FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

CELA

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 6485
DATE COMPLAINT FILED: August 5, 2011
DATE OF NOTIFICATION: August 11, 2011
DATE OF LAST RESPONSE: October 3, 2011
DATE ACTIVATED: November 16, 2011

EXPIRATION OF STATUTE OF LIMITATIONS:
April 28, 2016

COMPLAINANTS: Campaign Legal Center
Democracy 21

RESPONDENTS: W Spann LLC
Edward Conard
Restore Our Future and Charles R. Spies in his official capacity as Treasurer

RELEVANT STATUTES AND REGULATIONS:
2 U.S.C. § 431(4)(A)
2 U.S.C. § 431(8)(A)
2 U.S.C. § 431(9)(A)
2 U.S.C. § 432
2 U.S.C. § 433
2 U.S.C. § 434
2 U.S.C. § 441f
11 C.F.R. § 110.1(g)
11 C.F.R. § 110.4(b)

INTERNAL REPORTS CHECKED: Disclosure reports

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

The Complaint in this matter alleges that Restore Our Future ("ROF"), an independent expenditure-only committee, accepted a $1 million contribution from an entity that appears to be a conduit for the true source of the contribution. Specifically, the Complaint alleges that

unknown respondents, "who created, operated and made contributions in the name of W Spann LLC," violated 2 U.S.C. § 441f by making a contribution in the name of another. It also alleges that W Spann LLC ("W Spann") violated section 441f by permitting its name to be used for making such a contribution. *Id.* Furthermore, the Complaint alleges that Respondents may have violated 2 U.S.C. §§ 432, 433, and 434 by failing to register W Spann as a political committee and to file disclosure reports with the Commission.

In their joint response, W Spann and its sole member, Edward Conard, concede that Conard provided the funds to make the contribution to ROF, and that W Spann was formed solely for the purpose of transmitting Conard's funds to ROF without disclosing Conard's identity. *See* Resp. at 2-3. The Response, however, denies that doing so violated the Federal Election Campaign Act of 1971, as amended (the "Act"). The Response notes that Conard hired a prominent law firm, Ropes and Gray LLP ("Ropes"), to advise him on how to make a lawful contribution to ROF without disclosing his identity, and that, after conducting its research, Ropes provided no guidance regarding potential liability under 2 U.S.C. § 441f. *Id.* at 3-4. In addition, the Response contends that because the Commission has yet to promulgate regulations implementing *Citizens United v. FEC*, 180 S. Ct. 876 (2010), and "related cases," the rules concerning the reporting of contributions to independent expenditure-only political committees are unclear. *Id.* at 2, 7-8. Thus, the Response maintains that Conard was not legally required to disclose his name as the source of funds under 11 C.F.R. § 110.1(g)(3), which governs contributions made by a single member LLC that elects to be taxed as a corporation, as W Spann did here. *Id.* at 6-7. Moreover, the Response denies that W Spann triggered political committee status because it failed to meet the definition of political committee under 2 U.S.C. § 431(4)(a). *Id.* at 9-10.

As set forth below, Conard concedes that he used W Spann as a "vehicle" for his contribution to ROF, and that in doing so he used W Spann's name to effect a contribution that was his own. The Office of General Counsel therefore recommends that the Commission find reason to believe that Edward Conard violated 2 U.S.C. § 441f, and that, correspondingly, W Spann LLC violated 2 U.S.C. § 441f by knowingly permitting its name to be used to make a contribution in the name of another. Because W Spann did not meet the requirements for triggering political committee status, this Office recommends that the Commission find no reason to believe that W Spann LLC violated 2 U.S.C. §§ 432, 433, and 434 by failing to register and report as a political committee.

This Office further recommends that the Commission enter into pre-probable cause conciliation with Edward Conard and W Spann LLC

Finally, this Office recommends that the Commission find no reason to believe that Restore Our Future and Charles R. Spies in his official capacity as Treasurer violated 2 U.S.C. § 441f by knowingly accepting a contribution made by one person in the name of another person.

II. FACTUAL BACKGROUND

Edward Conard is a longtime friend and former business partner of Mitt Romney, a candidate for the office of President of the United States in 2012. Resp. at 2. ROF is an independent expenditure-only political committee registered with the Commission.

