FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matters of	)	
	)	
W Spann LLC, *et al.*	)	MUR 6485
F8, LLC, *et al.*	)	MURs 6487 & 6488
Specialty Investments Group, Inc., *et al.*	)	MUR 6711
SPM Holdings LLC, *et al.*	)	MUR 6930

STATEMENT OF REASONS OF
CHAIRMAN MATTHEW S. PETERSEN
AND COMMISSIONERS CAROLINE C. HUNTER AND LEE E. GOODMAN

In its landmark *Citizens United* opinion, the Supreme Court recognized the First Amendment right of corporations to expressly advocate the election or defeat of federal candidates.[1] Of the many issues resulting from the decision, amongst the most difficult has been determining how the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations apply to contributions from closely held corporations or limited liability companies taxed as corporations ("corporate LLCs"). In the 2012 election cycle—the first presidential cycle following *Citizens United*—the Commission received complaints alleging that certain contributions made to Super PACs by closely held corporations or corporate LLCs violated the Act's prohibition against making contributions in the name of another.[2]

Historically, the Act's giving-in-the-name-of-another prohibition focused on the "true source" of a contribution; in other words, whether a person passed funds through a straw donor to make a contribution. Until recently, however, federal law prohibited all corporate contributions, so the inquiry generally looked at whether a corporation (or some other person) paid or reimbursed individuals for making contributions in their names. Thus, application of the true source analysis to determine whether a corporation may be considered a straw donor for an

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1 *Citizens United v. FEC*, 558 U.S. 310 (2010). *Citizens United* triggered a cascade of changes to campaign finance law. First, it compelled the U.S. Court of Appeals for the District of Columbia to hold unconstitutional the Act's contribution limits as applied to individuals' contributions to political committees that only made independent expenditures. *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010). This, in turn, compelled the Commission to determine that corporations and labor organizations could also make contributions to similar political committees, now known colloquially as Super PACs. *See* Advisory Opinion 2010-11 (Commonsense Ten); Advisory Opinion 2010-09 (Club for Growth). Consistent with these authorities, Super PACs may not make contributions to candidates, nor may they accept contributions from foreign nationals or government contractors.

2 52 U.S.C. § 30122 (formerly 2 U.S.C. § 441f).

individual's contribution is an issue of first impression before the Commission. As we approached these matters, we kept this consideration in mind as well as the following:

- The Commission has considered the giving-in-the-name-of-another prohibition almost exclusively in situations where excessive and/or prohibited contributions were funneled through straw donors—unlike here, where the Act's amount limitations and corporate source prohibitions are not implicated because Super PACs received the contributions.

- Longstanding Commission precedent has treated funds deposited into a corporate account and then used for contributions as the funds of that corporation and, thus, has held that the corporation made those contributions. Likewise, the Commission has consistently refused to consider the corporation's owner as the maker of such contributions.

- The Commission has previously considered but rejected an attribution rule that would deem the individual owners of corporate LLCs as the makers of those LLCs' contributions. The Commission has not revised this regulation since *Citizens United.*

- The speech rights recognized in *Citizens United* would be hollow if closely held corporations and corporate LLCs were presumed to be straw donors—thus, triggering investigations and potential punishment—each time they made contributions.

In light of these considerations, it was necessary to examine a sufficient number of factual scenarios to ensure a sound application of the Act and to provide clear public guidance on the appropriate standard that we will apply in future matters. Indeed, with the benefit of varying fact patterns, the Office of General Counsel ("OGC") significantly refined its analysis for considering these types of matters.

We conclude that, to vindicate the purpose underlying section 30122 without violating First Amendment rights, the proper focus in these matters is whether the funds used to make a contribution were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements, making the individual, not the corporation or corporate LLC, the true source of the funds. Thus, in matters alleging section 30122 violations against such entities, the Commission will examine whether the available evidence establishes the requisite purpose.

Because, as noted above, the question whether closely held corporations and corporate LLCs may be straw donors under section 30122 is one of first impression, and because past Commission decisions regarding funds deposited into corporate accounts may be confusing in light of recent legal developments, principles of due process, fair notice, and First Amendment clarity counsel against applying a standard to persons and entities that were not on notice of the governing norm.[3] For this reason, we concluded that MURs 6485, 6487, 6488, and 6711 should

[3] *See Citizens United*, 558 U.S. at 324 (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)) ("The First Amendment does not permit laws that force speakers to retain a campaign finance attorney, conduct demographic marketing research, or seek declaratory rulings before discussing the most salient political issues of our day. Prolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"); *id.* at 329 ("We decline to adopt an interpretation that requires intricate case-by-case determinations to verify whether political speech is banned,

be dismissed in an exercise of the Commission's prosecutorial discretion, and we agreed with OGC's recommendation to find no reason to believe a violation occurred in MUR 6930 based on a rationale similar to the one we adopt here.[4] Accordingly, we voted to close the files in each matter.

I. FACTUAL BACKGROUND

Each of these matters arose from Super PAC disclosures of contributions received from closely held corporations or corporate LLCs.

