FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of	)	
	)	
Rick Santorum for President and	)	
Nadine Maenza in her	)	
official capacity as treasurer;	)	MUR 6540
Michigan Faith & Freedom Coalition;	)	
Glenn Clark; and	)	
The Palazzo Grande, Inc.	)	

STATEMENT OF REASONS
Vice Chairman DONALD F. McGAHN and
Commissioner CAROLINE C. HUNTER

The complaint in this matter alleged that the campaign of then-presidential candidate Rick Santorum received impermissible in-kind contributions from the Michigan Faith & Freedom Coalition ("MFFC") during the Michigan Republican Presidential Primary of 2012. Specifically, the complaint alleged that when Santorum appeared at an issues-oriented forum sponsored by the MFFC in February 2012, he received a prohibited corporate contribution; and that since the president of the organization was also a volunteer to Rick Santorum for President ("RSFP" or the "Santorum campaign"), all of MFFC's activities were illegally coordinated with the campaign, and thus prohibited.[1]

[1] *See* MUR 6540 (Rick Santorum for President), Complaint.

As presented in the complaint and response, the facts in this case do not amount to a violation of the law.[2] The issues forum hosted by MFFC was not a Santorum campaign event and was conducted consistent with Commission regulations and precedent. Similarly, the complaint fails to provide sufficient facts in support of a claim that other activities of MFFC were coordinated with RSFP. Therefore, we rejected the recommendation by OGC that the Commission find reason to believe that the Respondents violated the Federal Election Campaign Act of 1971, as amended ("the Act").[3] The file on this matter was then closed on May 21, 2013.[4]

I. BACKGROUND

A. The Complaint and Response

The complaint in this matter is scant at best, a mere two pages in length with mostly conclusory statements. Attached to it were two newspaper articles written by the same

[2] Although this is a complaint-generated matter, the Office of General Counsel ("OGC") performed extensive research during an extra-statutory investigation that produced various news articles and materials that claimed violations had occurred. The Act is clear that OGC may only investigate a matter after the Commission finds there is reason to believe ("RTB") that a violation occurred or is about to occur. Moreover, the Commission has already set forth the proper procedure for its staff to bring materials before it for consideration, including news articles, in its Directives. *See* Federal Election Commission, Directive 6 "Handling of Internally Generated Matters" (Apr. 21, 1978). This is discussed in more detail below.

[3] *See* MUR 6540 (Rick Santorum for President), First General Counsel's Report ("FGCR").

[4] MUR 6540 (Rick Santorum for President), Certification dated May 21, 2013. Closing the file on a matter is a ministerial action that is typically non-contentious. Not so here. The first motion to close the file, which came after the motions to find RTB failed, failed by a vote of 3-2 on May 7, 2013. *See* MUR 6540 (Rick Santorum for President), Certification dated May 7, 2013. The Chair of the Commission explained that she cast a vote against closing the file because she had seen newspaper articles suggesting that the President would soon be appointing new commissioners. *But see* MUR 6506 (Meeks), Certification dated May 21, 2013 (motion to close the file passed 5-0). In other words, the Democrat chair of the FEC refused to close the file on a matter concerning a Republican presidential candidate and a faith-based group in order to wait for a Democrat President to appoint new commissioners, but was content to close the file on a Democrat candidate. Publicly, the Chair claims to be committed to efficiency. *See* MUR 6543 (Unknown Respondents), Statement of Reasons of Chair Ellen Weintraub ("I will continue to do everything in my power to resolve cases efficiently and at a pace the public deserves."). Apparently, this desire for efficiency does not extend to all respondents before the Commission. After an exorbitant amount of effort to have the Chair place this matter on a subsequent agenda, the Commission then closed the file, with the Chair once again opposing. *See* MUR 6540 (Rick Santorum for President), Certification dated May 21, 2013 (Commission voting 4-1 to close the file). Unfortunately, this is not an isolated incident. There are a number of other matters – some of them involving allegations from the 2010 election cycle – that, despite our repeated requests to have them placed on a meeting agenda, the Chair has refused to consider.

journalist, one of which was premised on the filing of the complaint, and the other a derivative of the first. The responses were similarly short in length, and simply addressed the bare-bones complaint. Based upon the complaint and response, it appears that in the fall of 2011, MFFC invited the candidates in the Michigan Republican Presidential Primary to attend a forum to address public policy issues of import to their membership and supporters. Since some candidates seemed reluctant to attend the forum with other candidates, the MFFC rescheduled and reformatted the event to take place throughout February 2012, with several events across the state. All of the candidates in the primary were again invited and each was given equal opportunities to address MFFC's membership at separate events.[5] These events were an apparent attempt to bring attention to the issues central to MFFC, and by inviting candidates to join faith-based policy leaders at the events, MFFC hoped to bring attention to their cause.

Only Santorum accepted the invitation from MFFC. He then attended the forum held on February 17, 2012 at The Palazzo Grande, who had donated the use of their facilities to MFFC. At the event, Santorum spoke about faith and values, and on his ideas on public policy issues related to people of faith. There were other speakers at the event, including members of the clergy who spoke on faith-based issues and a medical doctor who spoke on health care. MFFC retained total control of the event, and no campaign literature, signs, or other collateral from RSFP or otherwise were permitted.[6]

At some point at the beginning of 2012, Glenn Clark, who is and was the president of MFFC, decided to endorse Santorum. This was done in his personal capacity, as a leader of

[5] MUR 6540 (Rick Santorum), MFFC Response at 2.

[6] *Id.*

faith-based activists, and not in his role as president of MFFC.[7] He also volunteered his own time for RSFP, but was not a paid staff member or consultant for the campaign.[8] Clark's decision had no effect on the MFFC forums or its attendees, and indeed several invitations had been sent from MFFC to campaigns other than RSFP before Clark endorsed Santorum.[9]

The complaint in this matter alleged that Clark, MFFC, The Palazzo Grande, and RSFP (collectively, "the Respondents") violated the Act during the Michigan Republican Presidential Primary by making and receiving prohibited corporate contributions in regards to the February 17, 2102 forum, and "[b]ecause all of MFFC's expenditures were coordinated with Santorum for President, those expenditures were in-kind contributions to Santorum for President."[10] Respondent disagreed.

OGC recommended that the Commission (1) find reason to believe ("RTB") that Respondents, other than Clarke, violated 2 U.S.C. § 441b with regards to the event and other alleged coordinated activity, (2) take no action at this time regarding Clark, and (3) find reason to believe RSFP, and Nadine Maenza in her official capacity as treasurer, violated 2 U.S.C. § 434(b) for failing to report the alleged in-kind contributions.[11] As further explained below, we did not support these recommendations.

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[7] MUR 6540 (Rick Santorum), Response of Santorum for President at 1 (Oct. 19, 2012) ("Mr. Glenn Clark . . . was a volunteer who endorsed Sen. Santorum in his individual capacity."). *See also* MUR 6540 (Rick Santorum), Response of Glenn Clark as President of the Michigan Faith & Freedom Coalition at 3 (Apr. 10, 2012) ("At no time was any coordination made between Mr. Santorum's committee and [MFFC]. In fact, several invitations had already been sent inviting the various candidates to speak to our organization before *I decided which candidate to personally support*." (emphasis added)).

[8] *Id.* at 2.

[9] *Id.* at 3.

[10] MUR 6540 (Rick Santorum), Complaint at 2.