The Response states that Conard learned that recent changes in campaign finance laws would allow him to make a large "donation" to ROF. *Id.* Conard claims that, because of concerns that making a large donation to ROF could jeopardize the safety and security of his family, he sought a legal way to make a "donation" to ROF without disclosing his identity. *Id.* According to the Response, in February 2011, Conard retained Ropes to advise him on creating

"an entity for the sole purpose of making a donation to ROF." *Id.* at 3; Decl. of Kimberly Cohen, Partner, Ropes & Gray LLP, Resp. Ex. B ¶¶ 3-4 ("Cohen Decl."). Conard asked whether such an entity could be legally established in a way that would not require him to publicly disclose his name in connection with the contribution. Cohen Decl. ¶¶ 3-4. Ropes understood that Conard would "use the new entity to make a contribution to [ROF]" and that "the contribution would be authorized and funded solely by Mr. Conard." *Id.* ¶ 5.

To respond to Conard's inquiry about disclosure of his identity in connection with the contribution, Ropes conducted legal research on the relevant campaign finance laws. *Id.* ¶¶ 6-7. Based on its research, Ropes advised Conard that he could make the contribution through a limited liability company ("LLC") and that Ropes "could do [its] best to mask Mr. Conard's identity as the LLC's sole member." *Id.* ¶ 7. Ropes warned that the rules governing contributions to independent expenditure-only political committees were not entirely clear and "that the FEC might seek to look through the contributing entity to the underlying contributor." *Id.* ¶ 8. Ropes did not advise Conard, however, that making such a contribution could result in a violation of 2 U.S.C. § 441f for making a contribution in the name of another. *Id.*

With Conard's authorization, Ropes formed W Spann LLC, a Delaware LLC, for the purpose of making a contribution to ROF; prepared the necessary paperwork; and helped Conard open a bank account for W Spann. *Id.* ¶ 9. According to Delaware's Department of State, W Spann was formed on March 15, 2011. Conard states that he authorized W Spann to make the "donation" to ROF on April 28, 2011. Resp. at 4. Ropes subsequently advised Conard that W Spann should file an election with the IRS as a corporation, not a partnership. *Id.*; Cohen Decl. ¶ 10. In Ropes' view, "treating the LLC as a corporation would help protect the identity of the LLC's sole member, Mr. Conard, from disclosure under the applicable law" based upon

Ropes' understanding that FEC regulations do not require attribution to an LLC's member if the LLC elects to be treated as a corporation for tax purposes. Cohen Decl. ¶ 10. W Spann filed its election as a corporation with the IRS on May 6, 2011, with an effective date of March 15, 2011. *See* Resp. at 7 n.4. After filing the IRS election, Ropes dissolved W Spann in May 2011. Resp. at 5; Cohen Decl. ¶ 11.

In August 2011, Conard's $1 million contribution to ROF attracted significant media attention.[1] In response, Conard issued the following media statement:

> I am the individual who formed and funded W Spann LLC. I authorized W Spann LLC's contribution to Restore Our Future PAC. I did so after consulting prominent legal counsel regarding the transaction, and based on my understanding that the contribution would comply with applicable laws. To address questions raised by the media concerning the contribution, I will request that Restore Our Future PAC amend its public reports to disclose me as the donor associated with this contribution.

Media Statement of Edward Conard, Aug. 5, 2011, Resp., Ex. A ("Conard Media Statement"). ROF complied with Mr. Conard's request and amended its report to disclose him as the donor of the contribution at issue. *Id.*; *see* Amended 2011 Mid-Year Report, filed Aug. 15, 2011.

III. LEGAL ANALYSIS

A. The Available Information Provides Reason to Believe that W Spann Was Not the True Source of the Contribution to ROF

1. The Legal Standard for Section 441f

The Act prohibits a person from making a contribution in the name of another or knowingly permitting his or her name to be used to effect such a contribution. 2 U.S.C. § 441f.