A. MUR 6485 (W Spann)

In MUR 6485,[5] Edward Conard sought to make a large contribution to Restore Our Future, a Super PAC supporting Mitt Romney's presidential candidacy.[6] Concerned that disclosure of the contribution would "jeopardize the safety . . . of his family," Conard retained legal counsel to advise him on whether he could "create an entity for the sole purpose of making a [contribution] . . . [which] would not require full public disclosure of his name in connection with the contribution."[7] Counsel advised him that he could do so through a corporate LLC.[8] Counsel warned that "the FEC might seek to look through the contributing entity to the underlying contributor," but did not otherwise "consider [the giving-in-the-name-of-another prohibition] when conducting [its] research."[9] Pursuant to that advice, Conard authorized the formation of W Spann LLC in March 2011.[10] On April 28, 2011, Conard further authorized W Spann to make the contribution to Restore Our Future, and in May 2011 W Spann LLC was dissolved.[11] Soon after, when the contribution "attracted significant media attention,"[12] Conard

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especially if we are convinced that, in the end, this corporation has a constitutional right to speak on this subject."); *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012) ("[L]aws . . . must give fair notice of conduct that is forbidden or required. . . . [T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity does not chill protected speech.") (internal cites omitted).

4 *Heckler v. Chaney*, 470 U.S. 821 (1985).

5 Complaint (Aug. 5, 2011), MUR 6485 (W Spann).

6 Conard Response at 2 (Oct. 3, 2011), MUR 6485 (W Spann).

7 *Id.* at 2-3; Declaration of Kimberly E. Cohen ¶ 4 (Oct. 3, 2011) ("Cohen Decl.").

8 Conard Resp. at 3; Cohen Decl. ¶¶ 7-8.

9 Cohen Decl. ¶ 8; Conard Resp. at 2, 4.

10 Conard Resp. at 4; Cohen Decl. ¶ 9.

11 Conard Resp. at 4-5.

12 First General Counsel's Report at 5 (Aug. 28, 2012), MUR 6485 (W Spann).

released a statement acknowledging that he formed and funded W Spann LLC.[13] In that same statement, Conard asked that Restore Our Future amend its reports to identify him as the contributor.[14] Conard thus quickly corrected the record well over one year before the 2012 election. In its analysis of these circumstances, OGC treated Conard's statements as evidence of the section 30122 violation.[15]

B. MURs 6487 and 6488 (F8/Eli Publishing)

MURs 6487 and 6488 also involve contributions that Restore Our Future received from two limited liability companies, F8 LLC and Eli Publishing LLC.[16] In 1997, Steven Lund founded Eli Publishing "for the purpose of publishing a range of specialty books."[17] As of June 2012, Eli Publishing had "publish[ed] one book with the intent to publish additional books" and continued to earn revenues.[18] F8 was formed in 2008 and, in its response, described itself as having a "commercial" purpose.[19] Eli Publishing and F8 each made contributions of $1 million to Restore Our Future on March 31, 2011.[20] In response to media inquiries, Lund stated that "he made the contribution 'through a corporation he created to publish a book years ago because donating through a corporation has accounting advantages.'"[21] He also stated that he was not trying to hide his donations.[22] OGC interpreted Lund's public statements as dispositive admissions.[23]

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13 Conard Resp. at 5; Conard Media Statement (Aug. 5, 2011).

14 Conard Resp. at 5; Conard Media Statement; 2011 Mid-Year Report at 11, Restore Our Future (Amend. Aug. 15, 2011).

15 FGCR at 7-8, MUR 6485 (W Spann).

16 Complaint at 4 (Aug. 11, 2011), MUR 6487 (F8); Complaint at 4 (Aug. 11, 2011), MUR 6488 (Eli Publishing).

17 Steven J. Lund, *et al.* Joint Response at 2 (Oct. 6, 2011), MUR 6488 (Eli Publishing).

18 *Id.*; First General Counsel's Report at 4 (June 6, 2012), MURs 6487/6488 (F8/Eli Publishing).

19 F8 Response at 2 (Oct. 7, 2011), MUR 6487 (F8). F8's registered agent (and one of its managers) is Jeremy Blickenstaff, who is reportedly Lund's son-in-law. *See* FGCR at 4-5, MURs 6487/6488 (F8/Eli Publishing) (citing materials available at the Utah Division of Corporations and Commercial Code).

20 2011 Mid-Year Report at 16, Restore Our Future (Amend. Aug. 15, 2011).

21 Complaint at 3, MUR 6488 (Eli Publishing).

22 FGCR at 10, MURs 6487/6488 (F8/Eli Publishing).

23 *See id.* at 8-11 (starting the analysis of Lund's liability with the fact that Lund "neither denies the truth or authenticity of [his] reported statements"; describing his statements as "inherently reliable as admissions"; asserting that his statements "indicate that Lund effectively admitted that he was the true source of the contribution by Eli Publishing," and concluding that "these statements are more than adequate by themselves to conclude there is reason to believe the contribution in the name of Eli Publishing may have violated" section 30122).