[11] MUR 6540 (Rick Santorum for President), FCGR at 21.

B. OGC's Extra-Statutory Pre-RTB Investigation

Nearly five months after the complaint and response were filed, and long after the statutory deadlines regarding the service of and response to complaints had passed, OGC submitted to Respondents voluminous additional materials and sought a response. Included in these 35 pages of materials were several newspaper articles, as well as a posting on TPM2012, a blog associated with the liberal TPM ("Talking Points Memo") Muckraker website.[12] OGC claimed that these materials were found "[in] the course of its review" of "publicly available information that may be relevant to the allegations in the complaint," and that the respondents could "supplement" their response.[13]

In response to OGC's pre-RTB inquiry, counsel to the Santorum campaign noted that "[i]t is not clear to [her] exactly why you forwarded the press clippings . . . ."[14] We share that confusion. For almost five years, we have asked OGC to provide the authority, even a scintilla of information that would authorize what has become their ever-growing habit of gathering news clips and other materials (that now includes openly-biased blog posts) in an effort to supplement the complaint and sending them to respondents long before the Commission considers the matter. Simply put, OGC has been unable to provide authority for their actions.[15]

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[12] *See* Michael Calderone, *TPM joins the pool and makes a splash*, October 30, 2009, Politico, http://www.politico.com//news/stories/1009/28955.html (describing TPM's "left-leaning" lack of objectivity).

[13] MUR 6540 (Rick Santorum for President), Letter from OGC Staff Attorney to Cleta Mitchell, Counsel to the Santorum Committee (Oct. 2, 2012). Curiously, OGC does not include its pre-RTB investigatory correspondence in materials that go public at the conclusion of a matter. *See* Notice 2003-25: Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70426 (Dec. 18, 2003).

[14] MUR 6540 (Rick Santorum for President), Letter from Cleta Mitchell, Counsel to the Santorum Committee, to OGC Staff Attorney (October 19, 2012).

[15] Given that we have thus far been unable to stop OGC's ever-growing pre-RTB activity, we have endeavored to ensure that respondents will at least be afforded an opportunity. *See, e.g.*, MUR 6056 (Protect Colorado Jobs, Inc.), Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn at 11 ("And if we assume *arguendo* that certain limited reviews of publicly available materials are permissibly undertaken . . . then any unearthed facts or allegations that OGC uses to support RTB recommendations

Instead, OGC relies on what is little more than anecdotal folklore. We have heard that in the past, the Commission occasionally asked OGC to send a letter to a respondent to clarify what was said in response to a complaint. There are vague citations to discussions that may have occurred in past executive session deliberations of specific matters about the practice. But when pressed, OGC cannot cite a specific matter. From such folklore, OGC has taken license to send such letters in all matters as they see fit. The process, we are told, evolved "organically." But, importantly, OGC has been unable to identify a Commission vote empowering it to conduct what are, by any definition, pre-RTB investigations. Essentially, OGC believes that it has the power to conduct these extra-statutory investigations through some crude intra-agency common law, and that it takes the affirmative vote of four Commissioners to take it away.[16] We disagree.

1. OGC's pre-RTB Investigation is Contrary to the Act

The fundamental problem with OGC's self-proclaimed power to begin investigating a matter prior to a Commission vote is that it is contrary to the Act. The Act is clear that an investigation is to begin only after the Commission votes to find reason to believe:

> If the Commission, upon receiving a complaint under paragraph (1) or on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, determines, *by an affirmative vote of four of its members*, that it has reason to believe that a person has committed, or is about to commit, a violation of this Act . . . the Commission shall, through its chairman or vice chairman, notify the person of the alleged violation. Such notification shall set forth the factual basis for such alleged violation. The Commission shall *make*

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should be provided to respondents so that they may have a full and fair opportunity to challenge them before the Commission votes on those recommendations.").

[16] During our tenure as Commissioners, we have made it a priority to roll back OGC's extra-statutory, pre-RTB investigative activities. We have scrubbed OGC's draft Factual & Legal Analyses for citations to materials not included in the complaint or response. We have declined to accept recommendations reliant solely on such information. Through it all, we have stated explicitly to OGC that its practices are not welcome and must stop. The message, we are sad to say, has not been received – if anything, OGC seems to have become even more aggressive with its pre-RTB activities.

> *an investigation* of such alleged violation, which may include a field investigation or audit, in accordance with the provisions of this section.[17]

In fact, the legislative history of the Act demonstrates that Congress intended to place limits on what the Commission could do prior to a finding of RTB. Early versions of S. 3065, which President Ford ultimately signed into law as the Presidential Election Campaign Act Amendments of 1976, contained language that expressly allowed pre-RTB investigations. As reported initially by the Senate Rules Committee, the bill provided:

> The Commission, *upon receiving a complaint under paragraph 1, or if it has reason to believe that any person has committed a violation of this Act* or of chapter 95 or 96 of the Internal Revenue Code of 1954, shall notify the person involved of such alleged violation and *shall make an investigation* of such alleged violation in accordance with the provision of this subsection.[18]

However, the legislation that Congress passed was significantly different:

> The Commission, *upon receiving a complaint under paragraph 1, and if it has reason to believe that any person has committed a violation of this Act*, or of chapter 95 or 96 of the Internal Revenue Code of 1954, *or, if the Commission, on the basis of information ascertained in the normal course of carrying out its supervisory responsibilities, has reason to believe that such a violation has occurred*, shall notify the person involved of such alleged violation and *shall make an investigation* of such alleged violation in accordance with the provisions of this section.[19]

This evolution shows that Congress did not intend for the Commission to conduct an investigation before finding RTB. The committee bill would have allowed the Commission to "make an investigation" without such finding, but the final bill required the Commission to find RTB before it could do so. This was true whether the RTB finding was premised on a complaint

[17] 2 U.S.C. § 437g(a)(2) (emphasis added). *See also* 11 CFR § 111.10(a).

[18] S. 3065, 94th Cong. § 108 (1976), *available at*, Federal Election Commission, Legislative History of the Federal Election Campaign Act Amendments of 1976, at 236 (1977) (emphasis added).

[19] Federal Election Campaign Act Amendments of 1976, § 109, 90 Stat. 475, 483 (1976) (emphasis added) (current version at 2 U.S.C. § 437g(a)(2)).

or upon information ascertained in the normal course of carrying out its supervisory responsibilities. Thus, in either case, a Commission finding of RTB became a condition precedent for a Commission investigation. This remained true even when Congress amended the provision again in 1979 into its substantially current form.

The American Bar Association recognized this in a 1982 report on the Commission's enforcement procedures: "The General Counsel is prohibited from requesting information from the Respondent prior to a finding of Reason to Believe."[20] It went on to explain: "The Commission has concluded that any such communication with the Respondent prior to a finding of Reason to Believe is not authorized by the Act."[21]

Other parts of the Act make clear that the decision to investigate is made by the Commission and cannot be delegated. For example, 2 U.S.C § 437c(c) states that "[a] member of the Commission *may not delegate* to any person his or her vote or any decision making authority or duty vested in the Commission by the provisions of this Act...",[22] while 2 U.S.C. § 437d(a)(9) includes among the list of Commission powers the power "to conduct investigations," which is specifically cross-referenced in 2 U.S.C. § 437c(c) as a power that requires four affirmative votes to exercise.[23]

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[20] Committee on Election Law, Section of Administrative Law, American Bar Association, *Report on the Reform of the FEC's Enforcement Procedures* at 230 (1982).

