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October 3, 2011

BY HAND DELIVERY

Ms. Kathleen Guith, Esq.
Acting Associate General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

Re: MUR 6485 (Edward Conard, W Spann LLC)

Dear Ms. Guith:

We write on behalf of our clients, Edward Conard and W Spann LLC, in response to the Complaint filed in the above-captioned Matter Under Review. The Complaint alleges that Mr. Conard violated the Federal Election Campaign Act's prohibition on contributions in the name of another by making a contribution to Restore Our Future PAC ("ROF"), an independent expenditure committee, through W Spann LLC. The Complaint further alleges that W Spann LLC should have been registered as a federal political committee.

As Mr. Conard publicly declared when this matter became a topic of media notoriety,[1] he did fund and authorize a donation by W Spann LLC to ROF. Before creating W Spann LLC for this purpose, he sought legal advice from a prominent national law firm regarding the proposed transaction, and he followed their advice. That law firm, with full knowledge of his objectives, considered how best to structure the transaction so that his identity would not need to be disclosed. Finding the applicable law to be "not entirely clear," the firm nonetheless advised Mr.

[1] A copy of Mr. Conard's public statement, issued to the media in response to their inquiries on August 5, 2011, is attached as Exhibit A.

Conard that it was not aware of any rules in effect at that time under which the Commission might seek to look through the new entity to the underlying contributor, that he therefore could form a limited liability company as the vehicle for the contribution, and that the law firm could proceed to form W Spann LLC for this purpose. Whatever the Commission may think of the merits of the law firm's advice, Mr. Conard, a non-lawyer, reasonably relied on that advice.

Moreover, it is indeed the case that the Commission has yet to promulgate regulations reflecting the dramatic changes wrought by *Citizens United v. FEC* and related cases, or clarifying how unlimited corporate donations to independent expenditure committees are to be reported. Against this backdrop of regulatory uncertainty, there is no basis for asserting a legal requirement for public disclosure by W Spann LLC (a single-member limited liability company that elected to be treated as a corporation for tax purposes), or by Mr. Conard personally, of W Spann LLC's source of funds. Should the Commission wish to clarify its post-*Citizens United* reporting rules to require such disclosure, a rulemaking -- not this Matter Under Review -- would be the appropriate venue for doing so.

As for W Spann LLC, before its dissolution, it was a vehicle for one man's one-time political donation. As such, it did not meet even the most straightforward regulatory definition of a "political committee." For these reasons, as explained in greater detail below, the Commission should dismiss the Complaint with no further action.

I. BACKGROUND

Mr. Conard is a longtime friend and former business partner of Mitt Romney. He wanted to make a significant donation to support Mr. Romney's presidential candidacy. He had heard that changes in the campaign finance laws would allow him to make a large donation to ROF, which was supporting Mr. Romney's candidacy. If it was legally permissible to do so, he wanted to make the donation in a manner that did not cause his identity to be widely publicized, particularly on the internet. He was concerned that disclosure on the internet of a large donation by him could jeopardize the safety and security of his family.

Mr. Conard at first tried to research the question himself. He found on the internet an article suggesting that there were legal ways to make anonymous political contributions in the wake of *Citizens United*. Mr. Conard is a businessman, not a lawyer, so he sought professional advice to determine whether and how one might make a donation to ROF that would not by law need to be disclosed. Initially, he consulted his accountants, who did not have an answer. He turned next to his legal counsel, the prestigious national law firm, Ropes & Gray LLP ("Ropes").

Mr. Conard told Ropes that he wanted to create an entity for the sole purpose of making a donation to ROF, and he asked whether an entity could be established legally in a way that would not require full public disclosure of his name in connection with the contribution. *See* Declaration of Kimberly E. Cohen, Esq. at ¶ 4 ("Cohen Decl.") (attached as Exhibit B). Ropes understood that he intended, if possible, to make a contribution through the new entity that would be solely funded and authorized by him. *Id.* at ¶ 5.