C. MUR 6711 (Specialty Investments Group)

MUR 6711 centers on contributions made by a corporation, Specialty Investments Group (SIG), and its subsidiary, Kingston Pike Development, LLC (KPD) to FreedomWorks for America.[24] William Rose formed both entities in September 2012.[25] In a joint response, Rose, SIG, and KPD assert that SIG and KPD "were formed for the purpose of engaging in the real estate business" and SIG "received private capital and made investments in properties and projects, many of which Mr. Rose has worked on for several years."[26] Between October 1, 2012, and November 1, 2012, FreedomWorks disclosed that it received $12,075,000 from SIG and KPD.[27] Based on anonymous sources quoted in a news article, the complainant alleges that the funds underlying these contributions originated with Richard Stephenson, a member of the FreedomWorks board of directors, and his family.[28] In his response, Rose stated—consistent with statements made to the press soon after making the contributions—that he "made contributions on behalf of SIG and KPD," that these contributions were done lawfully, and that they were correctly disclosed by FreedomWorks (as contributions from SIG and KPD).[29] OGC recommended that the Commission find reason to believe and investigate, in part, because of a concern that Rose may *not* have exercised direction and control over the contributions.[30]

D. MUR 6930 (Michel)

Last, in MUR 6930, Prazrakrel ("Pras") Michel formed SPM Holdings, LLC, to be the owner and repository of his assets, including his house, and the recipient of his income from

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[24] Complaint at 2 (Dec. 20, 2012), MUR 6711 (Specialty Investments Group).

[25] *Id.* at 1-2; William S. Rose Jr., *et al.* Joint Response at 2 (Feb. 25, 2013), MUR 6711 (Specialty Investments Group). Rose served as Chairman of the Board, President, and CEO of SIG; Rose was the sole manager of Kingston Pike Development. *Id.*

[26] *Id.* at 2-3. More specifically, Rose, SIG, and KPD state that "Rose, acting on behalf of SIG or one of its subsidiaries, has purchased, offered to purchase, and/or negotiated real estate investments valued at over $50 million." *Id.* at 3. An appendix included in the response identifies numerous real estate transactions. *Id.*, App. A. OGC also attached to its First General Counsel's Report a press release that Rose issued in November 2012 in which he "asserted that SIG is a legitimate real estate development business," but also acknowledged "social[] and political purposes." First General Counsel's Report at 8, Attach. 2 (June 6, 2014), MUR 6711 (Specialty Investments Group).

[27] 2012 Pre-General Report at 145-47, FreedomWorks for America (Amend. June 10, 2013); 2012 Post-General Report at 96, 168-71, FreedomWorks for America (Amend. May 21, 2013).

[28] Amended Complaint at 2-3 (Apr. 23, 2013), MUR 6711 (Specialty Investments Group) (citing Amy Gardner, *FreedomWorks Tea Party Group Nearly Falls Apart in Fight Between Old and New Guard*, WASH. POST (Dec. 25, 2012)). Complainant bases its allegations against Richard Stephenson on unsourced statements in a news article. *Id.* Specifically, that article reports that Brandon "told colleagues" Stephenson would be making a $10 to $12 million contribution, and that employees who attended a FreedomWorks retreat at which a budget was prepared saw Stephenson attend the same retreat and "dictate[] some of the terms of how the money would be spent." *Id.*

[29] Rose Joint Resp. at 3.

[30] FGCR at 15, MUR 6711 (Specialty Investments Group).

various endeavors.[31] Within months of forming SPM, he used the last of his personal funds not held by SPM to make $350,000 in contributions to a political committee called Black Men Vote.[32] Michel did not have sufficient funds outside of SPM to respond to an immediate call for more contributions to Black Men Vote, so he directed SPM to make contributions totaling another $875,000 to Black Men Vote.[33] The contributions from SPM were disclosed by Black Men Vote as contributions made by SPM. Like Conard, Lund, and Rose, Michel readily acknowledged that he directed that the contributions be made and were in some respects his contributions.[34] But in contrast to its treatment of Conard's, Lund's, and Rose's public acknowledgements as evidence of their section 30122 violations, OGC concluded that Michel's public acknowledgement was evidence that he did *not* violate section 30122. According to OGC, Michel's post-contribution acknowledgment demonstrated that he was not trying to hide anything. Therefore, OGC recommended that the Commission find no reason to believe that Michel violated section 30122.[35]

* * *

OGC recommended that we find reason to believe that W Spann and Edward Conard; Eli Publishing, Steven Lund, F8, and Unknown Respondents; and William Rose, SIG, KPD, FreedomWorks, Richard Stephenson, and Adam Brandon violated section 30122.[36] OGC recommended that we find no reason to believe that SPM Holdings LLC, SPM 2012 Holdings LLC, or Pras Michel violated section 30122.[37] As to this last matter, our colleagues rejected OGC's analysis and recommendation.

II. LEGAL ANALYSIS

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31 First General Counsel's Report at 3 (Nov. 11, 2015), MUR 6930 (Michel).

32 *Id.*

33 *Id.*

34 *Id.* at 4.