[21] *Id.* Importantly, the report noted that in some cases a respondent's "written submission may raise minor questions which the General Counsel and the Commission might wish to pursue prior to dismissing the complaint," but the report recommended only that "*the Commission* [and not the General Counsel] should have the authority to request additional information from the respondent." *Id.* (emphasis added).

[22] 2 U.S.C. § 437c(c) (emphasis added).

[23] The power to issue subpoenas, order testimony, and require answers to questions is also vested in the Commission. *See* 2 U.S.C. § 437d(a)(1), (3) & (4).

The purpose of this requirement is obvious, and well-ingrained into the fabric of the FEC. Before subjecting a political participant to the burdens of a federal investigation, there must exist bipartisan support among the Commissioners themselves, where no more than three come from the same political party. As the Supreme Court has noted, the Commission "must decide issues charged with the dynamics of party politics, often under the pressure of an impending election."[24] Given these dynamics, "[i]t is therefore essential in this sensitive area [of campaign regulation] that the system of administration and enforcement enacted into law does not provide room for partisan misuse . . . ."[25] In order to prevent such partisan misuses of the law, Congress enacted a number of safeguards into the Act, including the requirement that members of the Commission be appointed with the advice and consent of the Senate, and that no more than three members of the Commission be affiliated with the same political party.[26] That it takes the bipartisan support of at least four Commissioners to begin an investigation is central to the structure that Congress created.

The General Counsel, by contrast, has no such power. The only statutorily enumerated power of the General Counsel concerns the ability to make a recommendation to the Commission as to whether there is probable cause to believe that a violation occurred in a matter, a power that is contingent upon the Commission having already found RTB.[27] Certainly, the General Counsel is a position created by the Act, but it is the Commission who selects the General Counsel. This

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[24] *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981).

[25] *FEC v. NRA Political Victory Fund*, 6 F.3d 821, 825 (D.C. Cir. 1993) (*quoting* H.R. Rep. No. 917, 94th Cong., 2d Sess. 3 (1976)).

[26] 2 U.S.C. § 437c(a)(1). *See also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981) (noting that the Commission is "inherently bipartisan in that no more than three of its six voting members may be of the same political party.").

[27] 2 U.S.C. § 437g(a)(2) & (3).

differs from some other agencies, where the counsel is appointed by the President with the advice and consent of the Senate, and has either statutorily enumerated decision-making power or express delegation of power from an agency head.[28] The SEC, for example, has enacted regulations per its statute that specifically delegates certain powers to conduct investigations, disseminate information, and litigate matters on behalf of the SEC to the Director of the Division of Enforcement and the General Counsel without a specific vote of SEC members.[29] Neither the Act nor the Commission has ever so-empowered the General Counsel. Nor could the Commission delegate such power, as the Act expressly precludes the delegation of certain powers, including initiating an investigation.[30]

OGC's usurpation of the Commission's power to decide to investigate runs counter to the Act in other ways. For example, the Act establishes two distinct methods by which an enforcement proceeding may be initiated: (1) by a sworn complaint; or (2) "on the basis of information ascertained in the normal course of its supervisory responsibilities...."[31] In contrast with the Act, OGC has created what is essentially a hybrid between these two methods, where they essentially conduct their own ad hoc review and supplement the complaint,[32] while at the

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[28] The abuses by so-called independent "general counsels" at other agencies help to illustrate the wisdom of Congress' choice to have the FEC's General Counsel answer to the Commission, as well as the four vote requirement to launch an investigation or civil action. *See, e.g.*, Kim Strassel, *The Lord of U.S. Labor Policy*, WALL STREET JOURNAL: POTOMAC WATCH (July 4, 2013) http://online.wsj.com/article/SB10001424127887323899704578583671862397166.html.

[29] 17 CFR § 200.30-4 (delegating authority to Director of Division of Enforcement), 17 CFR § 200.30-14 (delegating authority to the General Counsel). *See also See FEC v. Machinists Non-partisan League*, 655 F.2d 380, 387-88 (D.C. Cir. 1981) (comparing the FEC's investigative statutory authority to other agencies such as the FTC and SEC by saying "the FEC has no such roving statutory functions").

[30] 2 U.S.C. § 437c(c).

[31] 2 U.S.C. § 436g(a)(2). *See also* 11 CFR § 111.3.

[32] The conflation is apparent based upon the language used by OGC in its letters. On the one hand, they claim that the information was obtained "[i]n the course of its review." On the other hand, they invite the respondent to

same time avoiding the Act's due process protections afforded to respondents in complaint-generated matters.

For example, in complaint-generated matters, the complaint must be under oath and notarized, protecting respondents from anonymous accusations. Commission regulations further require that complainants specify whether what is alleged is based upon personal knowledge, or merely information or belief. Unsworn complaints are considered defective and will be returned to the complainant. By contrast, news clips and other materials of the sort compiled by OGC are not under oath, and yet are somehow deemed by OGC to be a part of a complaint-generated matter.[33] Similarly, the Act demands that a proper complaint be forwarded to a respondent within five days, and a respondent has a set time within which to respond, thus ensuring that politically-sensitive matters do not unnecessarily drag on. Unfortunately, OGC often sends its additional materials and investigative inquiries long after a respondent submits a response to a complaint. Here, it was some five months later, that again, is wholly counter to the Act's processes.[34] That OGC provides a copy of its materials to a respondent does not cure such

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"supplement your response." *See e.g.* MUR 6540 (Rick Santorum for President), Letter from OGC Staff Attorney to Clete Mitchell, Counsel to the Santorum Committee (Oct. 2, 2012).

[33] In fact, the Commission has already determined that news articles standing alone are insufficiently reliable to support a reason to believe finding. This is not surprising, given the unreliability of modern media on issues of campaign finance. *See e.g.* Joe Trotter, "Media Watch: *New York Times* levels serious – and incorrect – charges," Center for Competitive Politics, September 14, 2012; Brad Smith, "Another Post in the Never Ending Saga of Why Media Reporting on Campaign Finance Reform so often Misinforms the Public," Center for Competitive Politics, July 28, 2012. Thus, there are fundamental issues with relying on newspaper articles as the source of information for finding RTB regardless of the avenue in which they are used. Articles are notoriously inaccurate and are often reliant on anonymous sources. Also, especially in the modern age of Internet journalism, the rush to break a story often takes precedence over the accuracy of the report. *See e.g.* David Carr, "The pressure to be a TV news leader tarnishes a big brand," NY Times, (April 21, 2013) http://www.nytimes.com/2013/04/22/business/media/in-boston-cnn-stumbles-in-rush-to-break-news.html?smid=pl-share; Marisa Guthrie, "Boston Marathon Bombing: Rush to Break News Burns CNN, Fox News," The Hollywood Reporter, (April 17, 2013) http://www.hollywoodreporter.com/news/cnn-boston-marathon-bombing-mistake-441551. This leads to a situation where skepticism of newspaper articles used as the basis for RTB is entirely necessary. Further, if anonymous complaints are prohibited by the Act, it is illogical to permit the underlying basis for a complaint to be an anonymous source in a newspaper article.