For several weeks, Ropes conducted legal research concerning the Federal Election Campaign Act, this Commission's regulations and advisory opinions, and secondary sources, to determine whether current campaign finance laws would require disclosure of Mr. Conard's identity if he formed and funded a new entity for the purpose of making a donation to ROF. *Id.* at ¶ 6. Ropes evaluated a variety of possible vehicles, including a trust, a 501(c)(4) tax-exempt social welfare organization, or a limited liability company. *Id.* at ¶ 7.

When this research was completed, Ropes advised Mr. Conard not to use a trust to make the donation because, under existing Commission advisory opinions related to trusts, Ropes believed it was possible the Commission would treat the contribution as attributable to Mr. Conard rather than the trust itself. Instead, Ropes advised Mr. Conard that he could create a limited liability company, which could make a donation to ROF, and that Ropes could do its best to mask his identity as the LLC's sole member. *Id.* at ¶ 7.

At no time did Ropes ever advise Mr. Conard that making a donation through a limited liability company, as Ropes advised he do, would constitute, or even risk constituting, a violation

of the FECA provisions governing contributions in the name of another or the registration of political committees. *See id.* at ¶ 8. Indeed, although Mr. Conard did not in any way limit the scope of the law firm's legal research, Ropes did not even consider those particular provisions when conducting its research on how the campaign finance laws would apply to the proposed contribution. *See id.*[2]

Nor did Ropes advise Mr. Conard of any other campaign finance statute or regulation that would be violated if Mr. Conard proceeded along the path that Ropes advised. Ropes did observe that making a large contribution through a limited liability company could draw adverse media scrutiny. *See id.*

Ropes then proceeded to establish the limited liability company that would make the donation to ROF. Ropes drafted the Limited Liability Agreement of W Spann LLC; filed the Certification of Formation, with a Ropes attorney listed as the authorized person; and applied to the IRS for an Employer Identification Number, with a Ropes attorney listed as the third party designee. *See id.* at ¶ 9. Ropes suggested that the address on W Spann LLC's bank account could be the address of either Bain Capital or Ropes itself. Once all the necessary arrangements were made, Mr. Conard asked Ropes whether he should proceed to transfer the funds to the LLC and then make the donation to Restore Our Future PAC from the LLC. Ropes responded by walking him through the steps to open the bank account for that purpose. *See id.*

Mr. Conard authorized W Spann LLC to make the donation to ROF on April 28, 2011. Ropes subsequently advised that W Spann LLC should file an election with the IRS to be treated as a corporation for tax purposes. *See id.* at ¶ 10. The firm had concluded that electing treatment as a corporation would help to protect Mr. Conard's identity from disclosure under applicable

[2] Mr. Conard was not aware that Ropes had failed to consider those provisions of FECA until after the Complaint was filed in this Matter Under Review.

FEC rules governing limited liability companies. *See id.* In May 2011, Ropes dissolved W Spann LLC. *See id.* at ¶ 11.

When his donation to ROF became a matter of public controversy in August 2011, Mr. Conard decided to publicly disclose his role in funding and authorizing the donation. To help address media scrutiny of the issue, he requested that ROF amend its reports to make his donation through W Spann LLC a matter of public record, which ROF has since done.[3]

II. ANALYSIS

Because the Commission has not yet revised its regulations to account for the treatment and reporting of disbursements by corporations to political committees, which were prohibited altogether prior to *Citizens United* and related cases, the precise reporting rules for W Spann LLC's disbursement to ROF are, for all practical purposes, non-existent. If the canvass is not entirely blank, it is close to it. This alone should be dispositive here because an enforcement action is not the time or place to be promulgating new rules. Even if, however, the Commission were to attempt to fit the facts of this case into the existing legal framework for limited liability companies under current regulations, no violation of the prohibition on contributions in the name of another occurred here. Nor did W Spann LLC meet the most elementary threshold for registration as a "political committee."

