guidance in the Supplemental E&J, that it has the requisite major purpose.

1 *FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010) ("*SpeechNow*") (discussing the organizational  
2 requirements of committees that make only independent expenditures. Committees that  
3 make contributions to candidates or parties are additionally subject to contribution limits  
4 and the *SpeechNow* decision does not apply to these committees.). These requirements,  
5 which promote disclosure, do not, of course, prohibit speech. *RTAA*, 681 F.3d at 552 n.3.

6 In the wake of the Supreme Court's decision in *Citizens United v. FEC*, 130 S. Ct.  
7 876 (2010), which struck down the Act's prohibitions on corporate independent  
8 expenditures and electioneering communications, the D.C. Circuit held in *SpeechNow*  
9 that political committees that engage only in independent expenditures are not subject to  
10 contribution limits. *See* 599 F.3d at 696. These political committees, often referred to as  
11 independent expenditure-only political committees or Super PACs, continue to be  
12 subject, however, to the "minimal" "reporting requirements of 2 U.S.C. §§ 432, 433, and  
13 434(a), and the organizational requirements of 2 U.S.C. §§ 431(4) and 431(8)." *Id.* at  
14 689. These political committees continue to be subject to certain source prohibitions,  
15 such as foreign nationals and federal contractors. *See* 2 U.S.C. §§ 441c, 441e.

16 Notably, the Supreme Court has stressed that such requirements serve the vital  
17 role of disclosure in political discourse. *See Citizens United*, 130 S. Ct. at 916  
18 (recognizing that increased "transparency" resulting from FECA disclosure requirements  
19 "enables the electorate to make informed decisions and give proper weight to different  
20 speakers and messages"); *Doe v. Reed*, 561 U.S. \_\_\_, 130 S. Ct. 2811, 2820 (2010)  
21 (holding that public disclosure of state referendum petitions serves important government  
22 interest of "promot[ing] transparency and accountability in the electoral process," and  
23 "preserving the integrity of the electoral process"); *Madigan*, 697 F.3d at 490 (upholding

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1 Illinois's campaign finance disclosure provisions against constitutional facial challenge,  
2 finding a substantial relation to "Illinois's interest in informing its electorate about who is  
3 speaking before an election"); *see also Doe*, 130 S. Ct. at 2837 (Scalia, J., concurring)  
4 ("Requiring people to stand up in public for their political acts fosters civic courage,  
5 without which democracy is doomed.").<sup>19</sup>

6                   b.       Application of the Test for Political Committee Status to  
7                   CHGO

8  
9                   i.       *Statutory Threshold*

10           To assess whether an organization has made an "expenditure," the Commission  
11 "analyzes whether expenditures for any of an organization's communications made  
12 independently of a candidate constitute express advocacy either under 11 C.F.R.  
13 § 100.22(a), or the broader definition at 11 C.F.R. § 100.22(b)." Supplemental E&J at  
14 5606.

15           It appears that CHGO made over \$1,000 in expenditures during 2010 by  
16 disseminating several communications that contain express advocacy. Although the  
17 exact amount spent by CHGO on expenditures is not known, CHGO reportedly spent at  
18 \$793,150 to disseminate four versions of "Song and Dance," \$561,790 to disseminate six  
19 versions of "Collectible Coin," and \$362,810 to disseminate two versions of "Make  
20 America Work." "Song and Dance," "Collectible Coin," and "Make America Work"  
21 contain express advocacy and are thus independent expenditures. *See supra* Section

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<sup>19</sup> *But cf. Minn. Citizens for Life, Inc. v. Swanson*, 692 F.3d 864, 876 (8th Cir. 2012) (striking down certain registration and disclosure provisions of Minnesota's campaign finance law, finding that those obligations as applied to associations that do *not* meet *Buckley's* "major purpose test" are unduly burdensome and do not match any "sufficiently important disclosure interest").