[34] In addition, OGC's process uses a tremendous amount of Commission resources without Commission approval.

defects. Although OGC claims that a response is not required, and that no adverse inference will be drawn if a respondent chooses not to respond, as a practical matter this is not true. On the contrary, a failure to respond will generally result in the unsworn materials being deemed true.[35]

2. OGC's Process is a Standardless Sweep

Given that the OGC's pre-RTB activities are contrary to the Act, it ought to come as no surprise that there is no publicly-available, Commission-approved process governing such activity. Thus, it is understandable why even experienced practitioners are confused by OGC's service of additional materials, sometimes months after they file a response to a complaint. What is not understandable is why, even assuming that OGC's pre-RTB machinations were lawful, there is no set process governing them. Instead, according to the now-public OGC version of the draft Enforcement Manual,[36] OGC apparently thinks it has free reign to conduct (or not conduct) pre-RTB investigative activities without any guiding or limiting principles. For example, OGC attorneys are guided by a "non-exhaustive" list of so-called "public information sources" that are, according to the draft manual, "available for factual research."[37] But as a practical matter, a non-exhaustive list is no list at all. It masks a standardless process where OGC can review whichever articles and other documents they wish and send whatever they desire to

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[35] Conflating complaint-generated and non-complaint-generated matters also creates unnecessary confusion regarding 2 U.S.C § 437g(a)(8), the provision that permits complainants to sue in limited circumstances. Although a complainant can sue in some instances regarding the Commission's treatment of the complaint, what about the materials compiled by OGC that were not in the complaint? Would the complainant, now-plaintiff, have standing to sue not only on the claims and information contained in the complaint, but also those that arose during OGC's pre-RTB investigation? We would think not, but would OGC argue a lack of standing in such a suit? By investigating a respondent prior to a Commission reason to believe vote, OGC has placed the Commission in an untenable position: OGC has essentially taken sides on a matter, ceases to be a dispassionate counsel to the Commission, and instead becomes de facto counsel to the complainant. Yet, it is the same OGC that, in the event the Commission declines to find RTB, is then tasked with defending that decision in the event of a 2 U.S.C § 437g(a)(8) suit.

[36] This draft was made public on June 26, 2013, which was after the file in this matter was closed. *See* Memorandum from Anthony Herman, General Counsel to The Commission on OGC Enforcement Manual ("OGC Proposal") (June 26, 2013), available at http://www.fec.gov/agenda/2013/mtgdoc_13-21-b.pdf\.

[37] *Id.* at 42.

the respondent for comment. Critically, there is nothing mandatory about the practice. In some matters, OGC appears to conduct extensive extracurricular research (some recent matters generated in excess of 80 pages of materials not contained in the complaint), whereas in others, no additional materials are generated. Worse, the use of materials tends to be selective, where OGC will mine inculpatory articles and forward those to respondent, yet somehow generally omit exculpatory information in its submissions to either respondents or the Commission. Not only is the scope of the pre-RTB investigation left entirely to the discretion of individual OGC attorneys, so is the intensity of the pursuit. In some matters, no pre-RTB letters are sent. In other cases, one letter is sent. And yet in other cases, numerous letters asking a variety of questions are sent.[38] In some cases, letters are sent to persons who are simply mentioned in a complaint, accusing them of potentially violating federal law.[39] And such letters are sent on Commission letterhead, which by its very nature suggests that such inquiries are undertaken with the imprimatur of the Commission.[40]

It is precisely this sort of standardless sweep that courts have time and time again chastised. As Justice O'Connor has explained, the law "must not permit policemen, prosecutors,

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[38] Because such letters are not made a part of the public record when a matter closes, it makes it impossible to cite to specific examples.

[39] This is counter to what courts have told the FEC it must do in the naming of respondents. *See e.g. Nader v. FEC*, 823 F. Supp. 2d. 53, 67 (D.D.C. 2011) ("The FEC has not identified any statutory or other authority for the proposition that, despite the Act's clear language, it has discretion to notify whomever it wants as 'respondents' to the administrative complaint. The statute clearly strips the agency of that discretion."). Further, this practice seems at odds with the Supreme Court's view on the impermissibility of "branding" by the government without notice. *Wisconsin v. Constantineau*, 400 U.S. 433, 435, 437 (1971) (striking down a law permitting the Chief of Police to post public notice "[i]n essence . . .giving notice to the public that he has found the particular individual's behavior to fall within one of the categories enumerated in the statutes" without notice or hearing to appeal, holding "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential.").

[40] In rare circumstances, in the interests of due process, we have tacitly agreed to permit OGC to communicate with respondents to clarify their response.

and juries to conduct a standardless sweep . . . to pursue their personal predilections."[41] Such standardless review raises also serious due process and equal protection issues.[42] The DC Circuit said this specifically about the FEC: "Plainly, mere 'official curiosity' will not suffice as the basis for FEC investigations . . . ."[43] Unfortunately, the current ad hoc, extra-statutory decision-making appears to turn on just that: official curiosity. This may unnecessarily expose the Commission to accusations of partisanship, ideological fervor, or selective prosecution[44] of the sort that could be mitigated were the Act followed.

3. Proper Precedure

We are not suggesting that the Commission turn a blind eye to illegal activity reported in the news that cries out for investigation. On the contrary, the Commission has already spoken to the issue in its Directive 6, which expressly instructs staff on how to bring newspaper articles and other similar sources before the Commission. Under that Directive, the Commission established a process to properly handle non-complaint-generated matters. These may arise either through referrals from "operating divisions of the commission" or through referrals from "other agencies" or "public government documents."[45] If news articles are the source for an enforcement matter, "[t]he Commission will take the ultimate responsibility for determining whether or not to open a MUR based on such accounts," and "[a] staff member must request the

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[41] *City of Chicago v. Morales* 527 U.S. 41, 65 (1999) (internal quotations and citations omitted) (O'Connor, J., concurring).

[42] *See Bush v. Gore*, 531 U.S. 98 (2000) (holding that manual recounts lacking specific standards of determining voter intent failed to satisfy the minimum requirements needed to prevent an arbitrary treatment of voters as required by the Equal Protection Clause).

[43] *FEC v. Machinists Non-partisan League*, 655 F.2d 380, 388 (D.C. Cir. 1981) (footnote omitted).

[44] *See FEC v. Central Long Island Tax Reform Immediately*, 616 F.2d 45, 55 (2d Cir. 1980) (Kaufman, J., concurring) ("such bureaucracies feed upon speech and almost ineluctably come to view unrestrained expression as a political 'evil' to be tamed, muzzled, or sterilized").

[45] Federal Election Commission, Directive 6 "Handling of Internally Generated Matters" (Apr. 21, 1978).

General Counsel, the Staff Director, or a Commissioner to prepare a memorandum to the General Counsel outlining the alleged violation. The supporting news accounts should be attached to the memorandum. This signed originating memorandum and accompanying news account will be submitted by the General Counsel to the Commission along with his or her recommendation as to whether or not a MUR should be initiated."[46]

The proper course of action here would have been for OGC to request that the Commission initiate a separate non-complaint-generated matter based on these articles. Long ago, the General Counsel confirmed that in complaint-generated matters where there are also additional materials such as news articles, the pre-MUR procedure of Directive 6 was the means by which such materials would be considered.[47] If the Commission, by a vote of four of its members, agreed with this request, OGC could then move to merge that proceeding with this matter, which too could only be done by a vote of four members of the Commission. To do otherwise, would be contrary to the Act and Commission protocols and would place OGC in an

[46] *Id.* at 4-5.