A. There Was No Contribution In the Name of Another

Neither Mr. Conard nor W Spann LLC violated the statutory prohibition on contributions made in the name of another. This Matter Under Review is the first instance of which we are aware in which a violation of 2 U.S.C. § 441f has been alleged in the context of a post-*Citizens*

[3] FEC Campaign Finance Reports and Data, Restore Our Future, http://query.nictusa.com/pdf/992/11932174992/11932174992.pdf#navpanes=0 (last visited Sept. 29, 2011).

United corporate donation to an independent expenditure committee. Because corporate donations to a federal political committee were, until recently, not legally permissible under FECA, the appropriate standard for reporting corporate donations is a speculative matter at best. A further layer of complexity is added in the case of donations by limited liability companies, which are sometimes treated under FEC regulations as corporations and, as described below, sometimes not. The question of how Section 441f's prohibition on contributions in the name of another would apply to permissible corporate "contributions" is still more esoteric -- indeed, so esoteric that it has no business being resolved outside the confines of a formal rulemaking.

Section 441f provides that "[n]o person shall make a contribution in the name of another person or knowingly permit his name to be used to effect such a contribution, and no person shall knowingly accept a contribution made by one person in the name of another person." Even assuming for the purpose of argument that the Commission should mechanically seek to apply its existing limited liability company regulations to donations made by limited liability companies to independent expenditure committees after *Citizens United*, W Spann LLC's transfer of funds to ROF was not a contribution in the name of another. It was made and reported in a manner that is consistent with current regulations.

The Commission's regulations regarding "contributions by limited liability companies" provide that "[a] contribution by an LLC with a single natural person member *that does not elect to be treated as a corporation* by the Internal Revenue Service pursuant to 26 C.F.R. § 301.7701-3 shall be attributed only to that single member." 11 C.F.R. § 110.1(g)(4) (emphasis added). In contrast, however, "[a]n LLC that elects to be treated as a corporation by the Internal Revenue Service, pursuant to 26 [C.F.R. §] 301.7701-3 . . . shall be considered a corporation pursuant to 11 [C.F.R.] Part 114," which regulates corporate activity. 11 C.F.R. § 110.1(g)(3). The regulations currently make no provision for the attribution of a contribution by a limited liability company that makes the IRS election to be treated as a corporation to anyone other than the limited liability company itself.

W Spann LLC was a registered limited liability company in Delaware that elected to be treated as a corporation for tax purposes effective March 15, 2011.[4] Because W Spann LLC elected to be treated as a corporation, any contribution made by W Spann LLC should be attributed to W Spann LLC itself. The contribution was not made in the name of another because the regulations do not require W Spann LLC to attribute contributions to its sole member, and therefore no violation of Section 441f occurred.

The existing limited liability company regulations are themselves an awkward fit, though they apply on their face, because when they were written the Commission assumed that a limited liability company that was treated as a corporation for tax purposes could not make a contribution in the first place. How should a disbursement by a limited liability company to an independent expenditure committee now be reported? Until the Commission enacts new regulations adapted to post-*Citizens United* realities, we simply don't know.

One can imagine many different approaches for how to treat disbursements to political committees from a corporation, given the variety of ways that corporate entities are organized and funded under state corporations laws and the federal tax laws. Should contributions from publicly held and closely held corporations be reported the same way? Should contributions from limited liability companies treated as corporations with multiple members and those with single members be treated the same way? What if the members of the limited liability companies are themselves corporations, some of which in turn might be closely held?[5]

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[4] The effective date of the election is "the date specified by the entity on [IRS] Form 8832." 26 I.R.C. § 301.7701-3(c)(iii). The effective date specified on Form 8832 "cannot be more than 75 days prior to the date on which the election is filed and cannot be more than 12 months after the date on which the election is filed." *Id.* W Spann LLC's election was filed on May 6, 2011, and W Spann LLC's effective date, March 15, 2011, was less than 75 days prior to the date of election.

[5] In the same vein, given the disconnect between case law and the Commission's current regulations, there is a material question as to whether a disbursement by a limited liability (continued...)