35 *Id.* at 9. Because we voted to accept OGC's recommendation to find no reason to believe a violation of the Act occurred in MUR 6930, this Statement of Reasons explains our reasoning in that case to the extent it supplements and refines the analysis set forth in the First General Counsel's Report.

36 FGCR at 19, MUR 6485 (W Spann); FGCR at 16-17, MURs 6487/6488 (F8/Eli Publishing); FGCR at 20, MUR 6711 (Specialty Investments Group).

In each of these cases, the complainant also alleged that respondents violated 52 U.S.C. §§ 30102, 30103, and 30104 by failing to register as political committees and file disclosure reports with the Commission. Compl. at 5-7, MUR 6485 (W Spann); Compl. at 4-7, MUR 6487 (F8); Compl. at 4-7, MUR 6488 (Eli Publishing); Compl. at 6-9, MUR 6711 (Specialty Investments Group); Complaint at 6-9 (Apr. 9, 2015), MUR 6930 (Michel). Because OGC did not recommend that we find reason to believe with respect to those allegations, and because we conclude the applicable statutory provisions addressing these circumstances is section 30122, we do not discuss those allegations here. Similarly, OGC did not recommend reason to believe findings with respect to Restore Our Future. FGCR at 19, MUR 6485 (W Spann); FGCR at 16-17, MURs 6487/6488 (F8/Eli Publishing).

37 FGCR at 12, MUR 6930 (Michel).

Under section 30122, "[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."[38] Commission regulations also prohibit "knowingly help[ing] or assist[ing] any person in making a contribution in the name of another."[39] The Act defines "person" to include partnerships, corporations, and other organizations.[40]

In numerous matters, the Commission has found that a corporation violates sections 30122 and 30118[41] when it reimburses, or advances funds to, straw donors for the purpose of making contributions ostensibly made by the straw donors to federal candidates.[42] In these schemes, an individual "who actually transmits the money acts merely as a mechanism, whereas it is the original source who has made the gift by arranging for his money to finance the donation."[43] But until recently, corporations could not make *any* contributions, and Super PACs did not exist.[44] Thus, the Commission has never addressed the inverse of the conventional corporate straw-donor scheme—that is, whether, or under what circumstances, a closely held corporation or corporate LLC may be considered a straw donor under section 30122.

As noted above, OGC refined its analysis over the course of these matters. For example, in MUR 6485 (W Spann), OGC concluded that corporations can be straw donors under section 30122, stating: "The Act and Commission regulations thus focus on the 'true' source

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[38] 52 U.S.C. § 30122.

[39] *Id.*; 11 C.F.R. § 110.4(b)(1)(iii). Commission regulations provide illustrative examples of activities that would constitute a violation of the Act by making a contribution in the name of another:

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

11 C.F.R. § 110.4(b)(2).

[40] 52 U.S.C. § 30101(11); 11 C.F.R. § 100.10.

[41] Section 30118 prohibits, in general, contributions or expenditures by corporations, national banks, and labor organizations.

[42] *See, e.g.*, MUR 6143 (Galen Capital Group) (finding violation of then-section 441f when corporation reimbursed individuals for contributions made); MUR 5666 (MZM) (same); MUR 4879 (Beaulieu of America) (same); MUR 4876 (Cadeau Express) (same); MUR 4871 (Broadcast Music) (same); MUR 4796 (DeLuca Liquor and Wine) (same); MUR 2195 (Eklutna) (same).

[43] *U.S. v. O'Donnell*, 608 F.3d 546, 550 (9th Cir. 2010) (distinguishing between "providing [a gift] from one's own resources rather than simply conveying").

[44] *See supra* note 1.

responsible for making the contribution. The determination of the true source of the contribution turns on consideration of who 'exercise[d] direction or control' over the funds distributed to the recipient."[45] Based on that analysis, OGC recommended that we find reason to believe the respondents violated section 30122. Later, in MUR 6930 (Michel), OGC omitted "direction or control," presumably because "direction or control" is necessarily present in all closely held corporations.[46] Instead, OGC explained that the Commission must "look to the structure of the transaction itself and the arrangement between the parties to determine who in fact 'made' a given contribution."[47] Accordingly, in that matter, despite the owner's sole direction or control over the funds at issue, OGC recommended that the Commission find Pras Michel was not the "true source" of his LLC's contribution because "it does not appear that Michel sought to elude the reporting provisions of the Act by using SPM as a mere pass through intermediary for the funds that SPM contributed in its name to Black Men Vote."[48] OGC then revised its legal analysis in MUR 6485 to clarify "direction or control" is not the dispositive analysis.[49]

* * *

Upon thorough consideration of these matters, we conclude that closely held corporations and corporate LLCs may be considered straw donors in violation of section 30122 under certain circumstances. However, pursuing enforcement against the Respondents in these matters would be manifestly unfair because Commission precedent does not provide adequate notice regarding the application of section 30122 to closely held corporations and corporate LLCs or the proper standards for its application.[50]

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[45] FGCR at 6, MUR 6485 (W Spann).