[47] In the past, even sitting Commissioners have submitted memorandums to the Commission regarding allegations in newspaper articles, consistent with Directive 6. *See* MUR 3540 (Prudential Securities, Inc.), Memorandum from Commissioner Potter to the Commission Re: Discussion of Possible Pre-MURs (Mar. 6, 1992) (circulating press articles to the Commission for discussion of whether a pre-MUR was warranted). Rather than following this established procedure, OGC has recently concocted another justification for their *ultra vires* pre-RTB investigations. They now claim that section 111.8 confers broad power on the General Counsel and allows OGC to avoid Directive 6. Unfortunately for OGC, the history of section 111.8 contradicts their recent reading, and in fact, at the time of its promulgation, OGC made clear that Directive 6 would remain as the appropriate pre-MUR procedure. *See* Meeting of the Federal Election Commission, Jan. 31, 1980 (Commissioner Joan D. Aikens: "Are we saying here that, particularly on a referral from another agency, that we're not going to have any more Pre-Murs, it will just go to the – automatically go to the first stage, or will we continue to Pre-Mur?" Assistant General Counsel Patricia Fiori: "The Pre-Mur procedure has not been put into the regulations, but that would still be a part of the Commission's procedures the same way it is now."); *id.* (Special Deputy to the Clerk of the House Douglas Patton, representing Edmund L. Henshaw, Commissioner Ex Officio: "How would you handle what is, if not in terms of, that sort of fall in between internally generated and a complaint? We've had some in the past like, you know, employees of the Commission, in terms of bringing attention, I think, to a newspaper article for example and . . ." General Counsel Charles N. Steel: "That's the Pre-MUR procedure, basically."). Although section 111.8 empowers the General Counsel to recommend RTB based upon materials obtained in the normal course of the Commission's supervisory powers, it is the Commission and not OGC that defines what is in the normal course, which the Commission has done *via* Directive 6. Whether or not Directive 6 goes beyond the Act by declaring something it concedes to be extraordinary (and thus, not normal) within the Commission's "normal course" is not an issue raised in this matter.

untenable position. OGC has an obligation to follow Commission procedures in its investigations, non-complaint-generated matters, and handling of news articles. If supplementary news articles are present and discovered by OGC properly, those should form the basis of a non-complaint-generated matter, which could be merged with an existing complaint-generated matter if the Commission determines that is appropriate.

But OGC did not do this. Instead, it appears OGC spent a significant amount of time investigating the circumstances surrounding the allegations in the complaint before it submitted its report to the Commission. After doing so, it – without Commission approval – sent nine articles to Respondents "to review this information and supplement [their] response, if [they] would like to do so."[48] Therefore, OGC engaged in an investigation prior to a vote on RTB, and then supplemented the complaint with the results of its research when it included multiple instances of information gleaned from those extraneous articles in its report to the Commission. Since the news articles OGC discovered in its pre-RTB investigation were not properly before the Commission, we have excluded their contents in our analysis.[49]

II. ANALYSIS

A. Attendance at Corporate Events

We now turn to the substantive issues raised by the complaint, the first being Santorum's attendance and speech at the February 17 MFFC event. It is generally unlawful for a corporation

[48] MUR 6540 (Rick Santorum for President), Letter from OGC Staff Attorney to Cleta Mitchell, Counsel to the Santorum Committee (Oct. 2, 2012).

[49] It is not readily apparent to us that even if the articles were considered, the result would change. The articles seem to suggest that Clark certainly wanted Santorum to win, and that he subjectively hoped that his efforts *via* the MFFC would help Santorum's electoral effort. Even if that is true, however, we fail to see how his subjective intent is relevant, given that the Supreme Court has said that such subjective determinations have no place in the administration of campaign finance law. *Federal Election Commission v. Wisconsin Right to Life*, 551 U.S. 449, 472 (2007) ("To the extent this evidence goes to WRTL's subjective intent, it is again irrelevant.").

such as MFFC to make a "contribution" to a Federal candidate.[50] However, Commission regulations set forth several examples of types of political communications a corporation may make without being considered a contribution, and a number of advisory opinions have expressed the view that under certain circumstances, the costs of activities involving appearances of candidates for Federal office would likewise not constitute a contribution under the Act.

First, Commission regulations expressly permit corporations to sponsor meetings, conventions, and other functions attended by Federal candidates.[51] For example, corporations may host federal candidates at events attended by its "restricted class," *i.e.*, management and administrative personnel and stockholders. In some instances, corporations may also invite "guests of the corporation who are being honored or speaking or participating in the event," which includes individuals outside the corporation's restricted class.[52] To avail itself of this regulatory permission, certain restrictions apply. First, discussions between the corporation and the candidate relating to the candidate's campaign plans, projects, and needs are deemed impermissible, and would transform the appearance into an impermissible in-kind contribution. Second, the express advocacy of the candidate's election at the event is not permitted, either by the corporation, the candidate, or the audience. As the Commission explained in the relevant regulatory Explanation & Justification, doing so would transform the event "into little more than a campaign rally."[53] Finally, with respect to Presidential candidates, the corporation does not

[50] 2 U.S.C. § 441b.

[51] *See* 11 CFR § 114.4(b)(1).

[52] *Id. See also* Explanation and Justification, Corporate and Labor Organization Activity; Express Advocacy and Coordination with Candidates ("1995 E&J"), 60 FR 64267-68 (December 14, 1995).

[53] *Id.*

need to invite all candidates, but all candidates must be given a similar opportunity to appear if they so request.[54]

Here, Respondents have shown that this was not a "Santorum rally," but rather an issues-oriented forum, thus consistent with Commission regulations. First, not only were all of the candidates in the primary "given a similar opportunity to appear," each was provided advanced notification beyond that required by the regulation.[55] Second, the complaint does not allege or otherwise present any evidence that there was any express advocacy of Santorum's election. The response explains that there was none and emphasizes that the forum was policy-oriented.[56] Likewise, there is no evidence there was any sharing of the Santorum campaign's needs, plans, and strategies between the campaign and MFFC beyond what was necessary to schedule Santorum's attendance. Although MFFC's president was an unpaid volunteer for the campaign, the complaint does not allege any facts demonstrating that he was in a position to know the campaign's plans, projects, and needs beyond that needed to organize Santorum's attendance at the MFFC event. In fact, the MFFC president has vehemently denied any illegal coordination with the campaign.[57]

Finally, because the event was promoted to MFFC's "membership and supporters," and classified by those involved in its planning and implementation as a "forum," the attendees may fit into the regulation's allowance for those "participating in the event" to be "other guests" of

[54] 11 C.F.R. § 114.4(b)(1)(ii). *See also* 1995 E&J at 64267 (there is no requirement that the corporation give advanced notification to the other candidates whenever they invite one to appear).

[55] MUR 6540 (Rick Santorum for President), RSFP Response at 1; MFFC Response at 2-3. *See* 11 C.F.R. § 114.4(b)(1)(ii); 1995 E&J at 64267 (noting that "commenters' expressed concern that [providing notification to other candidates in advance of an event] would be unworkable").

[56] MUR 6540 (Rick Santorum), RSFP Response at 1.