The Commission itself has acknowledged the need for new regulations to account for the impact of *Citizens United* and related court decisions, stating that the advent of independent expenditure committees that can accept corporate donations "implicates issues that will be the subject of forthcoming rulemakings." AO 2010-11 (Commonsense Ten). Indeed, the Commission has recognized that "[t]he results of these rulemakings may require the Commission to update its registration and reporting forms to facilitate public disclosure." AO 2010-11 (Commonsense Ten). Moreover, the Commission has stated that among the provisions the Commission "intends to initiate a rulemaking to implement" are multiple regulations in 11 C.F.R. Part 114, which regulates corporate speech.[6]

The adjudication of this Complaint is not the proper venue in which to resolve these difficult issues and to adopt a rule governing the reporting of corporate limited liability company donations to independent expenditure committees. If such is to be done, it should be done after

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company that elects to be treated as a corporation even constitutes a "contribution" within the meaning of Section 441f. For there to be a violation of 441f, there needs to be a "contribution" in the name of another. The Act prohibits "any corporation" from making a "contribution or expenditure in connection with any [federal] election." 2 U.S.C. § 441b(a); *see also* 11 C.F.R. § 114.2(b)(1). W Spann LLC elected to be treated as a corporation for federal income tax purposes and is therefore "considered a corporation pursuant to 11 [C.F.R.] Part 114." 11 C.F.R. § 110.1(g)(3). Read literally, FECA and Commission regulations prohibited W Spann LLC from making a "contribution." Yet, after *Citizens United*, *SpeechNow*, and similar cases, W Spann LLC's transfer of funds to ROF is constitutionally protected. To avoid an unconstitutional application of the Act, providing funds to an independent expenditure committee must be something other than a "contribution," though we do not yet know what to call it. The Commission dealt with a similar issue when it promulgated regulations under the Bipartisan Campaign Reform Act of 2002 ("BCRA"), creating a new term of art, "donations," to avoid inconsistencies. *See generally* 11 C.F.R. § 300.2(e). The Commission determined that "amounts given to persons who make disbursements for electioneering communications" are not "contributions" under the Act; they are "donations." 68 Fed. Reg. 412-413 (Jan. 3, 2003). In the case of W Spann LLC, there could be no "contribution in the name of another" because there was no "contribution."

[6] Press Release, FEC Statement on the Supreme Court's Decision in *Citizens United v. FEC* (Feb. 5, 2010), http://www.fec.gov/press/press2010/20100205CitizensUnited.shtml.

notice and comment, in the ordinary exercise of the Commission's statutory rulemaking authority. As Vice-Chair Hunter recently wrote:

> Congress made an affirmative choice not to give the FEC authority through the enforcement process to create new rules that regulate political speech. Instead, the statute prohibits the agency from promulgating any rule of law except through a rulemaking process, with adequate notice and comment from the public. Only then can the public have adequate notice of the rules of the game before the game begins.[7]

B. W Spann LLC Did Not Need to Register as a Political Committee

W Spann LLC was not a "political committee." A "political committee" is "any committee, club, association, or other group of persons which receives contributions aggregating in excess of $1,000 or which makes expenditures aggregating in excess of $1,000 during a calendar year[.]" 2 U.S.C. § 431(4)(a) (emphasis added); 11 C.F.R. § 100.5(a) (2010). Simply put, W Spann LLC was not a "political committee" because it was not a "group of persons." It was formed by one individual to make a single contribution, funded solely by him.

The Commission has already held that a single member LLC is not a "political committee. *See* AO 2009-13, n. 2 (Black Rock Group) ("The single member LLC also is not a 'political committee' because it is treated as an individual under the Act."). While the limited liability company in Black Rock Group was a "disregarded entity" for tax purposes, which had not elected to be treated as a corporation, a single-member limited liability company does not become a "group of persons" by electing corporate status. W Spann LLC was not formed to, and in fact did not, collect funds from anyone other than Mr. Conard. There was no group; there was only Mr. Conard.