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[1] *See, e.g.*, Nicholas Confessore, *Donation to Romney-Tied Group Draws Scrutiny*, N.Y. TIMES, Aug. 4, 2011, http://thecaucus.blogs.nytimes.com/2011/08/04/donation-to-romney-tied-group-draws-scrutiny/; Dan Eggen, *Mystery Firm's $1M Donation to Pro-Romney PAC Raises Concern Over Transparency*, WASH. POST, Aug. 4, 2011, http://www.washingtonpost.com/politics/short-lived-firms-1m-donation-to-gop-fund-raises-concern-over-transparency/2011/08/04/gIQAvczrul_story.html; Michael Isikoff, *Probe of Mystery Donation to Pro-Romney Group Sought*, Aug. 5, 2011, http://www.msnbc.msn.com/id/44025203/ns/politics-decision_2012/#.

Correspondingly, the Act prohibits a person from knowingly accepting a contribution made by one person in the name of another person. *Id.* The term "person" for purposes of the Act and Commission regulations includes partnerships, corporations, and other organizations. 2 U.S.C. § 431(11); 11 C.F.R. § 100.10.

Commission regulations provide illustrative examples of activities that would constitute a violation of the Act by making a contribution in the name of another:

> (i) Giving money or anything of value, all or part of which was provided to the contributor by another person (the true contributor) without disclosing the source of money or the thing of value to the recipient candidate or committee at the time the contribution is made, or
>
> (ii) Making a contribution of money or anything of value and attributing as the source of the money or thing of value another person when in fact the contributor is the source.

11 C.F.R. § 110.4(b)(2)(i)-(ii).

The Act and Commission regulations thus focus on the "true" source responsible for making the contribution. The determination of the true source of the contribution turns on consideration of who "exercise[d] direction or control" over the funds distributed to the recipient. *United States v. O'Donnell*, 608 F.3d 546, 550 n.2 (9th Cir. 2010) (an intermediary who serves a "ministerial role" should not be viewed as the source of a contribution unless "an intermediary *exercises direction or control* over a gift . . . .") (citing 11 C.F.R. § 110.6(d)) (emphasis added).

Requiring contributions to be made in one's own name, rather than in the name of another or through an intermediary, promotes full disclosure of the actual source of political contributions. *O'Donnell*, 608 F.3d at 553 ("[T]he congressional purpose behind § 441f — to ensure the *complete and accurate disclosure* of the contributors who finance federal elections — is plain.") (emphasis added); *Mariani v. United States*, 212 F.3d 761, 775 (3d Cir. 2000)

(rejecting constitutional challenge to section 441f in light of compelling governmental interest in disclosure). Given this important governmental interest in full and accurate disclosure, "it is implausible that Congress, in seeking to promote transparency, would have understood the relevant contributor to be the intermediary who merely transmitted the campaign gift." *O'Donnell*, 608 F.3d at 554.[2] Consequently, courts have flatly rejected the argument that "only the person who actually transmits funds to a campaign makes the contribution. . . ." *United States v. Boender*, 649 F.3d 650, 660 (7th Cir. 2011). Rather, to determine the true source of a contribution, "we consider the giver to be the *source* of the gift, not any intermediary who simply conveys the gift from the donor to the donee." *Id.* (citing *O'Donnell*, 608 F.3d at 550) (emphasis added).

The law is thus clear: if the true source of the contribution here — made nominally by W Spann — was in fact Conard, such that W Spann served merely as an intermediary for the true donor, the resulting contribution to ROF violated section 441f.

2. There Is Reason to Believe that Conard Used W Spann as an Intermediary to Convey His Contribution to ROF

Conard acknowledges that he exercised direction and control over the funds used to make the contribution to ROF and that he created W Spann for the sole purpose of masking his identity in order to make a contribution to ROF. The Response explicitly states that W Spann "was a vehicle for one man's one-time political donation." Resp. at 2. Indeed, after the negative publicity attracted by his actions, Conard requested that ROF amend its disclosure reports to disclose him as "the donor associated with this contribution." Conard Media Statement. ROF

[2] *See Citizens United v. FEC*, 130 S. Ct. 876, 914-16 (2010) ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages."); *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) ("Public disclosure also promotes transparency and accountability in the electoral process to an extent other measures cannot.").

then complied with the request and reported Conard as the donor of the $1 million contribution. Conard's admission that he was the true source of the contribution made in the name of W Spann is sufficient, on its own, to support a reason-to-believe finding that he violated 2 U.S.C. § 441f.