[46] Instead of a "direction or control" inquiry, OGC observed: "We recognize that Michel exercised sole authority over the disposition of SPM's resources, including its decision to make the contributions at issue here. By definition a single-member LLC acts only by the will of that member. But absent further regulation in this area, the mere involvement of such an entity in a contribution does not alone resolve the true-source inquiry under Section 30122." FGCR at 10, MUR 6930 (Michel).

[47] *Id.* at 7-8.

[48] *Id.* at 2. Our colleagues voted against accepting OGC's analysis but as of the date we voted on this matter they had not articulated for us or the public an alternative analysis or standard. Commission Certification, MUR 6930 (Michel) (Feb. 23, 2016). More recently, our colleagues have explained their view that there was no significant distinction between Mr. Conard's and Mr. Michel's activities. *See* Statement of Reasons of Vice Chairman Steven Walther and Commissioners Ellen Weintraub and Ann Ravel at n.2 (April 1, 2016), MURs 6487, 6488, 6485, 6711, 6930 (W Spann *et al.*). Under the analysis of our colleagues, section 30122 makes all closely held corporations or corporate LLC contributions unlawful, even if the LLC was formed for and conducted other legitimate business activities. As we explain in this Statement, in our view this would be drastic and would countermand *Citizens United* with respect to the First Amendment rights of these entities.

[49] Supplement to the First General Counsel's Report at 1 (Feb. 23, 2016), MUR 6485 (W Spann).

[50] The Commission's interpretation applying section 30122 to closely held corporations and corporate LLCs as straw donors in a case of first impression necessarily requires the Commission to set standards and draw lines distinguishing permissible versus proscribed conduct. The Commission has several procedures available for drawing such lines. They include notice and comment rulemaking, interpretative guidance, and statements interpreting the Act in the enforcement context. As noted above, when we voted in these matters, our colleagues

A. Whether Corporations May Be Considered Straw Donors in Violation of Section 30122 is an Issue of First Impression.

When Congress enacted the prohibition against contributions in the names of others, corporations could not make any contributions under the Act. Thus, Congress likely did not contemplate that corporations could violate the prohibition against giving in the name of another by acting as straw donors for contributions. This conclusion is buttressed by the fact that, until these matters, the Commission has considered alleged violations of section 30122 almost exclusively in contexts where individuals were the purported straw donors.

Moreover, before *Citizens United*, nearly every alleged straw-donor scheme addressed by the Commission involved *excessive and/or prohibited contributions*.[51] Here, by contrast, the Act's amount limitations and corporate source prohibitions are not implicated because the contributions at issue were given to Super PACs, which only engage in independent speech and do not make contributions to candidates. Accordingly, the alleged section 30122 violations in these matters differ substantially from those previously considered by the Commission and present an issue of first impression.

B. Corporations Exercising Newfound Rights Under *Citizens United* Could Have Been Misled Or Confused By Commission Precedent Regarding Funds Deposited Into Corporate Accounts And the Commission's Regulation on LLC Contributions.

Even more significant is that Commission precedent treats funds deposited in a corporate account as the corporation's funds, even if the corporation's owner could legally convert them into his or her own personal funds. Consequently, when such funds have been contributed to a political committee, the Commission has concluded that the corporation—not the individual(s) owning the corporation—made the contribution. In *FEC v. Kalogianis*, for example, the Commission alleged that a former candidate had violated then-section 441b[52] by loaning funds from his own closely held corporations to his campaign.[53] In ruling for the Commission that the loan violated the ban on corporate contributions, the court rejected the candidate's argument that

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articulated no uniform standards for applying the Act. Further discussions within the Commission failed to define any standard and indicated notice and comment rulemaking would not be constructive. More recently – and for the first time – our colleagues set forth a rationale without lines that presumes the unlawfulness of all corporate LLC contributions. *See supra* note 48. In the absence of any consensus regarding how to draw lines distinguishing lawful contributions versus unlawful contributions by closely held corporations and corporate LLCs, we have proceeded to announce our view of the proper standard here as part of our interpretation of the Act.

51 *See, e.g.*, *supra* note 42; MUR 4646 (Amy Robin Habie) (finding violation of then-section 441f when individuals reimbursed others' contributions to candidates in amounts exceeding Act's limits); MUR 4484 (Bainum) (finding violation of then-section 441f when individual made contributions to candidates in name of infant son in amounts exceeding the Act's limits); MUR 4297 (Ortho Pharmaceutical) (finding violation of then-section 441f when incorporated federal contractor reimbursed contributions to candidates).

52 This section has since been recodified as 52 U.S.C. § 30118.

53 *FEC v. Kalogianis*, No. 06-68 at 6, 8-9 (M.D. Fla Nov. 30, 2007), *available at* http://www.fec.gov/law/litigation/kalogianis_order.pdf.