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[7] Vice Chair Caroline Hunter, "FEC Enforces Law As It Is, Not as Some Wish It to Be," Roll Call, July 14, 2009.

Notably, the Supreme Court has identified the pooling of resources as being among the characteristics of political committees. *See McConnell v. FEC*, 540 U.S. 93, 135 (2003) (contributions "'enabl[e] like-minded persons to pool their resources'") (quoting *Buckley v. Valeo*, 424 U.S. 1, 22 (1976)); *see also* AO 2009-13 (Black Rock Group) (Concurrence of Vice Chair Matthew Petersen and Commissioners Caroline Hunter and Donald McGahn II). Unlike the funds of a political committee, W Spann LLC's funds consisted solely of capital contributions from its single member, Mr. Conard. It did not pool funds or solicit funds from others.[8]

The Act requires a "political committee" to comply with numerous regulations in addition to registration, including filing and recordkeeping requirements. *See* 2 U.S.C.§§ 432-34 (2006). Because W Spann LLC did not meet the statutory definition of a political committee, however, it was not required to meet those obligations.

[8] Furthermore, the Commission's own 2007 policy governing political committee status has yet to be adapted to deal with the new independent expenditure entities and their donors. *See* 72 Fed. Reg. 5595, "Supplemental Explanation and Justification for the Regulations on Political Committee Status" (Feb. 7, 2007). As Commissioner McGahn explained in his Statement of Reasons in MUR 5831 ("Softer Voices et al."), that 2007 policy "relies upon several regulations that have been struck or called into question by [*Wisconsin Right to Life, Citizens United, Davis, EMILY's List, SpeechNow*, and *Unity'08*]." MUR 5831, Statement of Reasons, Commissioner Donald F. McGahn II (Feb. 1, 2011). The unclear standard for determining whether even a group of persons, which W Spann LLC was not, is a political committee means that many are "left to guess whether or not certain activity triggers the application of myriad mandatory and (continued...)

III. CONCLUSION

For the reasons stated above, we respectfully submit that the Complaint should be dismissed on the merits. Moreover, in exercising its discretion, the Commission should also give due weight to the fact, demonstrated above, that Mr. Conard acted only after consulting counsel and confirming with them the legality of the proposed transaction. He retained counsel, disclosed to them in all material respects his proposed course of action, sought their legal advice, and then relied upon that advice.

Respectfully submitted,

Robert K. Kelner

cc: Chair Cynthia L. Bauerly
Vice-Chair Caroline C. Hunter
Commissioner Donald F. McGahn II
Commissioner Matthew S. Petersen
Commissioner Steven T. Walther
Commissioner Ellen L. Weintraub
Mr. Jeff S. Jordan, Esq.
Ms. Kim Collins, Esq.

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sometimes redundant reporting obligations, which impose different burdens depending on who is speaking." Id.

MEDIA STATEMENT OF EDWARD CONARD
August 5, 2011

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.

BEFORE THE FEDERAL ELECTION COMMISSION

In Re: Matter Under Review 6485

DECLARATION OF KIMBERLY E. COHEN

I, Kimberly E. Cohen, hereby declare as follows:

1. I have personal knowledge of all information contained in this Declaration.

2. I am currently, and was at all times relevant to this Declaration, a partner at Ropes & Gray LLP ("Ropes & Gray") in Boston, Massachusetts. Edward Conard was and is a client of Ropes & Gray for whom I have provided legal services, including estate planning advice.

3. In February of 2011, Mr. Conard contacted me to seek legal advice regarding a contribution that he proposed to make to a 527 organization supporting the presidential candidacy of Mitt Romney. I learned soon thereafter that the organization was Restore Our Future PAC, an independent expenditure committee registered with the Federal Election Commission ("FEC").

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. He asked if such an entity could be established legally in a way that would not require full public disclosure of his name in connection with the contribution. He was concerned about the effect on his family's safety from widespread knowledge that he had made such a large contribution.