1 II.B.1.a. Thus, it appears that CHGO far exceeded the \$1,000 statutory threshold for  
2 political committee status. *See* 2 U.S.C. § 431(4)(A); 11 C.F.R. § 100.5.

3 *ii. Major Purpose*

4 CHGO's official statements of purpose on its website and in its Response indicate  
5 that its mandate is "public education activities" focused on "macro-economic issues,"  
6 Resp. at 2. Likewise, CHGO states in its Supplemental Response that the organization's  
7 "sole and stated purpose is to educate the public on matters of economic policy  
8 formulation at all levels of government." Supp. Resp. at 5. The Commission noted in the  
9 Supplemental E&J that it may consider such statements in its analysis of an  
10 organization's major purpose, Supplemental E&J at 5606, but that such statements are  
11 not necessarily dispositive. *See Real Truth About Obama v. FEC*, No. 3:08-cv-00483,  
12 2008 WL 4416282, at \*14 (E.D. Va. Sept. 24, 2008) ("A declaration by the organization  
13 that they are *not* [organized] for an electioneering purpose is not dispositive.") (emphasis  
14 in original, alteration added), *aff'd*, 575 F.3d 342 (4th Cir. 2009), *vacated on other*  
15 *grounds*, 130 S. Ct. 2371 (2010), *remanded and decided*, 796 F. Supp. 2d 736, *affirmed*  
16 *sub nom. Real Truth About Abortion v. FEC*, 681 F.3d 544 (4th Cir. 2012), *cert. denied*,  
17 81 U.S.L.W. 3127 (U.S. Jan. 7, 2013) (No. 12-311). Under the Commission's case-by-  
18 case approach, the Commission considers the organization's "overall conduct," including  
19 its disbursements, activities, and statements. Supplemental E&J at 5597.

20 CHGO's 2010 Form 990 filed with the IRS shows that the group spent over \$4.5  
21 million on media placement and production during the 2010 calendar year. Compl.,  
22 MUR 6471, Ex C. While precise totals spent on every advertisement are unavailable,  
23 CHGO allegedly spent approximately \$793,150 to show four versions of "Song and

1 Dance," approximately \$561,790 to show six versions of "Collectible Coin," and  
2 approximately \$363,810 on two versions of "Make America Work"—each of which<sup>20</sup>  
3 contains express advocacy. According to the available information, there is reason to  
4 believe that CHGO's spending on independent expenditures constituted a significant  
5 portion of its overall spending in the 2010 calendar year. These figures reflect only  
6 advertisements identified in the Complaints and Responses and not the full extent of  
7 CHGO's spending during the 2010 calendar year.

8 In past enforcement actions, however, the Commission has determined that funds  
9 spent on communications that support or oppose a clearly identified federal candidate,  
10 but do not contain express advocacy, should also be considered in determining whether  
11 that group has federal campaign activity as its major purpose.<sup>21</sup> For example, the  
12 Commission has relied, in part, on the following advertisements in determining that an  
13 entity was a political committee:

- 14 • ***Child's Pay***: The advertisement contains "images of children performing  
15 labor-intensive jobs: washing dishes in a restaurant kitchen, vacuuming a  
16 hotel hallway, working on an assembly line in a factory, collecting  
17 garbage, working at an auto repair shop, and checking groceries," and

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<sup>20</sup> Not including the Walt Minnick version of "Collectible Coin." *See supra* Section II.B.1.b.