Despite these admissions, the Response argues that, under the Commission's regulations governing limited liability companies, Respondents cannot be liable for violating section 441f. The Response notes that a contribution from a single member LLC that does not elect corporate tax treatment is attributed only to that single member under 11 C.F.R. § 110.1(g)(4). In contrast, the Response claims that a contribution from an LLC electing corporate tax treatment, such as W Spann, should be attributed to the LLC itself, citing 11 C.F.R. § 110.1(g)(3). However, that regulation simply provides that an LLC that elects corporate tax treatment should be treated as a corporation and offers no additional guidance concerning how a contribution from such an entity should be attributed. Because W Spann elected corporate tax treatment, the Response contends that the contribution should be attributed to W Spann and not Conard, as its sole member. Resp. at 7.

W Spann's tax treatment, however, is not dispositive in determining the true source of the contribution. W Spann's treatment as a corporation or partnership only affects the analysis if the contribution was from the LLC itself. But Conard admits the contribution was his. *See* Conard Media Statement. W Spann, in contrast, was merely a "vehicle" for his contribution. *See* Resp. at 2. Thus, in assessing the contribution's true source under 2 U.S.C. § 441f, W Spann's election as a corporation or partnership is of no consequence. Similarly, W Spann's tax treatment is not dispositive in determining who exercised direction or control over the contribution. Indeed, Conard's description of W Spann as a "vehicle" acknowledges that he exercised direction and control over the $1 million and that he simply conveyed it through W Spann to ROF.

Nonetheless, even if W Spann's tax election was afforded legal significance, its treatment as a corporation would not change the nature of the contribution itself. Here, Conard *admits* that he set up the business entity for the sole purpose of conveying his funds to ROF without disclosing his identity. He then dissolved the entity once that goal — that is, of serving as a conduit for his contribution — was accomplished. Moreover, Ropes made Conard aware that, regardless of whether Conard used an LLC to convey his contribution, "the FEC might seek to look through the contributing entity to the underlying contributor." Cohen Decl. ¶ 8. The fact that Conard still made the contribution through W Spann when he was aware that the Commission might look through W Spann as the "contributing entity" suggests Conard's willingness to claim ultimate responsibility for the contribution. In fact, he did just that.[3]

Thus, Conard's admissions demonstrate that he was the true source of the contribution to ROF and that his efforts to attribute the contribution to another person indicate that he violated 2 U.S.C. § 441f. It is entirely irrelevant that the other "person" in this case was a corporate entity, not an individual.

3. *Citizens United* Does Not Alter the Scope of 2 U.S.C. § 441f

The Response also argues in a footnote that no violation occurred because W Spann's transfer of funds to ROF cannot be considered a "contribution" under the Act at all. If the

[3] We note that in MUR 4313 (Coal. for Good Gov't, Inc.), the Commission found reason to believe that respondents violated 2 U.S.C. § 441b by making a prohibited corporate expenditure based on the legal theory that any funds from a corporate account constitute corporate funds even if they originated as personal funds. MUR 4313 is distinguishable from this matter on several grounds, including that section 441b was designed to remedy different harms and, more significantly, MUR 4313 involved an independent expenditure, not a contribution. Accordingly, the respondents in MUR 4313 could never have been liable for making a contribution in the name of another under section 441f. Moreover, in matters where contributions are involved, the Commission has generally sought to determine the true source of the contribution in determining who should be considered the contributor. *See, e.g.*, MUR 5655 (Rick Renzi for Cong.), Gen. Counsel's Rpt. #2 at 2 (Commission took no further action as to the 2 U.S.C. § 441b(a) allegation where results of investigation revealed that funds initially deemed to be from corporate treasury constituted personal funds of candidate); MUR 3191 (Christmas Farm Inn, Inc.) (Commission found probable cause to believe that respondents violated 2 U.S.C. § 441b where funds loaned to committee by the candidate actually originated from a corporation); MUR 3119 (Chandler for Cong.) (stating same). This approach is consistent with the purpose of section 441f, which focuses on identifying the true source of the contribution.