"a contribution of corporate money by the sole shareholder of a corporation and a contribution by the shareholder of the shareholder's money warrant equivalent treatment because in each instance the contribution is necessarily the shareholder's money."[54]

Likewise, in MUR 3191 (Christmas Farm Inn, Inc.), the Commission found that a candidate violated then-section 441b when the candidate loaned his campaign funds initially drawn on his closely held corporation's account.[55] The Commission rejected the argument that the funds were personal funds,[56] because "[a] subchapter S Corporation retains as its own any income taxed to individual shareholders until such time as a distribution or dividend is declared."[57] And in MUR 4313 (Coalition for Good Government), the respondent created a corporation to run a television ad and deposited his personal funds into the corporation's account for the purpose of funding the ad.[58] Under these circumstances, OGC reasoned that:

> [O]nce a decision is made and carried out to conduct business using the corporate form, any funds taken from the corporation's accounts are to be deemed corporate in nature, *whether or not they originated as, or could be converted into, the personal funds of a shareholder*. . . . In the present matter, when the Coalition was incorporated it took on a legal identity separate from that of Mr. Jones and was subject to regulation as such. . . . Thus, given the Coalition's corporate status, and the fact that the funds for the television spot came from the Coalition's account, the expenditures made for the advertisement were made with corporate funds.[59]

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54 *Id.* at 8 (holding that "precedent precludes this interpretation of the statute").

55 Conciliation Agreement at 2, 4, 8 (June 23, 1995), MUR 3191 (Christmas Farm Inn, Inc.). The candidate had cashed checks from a corporate account into his personal checking account, and then made personal checks out to his campaign committee. Factual & Legal Analysis at 3-4 (Oct. 7, 1991), MUR 3191 (Christmas Farm Inn, Inc.). The committee reported the receipts as loans from the candidate. Statement of Reasons of Commissioner Joan D. Aikens and Commissioner Lee Ann Elliott at 2 (Sept. 12, 1995), MUR 3191 (Christmas Farm Inn, Inc.).

56 *See* 11 C.F.R. § 110.10 ("[C]andidates . . . may make unlimited expenditures from personal funds as defined in 11 CFR 100.33.").

57 FLA at 3-4, MUR 3191 (Christmas Farm Inn, Inc.). In MUR 6102 (Georgianna Oliver), the Commission considered an allegation that a candidate loaned corporate funds to her own campaign. *See* Statement of Reasons of Vice Chairman Matthew S. Petersen and Commissioners Cynthia L. Bauerly, Caroline C. Hunter and Donald F. McGahn II at 1 (Sept. 28, 2009), MUR 6102 (Georgianna Oliver). The Commission drew heavily on principles of corporate law, but dismissed the case on the grounds that the candidate had, according to sworn testimony, followed corporate bylaws in distributing the funds. *Id.* at 6.

58 First General Counsel's Report at 33 (Oct. 18, 1996), MUR 4313 (Coalition for Good Government).

59 *Id.* at 34 (citing MUR 3191 (Christmas Farm Inn, Inc.) and MUR 3119 (Chandler for Congress)) (emphasis added).

These authorities reflect Commission reliance on "well established principle[s] of corporate law"[60] to find that once funds are deposited in a corporate account, they become the corporation's funds and are no longer those of the corporation's owner. Thus afterwards, any contributions of such funds are considered corporate in nature[61] because a corporation, even a closely held one, or a corporate LLC, has "a legal identity separate from that of [the owner] and [is] subject to regulation as such."[62]

The Commission has applied similar logic in the rulemaking context. In its 1998 LLC rulemaking, the Commission considered but rejected a proposal to deem contributions by closely held corporate LLCs as contributions from their individual owners.[63] The Commission ultimately decided to treat corporate LLCs as distinct from their individual owners, including single-member corporate LLCs. The resulting regulation—which was the only one specific to LLCs that Respondents could have consulted when they undertook their activities—thus requires partnership LLCs to attribute their contributions to their individual members but provides no similar instruction to corporate LLCs.[64]

Given the Commission's historical treatment of contributions made from funds deposited into a corporate account as corporate contributions, it would be reasonable for Respondents to conclude that contributions made by their closely held corporations and corporate LLCs were lawful and not contributions in the name of another. Thus, Respondents were not provided adequate notice that their conduct could potentially violate section 30122.

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60 Plaintiff Federal Election Commission's Motion for Summary Judgment, *FEC v. Kalogianis*, No. 06-68 (Feb. 28, 2007) at 18, *available at* http://www.fec.gov/law/litigation/kalogianis_fec_summary_judgment_motion.pdf.

61 *See, e.g.*, FGCR at 8, 34, MUR 4313 (Coalition for Good Government) ("[A]ny corporation acquires, by the act of incorporation, a legal identity separate from its investors, and is subject to regulation as such . . . . The fact that Mr. Jones invested his personal property in the [corporation] does not mean that its funds could still be viewed as his personal funds for purposes of the Act . . . . Thus, given the Coalition's corporate status, and the fact that the funds for the television spot came from the Coalition's account, the expenditures made for the advertisement were made with corporate funds."); Conciliation Agreement at 2-3 (Dec. 20, 2002), MUR 4313 (Coalition for Good Government) (identifying the incorporated entity as the person making the expenditures).