<sup>21</sup> *See* Conciliation Agreement ¶ IV.11, MUR 5754 (MoveOn.org Voter Fund) (relying on funds used for advertisements that "opposed" or "criticized" George W. Bush to establish political committee status); Factual and Legal Analysis at 2, MUR 5753 (League of Conservation Voters 527) (finding major purpose satisfied where funds spent on door-to-door and phone bank express advocacy campaign, and also on advertisements "supporting or opposing clearly identified federal candidates, some of which contained express advocacy"); Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund) (concluding that PFA VF had met the major purpose test after spending 60 percent of its funds on communications that "praised George W. Bush's leadership as President and/or criticized Senator Kerry's ability to provide similar leadership"); *see also* Stipulation for Entry of Consent Judgment ¶ 22, *FEC v. Citizens Club for Growth, Inc.*, Civ. No. 1:05-01851 (Sept. 6, 2007) (entering stipulation of Commission, approved as part of a consent judgment, where organization was treated as a political committee because "the vast majority of [the group's disbursements] were made in connection with federal elections, including, but not limited to, funding for candidate research, polling, and advertisements and other public communications referencing a clearly identified federal candidate").

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concludes with the question: "Guess who's going to pay off President Bush's \$1 trillion deficit?"<sup>22</sup>

- **70 Billion More:** The advertisement shows images of a young boy sitting at a school desk and a young girl with a thermometer in her mouth. The voice-over states: "We could build thousands of new schools, or hire a million new teachers. We could make sure every child has insurance. Instead, George Bush has spent \$150 billion in Iraq and has a secret plan to ask for \$70 billion more. But after four years it's now clear: George Bush has no plan for taking care of America. Face it. George Bush is not on our side."<sup>23</sup>
- **Jobs:** "Is George Bush listening to us? Since taking office, he's let oil and energy companies call the shots. Special exemptions from the Clean Water and Clean Air Acts. Halliburton collecting billions in no-bid contracts. Here in Wisconsin, 52,500 manufacturing jobs lost. America is going in the wrong direction. And George Bush just listens to the special interests."<sup>24</sup>
- **Yucca You Decide:** "Yucca Mountain. While everyone plays politics, who's looking out for Nevada? Eighty-five percent of the nuclear waste could come through Las Vegas. Past businesses. Through communities. By our schools. Accidents happen, and if so, how could Las Vegas, a city and economy built on tourism, recover? Who would come visit us then? The question: did George W. Bush really try and stop Yucca Mountain? Or was he just playing politics?"<sup>25</sup>
- **Finish It:** [On screen: Images of Mohammed Atta, Osama bin Laden, Khalid Sheik Mohammed, Nick Berg's killers, and victims of terrorist attacks.] "These people want to kill us. They killed hundreds of innocent children in Russia. Two hundred innocent commuters in Spain. And 3,000 innocent Americans. John Kerry has a 30-year record of supporting cuts in defense and intelligence and endlessly changed positions on Iraq.

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<sup>22</sup> Factual and Legal Analysis at 3-4, 12-13, MUR 5754 (MoveOn.Org Voter Fund). The full communication can be viewed at <http://www.youtube.com/watch?v=A9WKimKIyUQ>.

<sup>23</sup> *Id.* at 4, 12-13. The full communication can be viewed at <http://archive.org/details/movf70billionmore>.

<sup>24</sup> Factual and Legal Analysis at 5, 18, MUR 5753 (League of Conservation Voters 527). The full communication can be viewed at [http://archive.org/details/lcv\\_jobs\\_102604](http://archive.org/details/lcv_jobs_102604).

<sup>25</sup> *Id.* at 5, 18. The full communication can be viewed at [http://archive.org/details/lcv\\_yucca\\_decide](http://archive.org/details/lcv_yucca_decide).

1                   Would you trust Kerry against these fanatic killers? President Bush didn't  
2                   start this war, but he will finish it."<sup>26</sup>  
3

- 4                   •       **Ashley's Story:** This advertisement recounts the story of Ashley Faulkner,  
5                   whose mother was killed in the September 11, 2001, terrorist attacks, and  
6                   the interaction she had with President George W. Bush during a visit to  
7                   Ohio. It closes with Ashley Faulkner's father stating: "What I saw was  
8                   what I want to see in the heart and in the soul of the man who sits in the  
9                   highest elected office in our country."<sup>27</sup>  
10

11                   The Commission found that each of these advertisements—though not express  
12                   advocacy—indicated that the respondent had as its major purpose the nomination or  
13                   election of federal candidates. These ads evidenced that the organization's major purpose  
14                   was federal campaign activity because they "support," "oppose," "praise," or "criticize"  
15                   the federal candidates. *See supra* note 21-25.