payment is not a "contribution," the Response posits, then it must follow by definition that the passing of such funds through an intermediary is not a "contribution in the name of another." As a basis for this textual argument, the Respondents point to the purported tension between the Act's literal prohibition on any "contribution" by a corporation and the post-*Citizens United* regime in which corporations may make contributions to independent expenditure-only committees, such as ROF. Respondents assert that "[i]n order to avoid an unconstitutional application of the Act," the transfer of funds to such committees must be labeled something other than a "contribution," such as a "donation," citing to the Commission's use of the term "donation" in its electioneering communications regulation. Resp. at 8 n.5 (referring to 11 C.F.R. §§ 104.20 (electioneering communications) and 300.2(e) (definition of donation)). The Response argues that because the Commission has determined that funds provided to make electioneering communications are to be considered "donations," not contributions, it follows that the Commission should likewise conclude that funds provided to independent expenditure-only political committees like ROF are not contributions. *Id.* (citing Bipartisan Campaign Reform Act of 2002 Reporting, 68 Fed. Reg. 404, 412-13 (Jan. 3, 2003)).[4]

The argument lacks merit for several reasons. First, although the decision in *Citizens United* may have opened the way for corporations to make previously prohibited contributions to independent-expenditure only committees such as ROF,[5] nothing about that development

[4] At the time he made his contribution through W Spann to ROF, Conard does not appear to have relied on the *Citizens United*-related arguments raised in the Response; indeed, the Ropes attorney, who had previously advised Conard regarding estate planning, did not even include 2 U.S.C. § 441f in its legal research. *See* Cohen Decl. at ¶¶ 1, 8.

[5] *See SpeechNow.org v. FEC*, 599 F.3d 686, 689 (D.C. Cir. 2010) (relying on *Citizens United* in holding that contribution limits are unconstitutional as to independent expenditure-only political committees); Advisory Op. 2010-11 (Commonsense Ten) (concluding that corporations and unions may make unlimited contributions to independent expenditure-only political committees because "independent expenditures do not lead to, or create the appearance of, *quid pro corruption*") (citing *Citizens United*, 130 S. Ct. at 910) (emphasis in original).

purported to alter the Act's well-settled prohibition of contributions in the name of another — whether made through corporations or otherwise — or the interest in full and accurate disclosure upon which that prohibition is based. Indeed, *Citizens United* upheld the challenged disclaimer and disclosure provisions of the Act based on the principle that "the public has an interest in knowing who is speaking about a candidate shortly before an election." 130 S. Ct. at 915.[6] That *Citizens United* and its progeny now permit corporations to make contributions to independent expenditure-only political committees does not — either directly or by implication — limit the scope of section 441f's applicability.

Second, Respondents' contention that the funds transferred from W Spann to ROF were not "contributions" is at odds with Conard's admission that he provided the funds through W Spann to ROF to "support Mr. Romney's presidential candidacy." Resp. at 2. Accordingly, he provided the funds "for the purpose of influencing [an] election for Federal office," definitively making the transfer a "contribution" under the Act. 2 U.S.C. § 431(8)(A)(i). The fact that the Commission chose to use the term "donation" in connection with its electioneering communications regulation does not alter the fact that W Spann's transfer of funds here was a

[6] The Response claims that Conard did not want to disclose his name when making the contribution because he feared for the safety and security of his family. But it provides no specific evidence of threats that Conard received prior to his forming W Spann or even after he issued his media statement stating that he was the source of the contribution to ROF. While the Commission has yet to promulgate regulations to reflect changes in the law resulting from *Citizens United*, *see Notice of Proposed Rulemaking on Independent Expenditures and Electioneering Comm.*, 76 Fed. Reg. 80,803 (Dec. 27, 2011), none of these decisions held that disclosure of contributions was no longer required or that individuals could now make "anonymous political contributions" through one's corporation as Conard sought to do. Resp. at 3. Instead, the Supreme Court has held that, to avoid disclosure, speakers must "show 'a *reasonable probability* that the compelled disclosure of personal information will subject them to threats, harassment, or reprisals from either Government officials or private parties.'" *Doe v. Reed*, 130 S. Ct. 2811, 2820 (2010) (emphasis added) (internal citations omitted) (quoting *Buckley*, 424 U.S. at 74) (citing *Citizens United v. FEC*, 130 S. Ct. at 915) (rejecting facial challenge to state law requiring disclosure of petition signatures). "The proof may include, for example, specific evidence of past or present harassment of members due to their associational ties, or of harassment directed against the organization itself. A pattern of threats or specific manifestations of public hostility may be sufficient." *Buckley*, 424 U.S. at 74. The Response fails to make the required showing. Regardless, even assuming *arguendo* that Conard faced real threats, his actions in making the contribution in the name of another person still constitute a section 441f violation.