62 FGCR at 8, MUR 4313 (Coalition for Good Government). OGC argues that MUR 4313 (Coalition for Good Government) is distinguishable on the grounds that "section 441b [now section 30118] was designed to remedy different harms and, more significantly, MUR 4313 involved an independent expenditure, not a contribution. Accordingly, the respondents . . . could never have been liable for making a contribution in the name of another under section [30122]." FGCR at 9 n.3, MUR 6485 (W Spann). These arguments miss the mark. The significance of MUR 4313 is the underlying rationale that "any funds taken from the corporation's accounts are to be deemed corporate" funds. FGCR at 34, MUR 4313 (Coalition for Good Government). That rationale is in no way conditioned upon the purpose of section 441b or that the funds were used to make an expenditure, as opposed to a contribution. In any event, *Kalogianis* and MUR 3191 (Christmas Farm Inn, Inc.), discussed above, did involve contributions, and the Commission refused to attribute the contributions to the individuals controlling and funding the corporations in those cases.

63 *See Treatment of Limited Liability Companies Under the Federal Election Campaign Act*, 63 Fed. Reg. 70065, 70066 (Dec. 18, 1998). "Alternative A" proposed attributing all LLC contributions, including corporate LLCs, to the LLC and its individual owners, but the Commission rejected Alternative A.

64 11 C.F.R. § 110.1(g).

C. Because (1) the Issue in These Matters is One of First Impression and (2) Commission Precedent Treated Funds from a Corporation as the Corporation's Contribution, Applying Section 30122 Against Respondents Would Be Unfair.

Under certain circumstances, closely held corporations and corporate LLCs may be considered straw donors under section 30122. Section 30122 prohibits a *person* from making a contribution in the name of another *person*, and the Act's definition of "person" includes corporations.[65] Yet, our conclusion that section 30122 applies to closely held corporations and corporate LLCs is only the beginning of the analysis: The conclusion must be squared with longstanding Commission precedent, discussed above, that has treated contributions drawn from corporate accounts—even those of closely held corporations—as corporate contributions rather than contributions from individual owners. In considering the appropriate interpretations of the legal standard to apply in future matters involving similar allegations, we bear in mind not only the statutory text and the disclosure interests at issue but also the profound First Amendment rights at stake. Thus, our interpretation must faithfully implement the Act's language in a way that preserves the associational and free speech rights of closely held corporations and corporate LLCs. After all, "political speech does not lose First Amendment protection simply because its source is a corporation."[66] For this reason, the Commission's approach may not merely presume that contributions from closely held corporations or corporate LLCs are actually contributions in the name of another.

As Commissioners, we are obligated to "safeguard the First Amendment when implementing" the Act.[67] Consistent with this command, we conclude that, when enforcing section 30122 in similar future matters, the proper focus will be on whether funds were intentionally funneled through a closely held corporation or corporate LLC for the purpose of making a contribution that evades the Act's reporting requirements.[68] If they were, then the true source of the funds is the person who funneled them through the corporate entity for this purpose. Where direct evidence of this purpose is lacking, the Commission will look at whether, for instance, there is evidence indicating that the corporate entity did not have income from assets, investment earnings, business revenues, or bona fide capital investments, or was created and operated for the sole purpose of making political contributions. These facts would suggest the corporate entity is a straw donor and not the true source of the contribution. This analysis will be required even if a single member exercises sole authority over the disposition of the entity's resources. Because closely held corporations and corporate LLCs are constitutionally entitled to make contributions to Super PACs, such contributions shall be presumed lawful unless specific evidence demonstrates otherwise. Absent such evidence, the Commission will have no reason to believe that a contribution made by a closely held corporation or corporate

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[65] 52 U.S.C. § 30101(11).

[66] *Citizens United*, 558 U.S. at 342 (internal quotes omitted).

[67] *Van Hollen v. FEC*, No. 15-5016, Slip Op. at 27 (D.C. Cir. Jan 21, 2016).

[68] At least when applied to corporate contributions to Super PACs, section 30122 does not guard against circumvention of amount limitations or certain source prohibitions but rather addresses only disclosure. Thus, determining whether there exists a purpose to evade disclosure is the relevant inquiry in these types of matters.

LLC was in violation of section 30122. In short, this approach vindicates the purposes underlying section 30122 while simultaneously acknowledging the speech rights of closely held corporations and corporate LLCs and avoiding constitutional doubt.[69]

As explained earlier, this is the first occasion the Commission has examined whether it is possible for individuals to violate section 30122 by contributing in the names of their closely held corporations and corporate LLCs. Based on Commission precedent, the regulated community may have reasonably concluded that the answer to that question was "no." Therefore, because Respondents did not have prior notice of the legal interpretation discussed above, we determined that applying section 30122 to Respondents would be inconsistent with due process principles.[70] The Supreme Court has observed that "[a] fundamental principle in our