[57] MUR 6540 (Rick Santorum for President), MFFC Response at 2.

the corporation.[58] Given that the Commission has never precisely defined "participating" in this context, an enforcement matter is not the proper vehicle to define that term.[59] This is particularly true given that the response can be read as showing that attendees can and did take an active role in the program by not only listening to the speakers, but asking them questions and eliciting further explanations of their opinions on how faith and values are properly intersected with public policy issues. Therefore, the event of February 17, 2012 was not a "rally" for Santorum. The interaction between the campaign and MFFC, including its president, is the type of event contemplated by Commission regulations and is a permissible form of corporate communication.[60]

Even if MFFC's sponsorship of the February 17 forum did not fall within the scope of section 114.4(b)(1), this does not end the analysis, nor necessarily convert the event into a Santorum campaign rally. In a number of advisory opinions, the Commission has concluded that the costs of activities involving candidate appearances would not constitute a prohibited in-kind "contribution" to the candidate, even when such an appearance does not come squarely within any of the regulatory exceptions to the corporate contribution ban. Among the many advisory opinions issued by the Commission addressing this issue, Advisory Opinion 1996-11 (National Right to Life Conventions, Inc.) and 1980-22 (American Iron and Steel Institute) are indistinguishable in all material aspects from the MFFC forum. In 1996-11, the Commission concluded that the requester could invite candidates to speak at its event – even if attended by people outside the restricted class – so long as several conditions were followed: (1) no one

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[58] 11 C.F.R. § 114.4(b)(1).

[59] *See FCC v. Fox Television Stations* 132 S. Ct. 2307, 2317 (2012) ("[a] fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required").

[60] *See* 11 C.F.R. § 114.4(b)(1).

involved in the event expressly advocated the nomination, election or defeat of any candidate; (2) there would only be brief mentions of the speaker's candidacy; (3) there would be no solicitation, making, or acceptance of contributions to the speaker's campaign; and (4) there would be no distribution of campaign materials at the event.[61] Likewise, in 1980-22, the Commission permitted a corporation to sponsor "town meetings" about the future of the steel industry that included federal candidates because "the purpose of the 'town meetings' [was] primarily to serve as a forum for discussion of problems of the steel industry and that the overall context of these meetings will be limited to effecting that primary purpose."[62] Other AOs and Commission matters have reached similar results.[63]

The MFFC event is the sort of event that the Commission has not previously deemed impermissible. Here, as was similarly the case in 1980-22 and 1996-11, the event's primary purpose was not a campaigning, but instead the discussion of faith-based policies and issues where not only Santorum, but clergy, attended and spoke. As explained in the response, the

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[61] Advisory Opinion 1996-11 (National Right to Life Conventions, Inc.) at 5-6. *Cf.* MUR 6540 (Rick Santorum for President), FGCR at fn 63 (misciting Advisory Opinion 1996-11(National Right to Life Conventions, Inc.) for the proposition that the events in that instance would be "campaign related" when the very next sentence from the one quoted in the FGCR concludes the activity in question, though subjectively campaign related, was permissible and not an in-kind contribution).

[62] Advisory Opinion 1980-22 (American Iron and Steel Institute) at 2.

[63] *See, e.g.,* Advisory Opinions 1992-06 (Duke) (and advisory opinions cited therein) (concluding that a university's sponsorship of a speech by and payments of travel expenses and an honorarium to a presidential candidate were not contributions or expenditures in the Act); 1992-05 (Moran) (concluding that a candidate's participation in two "public affairs forums" paid for by a local cable station was not prohibited by the Act); 1981-37 (Gephardt) (concluding that a candidate's participation in "public affairs forums" hosted by corporate production company was not for the purpose of influencing a federal election). *See also* Advisory Opinion 2012-29 (Hawaiian Airlines, Inc.), Draft B (concluding candidates could appear at a function hosted by a corporation with attendees from outside that corporation's restricted class without a corporate contribution resulting to the candidates); *Id.*, Certification of Agenda Document No. 12-61-A (August 27, 2012) (Draft B failing 3-3 with Commissioners Hunter, McGahn, Petersen voting in the affirmative and Commissioners Bauerly, Walther, and Weintraub dissenting). *See also* MUR 6459 (Iowa Faith and Freedom Coalition, *et al.*), Statement of Reasons of Commissioners Caroline C. Hunter, Ellen L. Weintraub, Donald F. McGahn II, Cynthia L. Bauerly, Mathew S. Peterson, and Steven T. Walther (rejecting OGC recommendation to find reason to believe that a corporation hosting several candidates to attend an issues forum was an impermissible corporate in-kind contribution "for several reasons").

forum provided its members and supporters the opportunity to hear from, and engage with, community leaders and discuss faith and values, and the role those play in shaping public policy.[64] Similar to the AOs, there is no evidence of communications expressly advocating the nomination or election of Santorum (or the defeat of others),[65] and there is no accusation that there was any solicitation, making, or acceptance of campaign contributions for the candidate in connection with the activity. Thus, consistent with previous advisory opinions where policy and issue events were not campaign events, the issue event here was not a Santorum campaign event and, thus, did not result in a prohibited in-kind contribution.

To conclude that this forum was somehow transformed into a campaign rally by the mere presence of a candidate would have damaging effects across the political spectrum in terms of grassroots participation. Whether issues-oriented organizations or party committees, local leaders have events throughout an election season that are attended by candidates in order to draw attention to the organization's or party committee's concerns and policies. Categorizing these as campaign events could result in the events being effectively banned. The Commission has never previously overreached that far, but determining that the MFFC forum at issue in this matter was actually a Santorum rally would do just that.[66] Indeed, the Commission has

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[64] MUR 6540 (Rick Santorum for President), MFFC Response at 2.

[65] *See, e.g, FEC v. Christian Coalition*, 52 F. Supp.2d 45, 63 (D.D.C. 1999) (concluding that the FEC was incorrect in its allegations that a speech made by Ralph Reed on behalf of a pro-family organization during the 1992 general election contained express advocacy).

[66] The FEC, in exercising its discretionary power, must avoid serious constitutional doubt where possible. *See Arizona v. Inter Tribal Council of Arizona*, No. 12-71, slip op. at 16 (U.S. June 17, 2013) available at http://www.supremecourt.gov/opinions/12pdf/12-71_7l48.pdf ("[V]alidly conferred discretionary executive authority is properly exercised ... to avoid serious constitutional doubt."). *See also Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress."); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979) ("In a number of cases the Court has heeded the essence of Mr. Chief Justice Marshall's admonition in *Murray v. The Charming Betsy*, 2 Cranch 64, 2 L.Ed. 208 (1804), by holding that an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available.").

previously determined that an event where campaign materials of a candidate were present did not convert that event to a campaign rally for that candidate.[67] Here, Respondents categorically state that no candidate materials were allowed or present at the MFFC forum.[68]

Therefore, Rick Santorum's attendance at the MFFC forum in February of 2012 was not illegal. Nothing in the record indicates it was a campaign event or a Santorum campaign rally, and all of the requirements to exempt it from the definition of "contribution" were adhered to by the Respondents. Thus, there is no reason to believe that any of the Respondents violated the Act with regards to this event.[69]

B. General Allegations of Coordination

In addition to its specific allegations surrounding MFFC's February 17 event, the complaint also generally alleges that "all of MFFC's expenditures were coordinated with Santorum for President" and thus "those expenditures were in-kind contributions to Santorum for President."[70] Yet, the complaint fails to identify any of these alleged in-kind contributions with

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Certainly, construing the Act to ban a faith based rally, particularly where the factual record demonstrates that it was not simply a *de facto* campaign rally, raises serious constitutional issues which our analysis avoids.