contribution. The Commission routinely has described the transfer of funds from a corporation as a "contribution." *See, e.g.*, MUR 6403 (Alaskans Standing Together) Factual and Legal Analysis at 6; Advisory Op. 2011-24 (StandLouder.com) at 6; Advisory Op. 2011-11 (Colbert) at 4; Advisory Op. 2010-11 (Commonsense Ten) at 2. Indeed, Conard's own media statement and the declaration from Ropes attorney Cohen refer to the funds provided to ROF as a "contribution," and further indicate that Conard understood that W Spann was making a "contribution" when he authorized W Spann to transfer the funds to ROF. *See, e.g.*, Conard Media Statement ("I authorized W Spann LLC's *contribution* to Restore Our Future PAC.") (emphasis added); Cohen Decl. ¶ 4 ("Mr. Conard informed me that he wanted to create an entity for the sole purpose of making a large *contribution* to Restore Our Future PAC.") (emphasis added).

Third, corporations have long been considered "persons" under the Act, and consequently are subject to the Act's prohibitions against making a contribution in the name of another person. *See* 2 U.S.C. §§ 431(11), 441f. Admittedly, there has been little opportunity to apply section 441f in situations where the conduit is a corporation because section 441b prohibited *all* corporate contributions, not just those made in the name of another person. *Cf. Van Hollen v. FEC*, __ F. Supp. 2d __, 2012 WL 1066717 (D.D.C. 2012) ("The fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity; it demonstrates breadth.") (quoting *Penn. Dep't of Corr. v. Yeskey*, 524 U.S. 206, 212 (1998)). Nonetheless, the plain language of section 441f applies to a corporation serving as a pass through just as it does to other intermediaries that serve only that purpose, and Respondent cites no authority to the contrary.

Thus, despite the corporate nature of W Spann, the contribution was made in violation of section 441f because Conard was the contribution's true source: he alone exercised direction and control over the funds, while W Spann acted merely as an intermediary, and indeed was established for solely that purpose and dissolved immediately thereafter.

4. A Knowing and Willful Finding Is Not Warranted

This Office does not recommend that the Commission find that Respondents knowingly and willfully violated the Act. A knowing and willful finding requires that the respondent knew that his action was unlawful. H.R. REP. NO. 94-917, at 3-4 (Mar. 17, 1976); *see AFL-CIO v. FEC*, 628 F.2d 97, 98, 101 (D.C. Cir. 1980) (stating that a "knowing and willful" violation requires "'defiance' or 'knowing, conscious, and deliberate flaunting' of the Act"). Conard states and an affidavit from counsel confirms that Conard hired counsel to find a legal way to make an anonymous contribution and was never advised that making a contribution through W Spann would violate the law. Evidence showing that Conard sought and followed the advice of his counsel is plainly inconsistent with the concept of willful intent.

Based on the foregoing, we recommend that the Commission find reason to believe that Edward Conard violated 2 U.S.C. § 441f by making a contribution in the name of W Spann LLC and that W Spann LLC violated 2 U.S.C. § 441f by knowingly permitting its name to be used to make a contribution in the name of another.

B. The Allegations Do Not Support Finding that W Spann Constitutes a "Political Committee"

The Act defines a "political committee" as any committee, association, or other group of persons that receives "contributions" or makes "expenditures" for the purpose of influencing a federal election which aggregate in excess of $1,000 during a calendar year. 2 U.S.C. § 431(4)(A). Notwithstanding the threshold for contributions and expenditures, an organization

will be considered a "political committee" only if its "major purpose is Federal campaign activity (*i.e.*, the nomination or election of a Federal candidate)." Political Committee Status: Supplemental Explanation and Justification, 72 Fed. Reg. 5595, 5597 (Feb. 7, 2007); *Buckley v. Valeo*, 424 U.S. 1, 79 (1976); *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 262 (1986).