16                   Likewise, the following advertisements on which CHGO spent an unknown  
17                   amount in 2010, though not express advocacy, support or oppose federal candidates and  
18                   therefore provide evidence that CHGO had as its major purpose the nomination or  
19                   election of federal candidates: "What She Believes,"<sup>28</sup> "Queen Nancy,"<sup>29</sup> and  
20                   "Collectable Coin" (Minnick Version) ("Stop the spending. Stand with Walt Minnick:  
21                   Idaho's independent voice.").

22                   CHGO argues in its Response and Supplemental Response that none of its  
23                   communications can be classified as express advocacy under either 11 C.F.R.  
24                   §§ 100.22(a) or 100.22(b), and that each of its communications qualifies as an "issue ad"

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<sup>26</sup>       Conciliation Agreement ¶ IV.14, MUR 5487 (Progress for America Voter Fund). The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/finish-it>.

<sup>27</sup>       *Id.* The full communication can be viewed at <http://www.livingroomcandidate.org/commercials/2004/ashleys-story>.

<sup>28</sup>       *See supra* Section II.B.1.iv.

<sup>29</sup>       *See supra* Section II.B.1.v.

1 and therefore not an “expenditure.” Resp. at 3; Supp. Resp. at 6. As discussed above,  
2 however, that argument fails to come to terms with the Commission’s longstanding view  
3 — upheld by the courts — that the required major purpose test is not limited solely to  
4 express advocacy (or the functional equivalent of express advocacy). Each of the CHGO  
5 ads features a clearly identified federal candidate, supports or opposes a candidate, and  
6 was run in the candidate’s respective state shortly before a primary or general election.  
7 The fact that some of the ads do not contain express advocacy, or the functional  
8 equivalent, does not shield such ads from consideration under the major purpose test.<sup>30</sup>

9 Nor does *Buckley* support an argument that determining an organization’s major  
10 purpose is limited to consideration of its express advocacy. The Court first established  
11 the major purpose test in the context of its discussion of Section 434(e)—a provision that  
12 required the disclosure of expenditures by persons *other* than political committees. In  
13 order to cure vagueness concerns in that section, the Court construed “expenditure” to  
14 reach only express advocacy. 424 U.S. at 79-80. By contrast, limiting which  
15 expenditures *political committees* would have to disclose, the Court held that the term  
16 “political committee”—as defined in Section 431(d)—“need only encompass  
17 organizations that are under the control of a candidate or the major purpose of which is  
18 the nomination or election of a candidate.” *Id.* at 79. Thus, the two limitations were  
19 imposed on two different terms in two different sections of the Act: (1) “express  
20 advocacy” as a limitation on “expenditures” made by persons other than political

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<sup>30</sup> Similarly, the fact that some of the ads contain a tag line requesting that the viewer call the candidate and tell the candidate to take certain action (*i.e.*, “Call Congresswoman Shea-Porter. Let her know if what you believe is what she believes when it comes to spending your tax dollars.”) does not immunize the communications from being considered federal campaign activity when determining major purpose.

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1 committees pursuant to Section 434(e); and (2) "major purpose" as a limitation on the  
2 definition of "political committee" pursuant to Section 431(d). The opinion could have  
3 articulated a test that linked the limitations—requiring, for example, that to be considered  
4 a political committee an organization's "major purpose must be to *expressly advocate* the  
5 nomination or election of a candidate." But the Court did not take that tack. Indeed, the  
6 Court noted that even "*partisan committees*," which include "groups within the control of  
7 the candidate or *primarily organized for political activities*" would fall outside the  
8 definition of "political committee" *only* if they fail to meet the statutory spending  
9 threshold. *Id.* at 80 (emphasis added).