[67] Tennessee Democratic Party, Final Audit Report of the Commission at 10-11(2006 Election Cycle).

[68] MUR 6540 (Rick Santorum for President), MFFC Response at 2; MUR 6540 (Rick Santorum for President), RSFP Response at 1, 2.

[69] Furthermore, the event could not be a coordinated communication under 11 CFR § 109.21. Although this type of activity could be considered a "communication" under 11 CFR § 114.4 ("Disbursements for communications beyond the restricted class in connection with a Federal election."), it cannot satisfy the content prong of 11 CFR § 109.21(c) since that requires the communication to either be an "electioneering communication" under 11 CFR § 100.29 or a "public communication" under 11 CFR § 100.26. A forum is certainly not an "electioneering communication," nor is it a "public communication" because it does not come within any of the specific examples in the definition, or "any other form of general public political advertising." Per the statutory construction canon of *ejusdem generis*, speaking at an event cannot be general public political advertising because it is wholly dissimilar to advertising *via* television, radio, print, or telephone. *See* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts at 199-213, Antonin Scalia & Bryan A. Garner (2012) (defining the *ejusdem generis* canon as the principle that "[w]here general words follow an enumeration of two or more things, they apply only to persons or things of the same general kind or class specifically mentioned" and describing its history and practical application).

[70] MUR 6540 (Rick Santorum for President), Complaint at 2.

any specificity. It premises this allegation solely on the fact that Clark, the president of MFFC, was also a volunteer for the Santorum campaign. The complaint then leaps to conclusions, claiming that Clark was "an agent of Santorum for President as its Michigan Statewide Grassroots Coordinator."[71]

Whether or not Clark was an agent of the Santorum campaign does not answer the question of improper coordination. Even if Clark was some sort of agent of the campaign for some purposes, that is not particularly helpful in proving impermissible coordination, because agency only begins the legal analysis. Commission regulations provide that any expenditure will be considered an in-kind contribution to a candidate if it is made "in cooperation, consultation or concert with, or at the request or suggestion of" a political candidate or an "agent thereof."[72] An "agent" of a Federal candidate is defined as "any person who has actual authority, either express or implied, to engage in" a specific list of activities involving the ability to effect a communication.[73] But the determination of whether spending was done "in cooperation, consultation or concert with, or at the request or suggestion of" a candidate or his agent is determined by the three-part test contained in 11 CFR § 109.21.

The complaint does not present any analysis or facts that support the application of section 109.21. Instead of presenting facts, the complaint seems to rely on the "when there's smoke, there's fire" speculation that the Commission has already determined is insufficient to justify an investigation.[74] The complaint fails to provide a single example of any communication

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[71] *Id.*

[72] 11 CFR § 109.20.

[73] 11 CFR § 109.3.

[74] *See* MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 1-2 ("The

by MFFC, besides the event held on February 17 discussed above, that was somehow coordinated, let alone whether any communications come within the content prong of the coordination rule.[75] Likewise, the regulation is communication-specific, *i.e.*, it states that "[a] *communication* is coordinated if . . . ." Generalized accusations of "coordination" are thus insufficient under the regulation. Thus, even if Clark were an agent of the campaign that does not answer the relevant question: Was a specific communication made based on the type of insider campaign information contemplated by the regulation? This complaint comes woefully short in establishing that Clark possessed that sort of information, let alone that he used it on behalf of MFFC.

Even the complaint's assertion that Clark was an agent of the campaign is lacking. It provides no evidence that Clark was an agent of RSFP beyond his supposed title of "Michigan Statewide Grassroots Coordinator."[76] The responses make clear that not only was this not Clark's official title – he was a volunteer to RSFP, not a staff member or paid consultant – but he had no authority to act on behalf of the campaign.[77] Thus, there is no evidence he was an agent

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Commission may find 'reason to believe' only if a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA. Complaints not based upon personal knowledge must identify a source of information that reasonably gives rise to a belief in the truth of the allegations presented. . . . Unwarranted legal conclusions from asserted facts, *see* SOR in MUR 4869 (American Postal Workers Union), or mere speculation, *see* SOR of Chairman Wold and Commissioners Mason and Thomas in MUR 4850 (Fossella), will not be accepted as true." (some citations omitted)). *See also* MUR 5467 (Michael Moore), First General Counsel's Report, at 5("Purely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred." (*quoting* MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 3))); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981) ("[M]ere 'official curiosity' will not suffice as the basis for FEC investigations . . .").

[75] *See* MUR 6540 (Rick Santorum for President), FGCR at 18 ("[W]e do not currently have information that MFFC made any expenditures in connection with the 2012 election other than those relating to the Rally....").

[76] MUR 6540 (Rick Santorum for President), Complaint at 2.

[77] MUR 6540 (Rick Santorum for President), MFFC Response at 2; *see generally* MUR 6540 (Rick Santorum for President), RSFP Response at 2 ("There were no discussions at any time – substantial or otherwise – between the

of RSFP, and therefore there is no way to find coordination between MFFC and RSFP simply because he had a role in both organizations.[78] More importantly, without a communication or any other type of expenditure made by MFFC placed before the Commission in this matter, there is no evidence of an in-kind contribution made by MFFC to RSFP.

OGC's arguments on this point are unavailing and either ignore or invert past Commission actions. OGC recommended an investigation in this matter "to determine if MFFC made other expenditures in connection with the 2012 presidential election that were coordinated with the Santorum Committee" and recommended the Commission find RTB a violation occurred because "a reason-to-believe finding is appropriate when 'the available evidence in the matter is at least sufficient to warrant conducting an investigation.'"[79] But, the appropriate standard is that there is a reason to believe a violation has occurred, and not the lesser standard of a reason to investigate. Indeed, the Commission has in past years recommended to Congress to change the Act to the more lax "reason to investigate" standard, which to date Congress has declined to do.[80] We know of no authority that permits the agency to take matters into its own hands and rewrite the Act to its own liking. Likewise, although the Commission's policy cited by OGC talks about a reason to investigate, the purpose of that policy statement was not to change the standard required by the Act, but instead to make clear that a RTB finding was a

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MFFC and the candidate or any agent or representative of the Santorum campaign regarding the needs, activities, plans or projects of the Santorum campaign . . . .").

[78] *See generally* MUR 6368 (Friends of Roy Blunt), First General Counsel's Report (recommending a finding of no reason to believe coordination existed because of a lack of conduct prong satisfaction when the complainant's allegations were based on a "close relationship" and interactions between the respondents).

[79] MUR 6540 (Rick Santorum for President), First General Counsel's Report at 19 (quoting *Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process*, 72 Fed. Reg. 12,545 (Mar. 16, 2007)).