The Complaint alleges that W Spann was both a conduit *and* a political committee. Based on the information presented by Respondents, it is apparent that W Spann's sole financial activity was its receipt of $1 million from Conard and subsequent disbursement of those funds to ROF as a vehicle for Conard's desire to make an anonymous contribution. Resp. at 2, 9. Under these unique circumstances, and in the context of a possible section 441f violation, W Spann can either be the conduit for the contribution or the contributor, but not both. For the reasons described above, the Commission has reason to believe that W Spann acted as a conduit, but not that W Spann accepted or made a contribution as set forth in section 431(4)(A). Therefore, it did not become a political committee as a result of conveying Conard's contribution. Moreover, in Conard's response to media reports about the contribution, he asked ROF to amend its disclosure reports with the Commission to reflect that he was the source of the contribution, not W Spann. *See* Conard Media Statement. ROF did so on August 15, 2011, ten days after Conard's public statement. *See* Restore Our Future Amended Mid-Year Report for 2011. ROF and Conard's actions after making the contribution therefore further demonstrate that the contribution was attributable to Conard, and thus should not be considered in assessing W Spann's political committee status under 2 U.S.C. § 431(4).

Advisory Opinion ("AO") 1996-18 (Int'l Assoc. of Fire Fighters), although it arises in a different factual setting, may provide some useful guidance. There, the Commission determined

that the passive receipt of federal campaign money into an intermediary's separate segregated fund (SSF) would not trigger political committee status. In that Advisory Opinion Request, a labor union proposed to use a state-authorized "conduit account" to receive and transfer an individual donor's contribution to the union's SSF with the donor's written authorization. The Commission concluded that the contribution should be attributed to the donor, not the union, because the donor exercised direction and control over the funds and determined when and to whom they would be disbursed. Advisory Op. 1996-18 at 2. The conduit account merely served a passive role: funds would sit idle awaiting direction from the true donor. *Id.* at 3. Accordingly, the conduit account would not be "accepting or making contributions for the purposes of the Act" and would not constitute a political committee. *Id.* at 2-3.

As noted in the analysis of the alleged section 441f violation, W Spann served as a vessel through which Conard passed the questioned contribution. Indeed, the Response itself acknowledges that W Spann "was a vehicle for one man's one-time political donation" to argue that it could not meet the definition of political committee. Resp. at 2. Thus, because there is reason to believe that W Spann served simply as a pass through, or mere conduit, for the contribution to ROF, and consistent with AO 1996-18, the corporate body did not "accept[] or make[]" contributions under 2 U.S.C. § 431(4)(A), and therefore does not appear to have triggered political committee status.[7]

[7] In Advisory Opinions 2009-02 (True Patriot Network) and 2009-23 (Black Rock Grp.), cited by Respondents, the Commission concluded that sole-member LLCs not treated as corporations or partnerships for tax purposes (*i.e.*, a "disregarded entity") are not political committees — the unity between the sole member and the LLC prevents the formation of a "group" under the Act's political committee definition. *See* 2 U.S.C. § 431(4); Resp. at 9-10. Those Advisory Opinions are distinguishable, as here W Spann elected to be treated as a corporation, not as a disregarded entity. Regardless, because we conclude that W Spann did not accept a contribution or make an expenditure and, thus, did not become a political committee, these Advisory Opinions on tax status are inapposite in any event.

Based on the foregoing, we recommend that the Commission find no reason to believe that W Spann LLC violated 2 U.S.C. §§ 432, 433, and 434.

C. There Is No Reason to Believe that Restore Our Future Knowingly Accepted a Contribution Made In the Name of Another

ROF contends that because the Complaint did not name it as a respondent, this Office should not have designated ROF as such. Given our conclusion that there is reason to believe that W Spann and Conard violated 2 U.S.C. § 441f when making the contribution to ROF, ROF could in turn be liable for violating section 441f, which prohibits "knowingly accept[ing] a contribution made by one person in the name of another person." In light of ROF's potential liability under the Complaint, ROF was appropriately named as a respondent and provided notice of the Complaint and an opportunity to respond.