10 Similarly, in *MCFL*, the Court's opinion nowhere suggests that express advocacy  
11 communications are the only kind of "campaign activity" that can satisfy the major  
12 purpose test. *See MCFL*, 479 U.S. at 252-53, 262 (political committee requirements  
13 inapplicable to "organizations whose major purpose is not *campaign advocacy*," but  
14 "political committee" does include organizations with a major purpose of "*campaign*  
15 *activity*") (emphasis added). And many lower federal courts have likewise decided that a  
16 determination of major purpose is not restricted to consideration of a group's express  
17 advocacy as compared to its other activities.<sup>31</sup>

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<sup>31</sup> *See North Carolina Right to Life v. Leake*, 525 F.3d 274, 289 (4th Cir. 2008) (major purpose test may be implemented by examining, *inter alia*, "if the organization spends the majority of its money on *supporting or opposing candidates*") (emphasis added); *Akins v. FEC*, 101 F.3d 731, 742 (D.C. Cir. 1997) ("an organization devoted almost entirely to *campaign spending* could not plead that the administrative burdens associated with such spending were unconstitutional as applied to it") (emphasis added), *vacated on other grounds*, 524 U.S. 11 (1998); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 393 (D.C. Cir. 1981) (recognizing "the grave constitutional difficulties inherent in construing the term 'political committee' to include groups whose activities are not . . . directly related to *promoting or defeating* a clearly identified 'candidate' for federal office") (emphasis added); *RTAA*, 796 F. Supp. 2d 736, 751 (E.D. Va. 2011) (Recognizing that "the FEC considers whether the group spends money extensively on campaign activities such as canvassing or phone banks, or on express advocacy communications" and "the FEC is entitled to consider the full range of an organization's activities in deciding whether it is a political committee"), *affirmed by* 681 F.3d 544 (4th Cir. June 12, 2012); *Free Speech v. FEC*, No. 2:12-cv-00127-

\* \* \* \*

1  
2 In short, based on available information regarding CHGO's spending in 2010,  
3 there is reason to believe that CHGO's major purpose is federal campaign activity.  
4 CHGO allegedly spent over \$1.7 million on express advocacy communications and over  
5 \$530,000 on non-express advocacy communications that support or oppose a clearly  
6 identified federal candidate. CHGO reported spending a total of \$4,770,000 in 2010,  
7 including \$4,594,825 on media placement and production alone. Given our assessment  
8 that all of CHGO's known advertisements contained express advocacy or were  
9 electioneering communications based on the standard described above, a substantial part  
10 of its \$4.5 million in media-related expenses, including over \$2.2 million spent on the  
11 advertisements identified in the Complaints, may relate to federal campaign activity as  
12 well, a question warranting further Commission inquiry.

13 Moreover, although it is unclear at this stage whether the amount CHGO spent on  
14 federal campaign activity exceeds 50% of its budget, that fact is not dispositive. *See*  
15 *supra* at 25 and note 16; *see also Human Life of Washington, Inc. v. Brumsickle*,  
16 624 F.3d 990, 1009 (9th Cir. 2010), *cert. denied*, 131 S. Ct. 1477 (2011) ("Nothing in  
17 *Buckley* suggests . . . that disclosure requirements are constitutional only when applied"