[80] *See* Legislative Recommendations in 2003, 2004, and 2005 FEC Annual Reports.

preliminary step rather than a final legal determination.[81] Thus, this clarification was a reaction to a misperception that a RTB finding was the equivalent to a conclusive, final determination that a treasurer violated the law and does not on its face jettison years of prior Commission precedent regarding RTB.[82]

In fact, the Commission has stated that: "[t]he Commission may find reason to believe *only if* a complaint sets forth sufficient specific facts, which, if proven true, would constitute a violation of the FECA."[83] This standard for determining the sufficiency of a complaint essentially mimics a verified complaint under a fact pleading standard.[84] However, merely because a complaint may appear to meet this standard it does not end the analysis; the Commission cannot find RTB until it allows respondents to explain why the Commission should not act on the complaint:

> (a) A respondent shall be afforded an opportunity to demonstrate that no action should be taken on the basis of a complaint by submitting . . . a letter or memorandum setting forth reasons why the Commission should take no action.
> (b) The Commission shall not take any action, or make any finding, against a respondent other than action dismissing the complaint, unless it has considered such a response or unless no such response has been served upon the Commission. . . .[85]

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[81] Statement of Policy Regarding Commission Action in Matters at the Initial Stage in the Enforcement Process, 72 Fed. Reg. 12545 (Mar. 16, 2007) ("Thus, the Commission is issuing this policy statement to assist complainants, respondents, and the public in understanding the Commission's findings at this stage of the enforcement process.").

[82] *Id.* ("Commission 'reason to believe' findings have caused confusion in the past because they have been viewed as definitive determinations that a respondent violated the Act.").

[83] MUR 4960 (Hillary Rodham Clinton For U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith and Scott E. Thomas at 1 (emphasis added).

[84] As opposed to notice pleading, fact pleading serves as a higher bar that complainants must meet before being entitled to discovery. This serves several important purposes: notice, issue narrowing, pleading facts with particularity and eliminating meritless claims. *Compare, e.g.,* South Carolina Rules of Civil Procedure, Rule 8 (similar to the federal rule with the important distinction that the State practice requiring pleading of the facts (rather than a "statement of the claim") is retained) *with* Fed. R. Civ. P 8(a)(2) ("a claim for relief must contain . . . a short and plain statement of the claim").

[85] 11 C.F.R. § 111.6; *see also* 2 U.S.C. § 437g(a)(1);.

This at least requires some minimal assessment by the Commission of the facts and their credibility as well as the law before finding RTB. The Commission cannot find RTB unless it considers a properly submitted response, and the Commission cannot investigate alleged violations until it makes this finding. Together, these requirements provide procedural safeguards that protect respondents from frivolous complaints meant to harass, unwarranted or premature discovery, and streamline enforcement by excluding innocuous respondents while allowing the Commission to better focus its resources. But this procedure also means that the response must be given more weight than its litigation analogue: the "answer," where a defendant's denials generally are tested through formal discovery.

Remarkably, OGC acknowledges a lack of such specific facts regarding any other expenditures by MFFC,[86] and thus they fail to meet even their watered down "reason to investigate" standard. In other matters, the lack of such information has led OGC to the opposite result. For example, in MUR 5467, OGC explained that "[p]urely speculative charges, especially when accompanied by a direct refutation, do not form an adequate basis to find a reason to believe that a violation of the FECA has occurred."[87] Likewise, in MUR 4545, OGC stated: "While the available evidence is inadequate to determine whether the costs [associated with President Clinton's train trip to the Democratic National Convention in August 1996] were properly paid, the complainant's allegations are not sufficient to support a finding of reason to

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[86] MUR 6540 (Rick Santorum for President), First General Counsel's Report at 18.

[87] MUR 5467 (Michael Moore) First General Counsel's Report at 5 (*quoting* MUR 4960 (Hillary Rodham Clinton for U.S. Senate Exploratory Committee, Inc.), Statement of Reasons of Commissioners David M. Mason, Karl J. Sandstrom, Bradley A. Smith, and Scott E. Thomas at 3).

believe...."[88] Ultimately, as the D.C Circuit explained to the Commission long ago, "[m]ere 'official curiosity' will not suffice as the basis for FEC investigations ...."[89]

OGC's arguments are particularly wide of the mark in the context of coordination. The FEC's confusion and hostility regarding the difference between campaign activity and issue support, which has resulted in unwarranted investigations into supposed coordination, is well-known and long-standing. For example, multiple extensive investigations were pursued against the Christian Coalition and its affiliates after the distribution of voter guides containing issue advocacy during the 1990, 1992, 1994, and 1996 elections, which "absorbed substantial Commission resources...."[90] The FEC claimed that the organization had coordinated its guides and other activities with multiple campaigns, and thus had provided them with an impermissible corporate in-kind contributions. After extensive litigation, the District Court of the District of Columbia ruled that those types of activities could not be prohibited as they were protected by the First Amendment.[91]

As a reaction to this overreach, the Commission adopted the content prong of its coordination regulation. Such a rule requires that there exist some specific facts regarding a communication that, assuming sufficient conduct, would be deemed a campaign

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[88] MUR 4545 (Clinton-Gore '96 Primary Committee, Inc.), First General Counsel's Report at 17.

[89] *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380, 388 (D.C. Cir. 1981).

[90] MUR 3975 (U.S. Term Limits), General Counsel's Report at 14 (Sept. 10, 1996). Interestingly, the file on MUR 3669 (Christian Coalition) is not available on the FEC's MUR Archive at http://www.fec.gov/MUR/. *See also* Mark Hemingway, *IRS's Lerner Had History of Harassment, Inappropriate Religious Inquiries at FEC*, May 20, 2013, Weekly Standard, http://www.weeklystandard.com/blogs/irss-lerner-had-history-harassment-inappropriate-religious-inquiries-fec_725004.html?page=1 (describing FEC lawyers' questioning respondents of MUR 3669 on the topics of their prayers).

[91] *FEC v. Christian Coalition*, 52 F. Supp.2d 45 (D.D.C. 1999).

communication.[92] In other words, the rule is designed to (1) separate campaign speech from issue-related advocacy, and (2) prevent the Commission from undertaking the sort of free-ranging intrusive investigations of the sort imposed on the Christian Coalition, among others. Unfortunately, it seems OGC is recommending a return to those dark days. To do so would require us to ignore the current regulation.[93]

III. CONCLUSION

Ultimately, there was insufficient credible evidence presented to support finding reason to believe that any of the Respondents violated the Act. For the foregoing reasons, we voted to reject OGC's recommendation to find reason to believe that the Respondents violated the Act.

DONALD F. McGAHN II
Vice Chairman

7/25/13
Date

CAROLINE C. HUNTER
Commissioner

7/25/13
Date

[92] Notice 2002-27: Coordinated and Independent Expenditures, 68 Fed. Reg. at 427 (Jan. 3, 2003) ("The Commission is including content standards in the final rules on coordinated communications to limit the new rules to communications whose subject matter is reasonably related to an election.").

[93] OGC's approach is reminiscent of the approach taken by some Commissioners in Advisory Opinion Request 2011-23 (American Crossroads). There, although all agreed that the requestors proposed communications would not be "coordinated" within the meaning of 11 CFR 109.21, some Commissioners still claimed that such speech would be prohibited due to the general application of the statute. AO 2011-23 (American Crossroads), Statement of Chair Cynthia L. Bauerly and Commissioner Ellen L. Weintraub. Remarkably, when confronted with essentially the same facts in an enforcement matter regarding a Democrat candidate, those same Commissioners supported OGC's recommendation against finding coordination, on the grounds that the communications did not come within the reach of the regulation. MUR 6502 (Nebraska Democratic State Central Committee) First General Counsel's Report at 8-13; *id.*, Factual & Legal Analysis; *id.*, Certification dated July 10, 2012. It seems that the novel argument that the regulation is not the exclusive rule of law, and that there still exists a more generalized and undefined statutory basis to ban speech, only applies selectively. We know of no authority granted to an administrative agency to disregard its regulations in such a manner, let alone selectively.