[69] The Commission is not required to provoke legal and constitutional controversies in its administration and enforcement of the law. Indeed the prudent and preferred course is to avoid such issues. Therefore, where the Commission has two reasonable ways of interpreting the law, its regulations, and enforcement practices, one of which avoids legal and constitutional doubt and another which creates serious legal and constitutional doubt, the Commission is well within its discretion to take the safer course. *See Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) ("Although [a regulatory agency's interpretations of its own statute] are normally entitled to deference, where, as here, an otherwise acceptable construction would raise serious constitutional problems . . . courts [must] construe the statute to avoid such problems unless such construction is plainly contrary to Congress' intent." (citing *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 L.Ed. 208 (1804), by holding that an Act of Congress ought not to be construed to violate the Constitution if any other possible construction remains available."))). *See also Department of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 346 (2000) (Scalia, J., concurring, in part) (noting that "[where statutory intent is unclear], it is our practice to construe the text in such fashion as to avoid serious constitutional doubt"). As a result, given the numerous legal and constitutional concerns raised above, we clearly would be within our discretion to dismiss this case and, in light of those concerns, we would exercise that discretion. *See Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("This Court has recognized on several occasions over many years that an agency's decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency's absolute discretion. This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement. The reasons for this general unsuitability are many. First, an agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and, indeed, whether the agency has enough resources to undertake the action at all. The agency is far better equipped than the courts to deal with the many variables involved in the proper ordering of its priorities. Finally, we recognize that an agency's refusal to institute proceedings shares to some extent the characteristics of the decision of a prosecutor in the Executive Branch not to indict—a decision which has long been regarded as the special province of the Executive Branch, inasmuch as it is the Executive who is charged by the Constitution to 'take Care that the Laws be faithfully executed.'") (internal citations omitted)). *See also United States v. Batchelder*, 442 U.S. 114, 123-24 (1979); *United States v. Nixon*, 418 U.S. 683, 693 (1974); *Vaca v. Sipes*, 386 U.S. 171, 182 (1967); *Confiscation Cases*, 7 Wall. 454 (1869).

[70] Even if we had applied the legal interpretation articulated above to a matter like MUR 6485 (W Spann)—which involved an LLC being created for the express purpose of making a contribution without disclosing the donor behind the organization—other factors still would have counseled in favor of dismissal. First, Conard acted pursuant to legal advice. Furthermore, within days of the contribution being called into question, Conard asked the recipient Super PAC to disclose him as the donor. The Super PAC did so immediately. Thus, less than three weeks after the initial report was filed, five months before the first presidential primary was held, and over a year before the 2012 general election, Conard's identity and status as contributor were disclosed to the public. Accordingly, little to no informational harm was suffered by the public.

legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."[71] This concern is particularly acute where First Amendment rights are at stake.[72] To decide otherwise would not only create due process concerns but would risk chilling vitally important political speech that is strictly protected by the First Amendment.[73]

III. CONCLUSION

For the foregoing reasons, we concluded that MURs 6485, 6487, 6488 and 6711 should be dismissed in an exercise of the Commission's prosecutorial discretion and voted to approve OGC's recommendation to find no reason to believe a violation occurred in MUR 6930.[74] Accordingly, we voted to close the files.

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[71] *Fox Television Stations*, 132 S. Ct. at 2317; *see also* Statement of Reasons of Vice Chairman Donald F. McGahn and Commissioners Caroline C. Hunter and Matthew S. Petersen at 23 (July 25, 2013), MUR 6081 (American Issues Project) ("[D]ue process requires that the public know what is required *ex ante*, and that the Commission acknowledge and provide the public with prior notice of any regulatory change.").

[72] *Buckley v. Valeo*, 424 U.S. 1, 41 n.48 (1976) ("[V]ague laws may not only trap the innocent by not providing fair warning or foster arbitrary and discriminatory application but also operate to inhibit protected expression by inducing citizens to steer far wider of the unlawful zone. . . than if the boundaries of the forbidden areas were clearly marked.") (internal quotations omitted); *Citizens United*, 58 U.S. at 324 ("Prolix laws chill speech for the same reason that vague laws chill speech: People "of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.") (citing *Connally*, 269 U.S. at 391); *Fox Television Stations*, 132 S. Ct. at 2317 (2012) ("[T]wo connected but discrete due process concerns [are]: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way. When speech is involved, rigorous adherence to those requirements is necessary to ensure that ambiguity dos not chill protected speech.").

[73] *See supra* notes 3 and 72 (the First Amendment cannot tolerate vague or unduly complex rules, or standards decided after the fact on a case-by-case basis); *see also Connally*, 269 U.S. at 391 ("[A] statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process."); *Papachristou v. Jacksonville*, 405 U.S. 156 (1972) ("Living under a rule of law entails various suppositions, one of which is that [all persons] are entitled to be informed as to what the State commands or forbids.") (internal quotes omitted); *United States v. Williams*, 553 U.S. 285, 304 (2008) (clarity in regulation is essential to due process protected by the Fifth Amendment).

[74] *Heckler v. Chaney*, 470 U.S. 821 (1985).

Matthew S. Petersen — Apr. 1, '16
Chairman — Date

Lee E. Goodman — April 1, 2016
Commissioner — Date

Caroline C. Hunter — April 1, 2016
Commissioner — Date