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SWS, at 12-14 (D. Wy. Mar. 19, 2013) (quoting *RTAA* and upholding Commission's case-by-case method of determining political committee status), *aff'd* 720 F.3d (10th Cir. 2013). *But see New Mexico Youth Organized v. Herrera*, 611 F.3d 669, 678 (10th Cir. 2010) (interpreting *Buckley*'s major purpose test as establishing that regulation as a political committee is only constitutionally permissible (1) when an organization's central purpose is "campaign or election related"; or (2) when a "preponderance of [the organization's] expenditures is for express advocacy or contributions to candidates."); Statement of Reasons, Comm'rs. Petersen and Hunter at 6, MUR 5842 (Economic Freedom Fund) (interpreting the Court's major purpose requirement to mean that "the Act does not reach those 'engaged purely in issue discussion,' but instead can only reach . . . 'communications that expressly advocate the election or defeat of a clearly identified candidate'" (citing *Buckley*, 424 U.S. at 79-80); *see also Colo. Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1154 (10th Cir. 2007) (holding a Colorado statute unconstitutional as applied because it "would, as a matter of common sense, operate to encompass a variety of entities based on an expenditure that is insubstantial in relation to their overall budgets").

1 to "organizations whose *single* major purpose was political advocacy") (emphasis added).  
2 And that consideration is particularly compelling here, at the initial stage of the  
3 enforcement process, where the Commission would seek merely to obtain a full record  
4 and would not be finding a violation of the Act on the facts before it. *See* Statement of  
5 Policy Regarding Commission Action in Matters at the Initial Stage of the Enforcement  
6 Process, 72 Fed. Reg. 12,545 (Mar. 16, 2007) ("[R]eason to believe findings indicate  
7 only that the Commission has found sufficient legal justification to open an investigation  
8 to determine whether a violation of the Act has occurred."). Accordingly, in light of the  
9 nature of the substantial spending for which we currently have information, there is  
10 reason to believe that CHGO's major purpose in 2010 was federal campaign activity (*i.e.*,  
11 the nomination or election of a federal candidate).

12 c. Conclusion

13  
14 CHGO made over \$1,000 in expenditures during 2010, and its spending during  
15 that calendar year indicates that it had as its major purpose federal campaign activity (*i.e.*,  
16 the nomination or election of federal candidates). Accordingly, we recommend that the  
17 Commission find reason to believe that CHGO violated 2 U.S.C. §§ 432, 433, and 434,  
18 by failing to organize, register, and report as a political committee, and that the  
19 Commission authorize an investigation.

20 **III. PROPOSED DISCOVERY**

21 We plan to seek information (1) to establish the extent, nature, and cost of  
22 CHGO's federal campaign activity; and (2) to identify potential witnesses who may have  
23 relevant knowledge of these facts. We also request that the Commission authorize the  
24 use of compulsory process, including the issuance of appropriate interrogatories,

1 document subpoenas, and deposition subpoenas, as necessary. The information sought  
2 through any discovery would be focused on ascertaining the scope of CHGO's reporting  
3 obligations, and would be consistent with the type of information that the Commission  
4 seeks in its analysis of a group's requirements as a political committee.

5 **IV. RECOMMENDATIONS**

- 6 1. Find reason to believe that the Commission on Hope, Growth and Opportunity  
7 violated 2 U.S.C. § 434(c).  
8  
9 2. Find reason to believe that the Commission on Hope, Growth and Opportunity  
10 violated 2 U.S.C. § 434(f).  
11  
12 3. Find reason to believe that the Commission on Hope, Growth and Opportunity  
13 violated 2 U.S.C. § 441d(a)(3).  
14  
15 4. Find reason to believe that the Commission on Hope, Growth and Opportunity  
16 violated 2 U.S.C. § 441d(d)(2).  
17  
18 5. Find reason to believe that the Commission on Hope, Growth and Opportunity  
19 violated 2 U.S.C. §§ 432, 433 and 434.  
20  
21 6. Authorize the use of compulsory process in this matter.  
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23 7. Approve the attached Factual and Legal Analysis.

1-10-2011 10:00 AM

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8. Approve the appropriate letter.

Date: 12/26/2013

By: Lisa Stevenson /ms

Lisa J. Stevenson  
Deputy General Counsel - Law

Daniel Petalas /ms

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