5. Ropes & Gray understood that Mr. Conard intended to use the new entity to make a contribution to Restore Our Future PAC, and that the contribution would be authorized and funded solely by Mr. Conard, using funds conveyed by him to the new entity.

6. In response to Mr. Conard's inquiry of whether an entity could legally be created for the sole purpose of making a contribution to Restore Our Future PAC without disclosure of his identity, we researched whether current campaign finance rules require disclosure of the underlying owner, or beneficiary, of a trust, a partnership, a corporation or a limited liability

company ("LLC") that makes a contribution to an independent expenditure committee such as Restore Our Future PAC. Our research included the Federal Election Campaign Act of 1971, as amended ("FECA"), FEC regulations and advisory opinions, case law, and treatises concerning tax-exempt organizations law.

7. While conducting legal research and consulting various Ropes & Gray attorneys and paralegals, Ropes & Gray considered several possible vehicles for the contribution, including a trust, an LLC, or a 501(c)(4) tax-exempt organization. We advised Mr. Conard not to make the contribution through a trust because, under existing FEC advisory opinions related to trusts, we believed it was possible the FEC would treat the contribution as attributable to Mr. Conard rather than the trust itself. We advised, however, that Mr. Conard could make the contribution through an LLC, and that we could do our best to mask Mr. Conard's identity as the LLC's sole member.

8. We indicated that FEC rules governing contributions to an independent expenditure committee were not entirely clear, and that therefore it was possible, though by no means certain, that the FEC might seek to look through the contributing entity to the underlying contributor. We added, however, that we were not aware of rules to that effect at this time. At no time did we ever advise Mr. Conard that making the contribution through an LLC, as we advised in the case of W Spann LLC, would constitute, or even risk constituting, a violation of 2 U.S.C. § 441f for making a contribution in the name of another or 2 U.S.C. §§ 432, 433, and 434 for failing to organize as a political committee. Although Mr. Conard's request for Ropes & Gray's legal advice did not limit in any way our consideration of these, or any other, provisions of the campaign finance laws, we did not consider these provisions when conducting our research. We noted that making a large contribution through an LLC could draw adverse media scrutiny.

9. After advising Mr. Conard that he could make the contribution through an LLC, we asked whether Mr. Conard wanted us to proceed to set up an LLC. With Mr. Conard's authorization, we proceeded to form an LLC for the purpose of making a contribution to Restore Our Future PAC. Ropes & Gray created W Spann LLC under the laws of Delaware. Ropes & Gray drafted the Limited Liability Agreement of W Spann LLC, filed the Certification of Formation, with a Ropes & Gray attorney listed as the authorized person, and applied to the Internal Revenue Service ("IRS") for an Employer Identification Number, with a Ropes & Gray attorney listed as the third party designee. We advised Mr. Conard regarding the documentation necessary to open a bank account for W Spann LLC, and we suggested that the address on W Spann's bank account could be the address of Bain Capital or Ropes & Gray. When all the necessary arrangements were made, Mr. Conard asked whether he should proceed to transfer the funds to the LLC and then make the contribution to Restore Our Future PAC from the LLC. We responded by walking him through the steps to open a bank account for this purpose.

10. Ropes & Gray subsequently advised Mr. Conard that W Spann LLC should file an election with the IRS to be treated as a corporation rather than as a partnership for tax purposes. Ropes & Gray advised Mr. Conard to do this because, in our view, treating the LLC as a corporation would help protect the identity of the LLC's sole member, Mr. Conard, from disclosure under applicable law. We based this advice on our understanding that the FEC's regulations governing limited liability companies do not require attribution of a contribution to

the LLC's member or members if the LLC made the election to be treated as a corporation for federal tax purposes.

11. Subsequent to filing the election with the IRS to treat the LLC as a corporation, we executed the necessary filing to dissolve W Spann LLC.

Under penalty of perjury, I declare that the foregoing is true to the best of my knowledge and belief.

Dated this 3rd day of October 2011

Kimberly E. Cohen
Ropes & Gray LLP
Prudential Tower
800 Boylston Street
Boston, MA 02199-3600