Nonetheless, we conclude that there is no evidence to suggest that ROF violated 2 U.S.C. § 441f by knowingly accepting a contribution in the name of another. The Complaint and Commission records show that ROF accepted a contribution from W Spann that was later attributed to Conard. But there is no information to suggest that, when ROF received the contribution on April 28, 2011, it was aware that Conard had made the contribution through the use of an intermediary, and thus, in the name of another. Therefore, ROF did not knowingly accept a contribution made in the name of another in violation of 2 U.S.C. § 441f.[8]

[8] Once ROF became aware of evidence suggesting that the contribution from W Spann may have been funded and directed by another person, ROF was required to remedy its receipt of such funds by refunding them to the true contributor within 30 days of that discovery, in this case Conard. 11 C.F.R. § 103.3(b)(2). Within ten days of Conard announcing he was the source of the contribution, ROF amended its reports to reflect that the contribution was made by Conard, not W Spann, at Conard's request. By amending its reports to reflect that Conard was the true source of the contribution, ROF effectively remedied the violation. Under the rather novel and unique circumstances presented here, we conclude there is nothing to be gained by obligating ROF to refund the contribution to Conard, who already instructed ROF to reflect his status as the actual contributor, particularly given the fact that Conard is lawfully entitled to contribute the funds to ROF in his own name, unlike in the typical 441f violation scenario. Consequently, we do not recommend that the Commission instruct ROF to take any further action with regard to 11 C.F.R. § 103.3(b)(2).

Accordingly, we recommend that the Commission find no reason to believe that Restore Our Future and Charles R. Spies in his official capacity as Treasurer violated 2 U.S.C. § 441f.

V. RECOMMENDATIONS

1. Find reason to believe that Edward Conard violated 2 U.S.C. § 441f;
2. Find reason to believe that W Spann LLC violated 2 U.S.C. § 441f;
3. Find no reason to believe that W Spann LLC violated 2 U.S.C. §§ 432, 433, and 434;
4. Find no reason to believe that Restore Our Future and Charles R. Spies in his official capacity as Treasurer violated 2 U.S.C. § 441f;
5. Approve the attached Factual and Legal Analyses;
6. Enter into conciliation with W Spann LLC and Edward Conard prior to a finding of probable cause to believe;
7.

8. Approve the appropriate letters.

Date: 8/28/12

Lisa J. Stevenson
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Roy Q. Luckett
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FEDERAL ELECTION COMMISSION
Washington, DC 20463

CELA

MEMORANDUM

SENSITIVE

TO: The Commission

FROM: Daniel A. Petalas DAP, JS
Acting General Counsel

Kathleen M. Guith KG, JS
Associate General Counsel for Enforcement

Williams Powers WP, JSD
Assistant General Counsel for Enforcement

SUBJECT: MUR 6485 (W Spann LLC) — Supplement to the First General Counsel's Report

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This submission supplements the First General Counsel's Report previously submitted in this matter.[1] We write to clarify our discussion at page 6 concerning the "true source" of a contribution under 52 U.S.C. § 30122. Specifically, the fact that another person exercises "direction or control" over an LLC intermediary may be consistent with a conclusion that the other person was the true source of a contribution, but that fact alone is not sufficient to resolve the true source inquiry. Rather, the analysis requires examination of whether a source transmitted property to another with the purpose that it be used to make or reimburse a contribution. *United States v. O'Donnell*, 608 F.3d 546, 550-51, 554 (9th Cir. 2010). Consequently, to the extent that our characterization of *United States v. O'Donnell* and other controlling legal authorities in the Report indicates that direction or control standing alone amounts to a violation of 52 U.S.C. § 30122, that does not reflect the legal position of the Office of General Counsel.[2]

This supplementation of the First General Counsel's Report does not alter our stated conclusion that, based on the record presented and for the reasons discussed at greater length in the Report, there is sufficient evidence to conclude that Respondent Edward Conard provided funds to W Spann LLC for the express purpose of transmitting

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[1] The First General Counsel's Report along with this Supplement will be released together when the Commission closes the file in this matter pursuant to the Commission's interim disclosure policy.

[2] This clarification is consistent with our further discussion of the same legal question in the First General Counsel's Report submitted in MUR 6930 (Michel). *See* First General Counsel's Report at 6-8, MUR 6930.

them through that entity to Restore Our Future, and thus that Conard was in fact the true source of that contribution in violation of 52 U.S.C. § 30122.

For the foregoing reasons, we recommend that the Commission approve the recommendations recited in the First General Counsel's Report as supplemented here.